THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER,
ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES,
AND NUMBERED CONSECUTIVELY

BOOK 9

Case No. 4761 — Case No. 5239

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FIELD—GARELLY

Case No. 4,761—Case No. 5,239

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FEDERAL CASES.

BOOK 9.

A COMPREHENSIVE COLLECTION OF DECISIONS OF THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER, (1880,) ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES.

N. B. Cases reported in this series are always cited herein by their numbers. The original citations can be found when desired through the table of cases.

Case No. 4,761.

Ex parte FIELD.

[5 Blatchf. 63.][1]

Circuit Court, D. Vermont. Oct. 7, 1862.

MARTIAL LAW — SUSPENSION OF WRIT OF HABEAS CORPUS — ORDERS TO MARSHAL TO DISREGARD WRIT — AUTHORITY OF PRESIDENT — CONSTITUTIONAL PROVISIONS.

1. The two orders issued by the war department of the United States, August 8th, 1862, one being an order "to prevent the evasion of military duty, and for the suppression of disloyal practices," and the other being an order "authorizing the arrest of persons discouraging enlistments," were issued in violation of section 9 of article 1 of the constitution, and of articles 4 and 5 of the amendments to the constitution.

2. Those orders cannot be regarded as having emanated from the president of the United States, although the one first above named purports on its face to be issued "by direction of the president of the United States," nor can they be regarded as suspending the writ of habeas corpus, in the cases embraced in them.

3. An order from a subordinate in the war department to a marshal of the United States, who holds in custody a person arrested by him under said orders, not to produce such person before a court of the United States, under a writ of habeas corpus issued by it to such marshal, requiring him to produce before it the body of such person, is no justification to such marshal for disobeying such writ.

4. The president of the United States had authority to issue his proclamation of September 24th, 1862 (13 Stat. 730), proclaiming martial law and the suspension of the writ of habeas corpus in the case of military arrests.

5. Such writ having been issued and so disobeyed by such marshal before the issuing of such proclamation, the fact that such proclamation had been issued was taken into consideration by the court, in punishing the marshal for his contempt, and a fine of $100 was imposed upon him, and he was not permitted to act as an officer of the court until he had paid the fine.

6. A jailor who acted as the mere servant of the marshal, in disobeying the writ, was discharged without punishment.

This was a hearing on a writ of habeas corpus, issued on the petition of Anson Field, directed to C. C. P. Baldwin, marshal of the United States for the district of Vermont, and Noble B. Flanagan, jailor of Chittenden county, Vermont, commanding them to produce the body of said Field. The petition for the writ set forth, that the petitioner resided in Jericho, in Chittenden county; that he was illegally imprisoned in the common jail of the county, by the marshal; that the jailor of said county held him by the order of the marshal; that the marshal held him by some pretended order of the president of the United States; and that he was not held by force of any process of any court of the state, or of the United States. On the return day of the writ, the jailor produced the body of the petitioner and made a verbal return to the writ, to the effect, that the petitioner and two other persons were brought to the jail by the said marshal, who directed the jailor to commit and hold them until further orders; and that the marshal presented no process or warrant, but said that he had arrested them under some general order from the war department. It not appearing that the said marshal had received notice of the issuing of the writ, the court adjourned the hearing, and directed that in the meantime the jailor should hold the petitioner in custody. On the adjourned day, the marshal and the jailor appeared, with their counsel, but without the petitioner, and made the following return to the writ: "United States of America, District of Vermont, September 1st, 1862. Now, in pursuance of the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

mandate of the within writ, the said C. C. P. Baldwin, marshal of the said district, and the said Noble B. Flanagan, say, that the said Field having been brought into court on the 28th day of August, 1862, and the matter continued until this day, and the body of said Field having been ordered to remain in custody, they now say that the said Anson Field is in their custody, and they say he was arrested and is held and detained, by virtue of orders issued by the authority of the president of the United States, signed by Edwin M. Stanton, secretary of war, copies of which are annexed hereto; and they further state, that said Field is held in custody, to be dealt with under said orders, report having been made to Major L. C. Turner, judge advocate, as in said orders directed; and said Flanagan acts solely under the directions of said Baldwin, being jailor in the county of Chittenden; and said Baldwin says that he has informed the war department of the United States of the issuing of the writ, and he is instructed by said department to pay no regard to it, and not bring the body of said Field into court; and the said Baldwin says that, as marshal of said district, having made said arrest, and now holding said Field in custody, by order of said department, he deems it his duty, in obedience to such instructions, not to bring said Field into court, intending thereby no disrespect to this court. C. C. P. Baldwin, Marshal. N. B. Flanagan, Jailor. Sworn to before me, September 1st, 1862, D. A. Smalley, Judge." The following were the orders referred to in the return: "Official War Bulletins. Persons liable to draft not allowed to leave their county. Washington, Friday, August 8th, 1862. The following order has just been issued by the war department: War Department, Washington, D. C., August 8th, 1862. An order to prevent the evasion of military duty, and for the suppression of disloyal practices. First: By direction of the president of the United States, it is hereby ordered that, until further orders, no citizen liable to be drafted into the militia shall be allowed to go to a foreign country; and all marshals, deputy marshals, and military officers of the United States, are directed, and all police authorities, especially at the ports of the United States on the sea-board, and on the frontier, are requested, to see that this order is faithfully carried into effect; and they are hereby authorized and directed to arrest and detain any person or persons about to depart from the United States in violation of this order, and report to Major L. C. Turner, judge advocate, at Washington city, for further instructions respecting the person or persons so arrested and detained. Second: Any person liable to draft, who shall absent himself from his county or state before such draft is made, will be arrested by any provost marshal, or other United States or state officer, wherever he may be found within the jurisdiction of the United States, and conveyed to the nearest military post or depot, and placed on military duty for the term of the draft; and the expenses of his own arrest and conveyance to such post or depot, and also the sum of five dollars as a reward to the officer who shall make such arrest, shall be deducted from his pay. Third: The writ of habeas corpus is hereby suspended in respect to all persons so arrested and detained, and in respect to all persons arrested for disloyal practices. Edwin M. Stanton, Secretary of War. Persons discouraging enlistments, to be arrested. The following order, authorizing the arrest of persons discouraging enlistments, has been issued: War Department, Friday, August 8th, 1862. Ordered—First: That all United States marshals, and superintendents or chiefs of police, of any city, town, or district, be, and they are hereby, authorized and directed to arrest and imprison any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States. Second: That an immediate report be made to Major L. C. Turner, judge advocate, in order that such persons may be tried before a military commission. Third: The expenses of such arrest and imprisonment will be certified to the chief clerk of the war department, for settlement and payment. Edwin M. Stanton, Secretary of War." As the return recited two distinct orders, the court directed the marshal to specify under which of them the arrest was made, when he further returned, "that said arrest and detention was and is had under the order entitled, 'Persons discouraging enlistments, to be arrested,' copied in the first return." After hearing the counsel for the marshal and the petitioner, the court decided that the return was insufficient, and ordered that the petitioner should be produced before the court within three hours, (he then being in the same village,) and that, in default thereof, the marshal and the jailor appear before the court on the 3d day of October, and show cause why they should not be punished for contempt of court. On that day, the marshal being in court, the district attorney, on his behalf, requested that the consideration of the matter be postponed until the 7th of October, which request was granted. No farther hearing was asked for.

SMALLEY, District Judge. As both of the orders of the 8th of August are referred to, and as it is conceded that a portion of the first one must be borrowed and added to the one entitled "Persons discouraging enlistments, to be arrested," in order to constitute any pretence of excuse for disobeying the order of the court, made on the 1st of September, I shall consider them both in connection with the constitution of the United States, to which both must be subservient.

The constitution of the United States provides (article 1, § 9), that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." Article 4th of the amendments to the constitution provides as follows: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In article 5th of the amendments it is provided, that no person shall be "deprived of life, liberty or property, without due process of law."

The order first referred to in the return states, that it is made "by direction of the president of the United States," and assumes to direct all marshals and military officers of the United States, and authorize all police authorities, to arrest, &c. It further assumes to suspend the writ of habeas corpus in relation to all persons arrested for disloyal practices. Neither at the time this order was issued, nor at the time the proceedings were had upon this habeas corpus, had congress or the president declared that the public safety required that martial law should be established, or that the writ of habeas corpus should be suspended, in loyal states. It will not be pretended that Vermont is not a loyal state. She has been, and is, among the first and most earnest to aid and sustain the government in putting down the causeless and atrocious rebellion which is now distracting and desolating our hitherto happy country. She has furnished more men to fight the battles of the Union than any other state of equal population; and thousands of the best and bravest of her sons now sleep the sleep of death, in the swamps and on the battle-fields of Virginia, Maryland, and Louisiana. The petitioner is a citizen not subject to military law, his age, being over sixty, not only excusing, but excluding him from military service, unless by that order every citizen is subjected to martial law. If that order is to receive the construction the marshal claims for it, then more than thirty thousand men in the states of New England and in New York, many of them of very limited intelligence and of low moral character, were authorized to arrest any citizen within those states, from the lowest to the highest, without complaint, without warrant, and without even informing their prisoner by whom, or of what, he was accused. This order assumes to authorize each of the officers or agents to determine who are guilty of disloyal practices —a phrase hitherto unknown, and as yet undefined, in this country—and each to give his own construction to the term; and, if any one of these inquisitors pretends to think that a citizen has done or said anything which he chooses to consider disloyal, the poor unfortunate, though he may be the most worthy, loyal, and patriotic person in the community, may be thrown into prison, and deprived of all opportunity of being heard before a court or a jury to establish his innocence, or of being confronted with the witnesses against him, or of even ascertaining the offence with which he is charged. Those who claim to exercise this extraordinary power may be governed by whim or caprice, personal ill feeling, political or religious prejudice, the hope of pecuniary gain, or any other of the many unworthy motives which influence human action; and yet all classes of citizens, from the day laborer in the field, to the senator in the legislative halls of the country, are subject to this despotic power. None are exempt. If one person argues that General McClellan is the most suitable person to command the army, and another insists that General McClellan ought to be removed and some other general appointed, both persons are liable to arrest, according to the peculiar views of the different agents who hear or are informed of the discussion, because each will say that such expression of opinion tends to discourage enlistments, and is a disloyal practice. One argues that the Quakers ought to be subject to draft, while another insists that they ought not. Yet both are in the same danger. One claims that the principles and policy advocated by the New York Tribune for the prosecution of the war should be adopted and followed, while another denies it, and avers, as his opinion, that the policy indicated by the New York Herald should be pursued. Yet both are liable to be arrested by a partisan of the other, for discouraging enlistments. These illustrations might be extended ad infinitum.

This order was made, and the action under it was had, before any attempt was made to establish martial law. Can it be contended, that, with the construction claimed for it, it is not in direct violation of section 9, of article 1, of the constitution; and of article 4 of the amendments thereto, which declares, that "the right of the people to be secure in their persons, &c., shall not be violated," and that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized;" and of article 5 of the amendments, which declares, that no person shall be "deprived of life, liberty, or property, without due process of law?" If there be any force in language, it appears to me too plain for discussion, that either the constitution or the order must fall.

Our revolutionary fathers having, after eight years of desolating war, achieved their independence of the British crown, were so jealous of their liberty, and so determined to protect it against any future encroach-

ments of power, that they were not satisfied to leave it with the safeguards that appear in the constitution which was submitted on the 17th of September, 1787; but, in 1789, they submitted to the several states ten amendments thereto, which were duly ratified before 1791, in order to give more certain and complete protection to the liberty and rights of the citizen. How futile were all their efforts, if the doctrine contended for in this case is to prevail. That liberty which they held so dear, and guarded with such jealous care, has much less protection than it had under the British crown. If the arrest and detention in this case be sustained, it strikes a much more deadly and fatal blow to civil liberty, than did the general warrants which the British cabinet ordered to be issued against the printers and publishers of the North Briton, number 45, in 1763. The parties aggrieved in that case sought redress before that illustrious and fearless judge and protector of civil liberty, Chief Justice Pratt, (Lord Camden,) who held such warrants to be illegal, who liberated the notorious Wilkes from the tower of London, upon a writ of habeas corpus, and under whose instructions, British juries gave, in two cases, £300 damages each, whilst in the other two the counsel for the crown consented to a verdict of £200 each, rather than have them go to a jury. Leeman v. Allen, 2 Wils. 160; Huckle v. Money, Id. 205. In this last case, the defendant made a motion for a new trial, on the ground that the damages were excessive. After argument, Chief Justice Pratt said: "I shall now state the nature of this case, as it appeared upon the evidence at the trial: A warrant was granted by Lord Halifax, secretary of state, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the North Briton, number 45, without any information or charge laid before the secretary of state, previous to the granting thereof, and without naming any person whatsoever in the warrant. Carrington, the first of the messengers to whom the warrant was directed, from some private intelligence he had got that Leech was the printer of the North Briton, number 45, directed the defendant to execute the warrant upon the plaintiff, (one of Leech's journeymen,) and took him into custody for about six hours, and during that time treated him well. The personal injury done to him was very small, so that, if the jury had been confined by their oath to consider the mere personal injury only, perhaps twenty pounds damages would have been thought damages sufficient. But that small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law, touching the liberty of the subject, appeared to them at the trial. They saw a magistrate over all the king's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them. They heard the king's counsel, and saw the solicitor of the treasury, endeavoring to support and maintain the legality of the warrant, in a tyrannical and severe manner. These are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition—a law under which no Englishman would wish to live an hour. It was a most daring public attack upon the liberty of the subject." A new trial was refused. That ruling was afterwards reviewed by Lord Mansfield, in Money v. Leach, 3 Burrows, 1742, and affirmed, against the crown, and has ever since been the settled law of England. Those warrants were not so arbitrary, and utterly repugnant to liberty and justice, as are the arrest and detention in this case. There the parties could resort to the writ of habeas corpus, if they felt aggrieved. The British ministry did not attempt to suspend that great writ of freedom. Is the British Magna Charta any more sacred than the United States constitution? Are the rights and liberties of the British subject any more securely protected than those of the American citizen? Even the French arrests under the "lettres de cachet," by which the Bourbons filled the prison of the Bastile, and thereby contributed so largely to the first French revolution, had more of the semblance of justice than the arrest in this case, for those letters named the person to be arrested, though they assigned no cause, and allowed no hearing.

If the language of this order of the war department could be considered without reference to the constitution of the United States, perhaps we might suppose that it was issued under the express direction of the president, and intended to suspend the writ of habeas corpus in the cases to which it refers. But, when it is considered in connection with the constitution, I can give it no such construction. I cordially adopt the language used by Judge Hall, of the northern district of New York, in the case of Ex parte Benedict [Case No. 1,292], where a person was arrested under the same order and brought before him on a writ of habeas corpus and discharged. After considering the order, in connection with the constitution, Judge Hall says: "My personal confidence in the integrity, patriotism, and good sense of the president, as well as the respect due to the high office he holds, compels me to require the most conclusive evidence upon the point, before adopting the conclusion that he has ever deliberately sanctioned so palpable a violation of the constitutional rights of the citizens of the

loyal states, as the order of the war department, thus construed, would justify and require."

The second order, entitled, "Persons discouraging enlistments, to be arrested," does not profess to be issued by the order or authority of the president, or to suspend the writ of habeas corpus, and it is only by borrowing two of the provisions of the first order, and appending them to the second, that the detention in this case, and the disobedience to the writ, can be pretended to be justified; for, even if the president possessed the delicate and dangerous power of suspending the writ of habeas corpus, it will hardly be claimed that he could delegate it to all or any of his subordinates, to be exercised when, in their discretion, the "public safety" might require it, any more than he could delegate the veto power. An order so entirely unprecedented, and so clearly in derogation of the common rights of the citizen, it is the duty of courts to construe most strictly. I cannot think, therefore, that it was intended, by itself, or in connection with the other, to have the operation which it is contended should be given to it or them.

Events which have transpired subsequently to the 1st of September, indicate very decidedly that the president did not intend that the orders should have any such construction. On the 6th of September, both of the orders of the war department, of the 8th of August, were rescinded; and, on the 24th of September, the president issued his proclamation, over his own signature, countersigned by the secretary of state, establishing, for reasons therein assigned, martial law over all the loyal states, and, as a consequence thereof, suspending the writ of habeas corpus. What effect should be given to that proclamation, I will consider hereafter. But the fact that the orders of the 8th of August, which, upon the construction claimed to be given to them, were broad enough to embrace every species of disloyalty, in word or act, were revoked in less than thirty days after they were issued, and that, eighteen days thereafter, the president issued his own proclamation in relation to military arrests and the writ of habeas corpus, is strong evidence, that he did not regard the aforesaid orders from the war department as emanating from him.

But there is another statement in the marshal's return to the writ, that is relied upon as a justification for disobeying it, which is this: "And said Baldwin says that he has informed the war department of the United States of the issuing of the writ, and he is instructed by said department to pay no regard to it, and not bring the body of said Field into court." The instructions here referred to were produced and read to me. They were in a telegram, which reads thus: "Washington, August 30th, 1862. To C. C. P. Baldwin, U. S. Marshal: Pay no attention to the habeas corpus for the liberation of Lyman, Barney and Field, and, if any attempt be made to liberate them from custody, resist it to the utmost, and report the names of all who may attempt it. By Order of the Secretary of War. L. C. Turner, Judge Advocate." It is proper to take some notice of the tenor of this despatch. Though coming from a major in the war department, it is not addressed to a military officer, but to a civil officer, and one peculiarly the officer of the court, created for that purpose, to execute its bidding, and whose official oath binds him to do so. It peremptorily orders him to disobey the legal process of the court, and, if others attempt to enforce it, to resist them to the utmost. It contains an implied threat against the members of the bar, and other officers of the court, and even against the court itself, if either shall do anything judicially or professionally to liberate a prisoner, confined in jail upon what we have already seen was a despotic and illegal order of the war department. A more flagrant disregard of the constitution of the United States can hardly be conceived. That great organic law and charter of American liberty distributes the powers of the government into three parts, executive, legislative and judicial, each, in their respective spheres, independent of the others. The framers of that once sacred instrument took especial care, so far as human wisdom could provide, that the judiciary should be placed entirely beyond the control or influence of either or both of the other branches of the government, believing that, in its being so constituted, was one of the great safeguards of civil liberty. I deeply regret that such an order should go abroad, purporting to come from the war department, not on my own account, but because such illegal assumptions of power go far to bring our institutions and government into disrepute, both at home and abroad. I need not say to the people of Vermont, my native state, where my temper and conduct through life are well known, that threats will not influence me, nor that I shall do what I deem my duty, unawed. "If" (in the language of a great magistrate) "they had any effect, it would be contrary to their intent. Leaning against their impression, might give a bias the other way. But I hope and believe that I have fortitude enough to resist that weakness." At a very early stage of the rebellion, it became my judicial duty to express my views and opinions in relation to it, and the obligations of all loyal citizens; and thus they became widely known. I have had no change of opinion since, upon those questions, nor has any act or word of mine indicated any. In issuing this writ of habeas corpus, and in passing on questions raised upon it, I have simply performed an imperative judicial duty. If I had shrunk from it, or in any

way avoided it, I should have proved recreant to the great trusts reposed in me. A judge who will not faithfully and fearlessly perform every duty imposed upon him by the constitution and the laws, as much merits disgrace and punishment, as does the soldier who deserts his colors on the battle field.

There are other facts connected with the arrest and detention in this case, which deserve notice. At the last term of this court, it was determined that, when two or more persons were acting together in any way to discourage enlistments, it constituted an offence under the act of July 31, 1861 (12 Stat. 284), and, under a charge to the grand jury, delivered by Mr. Justice Nelson, an indictment was found against three persons, who are now held for trial thereon. This was well known to the marshal. He had no order from the war department to arrest any particular person, but only authority to arrest such as he chose. If he had reason to suspect that this petitioner, and the two others who were arrested with him, had been discouraging enlistments, he could have gone to a United States commissioner, and procured a warrant and had them brought up, and, if there was sufficient evidence, held for trial before this court; and it was his duty to do so. But, instead of performing his duty under the law, as an officer of this court, he volunteered, as a military agent, to make the arrest upon his own motion, and throw the accused into jail in violation of law. When he was before me on the 1st of September, he was reminded that, if the petitioner was guilty of the offence charged against him, he could and would be punished under the law; but he still chose to disobey the positive order of the court to bring the prisoner before it. This was a high handed, arbitrary exercise of power, without right, and in defiant violation of all constitutional authority and law, and of all civil liberty; and, if the power and majesty of the law are not to be trampled on with impunity, but are to be vindicated and maintained, as in times past, he ought to be and must be punished therefor.

In considering the character and extent of that punishment, it becomes necessary to inquire what effect is to be given to the President's proclamation of the 24th of September, 1862 (13 Stat. 730), which is as follows: "By the President of the United States of America. A proclamation. Whereas, it has become necessary to call into service, not only volunteers, but also portions of the militia of the states, by draft, in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained, by the ordinary processes of law, from hindering this measure and from giving aid and comfort in various ways to the insurrection: Now, therefore, be it ordered: First—That, during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commissions. Second—that the writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter, during the rebellion, shall be, imprisoned in any fort, camp, arsenal, military prison or other place of confinement, by any military authority or by the sentence of any court martial or military commission. In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed. [L. S.] Done at the city of Washington, this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the Independence of the United States the eighty-seventh. Abraham Lincoln. By the President: William H. Seward, Secretary of State." Is the power thus assumed by the president conferred upon him by the constitution or any act of congress, or by both combined?

This is the most grave and important question that has ever been presented before the judicial tribunals of this country—one upon which eminent jurists have differed and upon which they will undoubtedly continue to differ. I approach it with great hesitancy and would be glad to avoid expressing an opinion upon it; but I have no choice. In order to examine it in all its aspects, it is necessary to consider the present condition of the Union. That a gigantic insurrection and rebellion has been, for more than eighteen months, and is still, raging in many of the states, and that the armies of the rebellious states have been, and are, invading loyal states with immense forces, that hundreds of millions of dollars have been expended, and many thousands of lives lost, in endeavors to suppress and put it down, and that hundreds of thousands of men are now in the field, and in hostile array against each other, we know to be true. That there are recruiting stations in nearly every town in the loyal states, and troops in various places in every state being drilled and disciplined, in squads, companies, and regiments, and that a draft has been ordered, we also know.

The constitution of the United States makes the president commander-in-chief of the United States army, and of the militia of the several states when called into the actual service of the United States. It also provides, that he shall "take care that the laws be faithfully executed," and that con-

gress shall have power "to provide for calling forth the militia, to execute the laws of the Union. suppress insurrections, and repel invasions." In pursuance of this authority, the act of the 28th of February, 1795 (1 Stat. 424), was passed, the 2d section of which provides, "that whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the president of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed." The same act provides for organizing and governing the militia when so called out, and for establishing courts martial, &c. The question as to the construction of this act came before the supreme court of the United States, in the case of Martin v. Mott, 12 Wheat. [25 U. S.] 19. It was an action of replevin, for certain goods and chattels, brought in a state court of the state of New York. The supreme court of that state gave judgment against the avowant, and that judgment was affirmed by the court for correction of errors, and from thence was taken by writ of error to the supreme court of the United States. The opinion of the court was delivered by Mr. Justice Story, who says: "The avowry, in substance, asserts a justification of the taking of the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a court martial, for a failure to enter the service of the United States as a militia man, when thereto required by the president of the United States, in pursuance of the act of the 28th of February. 1795 (chapter 101). It is argued, that this avowry is defective, both in substance and form, and it will be our business to discuss the most material of these objections." "For the more clear and exact consideration of the subject, it may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares, that congress shall have power 'to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions;' and also 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States.' In pursuance of this authority, the act of 1795 has provided." &c. "It has not been denied here, that the act of 1795 is within the constitutional authority of congress, or that congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has taken place. In our opinion, there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object." "The power thus confided by congress to the president, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided?" "We are all of opinion, that the authority to decide whether the exigency has arrived, belongs exclusively to the president, and that his decision is conclusive upon all other persons." Again, Mr. Justice Story says: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer, that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself." Mr. Justice Story states and disposes of another objection to the avowry, in these words: "In the first place, it is said, that the original plaintiff was never employed in the service of the United States, but refused to enter that service, and that, consequently, he was not liable to the rules and articles of war, or to be tried for the offence by any court martial organized under the authority of the United States. The case of Houston v. Moore, 5 Wheat. [18 U. S.] 1, affords a conclusive answer to this suggestion. It was decided in that case, that although a militia man, who refused to obey the orders of the president calling him into the public service, was not, in the sense of the act of 1795, 'employed in the service of the United States,' so as to be subject to the rules and articles of war, yet that he was liable to be tried for the offence under the 5th section of the same act, by a court martial called under the authority of the United States." The decision of the state court was reversed, and the case was remanded to it, with directions to cause a judgment to be entered in favor of the avowant.

This question as to the power of the president to call out the militia and establish martial law, was again before the supreme court of the United States in the case of Luther v. Borden, 7 How. [48 U. S.] 1. That was an

action of trespass for breaking open the plaintiff's house, in Rhode Island, and arresting him under a military order, growing out of what has been usually called the "Dorr Rebellion." The opinion of the court was delivered by that eminent jurist, Chief Justice Taney. After considering the question as to who should determine whether the exigency had arisen which would justify calling out the militia, the chief justice says: "After the president has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court, (provided it came to the conclusion that the president had decided incorrectly,) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the president was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy and not of order. Yet, if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over." "It is true," adds the chief justice, "that in this case the militia were not called out by the president. But upon the application of the governor under the charter government, the president recognized him as the executive power of the state, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the president, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders; and it should be equally authoritative." "It is said that this power in the president is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which the power would be more safe, and at the same time equally effectual. When citizens of the same state are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the president, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human foresight could well provide." The chief justice then examines the case of Martin v. Mott [supra], and says: "The grounds upon which that opinion is maintained are set forth in the report, and, we think, are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the president, in exercising this power, shall fall into error, or invade the rights of the people of the state, it would be in the power of congress to apply the proper remedy, But the court must administer the law as they find it. The remaining question is, whether the defendant, acting under military orders issued under the authority of the government, was justified in breaking and entering the plaintiff's house." And, after examining matters as then existing in Rhode Island, he says: "It was a state of war; and the established government resorted to the rights and usages of war, to maintain itself, and to overcome the unlawful opposition. And, in that state of things, the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there was reasonable ground for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it."

The principle established by these cases determines, I think, that the president has the power, in the present military exigencies of the country, to proclaim martial law, and, as a necessary consequence thereof, the suspension of the writ of habeas corpus in the case of military arrests. It must be evident to all, that martial law and the privilege of that writ are wholly incompatible with each other.

But it may be argued that Vermont is a loyal state, more than five hundred miles from the seat of war; that the people are patriotic and law abiding; that the enforcement of civil law has not been interfered with within her borders; and that, therefore, there is nothing to justify martial law. But we have already seen that this is a question for the president, not for the court, to determine.

I am aware that the conclusion at which I have arrived may seem to conflict with some very high authorities, but it appears to me that they can be reconciled. In Ex parte Bollman, 4 Cranch [8 U. S.] 95, Chief Justice Marshall incidentally remarks, that only congress can suspend the writ of habeas corpus. And Judge Story, in his Commentaries on the Constitution (volume 3, § 1336), makes

the same remark. But neither was discussing the question, where, how, or by whom it could be suspended. It seems to have been an obiter dictum with both of those learned judges. The question came directly before Chief Justice Taney, in Ex parte Merryman [Case No. 9,487], and again before Judge Hall, of the northern district of New York, in Ex parte Benedict, before referred to. But both cases came up on an entirely different state of facts from that which now exists. The president had not then proclaimed martial law, and, in neither of the cases, was the act of 1795 referred to at all by the court, in its opinion. On the other hand, the president's legal adviser, (the attorney general,) Mr. Horace Binney, of Philadelphia, Mr. Reverdy Johnson, of Maryland, and Judge Parker, of Cambridge, Massachusetts, have, I understand, give deliberate opinions, that the privilege of the writ may be legally suspended without an act of congress. I have not had an opportunity of seeing the last named three opinions, and therefore do not know on what grounds they are based; but, coming from eminent lawyers and pure patriots, they are certainly entitled to great weight.

What, then, should be the order in this case? The writ of habeas corpus being now suspended, as to persons arrested as the petitioner was, if he were at this time before me, I should be constrained to order him back into the custody of the marshal. But, on the 1st of September, when the marshal was directed to bring him before me, he was legally entitled to the privilege of the writ; and, for disobeying that order, I shall direct the following sentence to be placed upon the records of the court, and shall use all the power the law confers upon me, to have it enforced: "District of Vermont. In the Circuit Court, October 7th, 1862. In the matter, Ex parte Anson Field [Case No. 4,761]. On the order on C. C. P. Baldwin, marshal, and N. B. Flanagan, jailor, to show cause why they should not be punished for contempt of court, in refusing to bring said Field into court in pursuance of the order of September 1st last, the court, having fully and carefully examined the matter in all its relations, and given it mature consideration, adjudges that said Baldwin was guilty of contempt of court in disobeying the order aforesaid, and that, within ten days, he pay to the clerk of the court a fine of one hundred dollars, and that, until he purges himself of said contempt, by complying with this order, he be not permitted within the court, to act as one of its officers; and that, the said Flanagan having acted as the mere servant of said Baldwin, he be discharged, as a vindication of the power of the law, does not require that he should be punished."

The marshal having, in accordance with the order of October 7th, paid into the court the fine of $100, was restored by the court to his full privilege as an officer of the court.

FIELD v. The ARGUS. See Case No. 521.

Case No. 4,762.

FIELD v. BAKER et al.

[12 Blatchf. 438;[1] 11 N. B. R. 415.]

Circuit Court, E. D. New York. Feb. 9, 1875.

BANKRUPTCY—CONDITIONAL SALE—NON-PERFORMANCE OF CONDITION—RIGHTS OF ASSIGNEE SUBSEQUENTLY APPOINTED — CONFESSION OF JUDGMENT BY BANKRUPT BEFORE ADJUDICATION — SOLVENCY.

1. In April, 1871, B. sold to F. his stock of goods in his store, for a price payable in instalments in fifty weeks, by a bill of sale, with an agreement therein, that, if F. should make default in paying any instalment, B. should be at liberty to treat the whole amount unpaid as due, and take possession of the goods and sell them to satisfy the debt. At the same time, F. gave to B. a mortgage on the goods, containing like terms as in the bill of sale. B. omitted to file the mortgage in conformity with the statutes of New York. F. went into possession of the goods, and, in November, 1871, made default in payment of an instalment. On the 13th of December, 1871, B. took possession of the goods, and afterwards sold them, and applied the proceeds on the said debt to him. No actual fraud in the transaction was alleged, nor was it claimed that F. was insolvent when he received the bill of sale and gave the mortgage. On the 20th of December, 1871, a petition in bankruptcy was filed against F., and he was afterwards adjudged a bankrupt. His assignee filed a bill against B. and F., to have the mortgage adjudged void, as against him, and the value of the goods taken by B. accounted for by him: *Held*, that, as the goods were sold with the reservation, in the bill of sale, of a right in B. to resume possession of them, and as B. did take possession of them before any other lien on them was acquired, and before the petition in bankruptcy was filed, the transaction was valid, as against the assignee.

2. In May, 1871, B. endorsed a note for F., and it was discounted by a bank, on a pledge, also, to the bank, of securities belonging to B., and the proceeds of the discount were paid to F. In July, 1871, a like transaction was had. Afterwards, and on the 28th of July, 1871, F. gave to B. a confession of judgment, in the amount of the endorsements, as security, on which a judgment was entered the next day. The notes were renewed twice, and F. agreed to pay them on the 1st of December, 1871, and that, if he did not, B. might pay them, so as to release the securities. F. failed to pay them, and then B. paid them, and caused execution on the judgment to be issued by a creditor of his to whom he had assigned it. The execution was levied on other goods than those sold by B. to F., and, on or about the 20th of December, 1871, such goods were sold under the levy, and the proceeds were credited on the judgment. In the bill before mentioned, the assignee prayed to have the judgment declared void, as against him, and the value of the goods sold under the levy, accounted for by B.: *Held*, that the time to be taken at which to test the condition of F. and the knowledge of B., was the time when the confession of judgment was given, and not the time when the execution was issued; and that, as it did not appear that F. was not solvent at that time, the transaction was valid, as against the assignee.

[Appeal from the district court of the United States for the eastern district of New York.

[This was a suit by Aaron Field, assignee

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

in bankruptcy of Harris Fiegel, against Adolph Baker and the said Harris Fiegel, to set aside a mortgage given by Fiegel to Baker, and to require said Baker to account for the value of the property taken by virtue of the same. The district court decreed in favor of the complainant (case unreported), and Baker appealed to this court.]

Thorndike Saunders, for plaintiff.

Tracy, Catlin & Brodhead, for defendant Baker.

WOODRUFF, Circuit Judge. On the 1st of April, 1871, the appellant, Adolph Baker, sold to the other defendant, Harris Fiegel, a stock of dry goods in the store theretofore occupied by the said Baker, in Grand street, Williamsburgh, together with store fixtures, &c., for the sum or price of $5,000, payable in instalments of $100 each week, until paid, with certain interest upon a portion thereof, and with an agreement, that, if Fiegel made default in the payment of the instalments as they became due, the vendor should be at liberty to treat the whole amount then unpaid as due, and to enter and take possession of the goods and sell and dispose thereof for the satisfaction of the amount remaining unpaid. These terms are embodied in the bill of sale; and, had there been no mortgage given by Fiegel, the transaction would have been in the nature of a sale, in which the vendor, in order to preserve his lien for the price, makes a conditional delivery of the goods, reserving the right to reclaim the goods in case the price is not paid agreeably to the terms of sale. Such a transaction is perfectly valid as between the parties, and involves no idea of preference, within the meaning of the bankrupt law. The vendor, by such a transaction, gains from the bankrupt no more than by the same transaction he gives. The taking of a security for money then presently loaned is not taking a preference; no more is a sale of property, and, at the same time, reserving a lien for the price.

This arrangement by the parties was carried into further execution by the simultaneous execution of a mortgage of the goods to the vendor, corresponding, in its provisions, with the terms and conditions expressed in the bill of sale. There is no pretence of any actual fraud in these transactions, nor that, at that time, Fiegel was insolvent, or that there was any suspicion, or ground of suspicion, that he was so. Baker, the vendor, omitted to file the mortgage in conformity with the statutes of New York, and, as Fiegel took possession and remained in possession, the mortgagee could not claim under that mortgage, as against creditors of the mortgagor or subsequent purchasers or mortgagees in good faith. Fiegel, the purchaser, made payment of instalments upon the purchase money down to some time in November, 1871, paying, in all, $3,200, and then made default. On the 13th of December, the vendor, in accordance with the terms of the sale and with the mortgage, entered, took possession of and removed such of the goods as had not been already disposed of by Fiegel, and afterwards sold the same at auction, and applied the proceeds to the satisfaction of the unpaid portion of the purchase price and interest. No question has been raised, in this case, of the regularity and validity of such sale and application of the proceeds, if, as against this complainant, the vendor had a right to take possession of the goods, as security for the balance due him as the price of the goods. This statement exhibits one of the transactions which is the subject of contest herein.

The other was as follows: In May, 1871, Fiegel requested the assistance of Baker in procuring a discount at bank, (where he was a stranger,) to the amount of $3,000. Baker introduced him to the officers of the bank, endorsed his note for $3,000, at three months, and pledged United States bonds as further security; and, on the 15th of July, 1871, another discount was obtained for Fiegel, to the amount of $2,000, upon the like security; and, on the 28th of the same month, Fiegel gave to Baker a confession of judgment, in the sum of $5,000, as security, to indemnify him against his endorsements and the hypothecation of his United States bonds, and judgment was entered upon such confession on the following day, July 29th, 1871. There is no evidence justifying any impeachment of the good faith of these transactions—certainly, none creating any doubt of the good faith of Baker; and it is clear, that Fiegel received thereby the full amount of the discount of the notes so given. These notes were twice renewed, but, at the time of the last renewal, Baker being desirous of obtaining his bonds, it was agreed that Fiegel would retire the renewal notes on the 1st of December, and, if not, that Baker might pay them, although they had not yet matured. Fiegel failed to pay the notes, and, soon afterwards, Baker paid them, and thereupon issued execution upon the judgment so confessed for his indemnity, or caused it to be issued by a creditor of his own, to whom he had assigned it. The execution was levied upon the goods of Fiegel, (not included in the sale by Baker,) and, on or about the 20th of December, the property levied upon was sold, and the proceeds of sale credited on the judgment. These proceeds were not paid to the sheriff by the purchasers, but appear to have been collected by the attorney who issued the execution, and to have been paid over to the creditor of Baker, above referred to, on Baker's account.

On the 20th of December, 1871, a creditor of Fiegel filed his petition in the district court, in bankruptcy, and such proceedings were had in that court, that Fiegel was afterwards adjudged bankrupt and the complainant was appointed assignee. He

filed his bill in the district court, praying that the hereinbefore mentioned mortgage and the said judgment be declared void, as against him, as assignee, and that Baker be required to pay the value of the property taken by virtue of the same respectively. In that court, and, as I think, in comformity with views that have until recently been generally entertained upon the questions involved, the complainant had a decree for such value, from which the defendant, Baker, has appealed to this court.

1. As to the judgment confessed by the debtor, to indemnify the appellant against his endorsements and the hypothecation of his United States bonds, to procure discounts for the use of the debtor. As already suggested, there is no sufficient evidence that this transaction was not made by the appellant in perfect good faith, as an act of kindness to Fiegel, without any reason whatever to believe that the latter was insolvent. On the contrary, the proofs show that Baker then had confidence in the solvency of Fiegel, and was justified in that confidence. More than this, it is not shown that at that time Fiegel was not in fact solvent. It is impossible, I think, to say that either party contemplated any fraudulent preference, or any insolvency or fraud upon the bankrupt law. Nor did the decision below proceed upon any such ground. Before the execution was issued, there was reason to believe that Fiegel was insolvent. He was, no doubt, insolvent in fact; and, under the circumstances disclosed by the evidence, Baker had knowledge enough to make him apprehend such insolvency, if not believe it. The decision below proceeded on the ground, that the time to be taken at which to test the condition of the debtor and the knowledge of the creditor, is the time when the execution was issued which gave to Baker a lien upon the property seized thereon; and that then an advantage gained by Baker, with reasonable cause to believe his debtor was insolvent, was illegal and void. In Clark v. Iselin [21 Wall. (88 U. S.) 360] the supreme court of the United States have, at this present term, decided, (reversing the decision of the circuit court,) that, where a warrant of attorney is executed, authorizing the entry of a judgment, the validity of a judgment and levy made in pursuance thereof is to be tested by the condition of things existing when the warrant is executed and delivered, and, if such warrant is not invalid or impeachable, then the judgment and levy are valid, notwithstanding the debtor's insolvency, and knowledge thereof by the creditor, before such execution is issued. Indeed, that case goes one step further than is required to sustain the execution and levy in this. There, the judgment itself was not entered until the insolvency of the debtor was apparent, and it was quite clear that such judgment, and the levy of an execution on the debtor's goods, must result in giving a preference to the judgment creditors over the other creditors of the debtor. I think conformity to that decision requires that this court sustain the validity of the judgment, execution, levy and sale in the present case.

2. As to the mortgage, I find no sufficient reason to doubt the correctness of the decision made in Re Leland [Case No. 8,234], that, where the holder of a chattel mortgage under the laws of New York omits to file his mortgage, or to take possession, and an assignee in bankruptcy of the mortgagor comes to the actual possession of the property, his title is unaffected by such outstanding mortgage; and that, as to him, the mortgage has no validity. This case is distinguished from that in two particulars—First, the property itself was sold and delivered with the express reservation of the right to resume the possession, expressed in the bill of sale; second, the vendor did, in fact, take possession before any other lien thereon was acquired, before the title of the assignee in bankruptcy, and, in fact, before any petition was filed. If the appellant be regarded simply as mortgagee, he took actual possession before any lien upon the property was acquired by any third person. Denio, J., in Van Heusen v. Radcliff, 17 N. Y. 580, in the court of appeals of New York, says, in reference to this statute: "When a conveyance is said to be void as against creditors, the reference is to such parties when clothed with their judgments and executions," &c. Hale v. Sweet, 40 N. Y. 97, and Doll v. Harlow [2 Hun, 659], in the supreme court of the second department (unreported), indicate that, in such case, the title of the mortgagee is regarded by the state courts as valid. How far it would be permitted to show fraud upon creditors, or the procurement of credit upon faith of the possession and apparent title, and hold such a mortgage void upon that ground, as to creditors who became such in reliance on the debtor's unincumbered title, it is not necessary here to inquire.

My conclusion is that the decree should be reversed, and the bill be dismissed, without costs.

Case No. 4,763.

FIELD v. BALTIMORE C. P. R. CO.

[Cited in Cully v. Baltimore & O. R. Co., Case No. 3,466. Nowhere reported; opinion not now accessible.]

Case No. 4,764.

FIELD v. COLUMBET.

[4 Sawy. 523.][1]

District Court, N. D. California. July 22, 1864.

CONSTRUCTION OF DEED—DESIGNATION OF QUANTITY — CONVEYANCES UNDER CALIFORNIA STATUTE — DIFFERENCE BETWEEN QUITCLAIM AND OTHER DEEDS IN CALIFORNIA — OPERATION OF QUITCLAIM DEED—ACTION OF MESNE PROFITS—VALUE OF IMPROVEMENTS AS SET-OFF TO DAMAGES—COLOR OF TITLE, WHAT—STATUTE OF LIMITATIONS, TO BE AVAILABLE, MUST BE PLEADED.

1. The designation of quantity in the description of a deed will not control the boundaries where they are clearly indicated; but where there is doubt as to the true description, such designation of quantity may be properly considered.

2. Under the California statute of conveyances, any words in a deed indicating an intention to transfer the estate, interest or claims of the grantor will be a sufficient conveyance, whether they be such as were generally used in a deed of feoffment, or of bargain and sale, or of release, irrespective of the fact of possession of grantor or grantee, or of the statute of uses.

3. The only practical difference in deeds in use in California, arises from their different operation upon subsequently acquired interests, or the covenants implied by particular terms; a quitclaim deed only passing such interest as the grantor possessed at the time, and having no operation whatever upon subsequently acquired interests.

4. A quitclaim deed does not affirm the possession of any title in the grantor, nor does it preclude him from subsequently acquiring a valid title and holding it for his own benefit; but it is equally effectual with any other form of deed to transfer existing interests.

5. In California claims for damages for withholding possession of land, or for waste and for rents and profits, may be, and usually are, united in the same action with a claim for the recovery of the premises; but distinct actions may be brought, if desired, for the land, and for the damages.

6. Under the California statute allowing the value of permanent improvements to be set-off, in certain cases, against damages for withholding possession of land, the defendant must have held the land not only in good faith, but also under color of title.

7. By "color of title" is meant the semblance or appearance of title. Wherever any instrument by apt words of conveyance from grantor to grantee in form passes what purports to be the title, it gives color of title.

8. The period prescribed within which actions for mesne profits must be brought in California is three years; but if the statute be not pleaded, mesne profits for a longer period may be recovered.

This was an action [by Edward Field against Clement Columbet] to recover the possession of a tract of land, containing about seven hundred and thirty acres, situated in the county of Alameda, in the state of California, and was tried at the June term of 1864 by the court, without the intervention of a jury, by stipulation of the parties. Both parties deraigned their title from the same source—from Fulgencia Higuera, the original grantee of the Mexican government, the plaintiff claiming by a deed executed in July, 1860, and the defendant by a deed executed to his wife, Ann Columbet, in December, 1854, and a subsequent deed to himself in January, 1859. The wife of Higuera united in the deed to the plaintiff, and his wife and children united in the deed to the defendant; but it did not appear that either wife or children ever possessed any interest in the premises to convey. No importance was therefore given to that fact.

A. M. Crane, for plaintiff.

Williams & Thornton, for defendant.

FIELD, Circuit Justice. Two positions are taken to defeat a recovery by the plaintiff: First. That the premises are embraced in the deed of December, 1854, to Ann Columbet, and in the deed of January, 1859, to the defendant. Second. That if the title remained in Higuera, his deed of July, 1860, was inoperative to pass it, the grantee not being at the time in possession of the premises.

The first position depends upon the construction to be given to the description of the premises in the deeds of 1854 and 1859. The description is identical in both deeds. It gives the boundary as commencing at a point on a certain creek "where the wagon-road passes to the house of Galindo," and after running in different directions as reaching on the north a range of hills designated "Lomas Altas," and proceeding thence "along the Lomas Altas southerly up to the aforesaid wagon-road to Galindo's house," and thence "westerly to the point of beginning," the tract "to contain in limits one mile square in quantity, including the two springs known as the 'Agua Calientes.'"

There are irreconcilable calls in this description, and the only question is, which of them must be rejected? If the line be run "along the Lomas Altas," it will not strike the wagon-road, which stops at Galindo's house; and it will follow for a great distance an easterly and not a southerly course. Yet this is the boundary for which the defendant contends, his theory being that the grantor intended that the line should follow the hills, and strike the line of the wagon-road protracted nearly a mile. On the other hand, if the words "along the Lomas Altas" be rejected, and the line be run southerly, it will strike the wagon-road and will include precisely the one mile square of land and the two warm springs mentioned. I am of opinion that the latter is the true description of the premises deeded. If the grantor had intended to convey the whole tract, as the defendant contends, it is not probable that he would have designated the two warm springs as included in the tract sold, for in that case there could have been no question on the point—each spring would have been more than a mile from the outer

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

boundary of the premises. This opinion is strengthened by the designation of quantity in the deed. The designation of quantity, it is true, will not control the boundaries where they are clearly indicated. Yet where there is doubt as to the true description, it may be properly considered. The boundary for which the defendant contends embraces over fourteen hundred acres—more than double the amount designated in the deeds under which he claims.

The position of the defendant, that the deed to the plaintiff is inoperative to pass the grantor's title, arises from the fact that it is what is termed a quitclaim deed, and the grantee was not in possession of the premises at the time of its execution. The deed recites a money consideration of $2930, and witnesseth that the grantors "have remised, released and quitclaimed, and by these presents do remise, release and quitclaim," to the grantee the land in question, and all their "estate, right, title and interest therein," to have and to hold the same to the grantee and his heirs forever. A deed of this character would be sufficient to pass the interest of the grantors under the statute of uses. It was so held by the supreme court of New York, in Jackson v. Fish, 10 Johns. 456, and the ruling has ever since been followed in the courts of that state. Lynch v. Livingston, 8 Barb. 485; Id., 2 Seld [6 N. Y.] 422.

In this state, the statute of uses has not been in terms adopted, and it is unnecessary to express any opinion whether it is to be considered in force as part of the common law. The statute of conveyances renders the deed as effectual for every purpose to pass the title or right of the grantors as it would have been had the statute of uses been expressly adopted. By the common law, where the right of property and the possession were united in the same person, a conveyance could only be made by feoffment with livery of seisin. But where the right of property and the possession were in different persons, a transfer of the estate could be made to the party in possession by a deed of release. The operative words of such release were the same as those used in the deed under consideration, "remise, release and quitclaim." The release operated in various ways according to the character of the possession and interest held by the releasee—sometimes by passing the estate or right of the releasor, sometimes by extinguishing his claim, and sometimes by enlarging the estate of the releasee. Without further particularizing the manner of its operation, it is sufficient to say that the deed divested the releasor of whatever estate and right he possessed, and transferred the same to the releasee, except where, from the nature of the interest or right released, the instrument could operate only by way of extinguishment, as in case of the release of a rent charge, or a common of pasture to the terre-tenant. Thus Sheppard, in his Touchstone, in defining the instrument, says: "A release is the giving or discharging of the right of action which a man hath, or may have or claim, against another man, of that which is his. Or it is the conveyance of a man's interest or right which he hath unto a thing to another that hath the possession thereof, or some estate therein." 1 Shep. Touch. 320. And again, the same writer says: "Lands, tenements and hereditaments themselves may be given and transferred by way of release; and all rights and titles to lands may be given, barred and discharged by release; and so also may rights and titles to goods and chattels." Id. 321. The only condition required for the efficacy of the deed was that the releasee should be in the actual possession of the premises. Cruise, Dig. tit. 32, "Deed," §§ 18–39.

The operative words of the instrument are as significant and potential now as at the common law, and their efficacy under our statute of conveyances is not dependent upon the fact of possession by the releasee. The statute allows the transfer of real property and of interests therein, whether the grantor or grantee be in or out of possession. It designates no form in which the conveyance shall be made, except that it shall be made by deed. Any words in a deed indicating an intention to transfer the estate, interest or claim of the grantor, will be a sufficient conveyance, whether they be such as were generally used in a deed of feoffment, or of bargain and sale, or of release, irrespective of the fact of possession of grantor or grantee, or of the statute of uses. The only practical difference in deeds in use in this state arises from their different operation under the statute upon subsequently acquired interests, or from the covenants implied by particular terms. The quitclaim deed only passes such interest as the grantor possessed at the time, and has no operation whatever upon subsequently acquired interests. By its execution, the grantor does not affirm the possession of any title, nor is he precluded from subsequently acquiring a valid title, and holding it for his own benefit. The subsequently acquired title does not inure in any respect to the benefit of the grantee in the quitclaim; and herein lies its distinction from the deed in fee-simple absolute under the statute, or the deed with covenants. It is equally effectual with either of the other forms in transferring existing interests. Such is the common opinion of the profession, and in consequence the quitclaim has become the form most generally in use. To hold that it has no efficacy, except where the grantee is at the time in possession, would disturb titles to property of the value of millions. Sullivan v. Davis, 4 Cal. 291, and Russell v. Coffin, 8 Pick. 142.

Judgment must be rendered for the plaintiff, and it is so ordered.

Judgment was accordingly entered for the plaintiff, and under it he was placed in possession. He then brought an action against the defendant for the use and occupation of the premises recovered from the time his title accrued as established in that case, and the time he was thus placed in possession; and also for the value of a building removed by the defendant from the property. The action was what was technically called an action for mesne profits, to which was added a claim for injuries to the freehold.

The defendant in his answer set up that he entered upon the premises in good faith under his deeds, and had made valuable improvements, the value of which he asked to have set-off against the claim of the plaintiff. The statute of the state provided that in actions for the recovery of real property, "where damages are claimed for withholding the property recovered upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff in good faith, the value of such improvements shall be allowed as a set-off against such damages."

The case was tried with a jury at the July term of 1865, the same counsel appearing for the parties as in the original action.

FIELD, Circuit Justice, charged the jury, among other things, as follows:

1. That although in this state there was a statute which allowed a plaintiff to unite in an action for the recovery of land a claim for damages for withholding the property, or for waste committed thereon, and for the rents and profits thereof, and in practice claims of this character are usually united in the same action with a claim for the land, as it was found to be more convenient and less expensive than separate actions, and equally effectual to enforce the rights of the plaintiff, yet that such union was not essential, but that distinct actions might be brought for the land and for the damages.

2. That to entitle the defendant to set-off the value of his improvements on the land recovered against the plaintiff's claim for damages, his holding of the premises must have been adversely to the claim of the plaintiff "under color of title;" that a holding in good faith was of itself not sufficient; and that by color of title was meant the semblance or appearance of title. Wherever any instrument by apt words of conveyance from grantor to grantee, in form, passed what purported to be the title, it gave color of title. If one entered under a deed purporting to transfer the title, he entered under the color of title, although in point of fact the title was never in the grantor.

3. That the defendant not having pleaded the statute of limitations, which prescribed three years as the term within which actions for trespass upon real property must be brought, and the action for mesne profits was considered one of that kind, the jury were not restricted to a consideration of the use and occupation of the premises for that period in the estimation of damages.

The jury found for the plaintiff.

Case No. 4,765.

FIELD v. DE COMEAN et al.

[5 Ban. & A. 40;[1] 17 O. G. 568.]

Circuit Court, S. D. New York. Dec. 18, 1879.[2]

PATENTS—INFRINGEMENT.

Letters patent number 155,077, dated September 15th, 1874, granted to complainant for improvement in glove fastenings, construed, and, upon the construction given, the defendants *held* not to have infringed.

[Followed in Field v. Ireland, 19 Fed. 835.]

[This was a bill in equity by Joseph F. Field against Oliver De Comean and others for the alleged infringement of a patent for an improvement in glove-fastenings.]

M. B. Andrus, W. S. Pladwell, and P. J. O'Reilly, for complainant.

C. A. Seward and C. B. Stoughton, for defendants.

WHEELER, District Judge. The orator has a patent, No. 155,077, dated September 15th, 1874, for an improvement in glove-fastenings, consisting of the combination of a spring inserted in the material of the glove and extending around the edges of the slit, which permits drawing the wrist of the glove over the hand, and adjusted so as to spring open by the insertion of the hand and to close automatically and overlap itself, and cause the edges of the slit to overlap each other when the glove is on. The defendants deny infringement. They make and sell for use springs for gloves, to be inserted into the material, and with arms extending along each edge of the slit, jointed at the apex, working together like the blade and handle of a jack-knife. The only question is whether the use of such springs is an infringement.

The plaintiff stated in the specification of his patent that springs had been combined before with the wrists of gloves, but of a different form. So his patent is not, and could not be maintained as a patent for the combination of springs in every form with the wrists of gloves to close them. It professes to be and is a patent of his style of spring combined with the wrists of gloves for that purpose. The question is whether the defendants' spring is substantially like his. His is a spring throughout, and pulls constantly upon the parts of the material until they come together and overlap. The

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

[2] [Affirmed in 116 U. S. 187, 6 Sup. Ct. 363.]

defendants' has stiff arms, and pulls the parts together only when closed far enough to have the spring on one arm operate in the opposite direction upon the cam-shaped end of the other, and it pulls the edges apart until the arms are at right angles to each other when opened far enough to cause the spring to act the other way on the cam. When so opened it will not close itself, as the orator's will, but has as much tendency to remain open as it has to remain closed after being closed.

It is said by an expert, called by the orator, that, if the edge of the cam which throws the arms apart was removed, the spring would become more like the orator's in its operation; but he probably failed to notice that the spring operates on the same edge of the cam, although on different sides of its pivot, both in opening and closing the spring, and that if this edge was removed, the spring would not move the arms together, or either way, at all. The form of the defendants' spring is different from the orator's, its mode of operation is different, and the result of its operation is somewhat different. It cannot be said to be the same as the orator's, or to be substantially like the orator's. Each got the idea of closing the wrists of gloves, by means of springs, from others. The orator carries out the idea in his mode, and the defendants in theirs, and as neither has control of anything but the particular mode, neither can justly say that the other uses his mode.

Let a decree be entered dismissing the orator's bill, with costs.

[Affirmed in 116 U. S. 187, 6 Sup. Ct. 363.]

Case No. 4,766.

FIELD v. GIBBS et al.

[Pet. C. C. 155.][1]

Circuit Court, D. New Jersey. Oct. Term, 1815.

SUIT UPON FOREIGN JUDGMENT — OBJECTION TO RECORD IN RESPECT TO SERVICE AND APPEARANCE—APPEARANCE BY ATTORNEY—AUTHORITY.

1. In an action of debt, on a judgment obtained against the defendants in the court of common pleas of Pennsylvania, one of the defendants pleaded, that he had not been served with process, and had not appeared in the suit in which the judgment had been entered. On a demurrer to this plea, it appeared from the record of the judgment, that there had been a general appearance by attorney, and that the pleadings had been entered by him for both defendants. The court overruled the demurrer.

[Cited in Lincoln v. Tower, Case No. 8,355.]

2. Nothing can be assigned for error, which contradicts a record.

[Cited in Kittredge v. Emerson, 15 N. H. 262; Wilcox v. Kassick, 2 Mich. 169; Dalton v. Luck, 16 Mo. 102; Baker v. Stonebraker, 34 Mo. 173; Downing v. Still, 43 Mo. 321.]

3. Facts, in opposition to the record of a judgment obtained in one state, cannot be alleged to contradict the judgment, in an action brought upon it in another state. A judgment, in one state, is conclusive between the parties in another state.

4. Construction of the act of congress of 26th May, 1790 [1 Stat. 122], entitled "An act to prescribe the mode in which the public acts, records, and judicial proceedings in each state, shall be authenticated, so as to take effect in every other state." In a judgment obtained in one state, against a person residing in another state, who had no notice of the suit, the remedy of the defendant is by application to the court, in which the judgment was entered. The attorney and the plaintiff are answerable in damages to the defendant, so also is the officer to whom the process was delivered; if the judgment was entered by default.

[Cited in Taylor v. Carpenter, Case No. 13,785.]

5. An attorney, who enters an appearance in a suit, without authority, is answerable in damages, for the injury he may thereby have occasioned the parties.

[Cited in Lewis v. Sumner, 13 Metc. (Mass.) 272.]

This was an action of debt, brought against Joel Gibbs and Martin Gibbs, for two thousand seven hundred and three dollars and fifty-eight cents. The first count in the declaration, was for fourteen hundred dollars; upon a judgment. obtained by the plaintiff, against these defendants, in the court of common pleas for the county of Philadelphia, in the state of Pennsylvania. The second count was for thirteen hundred and three dollars and fifty-eight cents, for goods sold and delivered. To this declaration, Martin Gibbs pleads, as to the first count, that at the time when the proceedings in the said count mentioned, were commenced, and always, before and since, he was a citizen of New Jersey, residing and commorant in the county of Burlington, in the said state; that no writ of summons or capias, or other process, was served upon him to answer the plaintiff in that suit, nor had he any notice or opportunity to defend himself in that suit; that he never appeared in the said court in the said suit, nor did he ever consent to any of the proceedings, or authorise any person to consent for him, thereto; therefore he says, said judgment, as to him, is void. As to the second count he pleaded nil debet, and tendered an issue which was joined. To the plea in bar to the first count, the plaintiff demurred generally, in which there was a joinder by the defendant.

WASHINGTON, Circuit Justice. The question for the consideration of the court is, whether the matter stated in the plea to the first count, is sufficient. in point of law, to bar the plaintiff from recovering upon the judgment set forth in that count. Upon examining the record of this judgment, it appears by the declaration, that Martin and Joel Gibbs, were attached to answer the plaintiff, in that suit; and both of the defendants appeared by John P. Ripley, their attorney, and pleaded several pleas. In every succeeding stage of that cause, until

[1] [Reported by Richard Peters, Jr., Esq.]

the judgment was rendered, it is stated in the record, that both defendants appeared by the same attorney. The question then is, can the defendant, Martin Gibbs. plead in bar of the count on this judgment, that he was not served with process, and did not appear in the cause, or authorise any person to appear for him? The general rule of law, to which I know of no exception, is, that nothing can be assigned for error, nor can any averment be admitted, which contradicts a record. "A record," says Lord Coke (Co. Litt. 260), "imports in itself such uncontrollable credit and verity, that it admits of no averment, plea. or proof to the contrary; for otherwise there would never be an end of the controversy."

If then, the present suit had been brought in a court of the state of Pennsylvania, there could have been no doubt as to the insufficiency of this plea; because it alleges facts, which are in direct opposition to the record. See the cases in 2 Bac. Abr. 219. Is there any difference where the action is brought in one state, upon a judgment rendered in another? I think not. In the case of Green v. Sarmiento [Case No. 5,760], which was tried in the Pennsylvania circuit court, in October, 1810, the court decided, that a judgment rendered in one state, is conclusive between the parties in every other state; precisely in like manner as it would be, had a suit been brought upon the judgment in a court of the state. where that judgment was rendered. The opinion given in that case, proceeded upon the ground, that the act of congress of the 26th May, 1790 [supra], was intended to carry into effect, that part of the first section of the fourth article of the constitution, which declares, "that congress may, by general laws, prescribe the manner in which the public acts, records, and judicial proceedings of the different states, should be proved, and the effects thereof" as evidence.

The constitution declares. that they shall be entitled "to full faith and credit;" and consequently, no law was necessary or would have been proper, to make them evidence. The law therefore in using the words, "full faith and credit," must have meant to express the effect, to which they were to be entitled in other states. Such is declared by the title of the law to be the design of it. If, to use the words of Lord Coke again, a record imports in itself such uncontrollable credit and verity, that it admits of no averment, plea, or proof to the contrary; and on this account, nothing would be heard in a Pennsylvania court, in contradiction to this record; can it be said. that a New Jersey court, in allowing this plea. gives to the judgment such faith and credit, as would be given to it in the state of Pennsylvania? It is impossible that this can be seriously asserted. But what, it may be asked, is to be done, if the judgment has been obtained against a person, residing out of the state, who was never served with process, or even notified of the existence of the suit, in which it was rendered.[2] I answer, that his remedy is the same, and no other, as would be open to him, if the suit had been brought in the state, where the judgment was rendered. The court in which the judgment was given, would upon motion, accompanied by sufficient proof, stay the execution, and set aside the judgment. Most certainly, if the attorney, who, without authority, entered the appearance, be not clearly able to answer in damages for the injury he has occasioned, the parties will be responsible. That the attorney in such case, is liable for such damages, there can be no doubt.

If the judgment was entered by default, for non-appearance upon a false return of the officer, the officer is liable. The injury complained of in this case, might have resulted, if the defendant had lived in Pennsylvania, and this suit been brought there; but he could not have pleaded the same matter in bar of the action on the judgment, which he has pleaded in this suit; nor can a sound reason be given, why it can be pleaded in this court. I am therefore of opinion that the plea to the first count is bad, and that judgment upon that count must be for the plaintiff.

Judgment for the plaintiff.

Case No. 4,767.

FIELD v. INSURANCE CO. OF NORTH AMERICA.

[6 Biss. 121.][1]

Circuit Court, N. D. Illinois. June, 1874.

OVER-VALUATION FOR INSURANCE — BURDEN OF PROOF — CONDITION OF TITLE — ESTOPPEL — PROOFS OF LOSS—WAIVER OF PROOFS—OWNERSHIP OF INSURED PROPERTY—VALUE—INTEREST.

1. A provision in a policy that "if the insured shall cause the property to be insured for more than its value, the policy shall be void," only avoids the policy in case of intentional over-valuation or fraudulent concealment. This is particularly true where an agent of the company was requested to examine the property, or had an opportunity so to do.

2. Burden of proof is upon the company to show that the over-valuation was intentional.

3. Though the policy provides that if the property is leasehold, or held otherwise than by absolute ownership, it must be so represented to the company and expressed in the policy, or the insurance will be void, yet if at the time of issuing the policy the agent of the company knew the actual condition of the title to the property, and failed or neglected to make the proper note in the policy, it cannot be avoided on that ground.

4. If these are presented in apt time, and are substantially in compliance with the requirements of the policy, that is sufficient, unless the company asks for more specific proof.

[2] See the case of Borden v. Fitch, 15 Johns. 121, where the principles decided in this case are discussed with great ability.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

5. If the adjuster of the company, after examining the premises, stated to the insured that the company was not liable, on the ground of the invalidity of the policy, such facts may be considered as a waiver of the proofs of loss.

6. If the property was insured as belonging to the wife, and the ownership lies between the husband and wife, and the former is estopped from claiming it, then the title is sufficient in the wife to support the action on the policy.

7. Value of insured property is for the jury to determine.

8. Interest may be allowed after the expiration of sixty days from the furnishing of proofs of loss.

[This was a suit by Phebe N. Field against the Insurance Company of North America.]

Bennett, Kretzinger & Johnson, for plaintiff.

I. When the agent of the insurance company is advised of all the facts at and before the policy is issued, and the agent makes out the application and policy, the company are bound, notwithstanding the errors of the agent in writing the application, or the failure to state all the facts in the application, or to comply with a condition in the policy requiring an indorsement on the policy. Fland. Ins. 100, 101, 198; Hough v. City Fire Ins. Co., 29 Conn. 10-22; Peck v. New London Mut. Ins. Co., 22 Conn. 584; Commercial Ins. Co. v. Spankneble, 52 Ill. 56; Atlantic Ins. Co. v. Wright, 22 Ill. 462, 472; New England F. & M. Ins. Co. v. Schettler, 38 Ill. 166; North Berwick Co. v. New England F. & M. Ins. Co., 52 Me. 336.

II. The doctrine of estoppel is applied in such case. Plumb v. Cattaraugus Co. Mut. Ins. Co., 18 N. Y. 393; Fland. Ins. 180, 1-5, inclusive; Beal v. Park Fire Ins. Co., 16 Wis. 241, 246; Frost v. Saratoga Mut. Ins. Co., 5 Denio, 156; Rowley v. Empire Ins. Co., 36 N. Y. 550; Insurance Co. v. Wilkinson, 13 Wall. [80 U. S.] 232; Commercial Ins. Co v. Ives. 56 Ill. 402.

III. Upon the question of valuation. Fland. Ins. 58, note 2; Id. 59, note 1; Williams v. New England Mut. Fire Ins. Co., 31 Me. 219; Fuller v. Boston Ins. Co., 4 Metc. [Mass.] 206; Holmes v. Charleston Ins. Co., 10 Metc. [Mass.] 211; Insurance Co. of North America v. McDowell, 50 Ill. 120, 127.

IV. When suit to recover for a loss is defended on other grounds than that the proof of loss was not sufficient, objections to the proofs are waived. Fland. Ins. 518. McMasters v. West Chester Co. Mut. Ins. Co., 25 Wend. 379; Aetna Fire Ins. Co. v. Tyler, 16 Wend. 385, 401; Norton v. Rensselaer & S. Ins. Co., 7 Cow. 645, 648; Patrick v. Farmers' Ins. Co., 43 N. H. 621; Francis v. Somerville Mut. Ins. Co., 1 Dutch. [25 N. J. Law] 78; Insurance Co. of North America v. Hope, 58 Ill. 75.

V. As to insurable interest. Fland. Ins. 281; Columbia Ins. Co. v. Lawrence, 10 Pet. [35 U. S.] 507.

Wharton & Canfield, for defendant.

BLODGETT, District Judge (charging jury). This is an action on a policy of insurance issued by the defendant, dated on the 20th of January, 1872, whereby defendant insured the plaintiff against loss by fire for the term of one year, for the sum of $3,000, upon her two-story frame warehouse, size, 22x40 feet, with addition, 16x24 feet, used for shelling corn and elevating by horse-power, and for storing grain, situate on lot five in block four, in Galva, Illinois, and which policy at the expiration of the year was renewed and extended for the term of another year.

The property insured was destroyed by fire on or about the 20th day of March, 1873, while the policy by the terms of renewal remained in full force.

The defendant having refused to pay the loss, this suit is brought.

No question is made by the defendant as to the fact of the issue of the policy or its extension, nor is it denied that the property insured was destroyed by fire during the life of the policy. The defendant, however, denies its liability in this case upon the following grounds.

1st. That the property in question was insured for more than its value, and the policy thereby became void.

2nd. That the plaintiff was not at the time the said insurance was effected, nor at the time of said loss, the owner in fee of the lot on which the building in question stood, and the nature of the plaintiff's title to or interest in said lot was not expressed in writing in the policy.

3d. That plaintiff did not within apt time after the loss, render to defendant proper proofs of loss as required by the terms of the policy.

4th. Defendant insists that plaintiff was not at the time of the issuing of the said policy, nor at the time of the fire, the owner of the property insured, but that the same was in fact, owned by her husband Solomon Field.

5th. That even if defendant is liable at all to plaintiff on this policy, the value of the property is far less than is claimed by plaintiff.

I will consider the various points made by the defendant in their order.

That the policy is void because the plaintiff has caused the property to be insured for more than its value.

The policy contains a provision that "if the insured shall cause the property to be insured for more than its value, the policy shall be void."

The fair and legal meaning of this language is that if the insured shall intentionally obtain insurance on her property to an

amount greater than its value, with a design thereby of obtaining, in case of loss, more than her property was fairly worth, she shall forfeit her policy.

It is a clause to prevent fraudulent over-valuation, and intended to deprive men of the benefit of such intentional over-valuation. But the clause does not render void a policy for such slight over-estimates of value as may be reasonably accounted for from difference of opinion as to value.

Value is always to a considerable extent a matter of opinion and judgment, and it would not be right to hold a policy void for over-valuation when it was clear from the proof that there was no intention to deceive, and when there was room for an honest difference of opinion. And this is especially true when the insurer, through its agent, has an equally good opportunity with the insured to ascertain the value of the property, and when the value is a matter of discussion between the parties at the time the insurance is effected, and the agent is requested to personally examine the property, and act upon his own judgment as to its value. In such cases, unless some fraudulent concealment of material facts is shown, the over-valuation must appear from the proof to be very considerable and palpable, and to have been intentional, to avoid the policy under this clause.

In this case plaintiff has introduced proof tending to show that defendant's agent was requested to examine the property and place all the insurance upon it that it would bear; that the agent lived in the same town where the property was located, and had some personal knowledge of the property. If you believe this testimony, then you ought not to find this policy void for over-valuation, unless you are satisfied that the agent was in some way imposed upon and induced to issue the policy for the amount in question, by reason of something more than a mere error of judgment on the part of the plaintiff or her agent as to the value of the property. On this branch of the defense, the defendant has the laboring oar and must make out the charge of intentional over-valuation by a preponderance of evidence.

As to the second point insisted upon, the policy contains this clause, "If the property insured be held in trust or on commission, or by a leasehold or other interest not amounting to absolute or sole ownership, or if the building insured stands on leased ground, it must be so represented to the company and expressed in the policy in writing; otherwise the insurance will be void." The main object of this clause is to prevent parties from insuring property in which they have no insurable interest. It is admitted by the plaintiff in this case that she did not own the fee simple title to the lot on which the property insured stood, but that she did own the building, and moved it on the lot under a verbal arrangement with the owner, whereby she was to pay the taxes and have the privilege or option of buying the lot for $400, whenever she saw fit to do so, and the owner was not to sell to any one else without notifying plaintiff and giving her the privilege of buying at the price stipulated. There is nothing in this policy to indicate that plaintiff's interest in the lot is less than a fee-simple title. The insurance is upon her two-story frame warehouse, situate on lot 5, block 4, etc. Upon the face of the policy it would appear that she claimed to be the owner of the lot as well as the building; that is, there being no expression to the contrary, such would be the legal inference from the language of the policy itself. The agent of the defendant, who wrote the policy, testified that when the application for the policy was made, the husband of plaintiff, who signed the application in her behalf, said, when asked about the title of the lot, that he had as good as bought it, while the evidence on the part of the plaintiff tends to show that when the application was made, a full and true statement of the facts in regard to the terms on which the warehouse had been moved upon the lot was made to defendant's agent, and he was referred to the owner of the lot for further information in regard to the matter. You will observe in this connection that no answer was written into the application in reply to the question as to the title. This application is filled up by defendant's local agent at Galva, but whether signed by plaintiff's husband in her behalf in blank and filled up afterwards by the agent, or whether filled as far as it now is before he signed it, is a matter upon which there is a conflict of evidence. If, however, you are satisfied from all the evidence in the case, that at the time the policy was issued the agent of defendant knew the actual condition of the title to the lot,—that is, knew that plaintiff was occupying the lot under a verbal contract with the owner for the occupation or purchase of the same at her option,—and failed or neglected to write into this application or policy such statements in regard to the title, then defendant cannot avoid this policy by reason of the failure to express in the policy the exact terms of plaintiff's interest in the lot. In other words, it is a question of fact for you to determine from the evidence whether the agent of the defendant knew at the time he issued this policy to the plaintiff, that she did not own the fee-simple title to said lot; and if you find he did so know, then his failure to make a proper note of the fact in the policy does not render the policy void. It was the duty of the agent to have made this explanation as to the title if he knew the facts, and the company will not be allowed to take advantage of his neglect in that particular, if he had such information.

As to the third point of the defense, the policy requires that the assured shall give immediate notice of the loss, "and as soon thereafter as possible render a particular ac-

count and proof thereof, signed and sworn to by him," and a failure to do so forfeits all claim under the policy. The defendant claims that plaintiff has not complied with this condition.

Plaintiff claims, first, that she did in apt time—that is, on the 14th day of April, 1873—render the proofs of loss required; second, that defendant, by its own action, waived the rendering of the proofs of loss.

It is admitted that plaintiff did furnish to defendant, on the 14th day of April, 1873, a proof of loss duly sworn to, but defendant insists that it does not comply with the policy, because she does not state her interest in the property insured, nor does she state in detail the nature of her ownership of the property. It being admitted that plaintiff did submit to defendant what purported to be and was intended as a proof of loss, in compliance with this condition of the policy, it is a question of law whether such proof was sufficient, no question being raised at the time; and I instruct you that the proof rendered was a substantial compliance with the terms of the policy. True, it might have been more specific, but it stated substantially all that she was required to state. That is, it gave the full written portions of the policy and all the indorsements thereon. It stated there was no other insurance, which is admitted to be the fact; it stated the actual cash value of the property at the time immediately preceding the fire; it stated that the property belonged to the plaintiff, which, I think, was a substantial compliance with the requirement that she should state the ownership and interest of the assured. It also states the purposes for which the building was occupied and by whom, the date of the loss and amount, and how the fire originated if known.

But as there is testimony in the case tending to show a waiver of proof of loss, I shall also ask you to make a special finding upon this point as a question of fact.

The evidence on the part of the plaintiff, bearing on this point, tends to show that, a few days after the fire in question, Mr. Holden, who was a general agent and adjuster for defendant, went to Galva and had an interview with plaintiff and her husband; that after being fully informed in regard to the condition of plaintiff's title to the lot, he informed plaintiff or her husband that the company was not liable for said loss, by reason of the failure to truly state the title to the lot in the policy, and only offered to make some small payment by way of gratuity or to save a law-suit. If you are satisfied from the evidence that defendant by its agent, did refuse to pay said loss on the ground of the invalidity of the policy for the reason stated, such facts may be considered by you as tending to show a waiver of the proofs of loss; for it may be properly asked, why should plaintiff be required to submit proofs as to the nature and extent of her loss, if defendant did not intend to pay or even examine such proofs, but placed its refusal to pay on entirely other grounds, which the proofs of loss called for by the policy could not remove or do away with?

As to the fourth point, whether the plaintiff was the owner of the warehouse at the time of the loss and at the time the policy was issued, you have heard all the proof. It is admitted that plaintiff was the wife of Solomon Field at the time this policy issued, and at the time of the loss. She claims to have purchased the property with her own means, and I take it there can be no doubt it was either hers or her husband's; at least defendant does not contend that it belonged to any one else. If the husband, by his dealing with defendant, had estopped himself from claiming the property, that is, if he had insured it as the plaintiff's, then, as between plaintiff and defendant, she had the right to assert the ownership and take the insurance. You have heard all the proof on this question of ownership, and can say whether the plaintiff has or has not shown an ownership of this property as against defendant. And, finally, as to the value of the property destroyed which was covered by the policy, it is for you to say under the proof what that value was. If you are satisfied from the evidence that the building and addition insured, with the machinery, excluding the fanning-mill, was of the value of $3,000 at the time of the fire; then the plaintiff will be entitled to recover that amount with interest at six per cent., since the expiration of sixty days after proofs of loss were furnished or waived.

If it was worth less than that amount, then she will be entitled to recover what it is found by you to be worth under the proof, with interest.

The jury returned a verdict for plaintiff, fixing damages at $3,000, and also found that proofs of loss had been waived by defendant.

NOTE. If the insured, with intent to defraud, makes claim for a larger loss than he actually sustained, he forfeits his rights. Huchberger v. Home Ins. Co. [Case No. 6,821]; Same v. Merchants' Fire Ins. Co. [Id. 6,822]. As to the agency of a solicitor, and forfeiture of policy and waiver, consult Cahill v. Andes Ins. Co. [Id. 2,289], and notes thereto. The supreme court of Illinois has recently held that an insurance solicitor is the agent of the insured, and not of the company. Lycoming Fire Ins. Co. v. Ruben [79 Ill. 402].

FIELD (JONES v.). See Case No. 7,461.

FIELD v. LAMB. See Case No. 4,775.

Case No. 4,768.

FIELD et al. v. The LOVETT PEACOCK.

[N. Y. Times, April 12, 1863.]

District Court, S. D. New York.

CARRIERS — DELIVERY OF CARGO TO CONSIGNEE — USAGE OF PORT.

[1. Delivery of cargo according to the usage of the port is equivalent to delivery to the consignee personally or at his warehouse.]

[Distinguished in The Ben Adams, Case No. 1,289.]

[2. A vessel is not responsible in rem for cargo lost from the pier through negligence of her officers, but after delivery to the consignee.]

In admiralty.

Before BETTS, District Judge.

This was a libel upon a bill of lading for alleged non-delivery of cargo. The bill of lading was given by the master at New Orleans, for 32 hogsheads of sugar, to be delivered to the libelants [Barnum W. Field and others] at New York, and the libelants claimed that one of them had never been delivered.

HELD BY THE COURT: That the contract of the vessel was to transport and deliver the goods laden on board according to the terms of the affreightment. She assumed no further obligation, and no further one can be imposed upon her in relation to that undertaking after it has been fulfilled. That a delivery according to the usage of the port is equivalent to one to the consignee personally or at his warehouse. That the testimony is clear that the usage in the port of New York in the foreign and coasting trade is to deliver goods on proper wharves within the harbor upon reasonable previous notice of the time of unlading, and that the mode of delivery in this case conformed to that rule. That the weighmaster and porter of the libelant, when they came on Saturday to remove the sugars from the pier, did object that all the thirty-two hogsheads had not been fully unladen for the consignee, but they did state that one hogshead was not found in the number landed, having the requisite marks upon it. The officers of the ship insisted that it had been discharged, and would be found upon the pier. Probable proof is furnished that one of two hogsheads, which were not removed from the wharf on Saturday, was purloined in charge of the persons taking it away. If such loss is owing to misconduct or negligence on the part of officers of the ship as bailees of the property, the blame is imputable to them personally, because of acts or omissions, after the sugar was out of the charge of the vessel, and cannot be attached to her, and a remedy therefor pursued in this form of action. The sugars were by law in possession of the consignees the moment they were lawfully out of the vessel and free of her custody and control, and neither the omission of the master or mate, or their positive misfeasance in respect to the cargo, could be longer charged upon the vessel.

Libel dismissed with costs.

Case No. 4,769.

FIELD v. LOWNSDALE et al.

[Deady, 288.][1]

Circuit Court, D. Oregon. Sept. 18, 1867.

REMOVAL OF CAUSES — DETERMINATION OF JURISDICTION BY FEDERAL COURT — CAUSE PENDING AGAINST SEVERAL DEFENDANTS — APPLICATION FOR REMOVAL BY ONE OR MORE — ACT OF JULY 27, 1866.

1. Notwithstanding the order of a state court allowing a petition for removal of a cause to an United States circuit court, the national court must determine for itself the question of its jurisdiction, and if it appears that any of the defendants are not entitled to such removal, the cause as to them must be remanded.

2. An application to a state court for removal of a cause need not be made at the same time by all the defendants, though under the construction given to section 12 of the judiciary act (1 Stat. 79) all the defendants must have been entitled to such removal.

[Cited in Northern Pac. Terminal Co. v. Lowenberg, 18 Fed. 343.]

3. Certain defendants not served or appearing in the state court when an order of removal was made, are not affected by it, and as to them the cause is still pending in that court, and must be removed by its order upon the petition of such defendants, before they can come into the national court.

4. The act of July 27, 1866 (14 Stat. 306), gives each defendant in a cause the right of removal without reference to the status of his co-defendant, "if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants, as parties in the cause."

5. A suit to quiet title to real property against several defendants, who, as alleged in the bill, claim to be the owners of the same as tenants in common, "is one in which there can be a final determination of the controversy," as to each defendant, without the presence of the other, as a party in the cause, and therefore within the act of July 27, 1866, aforesaid.

[Cited in Fields v. Lamb, Case No. 4,775; Steinkuhl v. York, Id. 13,356; Goodenough v. Warren, Id. 5,534; The Debris Case, 16 Fed. 34; Goldsmith v. Gilliland, 24 Fed. 158.]

[This was a suit by James Field against J. P. O. Lownsdale, administrator of the estate of Daniel A. Lownsdale, deceased; the said J. P. O., William E. Cooper and Mary E., his wife, Millard O. Lownsdale, Ruth A. Lownsdale, John R. Lamb and Emma, his wife, and Ida Squires, heirs at law of the said Daniel A.; the said J. P. O., guardian of the said Millard O.; William E. Cooper, guardian of the said Ida; John A. Blanchard, guardian of the said Ruth A. Lownsdale; and William Potter and Isabella Ellen, his wife.]

W. W. Chapman, for complainant.

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

W. W. Page and W. Lair Hill, for defendants.

DEADY, District Judge. This suit was commenced in the circuit court of the state for the county of Multnomah, on April 8, 1867. On May 23, 1867, the circuit court of the state made an order transferring the cause to this court. In pursuance of this order, copies of the complaint, process and order were filed in this court on August 30, 1867.

The order of removal recites, that it was made on the petition of the defendants, James P. O. Lownsdale, William E. Cooper, Mary E. Cooper, Millard O. Lownsdale, by his guardian, J. P. O. Lownsdale, Ruth A. Lownsdale, by her guardian John A. Blanchard, and Ida Squires, and that it appears from the petition that the plaintiff is a citizen of Oregon, and that Ida Squires is a citizen and resident of the state of Kentucky. At the date of the order of removal, it does not appear that the other defendants, namely, Robert [John R.] Lamb and Emma his wife, and William and Isabella Ellen Potter had been served with process or appeared in the suit. The order of removal is in terms unqualified, and removes the whole cause.

On September 9, 1867, the plaintiff filed a motion in this court, praying that the cause be remanded to the state court, for the reasons following: 1. It does not appear that this court has jurisdiction by removal. 2. The defendants were not all in court when the petition for removal was presented. 3. A part of the suit is yet pending in the said state courts. 4. The grounds of removal are insufficient.

The order of removal made in the state court is not conclusive upon the question of jurisdiction in the federal court. Notwithstanding this removal, this court must determine for itself whether it can take jurisdiction of the cause. This proposition has, I believe, never been disputed, and is expressly affirmed in New Jersey v. Babcock [Case No. 10,163]; Ward v. Arredondo [Id. 17,148]; Illius v. New York & N. H. Ry. Co., 3 Kern. [13 N. Y.] 598. The first and fourth grounds of the motion to remand are general and may be passed over for the present.

The second ground is not maintainable. The application to remove need not be made at the same time by all of the defendants. If the defendants in court were required to delay the motion for removal until all the defendants appeared or were brought into court, the result might be that the time for making the motion would pass by, and the right to a removal be lost. Ward v. Arredondo [supra].

The third ground of the motion assumes that the cause as to all of the defendants must be removed at once. But by the authority just referred to, it appears that the law has been held otherwise. Besides, as a matter of fact, the order of removal purports to transfer the whole cause to this court. I suppose that counsel for the plaintiff mean to insist, as a matter of law, that the cause is still in the state court as to the defendants—the Lambs and Potters. As to these defendants the cause is not in this court. They are not included in the order of removal, and the fair presumption from the whole record is, that they were not before the state court, when the order was made. They cannot enter an original appearance in this court, but only in the state court. They can only come into this court in pursuance of an order of the state court where the suit was commenced.

But it may be that the state court did not deem it necessary to a determination of this cause, that these absent defendants should be brought before it; and in this view of the matter, in making the order of removal, it may have regarded them as if they had not been named in the complaint. Or, it may have appeared to the court that it was by the plaintiff's neglect or contrivance that these defendants were not brought before it, or that they, or some of them, were fictitious persons or dead, and that, therefore, the defendants in court should not on that account be delayed in or denied their application for removal. I do not deem it necessary to decide this question absolutely, and only make these suggestions to prevent the contrary from being taken for granted if the question should arise in this court hereafter.

As the law stood up to the passage of the act of July 27, 1866 (14 Stat. 306), the removal of a cause from the state court to the national court, was governed by section 12 of the judiciary act. 1 Stat. 79. The uniform—though not the most obvious—construction of that act has been that all the defendants must be entitled to have the cause removed. In other words, all the defendants, either as being aliens or citizens of another state, must be entitled to sue in the national courts. Smith v. Rines [Case No. 13,100]; New Jersey v. Babcock [supra]; Ward v. Arredondo [supra]; Wilson v. Blodget [Case No. 17,792]. The only exceptions to this construction were the instances in which the defendants, who were residents and citizens of the state, were merely nominal or technical parties, without a beneficial interest in the controversy. Wormley v. Wormley, 8 Wheat. [21 U. S.] 451.

Taking section 12 of the judiciary act, with its received construction as the rule regulating removals, and this motion to remand would have to be allowed. Of all the defendants who appeared at the state court and joined in the petition for removal, only one of them—Ida Squires—appears to be a citizen of another state than Oregon. When the jurisdiction of this court depends upon

the character of the parties, it must appear affirmatively and cannot be presumed. For the purposes of this question of jurisdiction, the defendants before this court, except Ida Squires, must be considered as not being entitled to sue in this court, and therefore not entitled to remove a cause there from the state court.

By the act of July 27, 1866 (14 Stat. 306), it is provided that when a suit is commenced "in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, * * * and if the suit so far as relates to the alien defendant or to the defendant who is a citizen of a state other than that in which the suit is brought, is or has been instituted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then in every such case the alien defendant or the defendant who is a citizen of the state other than that in which the suit is brought, may at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him, into the next circuit court of the United States to be held in the district where the suit is pending, * * * and it shall be thereupon the duty of the state court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal. * * * And such removal of the cause, as against the defendant petitioning therefor, into the United States court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the state court as against the other defendants, if he shall desire to do so."

This act in a measure obviates the difficulty, not to say hardship, which arose from the early construction given to section 12 of the judiciary act. By the constitution of the United States, and even the letter of that act, a certain class of defendants—aliens and citizens of other states—when sued in a state court are entitled to have the cause removed into the proper national court. Yet by this construction they were debarred of this right if they were joined with a codefendant who was not so entitled.

Still, as to all these defendants, except Ida Squires, this cause must be remanded to the state court. As between them and the plaintiff, it is simply a controversy between citizens of the same state, who are supposed to have the same standing in the local forum, and with regard to whom the law presumes there exists neither prejudice nor favor on account of nationality or residence. The judicial power of the United States, so far as it depends upon the character of the parties, does not extend to a controversy between citizens of the same state. And although there are many reasons why it should be held to extend to the whole of a controversy, where some only of the defendants are aliens or citizens of another state—as in this case—at present, it is sufficient to say, that congress has not seen proper to provide for its exercise to that extent.

The only remaining question is, has this court jurisdiction of this cause as to the defendant Ida Squires? To answer this question it is necessary to consider the nature of the suit and the relation of Ida Squires to the subject of it and the parties thereto. From the complaint, it appears that the ancestor of Ida Squires conveyed block G. in the town of Portland, to W. W. Chapman, and that the plaintiff is in the possession and claims title by a regular chain of conveyances from Chapman to the north half of said block. The conveyance to Chapman is dated June 25, 1850. The complaint further alleges that the defendants, inclusive of Ida Squires, "are setting up some claim to the premises, tending to cast a cloud over the plaintiff's title," and therefore prays a decree against all the defendants, that they "be barred of setting up any claim or demand" to the premises in question. This is the subject of the suit—the title to the north half of block G, and the object of it is to quiet the title of the plaintiff thereto. If the defendants have any interest at law or in equity in the premises they must claim as the heirs of their ancestor, or the donees of the United States. In that case they must claim as tenants in common. If so, the interest of each in the land would be distinct from that of the other, and the suit might be separate as to each of them, either to quiet the title of the plaintiff or by the defendants for the purpose of recovering their supposed interest in the land. This being so, there can be no doubt but that the case falls exactly within the provision of the act of July 27, 1866—"The suit is one in which there can be a final determination of the controversy so far as it concerns Ida Squires, without the presence of the other defendants as parties in the cause."

An order will be entered remanding the cause as to all the defendants named in the order of removal except Ida Squires, and as to her the motion to remand is denied. This order is to be understood as in no way affecting the cause as to the defendants—the Lambs and Potters—who appear not to have been before the state court, when the order of removal was made. If they, or either of them, should hereafter appear or be brought into the state court, and that court should deem it proper to order a removal of the cause, as to them, the question of jurisdiction, as to such defendants, can then be considered in this court.

[NOTE. Subsequently, an order of removal was made in the case of the Lambs and others, and a motion to remand to the state court was denied (Case No. 4,775), it appearing that this court had jurisdiction of the cause.]

Case No. 4,770.

FIELD v. MOULSON.

[2 Wash. C. C. 155.][1]

Circuit Court, D. Pennsylvania. April Term, 1808.

OMISSION OF CONSIGNEE TO OBJECT TO INVOICE—PRESUMPTION AS TO RECEIPT OF GOODS — ACCOUNT OF SALES—PRESUMPTION AS TO PRICES—EVIDENCE.

1. An invoice of goods received by the consignee, retained by him, and not objected to, and the truth of it not disproved, is evidence that all the goods enumerated in it were received by the consignee.

2. If a consignee has rendered no account of sales of merchandise for many years, and at the trial offers no evidence to prove what part was sold, and at what prices, there is every presumption that the goods were sold at the invoice prices.

3. The plaintiffs offered to read an entry in the books of the bankrupt, to prove an item in the account against the defendant; but the court would not permit it.

Action [by Field's assignees] for goods sold and delivered. The plaintiffs proved that Field had, as long ago as 1794, consigned a quantity of goods to the defendant to sell on commission, by a letter, which the defendant, being called upon by the plaintiffs, produced in court on the trial, with an invoice enclosed; making the amount two hundred and fifty-four pounds one shilling and ten pence. In the letter, the bankrupt stated the goods to be unsaleable, and that he expected they would hardly sell for two-thirds, or one-half of the invoice price. The defendant could not show that he had rendered the bankrupt any account, or given him any information respecting the goods so consigned, nor did he produce any evidence upon the subject. The defence was, that the plaintiffs ought to prove that all the goods mentioned in the invoice were actually sent, and that they were sold; otherwise, the plaintiffs could only recover as much as the defendant was willing to admit.

Mr. Serjeant, for plaintiffs.
Mr. Shoemaker, for defendant.

WASHINGTON, Circuit Justice (charging jury). An invoice of goods, received by a consignee, retained, and not objected to, and the truth of it in no manner disproved, is evidence that all the articles enumerated in it, were received by the consignee; and if the consignee has rendered no accounts of sale, particularly after so many years, and at the trial offers no evidence to prove what part was sold, and at what prices; every presumption is against him, that he sold them at the invoice prices. But in this case, as the bankrupt stated in the letter which covered the invoice, that they would not probably sell for so much, the jury will say what damages the plaintiffs are entitled to receive.

Verdict for 447 dollars and 13 cents.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

Case No. 4,771.

FIELD v. SCHELL.

[4 Blatchf. 435;[1] 17 Leg. Int. 245.]

Circuit Court, S. D. New York. July 23, 1860.

COSTS—REMOVAL FROM STATE COURT—RECOVERY OF LESS THAN $500.

1. In a suit brought in a state court, to recover back an excess of duties paid to a collector, and removed to this court, where the plaintiff recovers here under $500 and over $50, and the case is one in which the plaintiff would have recovered costs in the state court, if the suit had not been removed, he is entitled to recover, in this court, the costs of the suit in this court, although, if the suit had been originally brought in this court, he would have recovered no costs.

[Cited in Wolf v. Connecticut Mut. Life Ins. Co., Case No. 17,924; Scripps v. Campbell, Id. 12,562; Kreager v. Judd, 5 Fed. 28; Jerman v. Stewart, 12 Fed. 275.]

2. Neither a docket fee, nor any item of costs, is taxable, on a reference to the collector, in a suit to recover back an excess of duties, to adjust the amount of the recovery, nor are any costs taxable for such adjustment.

This was an appeal from the taxation of a bill of costs by the clerk [in the suit of Benjamin H. Field against Augustus Schell, collector of the port of New York. See Case No. 4,772.]

John McKeon, for plaintiff.
James I. Roosevelt, Dist. Atty., for defendant.

NELSON, Circuit Justice. This suit was originally brought in a state court, to recover back an excess of duties paid to the collector, and was removed to this court under the act of congress of 1833 [4 Stat. 633]. The amount recovered was under $500, but over $50, which would have entitled the plaintiff to costs in the state court. The clerk refused to tax any costs in behalf of the plaintiff, on the ground that the recovery was less than $500. It is admitted that, if the suit had been commenced in this court, no costs could have been recovered, within the 20th section of the judiciary act of 1789 [1 Stat. 73]. The case, however, does not fall within that section, as the suit was commenced in a state court, and removed to this court, under the act stated. The question is not, therefore, necessarily concluded by the act of 1789.

I had occasion to look into the subject of costs in civil cases, on a question of taxa-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

tion, and to express an opinion upon it, which is reported in Costs in Civil Cases [Append. Fed. Cas.] and came to the conclusion, that, although the right to recover costs by the prevailing party, with the exception of a few cases, was not given in express terms, yet the general right was recognized in the judiciary act of 1789, and in numerous acts of congress passed since down to the present day. See, also, Conkling's Treatise, under the head of "Costs," pt. 2, c. 2, § 7, subd. 4, and S. D. Law's work on the Jurisdiction and Powers of the U. S. Courts, p. 255. Even the judiciary act of 1789 does not give costs in express terms. I have said that this case does not come within the prohibition of the 20th section of that act, and hence, if the plaintiff, as the prevailing party, is entitled to costs under the right as generally recognized by acts of congress and the usage and practice of the courts, there can be no well-rounded objection to the allowance of costs in the present instance; and, although the question is one not without difficulty, I am inclined to think that the case comes within this generally-recognized right, and that the costs should have been taxed by the clerk. That officer was doubtless controlled by the case of Coggill v. Lawrence [Case No. 2,957], and it must be admitted that some expressions in the opinion would lead to a denial of costs in the present case. But, in that case, the plaintiff would not have been entitled to costs in the state court, if the suit had not been removed, which distinguishes it from this one. Let the case be referred back to the clerk, for taxation according to the rules and practice of the court.

I observe one item in the bill which I feel bound to notice, by way of instruction to the clerk in this and all like cases. It is a docket fee on a reference to the custom-house. This is an abuse that has recently sprung up in the trial of these revenue cases, and must be corrected. The reference to the collector is simply to apply the rate of duty settled by the court to the goods entered. It is a matter of convenience to the court, and, so far as my experience goes, has always been adopted by the consent of counsel. It is simply a matter of arithmetic or calculation, and the collector is presumed to be the most familiar with the service. He applies the rate of duty which should have been applied at the entry of the goods. An effort seems to be made to turn this informal proceeding, adopted for the convenience of counsel and court, into a second trial or hearing of the case, which cannot be admitted. Even if the court had power to refer, which it is understood it has not, the practice should not be countenanced. I have never known a reference in the federal courts, in a common law case. No costs of any description should be allowed for adjustment at the custom-house, nor in the state court.

Case No. 4,772.

FIELD v. SCHELL.

[5 Blatchf. 1;[1] 43 Hunt, Mer. Mag. 205.]

Circuit Court, S. D. New York. May 30, 1860.

REPEAL OF TARIFF ACTS—DUTY ON NON-ENUMERATED ARTICLES—ACT OF AUGUST 30, 1842.

The 20th section of the tariff act of August 30, 1842 (5 Stat. 565), in regard to the rate of duty on non-enumerated articles, was not repealed by the act of July 30, 1846 (9 Stat. 42), or by the act of March 3, 1857 (11 Stat. 192).

[Cited in Cohen v. Phelps, Case No. 2,964.]

This was an action [by Benjamin H. Field] against [Augustus Schell] the collector of the port of New York, to recover back an alleged excess of duties exacted by him on several importations of caustic soda, made after the passage of the tariff act of March 3, 1857 (11 Stat. 192). The defendant imposed upon the article a duty of fifteen per cent. ad valorem, which was paid under protest, the plaintiff claiming that it was liable to a duty of only four per cent., under the 20th section of the tariff act of August 30, 1842 (5 Stat 565), on the ground that it resembled soda ash more nearly than it resembled any other article enumerated in the act of 1857, and that soda ash was, under that act, liable to a duty of only four per cent. Caustic soda was not enumerated in the tariff act of 1842, or in that of 1857, or in the tariff act of July 30, 1846 (9 Stat. 42). The plaintiff introduced considerable evidence, to show that caustic soda bore a close similitude, in material, quality, and the uses to which it was applied, to soda ash. The court charged the jury, that if, from the evidence, they were satisfied that caustic soda resembled soda ash, in material, quality and the uses to which it was or might be applied, or either of them, more nearly than it resembled any other article enumerated in the act of 1857, then only four per cent. duty should have been charged on it, and their verdict ought to be rendered for the plaintiff, for the excess. The jury returned a verdict for the plaintiff, and the defendant now moved for a new trial, on the ground of an alleged misdirection of the court to the jury, in such charge.

John McKeon, for plaintiff.

James I. Roosevelt, Dist. Atty., for defendant.

Before NELSON, Circuit Justice, and SMALLEY, District Judge.

SMALLEY, District Judge. Whether there was error in the charge of the court, depends upon the question whether the 20th section of the tariff act of 1842 has been repealed by either the act of 1846 or the act of 1857. That 20th section provides, that "there shall be levied, collected and paid on each and every non-enumerated article which bears a similitude, either in material, quality, tex-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

ture, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and, if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied, collected, and paid on such non-enumerated article, the same rate of duty as is chargeable on the article it resembles paying the highest duty; and, on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable." The 3d section of the act of 1846 provides, that, "from and after the first day of December next, there shall be levied, collected, and paid, on all goods, wares, and merchandise imported from foreign countries, and not specially provided for in this act, a duty of twenty per centum ad valorem." The 11th section of the same act provides, "that all acts and parts of acts repugnant to the provisions of this act, be, and the same are hereby, repealed." These sections, considered by themselves, would seem to indicate, quite decidedly, an intention to repeal the 20th section of the act of 1842, and, if this was an open question, I should have had great difficulty in coming to the conclusion that such was not their design and effect. It cannot now, however, be regarded as an open question. The supreme court, in the case of Stuart v. Maxwell, 16 How. [57 U. S.] 150, after an elaborate argument and full consideration, decided, that there was no necessary repugnance between the act of 1846 and the 20th section of the act of 1842, and, consequently, that the former did not repeal the latter, and that the duty, which was in that case assessed under the 20th section of the act of 1842, was rightly assessed. The case turned upon that question, it was the only point made or decided, and this court must be governed by it.

It was argued by the defendant's counsel, that, in the case of Stuart v. Maxwell [supra], the government sought to avail itself of this 20th section to enforce the payment of a higher rate of duty than it would otherwise have been entitled to, and thus increase the revenue; and that that decision, being in favor of the government, was not applicable to this case. It is very difficult to see why, if this 20th section is to operate in favor of the government in one case, to increase the revenue, it should not operate in a similar case against it, although it may diminish the revenue. Why the government should be permitted to avail itself of this 20th section for the purpose of increasing the duties, and the importer should not be permitted, under the same or similar circumstances, to avail himself of it for the purpose of diminishing the duties, I am at a loss to conceive. But, if there could, at any time, have been a doubt upon that question, it is removed by the case of Ross v. Peaslee [Case No. 12,077], in which Mr. Justice Curtis (who delivered the opinion of the court in Stuart v. Maxwell) held, that this 20th section was in force, and did not operate to reduce the duties in that case, from twenty per cent. to five per cent.

This brings us to the act of 1857. Does that act repeal the 20th section of the act of 1842? There is much less reason for saying that it does, than for saying that the act of 1846 does. There is nothing in the act of 1857 which indicates any intention to extend the act of 1846, or in any way to change or interfere with the construction given thereto, further than generally to reduce the duties, and take certain articles from one schedule and place them in another, and put others into the free list. The case of Stuart v. Maxwell was decided in 1853, and that of Ross v. Peaslee in 1855. Congress can, therefore, hardly be supposed to have been ignorant of these decisions at the time the act of 1857 was passed; and I think it cannot be presumed that, with such knowledge, it intended to alter that important provision of the law, without some definite expression of that intention. There are no repealing words in the act of 1857, and neither from the phraseology nor from the general purpose of that act, can I see any reason for supposing that it was designed to have, on the 20th section of the act of 1842, an effect which the courts had decided the act of 1846 did not have. It is clear, that the words, "non-enumerated article," in the 20th section of the act of 1842, the words, "not specially provided for in this act," in the 3d section of the act of 1846, and the words "not enumerated in the said schedule," in the 1st section of the act of 1857, mean the same thing and should receive the same construction. The distinction attempted to be drawn between them by the defendant's counsel cannot be sustained. This view of the subject is fully sustained by the decision of Judge Giles, in the Maryland district, in a case precisely like this, and in relation to this same article. Gamble v. Mason [Case No. 5,209]. The result is, that the 20th section of the act of 1842 is not repealed either by the act of 1846 or by the act of 1857, but remains in force. There was, therefore, no error in the instructions given by the court to the jury, and there must be a judgment for the plaintiff, on the verdict.

FIELD v. SCHNELL. See Cases Nos. 4,771 and 4,772.

FIELD (SEABURY v.). See Cases Nos. 12,574 and 12,575.

FIELD (STEERE v.). See Case No. 13,350.

Case No. 4,773.

FIELDEN et al. v. LAHENS et al.

[6 Blatchf. 524.][1]

Circuit Court, S. D. New York. July 31, 1869.

LIABILITY OF SURETY IN EQUITY — DISCHARGE AT LAW — JOINT OBLIGATION — EFFECT OF SUBSEQUENT STATUTE.

1. Equity will not hold a surety liable, when he is discharged at law.

2. In the case of an obligation joint, and not joint and several, executed by a principal and a surety, and the death of the surety, the remedy at law is gone, as against the legal representatives of the surety.

[Cited in Hudelson v. Armstrong, 70 Ind. 101.]

3. No state statute, enacted after the making of such an obligation, can change the contract of the surety, to his prejudice.

[Cited in Randall v. Sackett, 77 N. Y. 482.]

In equity. This case came up on a demurrer to a bill filed against the defendant [Louis Emile] Lahens, and the representatives of John Lafarge, deceased, to enforce the collection of the amount payable by the condition of a bond executed by Lahens and Lafarge, on the issuing, in a state court, of an injunction to stay the proceedings in a suit at law pending in such court. The bond was joint, and not joint and several. Lafarge was only a surety, and was in no way interested in the proceedings in the state court. The bond was dated April 25th, 1846, and was conditioned to pay to the firm of Fielden Brothers, & Co., (of whom the plaintiffs [Thomas Fielden and William C. Pickersgill] were the survivors,) all moneys which might be recovered by them in such suit at law, or the collection of which might be stayed by such injunction. A judgment was recovered by the plaintiffs in the suit at law, for $129,429.52, and the suit in which the injunction was issued was dismissed. Lafarge died, and Lahens, who was a defendant in the suit at law, was insolvent when the judgment was recovered, and had petitioned for a discharge under the bankruptcy act of the United States [14 Stat. 517]. Lafarge left assets sufficient to satisfy the judgment. The demurrer was interposed by the representatives of Lafarge.

William W. McFarland, for plaintiffs.
Charles O'Conor, for defendants.

NELSON, Circuit Justice. This case is an important one, on account of the large amount involved, and the certainty that, unless it shall be recovered out of the assets of the estate of Lafarge, it will be lost. But, in my view of it, the principles that must govern it are not new or difficult. One branch of it falls directly within the doctrine of the case of U. S. v. Price, 9 How. [50 U. S.] 83, 90–95, and the cases there referred to. The principle is, that equity will not hold a surety liable, when he is discharged at law; and that, in the case of a joint obligation, and of the death of the surety, as in the present case, the remedy at law is gone, as it respects the legal representatives of the surety. The cases on this subject are numerous, and it would be useless to discuss them. Several of them will be found referred to in the opinion of the court in the case of U. S. v. Price [supra], and many more in the dissenting opinion of Mr. Justice Woodbury in that case (pages 96–108).

It is urged, that certain provisions in the Code of Procedure of the state of New York have had the effect to change this rule, and to furnish a remedy at law against the representatives of a deceased joint obligor. That Code provides, in substance, that, in a suit upon a joint contract against defendants, a judgment may be rendered against any or either of them, severally. Sections 136, 274. These provisions were enacted after the date of the bond in question, and, if then operative and effectual to change the contract made by Lafarge, they must be disregarded, as the legislature possessed no such power. I agree, that if this bond had been joint and several, a suit at law might have been sustained against the representatives of Lafarge, and his estate would have been bound to pay the judgment and as, in such case, a joint suit could not have been maintained, at law, against the surviving obligor and the representatives of the deceased obligor, equity would have afforded relief. See cases in dissenting opinion of Woodbury, J., above referred to, pages 96–98. So, also, if the Code has the effect of converting this bond into a joint and several bond, and the legislature was competent to make the change, this suit is well brought, and should be sustained. But, as at present advised, I am of opinion that the provisions of the Code have no such effect; and, what is more important, if they purported to have such effect, they could not be upheld, on the ground that they would change a material part of the contract, to the prejudice of the surety. Lafarge, the obligor, did not agree to become severally bound, but jointly; and this distinction is so material, that bills are not unfrequently filed, and suits sustained or defeated, after a serious litigation to ascertain whether the bond, or other contract, was joint, or joint and several.

In any view, therefore, the demurrer must be sustained.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Case No. 4,774.

FIELDEN et al. v. LAWRENCE.

[3 Blatchf. 120.][1]

Circuit Court, S. D. New York. Dec., 1853.

CUSTOMS DUTIES—UNDERVALUATION — PENALTY—TENDER OF FEES FOR REAPPRAISEMENT — PROTEST—ACT OF FEBRUARY 26, 1845.

1. Where the invoice value of iron was raised by the official appraisers, on appraisal, and duty on the increase in value and a penalty for under-valuation were imposed, and the importer, on making entry of the iron, served on the collector a written notice, protesting "against the said increased appraisement, and against the exaction of the said increased duty and penalty," but was, at the same time, asked if he desired an appraisement by merchant appraisers, under section 17 of the act of August 30, 1842 (5 Stat. 564), and answered, that he did not or did not ask one, and did not offer the fees for such appraisement: *Held*, that if the protest might have amounted to notice of dissatisfaction with the appraisement under that section, had the notice been delivered without qualification, yet the assertion of the importer at the time, that he did not ask a re-appraisement, took from it that effect.

2. The importer was bound to offer the appraisers' fees for a re-appraisement, in order to put the collector in the wrong for not ordering one, and that, therefore, the appraisement by the official appraisers was conclusive as to value.

[Cited in Hedden v. Iselin, 31 Fed. 268.]

3. The protest did not comply with the act of February 26, 1845 (5 Stat. 727), and that, as it did not set forth distinctly the omission of the collector to order a re-appraisement, or that the appraisers valued the iron at the time of shipment and not at the time of purchase, as grounds of objection to the payment of the duties imposed, the importer could not raise those objections, in an action to recover back those duties.

This suit was brought [by Thomas Fielden and others] against [Cornelius W. Lawrence] the collector of the port of New York, to recover back penalties and increased duties imposed on importations of iron from Liverpool, upon which various entries were made, the additional duties amounting to $672, and the penalties to $2,264.60. The importations were made in 1847, and the appraisal was made under section 16 of the act of August 30, 1842 (5 Stat. 563). The plaintiffs, at the time of making their several entries, addressed to the collector the following notice, varied only so as to adapt the description of iron to the particular entry:—"Sir: The custom-house appraisers having appraised —— bundles, &c., of iron at £——, thereby subjecting the iron to an increased duty, as well as a penalty of 20 per cent., which we are required to pay, in order to enter and obtain possession of the goods, we hereby protest against the said increased appraisement, and against the exaction of the said increased duty and penalty, and, in making payment, reserve to ourselves, or whom it may concern, the right to recover the same back by action or otherwise," &c. It was proved that, when the protest was made, the plaintiffs were asked by a deputy collector, if they desired an appraisement by merchant appraisers, pursuant to the act, and answered, that they did not or did not ask one. The points taken for the plaintiffs on the argument were, that the letter was notice to the collector, within the meaning of the act, of the dissatisfaction of the plaintiffs with the appraisement, and that thereupon it became the duty of the collector to order a re-appraisement, without which the first appraisal was void; and that the appraisal was void for the further reason, that the appraisers took the market value of the iron at the time of exportation, and not at the time of purchase.

THE COURT held: 1. That if the protest might have amounted to notice of dissatisfaction with the appraisement, within the meaning of section 17 of the act of August 30, 1842 (5 Stat. 564), had the letter been delivered without qualification, yet the assertion of the plaintiffs, at the same time, to the collector, that they did not ask a re-appraisement, took from it that effect.

2. That a re-appraisement being at the expense of the importer, the plaintiffs were bound to offer the appraisers' fees, &c., in order to put the collector in the wrong for not ordering one; and that, as the plaintiffs did not take legal means to entitle themselves to a re-appraisal, the one made by the official appraisers was conclusive against them as to value.

3. That the protest did not comply with the requirements of the act of February 26, 1845 (5 Stat. 727), because it did not set forth, distinctly and specifically, the omission of the collector to order a re-appraisement, or that the appraisers valued the iron at the time of shipment and not at the time of purchase, as grounds of objection to the payment of the duties imposed; and that, therefore, the plaintiffs were not now entitled to raise those objections.

Judgment for defendant.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

FIELDS (HUSSEY v.). See Case No. 6,947.

Case No. 4,775.

FIELDS v. LAMB et ux.

[Deady, 430.][1]

Circuit Court, D. Oregon. July 21, 1868.

RIGHT OF REMOVAL TO FEDERAL COURT — STATUS OF CODEFENDANT—ACT OF MARCH 2, 1867.

1. The act of July 27, 1866 (14 Stat. 306), gives each defendant in a cause the right of removal, without reference to the status of his co-defendants, "if the suit is one on which there can be a final determination of the controversy, so far as it concerns him, without the presence

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of the other defendants, as parties in the cause."

[Cited in Goodenough v. Warren, Case No. 5,534.]

2. The act of March 2, 1867 (14 Stat. 558), does not in any particular repeal the act of 1866 (14 Stat. 306), but is supplemental thereto, and adds another cause for removal of cases from the state to the national courts.

[This was a suit by James Fields against John R. Lamb and Emma, his wife, to quiet the title of plaintiff to certain real property, claimed by defendants and others as tenants in common. A motion was made to remand the cause to the state court in which it was originally brought. A similar motion, made by the plaintiff, as to certain other defendants in the case of Field v. Lownsdale, Case No. 4,769, was allowed.]

W. W. Chapman, for complainant.

W. W. Page and W. Lair Hill, for defendants.

DEADY, District Judge. This suit was commenced in the state court for the county of Multnomah, against the above named defendants and others; and afterwards, on March 17, 1868, upon the petition of such defendants, was, as to them removed into this court. The petition and order for removal was made under the act of July 27, 1866 (14 Stat. 306). The complainant now moves this court to remand the cause to the state court, upon the ground that the order for the removal was made without authority of law.

From the petition it appears that Lamb and wife are citizens of the state of Kentucky; and it also appears from the complaint, that the suit is one in which there can be a final determination of the controversy, so far as it concerns these defendants, without the presence of those who are residents of the state of Oregon. This being so, the case is within the purview of the act of 1866, giving defendants the right of removal. Field v. Lownsdale [Case No. 4,769].

But counsel for the motion to remand insist that the act of July 27, 1866, is repealed and superseded by the act amendatory thereof, of March 2, 1867 (14 Stat. 558). It is admitted that the latter act does not expressly repeal the former one, but, on the contrary, only purports to amend it. The two acts are upon the same subject and must be construed together; and unless the one, or some provision of it be manifestly repugnant to the other, they must both stand. Between these acts there is no repugnance. The latter is nothing more than what it purports to be, both in its title and body, an amendment of or supplement to the former, providing an additional cause of removal. The act of 1866 enables a defendant, who is an alien or non-resident, to remove a cause to this court, "so far as it concerns him," although his co-defendants may not be entitled to such removal, "if the suit is one in which there can be a final determination of the controversy, * * * without the presence of the other defendants, as parties in the cause." The reason of this enactment is obvious. Prior thereto, the removal of a cause on account of the citizenship of the parties, from the state to the national courts, was governed by section 12 of the judiciary act (1 Stat. 79). Upon the construction given to this section by the courts, an alien or non-resident defendant, if joined with a citizen of the state where the action was brought, was denied the right of removal, because his co-defendant was not entitled to it. Smith v. Rines [Case No. 13,100]; New Jersey v. Babcock [Id. 10,163]; Ward v. Arredondo [Id. 17,148]; Wilson v. Blodgett [Id. 17,792]; Wormley v. Wormley, 8 Wheat. [21 U. S.] 451.

This technical construction of the act excluded many persons from the benefit of it, whose cases were fully within the reason of it. The term—"the defendant"—although used in the singular number, was construed in a collective sense, so as to include all the persons sued, be they many or few. If any of these persons were not aliens or non-residents, then this technical defendant, constituted of all the individual defendants, was held not to be an alien or non-resident, and therefore not entitled to a removal. To remedy this evil, so far as practicable, the act of 1866 was passed. The act of 1867 provides, that a citizen of another state, whether he be plaintiff or defendant, may remove a cause to the national court upon making an affidavit to the effect that he believes, that from prejudice or local influence, he will not be able to obtain justice in such state court. Between this provision and the act of 1866 there is neither conflict nor repugnance. Another cause of removal is simply added to those already provided. The latter act is supplemental to the earlier one. Neither was it necessary to make the affidavit in this case, required by the act of 1867. This removal was made under the act of 1866, on account of the citizenship of the parties solely, and not for the cause specified in the act of 1867—that the defendant believes he cannot obtain justice in the state court on account of "prejudice or local influence."

In conclusion, it is sufficient to say, that the act of 1867 does not repeal that of 1866, but amends it, not by changing it, but by adding thereto another cause of removal. They are both upon the same subject matter and can stand together without a shadow of repugnance or conflict in any particular. The removal was authorized, and the motion to remand is denied with costs.

FIELDS (OCEAN INS. CO. v.). See Case No. 10,406.

FIELDS, The, v. The SAILOR'S BRIDE. See Case No. 12,220.

Case No. 4,776.

FIELDS v. SQUIRES.

[Deady, 366.][1]

Circuit Court, D. Oregon. Feb. 15, 1868.

REAL PROPERTY — DIVISIBILITY OF COVENANTS RUNNING WITH THE LAND — SUIT BY ASSIGNEE OF COVENANT FOR TITLE AGAINST HEIR OF COVENANTOR—OREGON DONATION ACT — PRIOR POSSESSION—COVENANT TO CONVEY PARTICULAR TITLE—ESTOPPEL.

1. The assignee of a covenant for title, may maintain a suit to enforce the performance of such covenant, against the heir of the covenantor, to the extent of the interest inherited, although such covenant was the joint covenant of the ancestor and another, and such heir is not named therein.

[Cited in Hall v. Russell, Case No. 5,943.]

2. A covenant which runs with the land, is divisible into as many parts or interests as the land itself may be divided by subsequent successive conveyances, and the grantee of each parcel or interest may, as to the same, maintain suit upon such covenant against the original covenantor, or his legal representatives.

3. The donation act [of 1850 (9 Stat. 497)] does not include settlers upon the public lands in Oregon, who died before its passage—September 27, 1850.

4. One half of the land taken by a married settler, under the donation act, be it more or less, enures to the benefit of the wife; and she takes the same in her own right, as the direct donee of the United States, and not subject to any of the previous acts or contracts of the husband.

[Cited in Fitzpatrick v. Dubois, Case No. 4,842; Stevens v. Sharp, Id. 13,410.]

5. A grant to a settler under the donation act, does not take effect prior to the passage of such act, although made in consideration, or on account of prior residence and cultivation thereon.

[Cited in Mizner v. Vaughn, Case No. 9,678; Wythe v. Haskell, Id. 18,118; Bear v. Luse, Id. 1,179; U. S. v. Tichenor, 12 Fed. 421.]

6. On June 25, 1850, no law had been passed by congress for the disposal of the public lands in Oregon, and it was well known to all persons resident therein, that no one had any interest in such lands, except the bare possession, and on said day Lownsdale, Coffin and Chapman, by their deed, wherein they described themselves as proprietors of the town of Portland, Oregon, for a valuable consideration "thereby released, quitclaimed and confirmed" unto said Chapman, block G in said town, and delivered him the possession thereof; said deed contained two covenants—one of warranty against all claims, the United States excepted, and the other to convey the title of the United States if the covenantors obtained the same: *Held*, that the grantee in said deed took nothing thereby, except the actual interest of the grantors at the time—the possession.

[Cited in Lamb v. Wakefield, Case No. 8,024; Myers v. Reed, 17 Fed. 405; Wilson v. Fine, 38 Fed. 792.]

7. By the first of said covenants, Lownsdale, and those claiming under him, are rebutted from claiming any interest in block G, however acquired, except an interest or title derived from the United States.

8. Nancy Lownsdale, the wife of a settler under section 4 of the donation act, died intestate, after the provisions of such act had been complied with, and before the issuing of a patent for the donation, leaving her husband and four children living: *Held*, that her estate in the land was a qualified fee, and terminated with her life, and that the remainder was given by said section 4 directly to said husband and children in equal parts, who took the same as the donees of the United States, and not as the heirs of said Nancy; and that the interest thus acquired by said husband, is within the second of said covenants—the one for further assurance.

[Cited in Lamb v. Starr, Case No. 8,022; Mizner v. Vaughn, Id. 9,678; Lamb v. Davenport, 18 Wall. (85 U. S.) 313; Semple v. Bank of British Columbia, Case No. 12,660; Alexander v. Knox, Id. 170; Cutting v. Cutting, 6 Fed. 263; Traver v. Tribon, 15 Fed. 33.]

9. A covenant to convey a particular title if after acquired by the covenantor may be enforced by a suit in equity, if such covenantor neglect to perform the same, without a prior demand and refusal.

10. The possession delivered with the deed of June 25, 1850, was a sufficient estate to carry the covenants therein to the assignee thereof.

11. The prohibition contained in the proviso to section 4 of the donation act, does not include covenants or contracts made prior to the passage of such act.

12. The deed of June 25, 1850, is not within section 6 of the act of September 29, 1849, to regulate conveyances, and therefore cannot be construed as containing any covenants not specially set forth therein.

13. In the year 1860, Lownsdale being the owner of one fifth of Nancy's share of their donation as above stated, purchased the interest of Isabella Ellen, one of Nancy's children and died intestate, in 1862, leaving children; in 1864, the proper court of the state partitioned said Nancy's share of the donation, by giving three fifths thereof to Nancy, and the other two fifths to the heirs and vendees of said Lownsdale, and because of the inequality of said partition, required the two fifth tract to pay a certain amount of owelty to said children of Nancy: *Held*, that by this partition, Nancy's three children were divested of their interest in the two fifth tract, and Lownsdale's heirs were divested of their interest in the three fifth tract, and that Lownsdale's prior vendees of any particular parcel in this two fifth tract neither gained or lost by this partition, but can only claim that interest therein which their deeds from Lownsdale entitle them to, discharged from the owelty.

[Cited in Lamb v. Starr, Case No. 8,022; Lamb v. Carter, Id. 8,013; Traver v. Tribon, 15 Fed. 29; Traver v. Baker, Id. 190.]

14. Estoppel in pais, what declarations and conduct of party insufficient to create.

[Cited in Wythe v. Smith, Case No. 18,122; Shively v. Welch, 20 Fed. 33.]

[This was a suit in equity by James Fields against Ida Squires, by her guardian, William E. Cooper.]

W. W. Chapman, for complainant.

W. W. Page and W. Lair Hill, for defendant.

DEADY, District Judge. By this suit the complainant seeks to have his title to the north half of block G in the city of Portland ascertained and declared, as against the defendant, and also to obtain a decree against such defendant for specific perform-

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

ance of the covenant of her ancestor for further assurance, in regard to said block.

From the bill it appears, that on June 25, 1850, Daniel H. Lownsdale, Stephen Coffin and W. W. Chapman, had surveyed and laid off divers lots and blocks in the town of Portland, and made a map thereof, designating the same by numbers and letters, and being in possession, said Lownsdale, Coffin and Chapman by deed of that date, assumed and represented themselves to be the proprietors of the town of Portland, and "for a valuable consideration, thereby released, quitclaimed and confirmed, unto the the said Chapman, to have and to hold to him and his assigns forever, a certain two acre block of land, situate in said town, and represented upon the map thereof by the letter 'G,' and then and there delivered to him the possession thereof. That the said grantors in and by said deed covenanted to and with the said Chapman, that the property aforesaid, unto him, his heirs and assigns, they would warrant and defend against all claims, the United States excepted; and that if they should obtain the fee simple of said property from the United States, they would convey the same to the said Chapman by deed of general warranty."

That on March 7, 1851, Chapman sold and conveyed the north half of said block G to William Dobleblower, and gave him possession, and that on August 27, 1852, Dobleblower sold and conveyed said north half to complainant, and gave him possession, which possession he still retains. That on September 22, 1848, said Daniel H. being a widower and unmarried, settled on the tract of land embracing block G, and containing less than 320 acres, and continued such residence and settlement for more than four years thereafter, and thereby became the owner of the same under the donation act of September 27, 1850. That in the year 1850 or 1851, Daniel H. intermarried with Nancy Gillihan, the widow of William Gillihan, and in April, 1854, said Nancy died intestate. In the year 1862, Daniel H. died intestate. On October 17, 1860, a patent certificate issued from the U. S. land office, at Oregon City, for the land settled by Daniel H., to him and the heirs-at-law of his deceased wife, in which certificate, the west half of said tract of land embracing block G, was assigned to said heirs-at-law. That at the time of the marriage, between Daniel H. and said Nancy, the former was the father of three children by a former wife—namely: James P. O., Mary E., and Sarah; and the said Nancy was the mother of two children by her former husband—William Gillihan—namely: Isabella Ellen and William. That in the year 1848, Nancy and her former husband—Gillihan—settled on a tract of land, situate on Sauvie's Island, in Multnomah county, containing less than 640 acres. and continued to reside upon and cultivate the same, until some time in the year 1850, when said Gillihan died—having done and performed all things in and upon said land, as contemplated by the said act of September 27, 1850, up to the time of his death, by means whereof the widow of said Gillihan became and was entitled to one half of said tract, and is therefore not entitled to any part of the donation claim of said Daniel H. That, if notwithstanding the premises, the said Nancy was entitled to a part of the donation claim of the said Daniel H., she had notice, and good reason to be informed, that the said Daniel H. had sold and conveyed block G as aforesaid, "and that she took such part subject to the contract aforesaid of the said Daniel H., and that her heirs and assigns are bound thereby."

That on the death of Daniel H., he left as his heirs-at-law, the said James P. O., Mary E. (now wife of William E. Cooper), and Ida Squires the defendant, and Emma Lamb, children of the said Sarah, deceased, and Millard O. and Ruth A., children of the said Daniel H. and Nancy; and that on the death of the said Nancy, she left as her heirs-at-law, the said William and Isabella Ellen Gillihan and the said Millard O. and Ruth A. Lownsdale. That in the year 1860, Daniel H. purchased from the said Isabella Ellen (then intermarried with William Potter) and her husband, "all the right, title and interest of the said Isabella in said tract of land as the heir of said Nancy;" and that by means of the death of said Nancy and the purchase aforesaid, the same Daniel H. became "the owner and holder of the title of the government of the United States of two fifths of the lands alleged to be patented to the said heirs of Nancy," including block G, and that thereupon "the said two fifths interest in the north half of said block enured to the use and benefit of the complainant."

That in 1864, the said William Gillihan, Jr., by his guardian Martin Gillihan, commenced a suit in the circuit court for the county of Multnomah, state of Oregon, for a partition of the tract of land patented to the heirs-at-law of Nancy, claiming in such suit to be entitled to one undivided fifth thereof; and that the heirs-at-law of both Daniel H. and Nancy, as well as the grantees and assignees of the former were made parties to such suit; and that by the decree rendered therein, the said two fifths of said tract of land was recognized as having belonged to said Daniel H., "with all the equities in partition." And divers lots and blocks in said tract having been before then laid off and "disposed off" by the said Daniel H. and improved by different persons, were allotted to the heirs, grantees and assignees of the said Daniel H.; and to make partition equal the said lots and blocks were severally encumbered with large sums of money, which if not paid within a specified time, should be sold to pay the same; and that if

any claiming under the said Daniel H., and paying such assessments, should be afterwards evicted, that the sum so paid and interest should continue a lien on the particular tract for reimbursement. That the said block G was among the blocks so assigned in partition to the heirs and grantees of the said Daniel H., and the sum of $998.79, and $—— costs, was assessed upon the north half of said block, which the complainant was compelled to and did pay to prevent the same from being sold.

That the defendant, Ida Squires, though a resident and citizen of Kentucky, had a guardian (the said William E. Cooper), a resident of the city of Portland, and that said guardian and his ward well knew that the complainant was about to pay said sum, claiming this property as his own, yet neither of them made any objection thereto, but suffered and encouraged the complainant to pay the same: "Whereby the said Daniel H. in his life time and his heirs-at-law since his death, became and are bound to convey the said half block to your orator, by a good and sufficient deed;" and that the said Ida Squires, by virtue of the covenants in the deed of June 25, 1850—the possession of the complainant, and the said decree and the payment of the assessment thereunder is estopped to set up the title of the said Daniel H., so obtained as aforesaid, as a defence to the suit of the complainant. That the defendant paid Dobleblower $250 for the premises in question, and has since expended about $2,700 in improving the same, and that his possession from the date of such purchase until the present time has been visible and notorious, to the knowledge of Daniel H. and Nancy while living, and of the heirs of the former since his decease; and that at the date of such purchase, Daniel H. "assured the complainant that the title was good," which assurance said Daniel H. in his lifetime 'frequently' repeated to the complainant—by means whereof the defendant as heir-at-law of Daniel H., is estopped and ought to be barred from asserting any claim to the premises, or denying your orator's right thereto." The defendant demurs to the bill, and maintains in argument, that upon the facts stated, the complainant is not entitled to any relief.

The objections of the defendant, as specified in the demurrer and developed and amplified on the argument, involve the consideration of questions, some of which, besides being interesting in themselves, are of the highest practical importance to this community. The deed is objected to as inoperative and void because Chapman is both grantor and grantee, covenantor and covenantee, therein. Of course, Chapman could not grant to himself or covenant with himself. So much of the deed may be treated as surplusage—a blunder of the scrivener. There still remains, the grant and the covenants of Lownsdale and Coffin to and with Chapman, and these are easily and fairly divisible and separable from the void and repugnant grant and covenants by Chapman to and with himself. Waiving this objection, it is further objected, that the covenants with Chapman by Lownsdale and Coffin are joint and not several, and that therefore the remedy upon them must be joint—against both Lownsdale and Coffin or their representatives.

Counsel for the complainant maintains that equity will treat these covenants as joint or several, and among others cites Duvall v. Craig, 2 Wheat. [15 U. S.] 45, and 1 Story, Eq. Jur. 162, 163. But neither of these authorities support the position. In Duvall v. Craig, supra, the question was not whether the covenant could be treated as joint or several, but what constituted a breach of it. The case only decides that a joint covenant against encumbrances is broken by an encumbrance suffered or done by a part of the covenantors, and that all the covenantors are liable for such breach. To the same effect is Merriton's Case, Noy, 86, cited in the note to Duvall v. Craig. There the lessors covenanted against any encumbrance made by them. One of the lessors made a lease to a stranger. In an action on the covenant against both lessors, it was held that the act of one constituted a breach, for which the lessors were jointly liable. The citation from Story only goes to the extent, that in equity a joint debt will be deemed the several debt of each of the contractors in a certain class of cases, from the fact—either proven or presumed from the nature of the transaction—that each of the contractors had the benefit of the money advanced, or that the joint obligation has been given to pay an antecedent debt, for which all the obligors were severally liable. But "when the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived." 1 Story, Eq. Jur. 163. The general rule upon this subject seems to be well expressed in Rawle on Covenants (578): "Whether the liability created by the covenant be joint or several, or joint and several, obviously depends upon the terms in which it is expressed. Where an obligation is created by two or more, the general presumption is that it is joint, and words of severance are required in order to confine the liability of the covenantor to his own acts."

In support of the text the author cites among others Comings v. Little, 24 Pick. 266. In this case the court say: "The distinction is this: Where a man covenants with two or more jointly, and the interest and cause of action of the covenantees is several, each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. But when two persons covenant jointly with another, a joint action lies for the covenantee on a breach of the covenant by one of the parties only, because they are sureties for each other for the due

performance of the covenant." In the case under consideration the covenants are joint —they are the joint contracts of Lownsdale and Coffin with Chapman. An action at law for the breach of these covenants could not be maintained against either of the covenantors separately. But this is a suit in equity, not for damages for a breach, but to declare the legal effect of the one covenant and obtain the specific performance of the other, as against the heir of one of the covenantors on account of her interest in the land embraced in the covenant of her ancestor. As appears, Coffin has no interest in the land and can claim none. At the date of these covenants this was public land of the United States, and it must have been within the contemplation of the parties that if the property was subsequently acquired from the United States, it would be by one of the covenantors and not all of them. In such a case, I think the rule of law applicable to actions at law wherein the covenantee seeks to recover damages from the covenantors for a breach of the covenant, does not apply.

The defendant as heir-at-law of Lownsdale, appears to have inherited a separate interest in the property in question, of which the complainant by this suit seeks to obtain a conveyance on account of the covenant of her ancestor. The suit is to enforce performance of this covenant, not as a whole but as to a separate interest, which has descended to this heir, and as to such interest no other person is liable or interested as defendant; nor can such covenant be enforced in this particular against any other person, than this defendant.

Counsel for the defendant also object that the heir is not liable upon these covenants, because not named therein. The authorities cited in support of this position, are cases that arose under the ancient feudal warranty, and not the personal covenants contained in modern conveyances. Common law warranty was created without covenant, and was a natural incident of the feudal tenure. By the joint operation of the statutes de bigamis and quia emptores, the law was changed so that this warranty did not have the effect to bind the heirs unless mentioned in it. Rawle, Cov. 2, 3, 203. The authorities cited refer to this kind of warranty and are not applicable to the case under consideration. The covenants in this deed are deemed to run with the land, "and pass to the heirs of the purchaser and also to all persons claiming under him, who may maintain actions against them, against the vendor or his heirs." Cruise, Dig. tit. 32, c. 26, § 66. In support of this rule the author last quoted cites from 4 Ves. 370, as follows: "Rachel Boyes and her son conveyed a copyhold estate to a mortgagee by lease and release and covenanted for further assurance. The son died; and the mortgagee filed his bill against the customary heir of the son, who was an infant; praying that he might be decreed to surrender the estate to the plaintiff. The master of the rolls (Sir R. P. Arden) said, he was clearly of the opinion that this covenant was a contract for a valuable consideration, affecting the land and would affect the heir. And by the decree it was declared that the covenant in the mortgage deed, bound the land descended to the defendant." To the extent which these covenants affect the land, the heir is bound by them, though not named in them, so far as any interest which she may have by descent from the covenantor. Being so bound, the grantee or his assigns are entitled to maintain this suit against the heir as they would against the ancestor if now living.

Counsel for defendant further object that the complainant is not the assignee of the covenants in the deed, because he is the grantee of only one half of the premises embraced in the deed and to which the covenants relate. This objection rests upon the consideration that the covenantor ought not to be subject to a multiplicity of separate suits, by subsequent grantees of separate parcels of land, which he conveyed and covenanted concerning as a whole. But the law after some fluctuation, seems now to be well settled otherwise. In 2 Washb. Real Prop. 662, the author says: "The action for breach of this covenant (of warranty), should be brought by him who is the owner of the land, and, as such, the assignee of the covenant, at the time it is broken. Such covenant is moreover susceptible of division into as many parts or interests, as the land itself shall be divided into by subsequent successive conveyances, so that if A convey to B two parcels by one deed, with a covenant of warranty, and B sells one of them to C who is evicted by an elder title of the parcel so purchased by him, he may have covenant in respect to the same against A." The same rule is laid down as to all the covenants which run with the land in Rawle, Cov. 354, 355. Rawle cites the opinion of Lord St. Leonards (Sugd. Vend.), and says: "This view of the law has been adopted in this country." The opinion cited was upon a similar case to the one put by Washburne. "The better opinion seems to be, that an alienee of one of the estates could maintain covenant against the covenantor where the covenants run with the land, and as such, an action would lie either for damages, which would be measured by the loss of the assignee, as far as he might be entitled to recover it under the covenant, or for an act to be done, e. g. further assurance, which might be confined to the particular proportion of the property. It does not seem that any injustice would arise by suffering several covenants to lie, although it might expose the covenantor to inconvenience, whereas the denial of the right to each assignee might lead to positive in-

justice, or if not, to greater inconvenience on their part."

One of the grounds for the relief prayed for in the bill, is that Nancy did not take any share or interest in the donation of Daniel H., and therefore Daniel H. acquired the whole of such donation from the United States, including the premises in controversy. The reason alleged is, that Nancy was entitled to a share of the donation of her former husband—Gillihan, and therefore disqualified to take a share of the donation of Daniel H., on account of the proviso to section 5 of the donation act (9 Stat. 497): "That no person shall ever receive a patent for more than one donation of land in said territory, in his or her own right." From the statements in the bill, it appears that Gillihan had not completed his four years' residence upon the land on Sauvie's Island at the time of his death, so as to entitle Nancy to claim as his wife under section 4 of the donation act; and moreover, Gillihan being dead at the passage of the act—September 27, 1850—was not comprehended in the grant made by said section 4, and therefore Nancy could not claim a donation as his wife in the land occupied by him during his life. This question must be considered as not open to argument in this court, and needs no further discussion. Ford v. Kennedy, 1 Or. 166; Lamb v. Starr [Case No. 8,021].

But the complainant further contends that Nancy was not entitled to take a share of the donation of Daniel H., because such donation only included the number of acres (320), which he was entitled to hold as a single man, but that if she is allowed to take in such donation, she must take subject to the acts and contracts of Daniel H. before her marriage with him, and of which she then had notice. The facts stated in the bill, from which this conclusion is drawn, are, that Daniel H. settled upon his donation in 1848, and that it contained less than 320 acres. That in 1850 he married Nancy—prior to the passage of the donation act, and after the deed to Chapman, of which she then had notice.

Upon the first part of this position arises the question:—Can a married man exclude his wife from the benefit of the donation provided for her in section 4 of the donation act by simply limiting his settlement to the quantity of land thereby granted to a single man; or, in other words, can a married man claim and receive a grant as a single man? The language of the section is: "There hereby is granted to every white settler * * * the quantity of one half section, if a single man, and if a married man * * * the quantity of one section * * * one half to himself and the other half to his wife, to be held by her in her own right." The evident policy of the law was to give to husband and wife an equal quantity of land, imposing upon the husband, as the head of the family, the burden of performing the services upon which the grant is conditioned, coupled with the right of selection, within the limits of the act, as to place and quantity. The settlement of a married man is intended for the benefit of his wife as well as himself—to enable her to obtain her equal share of the bounty of the grantor. A married man may occupy less land than the law permits. He may have good reasons for so doing. A particular half section may be deemed of more value than any whole section, open to settlement. In this respect the act commits the interest of the wife to the judgment and thrift of the husband. But he cannot change the law and elect to take as a single man to the exclusion of his wife. The exclusive power of the husband is confined to the selection and location of the land. In any event, the land embraced in the settlement, whether a whole section or less, is granted to the husband and wife in equal parts. Even the division of the donation is beyond his control, as the act vests the power "to designate the part enuring" to each in the officers of the land office.

Neither did Nancy take her half of the donation subject to the deed of her husband to Chapman, whether she had notice of it or not. At the date of the deed and the marriage, this was public land of the United States. None of the parties had any interest in it, or claimed any power over it beyond the bare possession. Subsequently, congress by statute granted the west half of the donation to Nancy in her own right. These words—"to be held by her in her own right," were not inserted in the act without a purpose. It appears that they were placed there for the express purpose of excluding the conclusion that she took in right of or through her husband, and that therefore she would take subject to the previous acts and contracts of her husband—as an heir from an ancestor, or a vendee from a vendor. True, the services upon which the grant is conditioned are to be performed by the husband, yet by the terms and manifest intention of the act, the wife takes and holds as the direct donee of the United States as much as though she was a stranger to the husband. Under these circumstances, Daniel H. had the same power to affect or encumber his neighbor's donation, by a deed to Chapman, as his wife's. The question of notice is immaterial, as there is no privity between Nancy and her husband. Carter v. Chapman, 2 Or. 95. Neither did the grant relate back to the date of the settlement by Daniel H. in 1848, so as to give effect to his deed to Chapman, before Nancy became his wife. The grant was subsequent to the marriage, and "although the act of congress grants the land on account of the prior residence and cultivation, the grant itself cannot be said to take effect before it was made—the time of the passage of the act. A grant of land by statute for considerations transpiring years before, as for military services, takes effect from the date of the grant, and not the performance of the

service. In point of time the grant and the cause or consideration of it, may be identical or widely separated." Chapman v. School Dist. No. 1 [Case No. 2,607]; McCrackin v. Wright, 14 Johns. 193; Allen v. Parish, 3 Ohio, 107.

Before considering the nature and effect of the covenants in the deed, it will be necessary and proper to examine the condition of the subject matter described in the premises, and the nature and extent of the interest thereby released, quitclaimed and confirmed. Covenants cannot enlarge the premises of the deed, but the latter may and often do control the former. "The covenant of warranty is often limited and defined by the subject matter of the grant, as where the deed only purports to convey the right, title and interest of the grantor." 2 Washb. Real Prop. 665; Blanchard v. Brooks, 12 Pick. 66, 67; Comstock v. Smith, 13 Pick. 120. From the language of the bill it might be inferred by a stranger that the grantors in this deed undertook as owners of the land to convey the land, and that the grantee accepted the conveyance upon the faith of this undertaking or representation. But nothing would be more erroneous than this impression, or more unjust to the parties concerned. As a matter of law and public history, it is well known to the court, that at the date of this deed the title to lands in Oregon was in the United States, and that no law had been passed to dispose of it. This was as well known to the people of Oregon at that day—the parties to this deed included—as that they were living in a territory, and not a state. At the same time these lands were freely occupied by the inhabitants of the country, holding, as between themselves, under the laws of the provisional government, the bare possession. It is also true, that at the date of this deed and for years before, it was confidently expected that congress would—as they afterwards did—pass an act donating these lands to actual settlers. In June, 1850, the matter was specially before congress, and the result was the passage of the donation act of September following.

Under these circumstances this deed was made, and it is unreasonable to suppose that it was either executed or received upon the impression that the grantors were the proprietors of the soil or had any interest in it—particularly when it appears that Chapman, the grantee in the deed, was in fact one of the grantors and parties in possession. But the most casual examination of the deed itself, will show this to be so. The operative words in the premises of the deed are those of release and quitclaim. And although by the deed as set forth in the bill, the grantors "released, quitclaimed and confirmed" the block of land to the grantee, yet the natural and legal import of these words is not to assert that the grantors had then any particular estate or interest in the land. This taken in conjunction with the historic fact, that the grantors had then nothing in the block but the possession, with what may be called an expectancy of title from the United States, it may be safely concluded that the deed only passed the actual interest of the grantors—the possession. This was all the grantee took or could have expected at the time; and this is evident from the covenants which he took as security for the future.

These covenants are two in number, and both special or limited. The first is a warranty against all claims—the United States excepted; and the second is for special further assurance—that if the grantors should obtain the fee simple from the United States, they would convey the same to the grantee by deed of general warranty. The title of the United States is excepted in the covenant of warranty and in the covenant for further assurance, it is plainly asserted that the title was then in the United States. By this deed only the right to the possession—the then estate of the grantors—passed to the grantee. By the first covenant Daniel H. and those claiming under him are rebutted from claiming any interest in the premises, however acquired, except an interest or title derived from the United States. The title of the United States being expressly excepted from the operation of the warranty, Daniel H., if living, would not be prevented thereby, from asserting such title to the land, if by any means he should acquire it. The same is true of his heir—the present defendant. This covenant is exactly similar to the covenant in Cole v. Hawes, 2 Johns. Cas. 203, which was to warrant the bargained premises against all claims, except the lord of the soil. In that case the court held that the warranty did not extend to the title or claim of the lord of the soil—the owner of the fee simple. So here, the title of the then lord of the soil—the United States—is excepted from the warranty. As it appears then from the bill, that the alleged interest of the defendant in the premises is derived from the United States, it is not within the warranty of her ancestor, nor in any manner affected by it. Upon this covenant the complainant is not entitled to any relief against the defendant. The second covenant binds Daniel H., if he should obtain the fee simple from the United States, to convey the same to the grantee. This covenant is binding upon all persons claiming by, through or under Daniel H. It being decided that Nancy took a share in the donation of Daniel H., it is admitted that the latter never acquired, by any means, more than an undivided two fifths of the premises in question, and that of this interest he died seized, and it descended to his heirs-at-law. If Daniel H. obtained this interest from the United States, it is within the covenant, and his grantee is entitled to a conveyance from the heirs, but if he did not, it descended to the latter unaffected by the covenant. As to

the acquisition of these two fifths, the case is this—Nancy having died intestate, before the issuing of the patent, her share of the donation, by direction of section 4 of the act, went to Daniel H. and her four children in equal proportions. Some years afterwards, Daniel H. purchased the interest of Isabella Ellen, one of these children. The fifth purchased from Isabella Ellen, was not obtained by the covenantor from the United States, and is therefore not within his covenant to convey.

As has been shown, at the date of this deed, it was expected that congress would or might give this land to Daniel H. Upon the faith of this expectation, Chapman took this deed of release to himself, with the covenant of further assurance, if this expectation should be realized. Beyond the right to the possession, as against the grantors, Chapman took nothing by that deed but a possibility—the promise of a chance—that if congress gave the land to Daniel H., the latter would convey it to him, his heirs, or assigns. This must have been the understanding and intention of all the parties to the deed at the time. Upon this contingency the deed was made, and the covenants entered into. As to this fifth, the chance failed—the contingency did not happen—and so far the covenant never became operative. Congress gave the land to Nancy, and she dying before patent, this fifth went to Isabella Ellen. The latter by this means became the absolute owner of this interest and could dispose of it as she saw proper. Waiving the question of whether she took as the heir of her mother or the donee of the United States, it is sufficient that she was neither the child or heir of Daniel H., and did not claim under or through him. Her interest came to her unaffected by any acts or contracts of Daniel H. When the latter purchased it, he in no sense obtained it from the United States, and was therefore not bound, either in law or morals, to convey it to the grantee in the deed of June 25, 1850. 2 Washb. Real Prop. 665; Rawle, Cov. 192; Comstock v. Smith, 13 Pick. 119; Blanchard v. Brooks, 12 Pick. 66; Ellis v. Welch, 6 Mass. 250. As to the other fifth, the solution of the question is not so apparent and simple. After careful consideration of the authors and authorities upon the subject—keeping in view in the meantime, the expectation and intention of the parties to the deed, I have concluded that Daniel H. took this interest, not by descent as the heir to Nancy, but directly from the United States, as its donee.

There are only two ways of acquiring real property, one by descent, the other by purchase. If a person does not take as heir, he takes by purchase, no matter how he acquires his title. At the death of Nancy—April 15, 1854—there was no statute in Oregon regulating the descent of real property, or declaring who should be the heirs of an intestate, and therefore the subject was regulated by the common law. By this rule, her children were first entitled to take as heirs, and her husband never. The donation act does not prescribe who shall be considered the heirs of a deceased settler or his wife, any more than it prescribes who shall be considered the wife of a settler. Both these subjects are left to the local law—the law of Oregon. Counsel for the defendant maintain that this grant is within the rule in Shelley's Case, and that therefore Daniel H. must be considered as taking by descent from Nancy and not by purchase from the grantor—the United States. The rule in Shelley's Case, as a law of property, has always been in force in this state as a part of the common law; except as to devises by will. If the present case was within this rule, the consequences claimed by counsel would follow. Daniel H. would be considered as taking by descent from Nancy. This being so, he could not be said to have obtained this interest from the United States, and therefore it would not be within the operation of the covenant for further conveyance. Courts and commentators have differed as to the reasons of the rule in Shelley's Case, some resting it upon the grounds of feudal policy, others upon the policy of the law which prefers descent to purchase, or the technical doctrine of the common law, which would not allow that the fee could be in abeyance—not vested in some one. But it is agreed on all hands that it is a purely artificial rule, often in direct opposition to the real intent of the grantor or donor, and therefore not to be extended by analogy.

By the rule in Shelley's Case, if a grant was made to a person for life, with remainder to his heirs in fee or tail, such person, notwithstanding the words of the grant to the contrary, was deemed to take an estate of inheritance, and might alien the fee and bar the heirs. If he died seized it descended to his heirs, but they were not allowed to take the fee, by force of the grant, as purchasers, but only as heirs, by descent from their ancestor. But if the remainder is given to any other person than the heir of the first taker, or to such heir with another person, or to only a portion of the persons constituting the heirs of such first taker, the case is not within the rule, and the persons to whom the remainder is given take under the grant as purchasers. To be in by descent, a person must take as heir—in the quality of heir—and take neither more nor less than the law would give him as heir, independent of the grant. If, by the terms of the grant, the heir is to take exactly what the law would have cast upon him, on the death of his ancestor, the case is within the rule, and he is deemed to be in by descent, and not by purchase. You cannot by any grant or conveyance provide that an estate, after the life of the first grantee, shall go in the exact line of descent, and at the same

time the heirs be considered as in by purchase, and not liable to the incidents and burdens of an estate by descent. 4 Kent, Comm. 215, 232; 1 Washb. Real Prop. 78; 2 Jarm. Wills, 178 et seq.; Richardson v. Wheatland, 7 Metc. [Mass.] 171; Bond v. Swearingen, 1 Ohio, 395. The grant to Nancy took effect from the passage of the act. It was not of an estate for life merely, but of inheritance. Yet by the terms of the grant it was made liable to be determined by the happening of a particular event—namely: her own death before the issuance of the patent. The estate granted her was therefore, what the law calls a qualified or determinable fee, because, although it might have continued forever and descended to her heirs ad infinitum, yet it was liable to be determined—terminated—by the happening of this event, by which, its continuance or extent was limited. This event actually happened, and in contemplation of it, the act limited the estate in Nancy's share of the donation over to third persons in equal parts—her husband and children. Upon the determination of her estate in the land, the act in effect granted it over to these persons. Until this event, the husband and children had a contingent remainder in the land, which thereupon vested in them absolutely. This interest they took as direct donees of the United States by force of the grant, and not as heirs of Nancy, who left nothing for them to inherit, because her estate in the land terminated with her death. They were in by purchase and not by descent. The husband and children derived their interest from the United States, and not from Nancy, and therefore there is no privity of estate between them. 4 Kent, Comm. 9, 126; 2 Washb. Real Prop. 224 et seq.

In support of the position that Daniel H. took by descent from Nancy, counsel for defendant have cited Frizzle v. Veach, 1 Dana, 211, and McNair's Adm'r v. Hawkins, 4 Bibb. 390. The first case was this: In early days a person entered and surveyed a portion of the public land in Kentucky, and died before the issuing of the patent. In pursuance of the law in such cases the patent issued to the heirs of the person who located the land—afterwards execution issued against the estate of the deceased, and a question arose whether the land could be taken on the writ. If the heirs took as purchasers, of course the land was not liable for the debts of their ancestor, but if they took by descent it was. The court decided that the heirs took by descent. This is not a case in point. Under the system then in vogue in that country an entry and survey of a particular tract of land amounted to a purchase. Thereafter the locator had the equitable estate, and if he died before patent, it descended to his heirs. It went to his heirs, as heirs, by force of the law of descents, and not by operation of the grant. Then they stood in his place and represented him and were entitled to the patent. Bond v. Swearingen, 1 Ohio, 395. The second case so far as it bears upon this is directly against the defendant. It was a devise to A and the children of her body lawfully begotten, forever, with provision that after the death of A, the children, whether sons or daughters, were to have the devise equally. The court held that the estate was limited for life to A, with remainder to the children, and therefore it came within the rule in Shelley's Case, but for two reasons. The devise used the word "children" and not "heirs"—a term of purchase and not limitation. It also gave the devise to the children equally, while the law of descent at the time of the making of the will, cast the estate upon the males to the exclusion of the females and of the former preferred the eldest. The judgment was that the children took by purchase, and not descent. The court said: "The manner in which the estate is limited over to them" (the children, contrary to the law of descent), "precludes all possibility of their taking by descent."

So in this case, the grant in section 4 limited the estate in the land granted, after the death of Nancy before patent, and without will, not to heirs—those upon whom the law would cast it, but to her husband and children. Unless the law of descent, independent of the limitations in the grant, would have cast the estate upon the husband and children, and in the proportions which they took, they take by purchase—as donees of the United States. It is believed that no case can be found which does not agree with this proposition. In these respects a grant by the United States, is to be construed and have the same effect as that of a private person. The grant in section 4 is not couched in the language of a conveyance, though it must operate and be construed as one so far as practicable. When it provides that upon the death of Nancy, before the issuing of the patent, her husband and children shall be entitled to the share or interest in the donation, before granted to her, it may admit of argument whether they take such share by way of remainder or conditional limitation, after the determination of what proved to be only a life estate in Nancy. This is an abstruse branch of the law, and one that has in times past been fruitful of unprofitable subtleties. The question is not material here, for in any view of the case there can be no doubt that the grant is not within the rule in Shelley's Case, and that the material conclusion arrived at is correct—that Daniel H. took this fifth as the donee of the United States, and not by descent from Nancy. He was not an heir of Nancy, and could not inherit from her. The donation act does not pretend to make him her heir or call him such, and should not be so construed, in the absence of clear and express language to that effect. The object of this act was to make

grants of land to actual settlers in Oregon, and not to establish or change the law of descent. The power over this subject, as "a rightful subject of legislation," had been already delegated to the territorial legislature. [Act Aug. 14, 1848] 9 Stat. 323. Had the gift been to Daniel H. of the whole interest of Nancy, upon the contingency that she died without children, it would not be different in legal effect from the case under consideration. Yet the survivor, so far from being thereby made an heir, would take in opposition to and exclusive of the heirs. Even if he only was admitted to take an equal proportion with them, he would thereby take so much from them. The estate was not to go in the ordinary line of succession. The survivor takes that which the law of descent would give to the heirs, and the latter take so much less than they would if claiming as heirs. This being so, neither of them take in the character or quality of heirs, but as donees from the United States.

It is also evident that the purpose of congress was, in case of the death of the settler or his wife, without will, between the date of the act and the issuing of the patent, not to allow the share of the deceased to descend to his or her heirs generally, but to give it first to certain members of the family, without reference to the local law of descent. Independent of the intrinsic justice of this provision, it might have been dictated by a desire to prevent any uncertainty concerning the condition and disposition of the grant, if the grantee should die before patent. With the conclusion now reached, coincides the justice and equity of this case. As to this fifth it was obtained by Daniel H. under just such circumstances as the parties to the deed contemplated when this covenant was made and accepted—by gift from the United States. The complainant, as the assignee of Chapman, is entitled under the second covenant to a conveyance of this fifth from the heirs or grantees of Daniel H.

Before leaving this subject, it is proper to notice some minor objections to the enforcement of this covenant, insisted on by counsel for defendant. It is claimed that there is no breach of the covenant for further assurance, because it does not appear that the complainant has devised or demanded any particular assurance or conveyance. Where the covenant is general and does not specify the particular conveyance to be made, but only such as may prove necessary or be advised by counsel, the party claiming under it should demand such a conveyance as he conceives himself entitled to, or counsel shall devise, before he can allege a breach and maintain an action for damages. In such case, until the party bound to make further assurance is advised as to what is demanded, or needed, he cannot be said to be in default for not performing it. This is the rule in actions at law for damages, which can only be maintained when an affirmative breach of the covenant is shown. But, I apprehend it will be found that the rule has little application to a suit in equity for the specific performance of a covenant. Such suit is not maintained upon a technical breach of the contract, but upon its continuing obligation, binding the party to perform it specifically. In the absence of any special provision in the covenant to the contrary, the suit itself is a sufficient demand for performance. This covenant is special, and requires the performance of a particular thing—the conveyance of the property if obtained from the United States. A neglect to perform such a covenant, for the purposes of this suit, is equivalent to a refusal to do so. In this respect the covenant does not differ from an ordinary agreement to convey real property. Rawle, Cov. 109.

It is also objected that the defendant is not liable on this covenant to Chapman's assignee, because it does not run with the land. The reason given for this position is, that no estate passed to Chapman by the deed—the grantors not having any interest in the land at the time. This was the doctrine of the common law as to conveyances of estates less than freehold, which passed without livery of seizin. Noke v. Awder, 1 Cro. Eliz. 437; cited in Rawle, Cov. 383. And as under our modern system of conveyancing, freeholds pass without livery of seizin; it was held at one time that the doctrine became applicable to conveyances of such estates, and in case the grantor had no interest in the land, the assignee of his grantee could not sue upon the covenants, because they only passed as an incident of the estate. But this doctrine has been modified substantially, so that it may be said that whenever possession is taken under the deed, there is sufficient estate to carry the covenants to the assignee. Beddoe's Ex'r v. Wadsworth, 21 Wend. 123; Slater v. Rawson, 6 Metc. [Mass.] 439; Rawle, Cov. 382 et seq. This doctrine is peculiarly adapted to the early circumstances of this country. For years before the passage of the donation act, the right of the settlers upon the land was a mere possession with an expectation of future title from the United States. Under these circumstances, in all the towns, this possession was conveyed and re-conveyed with covenants for the title expected, and it is proper and safe to hold with these authorities that a sufficient estate passed to carry the covenants to the subsequent occupants and assignees.

It is further objected to these covenants, that they are void, because they are contracts prohibited by the donation act. The second proviso in section 4 is relied on. It reads—"That all future contracts, by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act, before he or they have received a patent therefor, shall be void." Waiving the ques-

tion of whether this prohibition extends to future contracts concerning lands which the covenantor might receive, but which eventually he does not acquire under the act and receive the patent therefor, it is plain that it does not include these covenants which were made before the passage of the act. It is a plain case for the application of the familiar rule—the mention of one excludes the other. The prohibition of future contracts is a recognition and affirmance of past ones, otherwise lawful.

Counsel for the complainant also insists, that independent of the covenants in the deed, Fields is entitled to the relief prayed for. In support of this position counsel cites section 6 of "An act to regulate conveyances," the same being included in "An act to enact and cause to be published a code of laws," passed September 29, 1849, and commonly called the "Steamboat Code." Laws 1843–49, p. 139. This section was in force at the date of the execution of the deed. It reads: "The words 'grant, bargain and sell' in all conveyances, in which any estate of inheritance, in fee simple, is limited, shall, unless restrained by express terms in such conveyance, be construed to be the following express covenants on the part of the grantor for himself and his heirs, to the grantee, his heirs and assigns." Then follows the specification of the covenants—namely, of seizin of an indefeasible estate in fee simple—against encumbrances, and for further assurance. This section is taken almost literally from the statute of 6 Anne, c. 35, and was first introduced into the United States in the province of Pennsylvania. Rawle, Cov. 533, 537.

It is difficult to perceive, how it can be even claimed that this deed falls within the operation of this section. It does not contain the words, "grant, bargain and sell," or either of them, or the equivalent of them, but the very reverse—"release, quitclaim and confirm." The deed does not assume to pass or limit an estate of inheritance in fee simple, but as has been shown only the interest of the grantor, which was then well known to all the parties to be merely the possession. Besides the express words in the special covenants restrain the statute and prevent the covenants from attaching. By the language of his covenants the grantor excepts the title of the United States from his warranty and expressly asserts that the title is in the latter, and not himself. The habendum—to have and to hold to him and his heirs and assigns forever, does not affect the question of whether the deed purports to pass an estate of inheritance. These words grant no estate, nor do they enlarge the interest already released by the premises or granting part of the deed. By this clause it is simply declared, that the interest of the grantor, whatever it is, is released absolutely—forever, and not for a limited time, to be by him thereafter resumed. This disposes of the case as to the two fifths interest of which Daniel H. died seized. The complainant is entitled to a conveyance of the fifth which Daniel H. obtained from the United States.

But the complainant alleges that he has since acquired three other undivided fifths of this half block by the decree in the partition suit. As has been shown in the statement of the bill, while the heirs of Daniel H. and the children of Nancy were tenants in common of the whole of the west half of the donation, and while such heirs and children and the grantees of Daniel H. were tenants in common of certain parcels of such half, the circuit court made a partition of the whole tract as between those two classes—the children of Nancy on the one hand and the heirs and grantees of Daniel H. on the other. By the decree it was declared that Daniel H. in his lifetime was the owner of two fifths of the whole tract, and that the other three fifths was the property of the children of Nancy. It also appeared that Daniel H. had disposed of certain parcels of the tract. From these premises it followed that the children of Nancy were entitled to three fifths in equal parts, and that the heirs and grantees of Daniel H. were entitled to the other two fifths according to their respective interests, or in other words, that such heirs were entitled to such two fifths, subject to the rights and interests of the prior grantees of Daniel H. The parcels affected by the contracts and conveyances of Daniel H., being in the aggregate more than two fifths of the tract, the court, in making partition between the two classes as above stated, was compelled to divide the tract into two unequal portions, and decree compensation in money from the greater to the less to make partition equal.

Thus the greater portion of the tract was allotted to those who represented only the two fifths interest, but for the sake of convenience it may be called the "two fifths tract." The lesser portion was allotted to those who represented the three fifths interest, but for the same reason it may be called the "three fifths tract." By this decree and allotment the interests of the children of Nancy in the two fifth tract were divested, and also the interest of the heirs of Daniel H. in the three fifth tract. The grantees of Daniel H. had no interest in the three fifth tract. They yielded nothing in the partition and received nothing. The decree left their interests as it found them. The exchange of interests was between the heirs and children. What the latter parted with in the two fifth tract the former received, and what the former parted with in the three fifth tract the latter received. Here the partition ended. No partition was made of the two fifth tract as between those to whom it was allotted. Nor was it ascertained and determined to whom it belonged, or in what proportions. It is allotted to a class of persons known or supposed to exist, to some or all of whom it must belong—namely: the heirs, grantees and assignees of Daniel H., who died seized.

It is allotted to them according to their respective interests, and not in definite quantities, divided or undivided. To the heirs the law will give in equal parts all that portion of the tract allotted, not previously disposed of by their ancestor, Daniel H. To the grantees or assignees of Daniel H., the law will give all those parcels or interests in the tract which by any conveyance or contract binding on the heirs, he disposed of in his lifetime. But as between these persons, whoever they may be, the determination of these questions is very properly omitted by the decree, and the parties interested must settle them among themselves amicably, or by judicial proceedings, as may be found necessary or deemed best.

Apply this statement of the operation and effect of the decree in the partition suit to the case of the complainant. Block G is a part of the two fifth tract, and the complainant claims the half of it. By the decree in the partition suit it is in no way ascertained or determined that the complainant is either heir, grantee or assignee of Daniel H., or that he had any interest in the two fifth tract. He brings this suit claiming to be entitled to the half of the block by virtue of the deed and covenants to Chapman, and the subsequent conveyances to himself. He claims under these conveyances, and whatever interest he is entitled to, results from them, and not the decree in partition. As has been shown, the complainant at the time of the decree had an equitable estate in an undivided one fifth of the half block and no more. As to this fifth he is now entitled to a conveyance of the legal title from the heirs of Daniel H., by reason of the covenant in the deed to Chapman, and it may be assumed for the present that he has the legal estate therein. Prior to and at the date of the partition the other four undivided fifths of the half block belonged—three fifths to the children of Nancy, and the other fifth to the heirs of Daniel H. As has been shown, this three fifths was by the partition vested in the heirs of Daniel H., in consideration of their interest in the two fifth tract being vested in the children of Nancy, and the payment of the owelty deemed necessary to make the partition equal.

The interest of the complainant was not diminished or increased by the decree. The decree left him as it found him, except that it diminished the number of his co-tenants or persons with whom he held in common. Before the decree he was practically the owner of an undivided fifth of the half block, and his co-tenants and owners of the other four fifths were the children of Nancy and the heirs of Daniel H. Since the decree, and by virtue of the decree, the heirs of Daniel H. are the owners of these undivided four fifths, and the complainant is tenant in common with them alone. It follows that the complainant acquired no further or additional interest in the half block by the partition. The nature or quantity of his interest has never varied or been affected by the partition and exchange between the children and the heirs. He claims under the deed and covenant of Daniel H., and not otherwise. If by these he would have been entitled to the whole interest in the half block, as against Daniel H., or his heirs, the decree would have reserved it for him. But by the deed and covenant he is only entitled to an undivided fifth of the half block, and the decree allotting this half block to the heirs and the complainant according to their respective interests, does not nor should not increase or diminish the interest of the latter. His interest, as now ascertained, was an undivided fifth, and he cannot take more, except at the expense of the lawful owners—the heirs of Daniel H.

Upon this point, the argument for the complainant is sought to be strengthened by appeals to the fact that he has made valuable improvements, and what is called in the statement of the bill, "the equities in partition." But certainly this is all irrelevant and beside the matter in controversy. The complainant cannot enlarge his interest in the land, by making improvements upon it. This is not a suit for partition. When partition is sought between the complainant and his co-tenants, the heirs of Daniel H., it can be properly considered and determined, to what extent the former may be equitably entitled to have the value of his improvements estimated in his favor in the partition, provided his fifth cannot be set off to him so as to include them. In such suit, equity may also apportion the owelty charged upon the half block, so as to relieve the complainant's fifth from any part of it, if it should be found proper and equitable to do so. The complainant to protect his interest from sale, deemed it necessary to pay this owelty, and has paid it. Because, as he alleges, the defendant and her co-heirs suffered and encouraged him to pay the owelty, he claims to have acquired some additional interest in the half block. This claim is without any foundation in law. Whoever deemed it necessary to protect his interests in the land might pay the owelty, but he thereby acquired no right as against the real owner, beyond the right to be re-imbursed the amount paid for the benefit of the latter, with a lien upon the land as security. The decree in this respect, is too plain to be misunderstood. Whoever paid owelty, paid it upon his own judgment, and could not thereby acquire or affect the rights of others, whether they had notice of it or not. The owelty was not apportioned among the persons who owned the two fifth tract, for the same reason that the land was not—the court did not know or undertake to determine, who the owners were, or what was the relative or absolute proportion or quantity of their interests. The owelty was charged upon the land in gross, and not upon any portion of it or

to any particular person. The land remains as security to any one, who from necessity or misapprehension, may pay beyond the extent of his real interest. But whether a mere volunteer, who confessedly had no interest in the land, could claim this security, may be a question. As between the heirs and the complainant, it appears to me that no part of the owelty is chargeable upon the complainant's fifth. The cause of and consideration for owelty was the excess in value of the land which the heirs got in the partition, over that which they thereby yielded to the children of Nancy. In a suit for partition between these parties, the court, upon this view of the case, ought to apportion the owelty, so as to discharge the complainant's fifth from any part of it, or by some means compel restitution or make compensation, for so much of the sum as has been paid on account of such fifth. This, it appears to me, is what equity would do in a suit for partition between these parties; but the occasion for furnishing this relief to the complainant does not arise in this suit. This suggestion rests upon general principles, and is equally applicable to any distinct parcel of the two fifth tract, upon which owelty was charged in gross, and which may be owned by the heirs and grantees of Daniel H. in common.

But there is a special circumstance in this case, which, as between the complainant and the heirs, must have the effect or operate to relieve or discharge the complainant's fifth from the owelty. The heirs are bound by the covenant of their ancestor, to convey to the complainant, his undivded fifth as their ancestor obtained it from the United States—free from encumbrances, or respond in damages for the breach of the covenant, so far as they have received assets. The owelty is an encumbrance, suffered during the time of their interest in the land, as heirs, and of which they have received the benefit.

The complainant also claims, that independent of the paper title set forth, there has arisen an equitable estoppel in pais, sufficient to bar the rights of the heirs in any part of the premises. The alleged declarations of Daniel H., and his and the heirs' notice of the complainant's possession and improvements and their acquiescence therein, are relied upon as constituting this estoppel. 2 Am. Lead. Cas. 754, upon the doctrine and effect of license to do some act or enjoy some privilege upon the land of another, is cited in support of this position. The authorities cited have no bearing upon the question; and moreover the facts alleged in the bill, do not show even a license for any purpose.

This is a question of title—ownership of the soil, and not a mere easement or privilege. Titles would not be worth the paper upon which they are written, if they could be called in question or destroyed in this way—by the proof of stale parol declarations inconsistent with or in opposition to them. As to these declarations the dead cannot answer. If allowed to be shown, in bar of the acknowledged title of the ancestor, the heirs would hold their property upon the insecure tenure of the testimony of interested witnesses and claimants, as to matters resting only in parol, which if false or exaggerated, are incapable at this late day of either contradiction or explanation This would be to offer a bounty for frauds and perjuries, instead of preventing them as the statute of frauds commands and intends. In 1852, when complainant purchased from Dobleblower, this land belonged to Nancy. She was then living, and to whom it would go upon her death was not known to any one. She had the power of disposing of it by will. If she died intestate, and before patent, and Daniel H. survived her, he would be entitled to a certain interest in it, depending upon the number of children she left living. But at that time Daniel H. had no interest. Under these circumstances, he is said to have assured the complainant that the title was good, and thereupon the latter purchased of Dobleblower. Waiving the question of what title is referred to by this ambiguous expression—whether it be that of Dobleblower, Chapman, Daniel H., or Nancy, this assurance amounts to nothing more that the expression of an opinion by a stranger—a person who had then no interest in the land and could not know that he ever would have. This expression of opinion as to the existing title—that it was good—could not create an estoppel against Daniel H. as to a subsequently acquired estate in the land. No special relation, implying trust and confidence, is shown or pretended to have existed between these parties. Daniel H. was not the guardian or attorney of the complainant. No misrepresentation of facts or concealment of them or fraudulent purpose is imputed to Daniel H. The complainant had the same means of knowing the state of the title that Daniel H. had. The latter is not responsible to the former for the correctness of his opinions about the title, even if these opinions influenced the complainant to make the purchase—which is extremely doubtful, even upon the face of the bill. So far as Daniel H.'s opinions resulted in written acts—his deed and covenant—he is responsible, and no further. If the complainant proposed to purchase upon the opinion of another as to the title, he should have taken the advice of counsel, and not Daniel H. Of course the subsequent repetitions of this assurance by Daniel H. do not vary the effect of the first one. Moreover, they are perfectly immaterial in any view of the matter, as the purchase was made before they were uttered, and could not have been influenced by them.

As to the other branch of this alleged equitable estoppel—the possession and improvements of the complainant—the case is equally clear against the complainant. During the tenure of Nancy in the land she was

a married woman, and the complainant could not acquire any rights as against her, on account of her silence as to his occupation and improvements, whether she had notice of them or not. And if this were otherwise, the land did not descend from her, so as to be bound for her acts or omissions, in the hands of Daniel H. and the children. Her estate in the land terminated with her death, as well as her enjoyment of it. Thereafter a new estate in the land commenced in Daniel H. and the children, which they took directly from the United States. During the lifetime of Nancy, Daniel H. and the children had no interest in the land, and could not be affected by notice of possession and improvements, more than any other stranger. After the death of Nancy, they became the owners of the land, and were capable—except those who were minors—of affecting their interests by their acts and doings, so far as the law allows them to be sufficient for that purpose.

But the whole idea upon which this branch of the case rests is a novelty and without authority of law. It is, that the complainant could acquire the title to this property as against the lawful owners, by being in possession and improving it, to their knowledge, for a less period than that prescribed by the statute of limitations. Mere possession, unless it be adverse and continued for twenty years, does not give title as against the owner. Possession is evidence of title, and sufficient evidence, in the absence of better. But here the title is shown beyond a doubt to have been in the defendant and those under whom she claims, all the period of the complainant's possession, since the death of Nancy. The possession of the complainant, if adverse, might ripen into title by lapse of time, and in such case it would be immaterial whether any one had notice of it or not. For the same reason, if sufficient time had not elapsed to work a transfer of the estate by reason of the possession, the owner's right is not affected by the possession, however distinctly he had notice of it. As was said in Chapman v. School Dist. No. 1 [Case No. 2,607]: "The owner of real property may rest upon his title, and is not required to be always upon the premises, asserting his title, as against the world or any less number of persons, whom he may permit or suffer from time to time, to be in the temporary occupancy or enjoyment of it." Admitting then, for the present, that the complainant was in the adverse possession, and that Daniel H. had notice thereof from the time he became owner of the land, it in no way benefits the complainant. It was the business of complainant to know whether he was upon his own land or that of another. But it is apparent and undeniable that the complainant's possession continued as it commenced, under the deed to Chapman and the mesne conveyances of Chapman to Dobleblower, and the latter to himself. By force of these, upon the death of Nancy, he became equitably entitled to an undivided fifth. Thereafter he was tenant in common with Daniel H. in his lifetime and his heirs since. His possession was not adverse to their title or right, but consistent with, and would not in any length of time affect their interest in the land. Tenancies in common would be dangerous tenures, if one tenant could occupy and improve the other out of his estate—particularly if that other was a minor, resident in another state.

It is also alleged that Daniel H. had notice of the complainant's possession when he purchased the fifth of Isabella Ellen, and, therefore, he and his heirs are estopped from asserting their title to such interest. How this can be, I cannot see. Daniel H.'s purchase of this interest, worked no wrong to the complainant. It was Isabella Ellen's property, and complainant, as against her, had no claim to it, either at law or in equity. She had an undoubted right to dispose of it, and Daniel H. to purchase it. If the complainant being in possession, did not prevent her from selling, as it did not, it did not prevent Daniel H. from purchasing. If Isabella Ellen, had agreed by a valid contract to sell this fifth to the complainant, or had for any other reason been bound in equity to convey it to him, and Daniel H. had interfered and obtained the conveyance first, with notice of the complainant's possession, then, this matter of notice would be material. But as it was, it amounts to nothing. If one tenant in common cannot dispose of his interest to a person who has notice of his co-tenant's possession, estates in common would often be inalienable. This, I believe, disposes of all the material questions raised and argued by counsel on the demurrer.

The demurrer is overruled, at the costs of the defendant, and unless leave is given to answer, there must be a decree for the complainant, that the defendant, by a proper conveyance with covenants of warranty, release to the complainant, her interest in the undivided fifth of the premises, which her ancestor obtained from the United States, and which she inherited from him.

Case No. 4,777.

FIELDS v. TAYLOR et al.

Circuit Court, D. Massachusetts. Oct., 1799.

ALIENS—SUITS BETWEEN.

The plaintiff named himself of London, and the defendants of Manchester, Eng., and declared on two notes made and endorsed in England. The defendant Taylor pleads to the jurisdiction that the causes of action accrued to the plaintiff at Manchester, etc., and of the jurisdiction of this court, and that since the said notes became due, he, Taylor, came to Boston to reside, and is now there with the property only brought with him. The plaintiff in his replication confesses that

the causes of action accrued at Manchester, etc., but inasmuch as the defendant has by his own showing since that time come to reside in Boston, he prays judgment, etc. After argument, THE COURT adjudged the plea in bar a good and sufficient answer in law to the plaintiff's declaration, and that he ought not to have or maintain his action.

[See Walton v. McNeil, Case No. 17,134.]

[NOTE. Nowhere reported; opinion not now accessible. Statement of the point determined was taken from a note to Rea v. Hayden, 3 Mass. 25. The reporter added that this decision was not founded on the principles of the common law, but rather upon the limited jurisdiction of the federal courts under the constitution and laws of the United States.]

FIELDS (UNITED STATES v.). See Case No. 15,089.

Case No. 4,778.

FIFTEEN EMPTY BARRELS.

[1 Ben. 125.][1]

District Court, E. D. New York. April, 1867.

INTERNAL REVENUE SEIZURE — COSTS — WATCHING SEIZED PROPERTY — DUTY OF COLLECTOR ON A SEIZURE.

1. Where a collector of internal revenue seized property as forfeited, and did not turn it over to the district attorney to have proceedings commenced, for thirty-seven days, and the property being forfeited, the collector presented for taxation a bill for watching the property while in his custody, at $5 per day, as being the "cost of seizure," within the ninth section of the Internal Revenue Act of July 13, 1866, but no facts were stated to show that the interests of the government required the delay in the prosecution: *Held*, that the language of the section in question covered any necessary expenses of watching property seized by a collector, for such time as should necessarily elapse between the seizure by the collector and that by the marshal under process.

2. It is the duty of a collector on seizing property, forthwith to turn the case over to the proper law officer of the government.

3. In this case twenty-four hours was sufficient time for that purpose, and the expense of watching it for that period is all that can be taxed.

4. Unless under special circumstances, the rate cannot be greater than that allowed to the marshal.

B. F. Tracy, U. S. Atty.

BENEDICT, District Judge. This case comes before me upon a question of costs. It appears that the property condemned in the cause was seized by Collector Wood on the 5th day of December, 1866, as forfeited for a violation of the internal revenue laws. The property remained in the hands of the collector until the 12th of January, when the case was turned over to the district attorney, an information filed, and the property condemned, no one appearing to defend.

The collector now presents for taxation a bill of costs of $185, which is supported by his affidavit that he has paid or has obligated himself to pay that sum to one Nathan Beers, for watching the property while in custody of the collector, at the rate of $5 per day.

The language of the section of the internal revenue law under which the claim is made is as follows: "The cost of seizure made before process issues, shall be taxable by the court." [Act July 13, 1866;] 14 Stat. 110.

This language can, I think, be properly construed to cover any necessary expenses of watching property seized by a collector, for such time as shall necessarily elapse between the seizure by the collector and the seizure by the marshal under process. But I am unwilling to extend its effect so as to cover a charge like the one before me.

The duty of a collector upon making a seizure of property which he has probable cause to believe liable to forfeiture, is to turn the case over to the proper law officer of the government forthwith, in order that legal proceedings may be commenced without delay.

This is also the right of the citizen whose property is seized, and who may justly complain if his property be detained for any considerable time, when he can neither take steps to make his defence, nor to obtain its release upon giving bonds. Any other practice is liable to abuse, and to bring suspicion and discredit upon the revenue department, and will never be encouraged by me.

In the case before the court, the property was detained by the collector for the space of thirty-seven days, and no other reason is suggested for the delay, except that Revenue Agent Linton, and Inspectors Cocheu and Meade desired proceedings to be delayed. But no facts are presented before me to show that the interests of the government required any delay at all, and it is not easy to imagine any proper reason for delaying proceedings in a case so clear that the owner deemed it not worth while to interpose any defence.

In such a case my opinion is that no more than twenty-four hours' delay was necessary, and expenses for custody of the property for that period is all that can be taxed as cost of seizure.

I notice also that the rate charged per day is double that allowed by law to the marshal in such cases. Unless under special circumstances of necessity, but $2.50 per diem is allowed to the marshal, and no greater rate can be claimed by the collector in this case.

Let the bill be taxed by the clerk in accordance with this decision, and the amount so taxed be paid the collector.

FIFTEEN HOGSHEADS OF BRANDY (UNITED STATES v.). See Case No. 15,090.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

Case No. 4,779.

FIFTEEN PIECES OF BLACK SILK.

[3 Ben. 189.][1]

District Court, S. D. New York. April, 1869.

BONDING PROPERTY SEIZED AS SMUGGLED.

1. Where goods were seized as smuggled, and a libel was filed without delay to forfeit them and a claim was put in by an agent of the owner of the goods, who applied for an appraisement of the property and its delivery to him on bond: *Held*, that the 89th section of the act of 1799 (1 Stat. 695), applies only to seizures for violations of that act.

2. A delivery on bail in this case was a matter of discretion, and, as there had been no delay in the prosecution and the goods were not perishable, the application to bond must be refused.

T. Simons, Asst. Dist. Atty., for the United States.

M. V. B. Wilcoxson, for claimant.

BLATCHFORD, District Judge. This is an information in a cause of seizure and forfeiture of certain goods for an alleged violation of the 46th and 68th sections of the act of March 2, 1799 (1 Stat. 661, 677), and of the 4th section of the act of July 18, 1866 (14 Stat. 179). On the facts shown to the court, the goods were smuggled into the United States, in the ship Australasian, from Liverpool, by a passenger from Liverpool, as personal baggage. A claim has been filed to the goods, by one Josias Taylor, as agent for one George Pursey, who is sworn by Taylor to be the owner of the goods and to reside in London. An application is made to the court by the claimant for the delivery of the goods to him, as such agent for such owner, on an appraisement thereof and the execution of a bond therefor, in pursuance of the requirements of the 89th section of the act of March 2, 1799.

I concur with Mr. Justice Story (The Struggle [Case No. 13,550]) in the view, that the provision for the bonding of seized property, made by the 89th section of the act of 1799, applies only to seizures for violations of that act, and that, even under that section, a delivery on bail is not compulsory on the court, but is a matter of sound discretion. It is, therefore, discretionary with the court, as regards both of the statutes under which this case is prosecuted, whether it will deliver the goods on bail.

It appears, by the papers, that Pursey, the alleged owner, came as passenger in the ship, and himself conducted in person the smuggling proceedings on board of the vessel, which consisted in representing the property as personal baggage, and in offering money to the inspector to pass it. Why Pursey does not himself make the claim and verify it is not explained, nor does he make any affidavit in explanation of the facts sworn to by the inspector. In view of the provisions of the 4th section of the act of 1866, that, in all cases where the possession of goods brought into the United States contrary to law shall be shown to be in a defendant, or where he shall be shown to have had possession thereof, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury, and of the fact that the claimant in this case swears that Pursey is the owner of all the property, and that it is apparent from the papers, that Pursey was in possession of all of the property on board of the vessel, and of the circumstances of the smuggling, I cannot regard this as a proper case in which to allow the property to be delivered on bail. Mr. Justice Story, in the case before referred to, says: "I cannot say that I approve of the practice of an indiscriminate delivery of property seized, on giving bail for the appraised value. It is attended with many inconveniences and often leads to frauds. In the exchequer, in England, no delivery is allowed, unless the property be perishable, or the government officers have been guilty of laches and delay in the prosecution." Such a practice is a sound one. The property in this case consists wholly of dry goods and not at all of perishable articles, nor has there been any delay in the prosecution. The seizure was made March 5th, 1869, and the libel was filed March 13th, 1869.

The application is refused.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

FIFTEEN THOUSAND DOLLARS SPECIE (MAGOWN v.). See Case No. 8,959.

Case No. 4,780.

FIFTH NAT. BANK v. LONG.

[7 Biss. 502;[1] 9 Chi. Leg. News, 381; 4 Law & Eq. Rep. 210.]

Circuit Court, N. D. Illinois. July, 1877.

PRACTICE—BRINGING THE UNITED STATES INTO COURT.

1. The district attorney is not so far an officer of the court that the court can compel him to enter the appearance of the United States.

2. The United States can be brought into court by the entry of an order that it shall plead, etc., within a given time, and the service of a copy of such order upon the proper representatives of the government.

In equity.

Hitchcock, Dupee & Judah, for complainant.

Mark Bangs, Dist. Atty., for the United States.

BLODGETT, District Judge. The motion made in this case is that the court direct or order the district attorney to enter the appearance of the United States as one of the parties defendant.

The case is really this: The complainant files a bill to foreclose a mortgage made by Long to the complainant. It appears that

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

the United States recovered a judgment at some time after the mortgage in question against Long, so that the United States are judgment creditors of Long, and the complainant is anxious to foreclose the equity of redemption against the United States, as well as against Long. The motion is that the district attorney shall be required to enter the appearance of the United States.

I do not think the court has any power to enter any such order, or to entertain such a motion as that. The district attorney is not so far the officer of the court that the court can compel him to perform an official act for the United States in reference to a matter of this kind. I think—I only make this by way of suggestion—that the court can enter the following order if the complainant wishes it: that the United States shall enter its appearance in this case, and plead, answer or demur to the bill by a given time, and direct that a copy of this order shall be served upon the district attorney, and also upon the attorney general, or some other government officer, and then if the government does not enter its appearance, it will be a question for you to determine whether you will take a default against them or not.

I should be quite inclined myself to think that if the government did not enter its appearance, and the record shall show such a service, inasmuch as the government has entered the arena as a property holder, or rather as a lien holder, that it could be treated like any other person. It is true the old English rule holds that the king cannot be sued in his own court, or the sovereign cannot be sued here in its own court, and that rule is carried so far in England that the king cannot be sued for debt or for trespass, but Mr. Justice Greer, in Elliot v. Van Voorst [Case No. 4,390], seems to think that there may be such a thing as a distinction between the United States as a sovereign in executing its prerogatives of sovereignty, and the United States as a property holder; and I am inclined to give you the rule which I have suggested, but I do not think I can enter an order that the district attorney shall enter the appearance of the United States.

Another suggestion has occurred to me in the matter: that is, inasmuch as this judgment appears from the record of the judgment itself—being a judgment in favor of the United States—to have been rendered in the interest of the internal revenue bureau, perhaps the order had better be served upon the commissioner of internal revenue, the attorney general, and the district attorney.

FIFTY BARRELS OF WHISKY (UNITED STATES v.). See Case No. 15,091.

FIFTY-EIGHT THOUSAND EIGHT HUNDRED AND FIFTY CIGARS (UNITED STATES v.). See Case No. 15,092.

FIFTY-FOUR BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 15,093.

Case No. 4,781.

FIFTY-ONE BALES OF GOATS' HAIR.

[2 Ben. 479.][1]

District Court, S. D. New York. June, 1868.

REVENUE ACT OF 1861—GOATS' HAIR.

Under the twenty-third section of the tariff act of March 2, 1861 (12 Stat. 193, 195), goats' hair, uncleaned and unmanufactured, is exempt from duty, notwithstanding the provisions of the fourth section of the act of June 30, 1864 (13 Stat. 206).

This was an application, on the part of the collector of the port of New York, for an order directing the payment, out of the proceeds of the property above-named, which had been sold as perishable, of duties on the goods. The suit was brought to forfeit the goods to the United States, by reason of fraud in the entry, and the duties were claimed under the fourth section of the tariff act of June 30, 1864 (13 Stat. 206).

BLATCHFORD, District Judge. The prayer of the petition is denied. I think that the twenty-third section of the act of March 2, 1861 (12 Stat. 193, 195), exempting from duty hair of all kinds, uncleaned and unmanufactured, applies to the goats' hair in question, which is uncleaned and unmanufactured, and that such section is in force, notwithstanding any thing in the act of June 30, 1864. The fourth section of that act is merely a substitute for the twelfth section of the act of March 2, 1861, and is not repugnant to anything in the provision, in regard to hair, in the twenty-third section of the act of 1861. The hair in question was exempt from duty.

FIFTY-ONE CASES OF BRANDY (HOOPER v.). See Case No. 6,674.

FIFTY-ONE DOZEN PIECES OF MERCHANDISE (UNITED STATES v.). See Case No. 15,094.

FIFTY-SIX BARRELS OF WHISKY (UNITED STATES v.). See Case No. 15,095.

FIFTY-SIX THOUSAND FOUR HUNDRED AND TWELVE FEET OF LUMBER (LYON v.). See Case No. 8,647.

Case No. 4,782.

FIFTY THOUSAND CIGARS.

[1 Lowell, 22;[2] 2 Int. Rev. Rec. 108.]

District Court, D. Massachusetts. Sept, 27, 1865.

QUI TAM ACTIONS — DEPUTY-COLLECTOR AS INFORMER — INFORMATION RECEIVED BY DEPUTY COLLECTOR.

1. A deputy-collector of customs who receives information by a telegram addressed to the col-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

lector, that a certain vessel within his district has goods on board liable to forfeiture, and who sends the telegram to the collector, does not thereby become the informer under the statute of 1799 [1 Stat. 627], as against the person sending the telegram, though he may have verified some of its statements and have sent information of such verification to the collector.

[Cited in U. S. v. Simons, 7 Fed. 712.]

2. Nor is the person who carries the telegram and information such informer; nor the officers who seize the goods but make no new discoveries.

3. Information received by a deputy-collector under such circumstances, is received by the collector, within the meaning of the statute.

This was an information against fifty thousand cigars and a small quantity of sugar, seized on board the schooner Atlantic at Holmes Hole, in the collection district of Edgartown, for smuggling. The property had been heretofore condemned as forfeited, and the proceeds ($4927.49) paid into the registry of the court. The question now was between several persons claiming as informers, under the statute.

On Saturday, the 4th of March, 1865, Lewis B. Smith, deputy collector of customs at Portland, Me., obtained information that a quantity of cigars intended to be smuggled were on board said schooner, then reported at Holmes Hole. He communicated the fact to Israel Washburn, Jr., collector of the port of Portland, and requested him, as he was better known than himself, to telegraph it to the collector of the district where the Atlantic was. The following despatch was accordingly sent:—

"Confidential. Portland, March 4, 1865. To Collector of Customs, Holmes Hole, Mass.: I have information that a very large quantity of cigars in schooner Atlantic are intended to be smuggled; reported at Holmes Hole, 2d inst. [Signed] Israel Washburn, Jr."

The despatch reached Holmes Hole on the 4th, a little after sunset, and was opened by Mr. Beetle, the deputy-collector of customs for the district, who resides there, the collector living at Edgartown, eight miles away. Mr. Beetle immediately put an officer on board with instructions to see that nothing was landed. No cigars appeared on the schooner's manifest. The wind coming fair on Sunday morning, the officer, without the knowledge of Mr. Beetle, came ashore, and the schooner went to sea. A head wind, however, coming up, she put back in the afternoon, and Mr. Beetle again put the officer on board with instructions to prevent any thing from being landed and to detain the schooner. Mr. Beetle testified that he then went to the house of Mr. Luce, an inspector, about four miles from Holmes Hole, on the road to Edgartown, and sent him with the despatch to Mr. Vinson, the collector at Edgartown, telling Luce to give the despatch to Vinson, and to tell him all about the matter, and what had been done; and to have the revenue cutter come round and make the seizure; that he himself hastened back to Holmes Hole to see that the schooner did not escape; that Luce went, and the cutter came round in the evening, the schooner was taken possession of, searched, and the cigars and sugar found; that if the cutter had not come round, he should have obtained a force and seized her, but that he thought it better to have the cutter do so if she was at hand.

Mr. Vinson, collector of the port, testified that Luce came to him, told him that he believed the schooner Atlantic had cigars on board intended to be smuggled; that Mr. Beetle had put an officer on board, who came ashore; that she left the harbor, but came back again, and that Mr. Beetle had put the officer on board again; that no cigars appeared on her manifest; and then handed him the despatch from Mr. Washburn. Mr. Vinson further testified that it was in consequence of the information and the telegram thus received that he ordered the seizure to be made; that he could not discriminate between them, and should have made the seizure from either.

The persons claiming as informers were Mr. Smith, who caused the telegram to be sent, Mr. Luce, Captain Usher, commanding the revenue cutter, Mr. Beetle, and Mr. Andrews, the inspector put on board by him.

The affidavit of Mr. Luce was presented, in which he said that he carried no message from Mr. Beetle to Mr. Vinson, but gave original information; and, on Mr. Luce's behalf, it was contended that he appropriated the contents of the despatch, made the information his own, and then communicated it to Mr. Vinson as original, and was, therefore, the informer.

R. R. Bishop, for Smith.

W. J. Forsaith, for Luce and the other petitioners.

LOWELL, District Judge. In this case a large quantity of cigars, and a small quantity of sugar and molasses, have been condemned and sold, having been found on board the American schooner Atlantic under circumstances which showed very clearly an intention to smuggle them into the United States. Several persons have filed petitions for the share of the proceeds of the forfeiture provided by sect. 91 of the collection act of 1799, which enacts, among other things, that in all cases where such fines, &c., shall be recovered, in pursuance of information given to the collector, by any person other than the naval officer or surveyor of the district, a certain share shall be given to such informer.

[2] [The petitioner Smith, who is a deputy collector of customs at Portland, was told by a person in the trade in which the schooner was engaged, and who appeared to have adequate means of knowledge, that a large quantity of cigars were on board the vessel, and

[2] [From 2 Int. Rev. Rec. 108.]

were about to be smuggled. This person most positively refused to inform him against the goods himself, or to let his name appear in any way, and he has not made claim in this cause, and so far as appears is not known to any one connected with the affair, excepting Mr. Smith. He evidently intended that Smith should inform against the goods. The vessel was reported as then lying at Holmes Hole, in Massachusetts, which was the fact; she having put in there on her voyage from Cuba to Winterport, in Maine. It being Saturday, Smith, finding that he could not reach Holmes Hole before Monday night, requested Mr. Washburn, the collector at Portland, whose name, he thought, would be better known than his own, to telegraph these facts to the collector of the port, where the vessel was lying. Mr. Washburn accordingly sent a telegram, addressed to the "Collector of Customs, Holmes Hole," saying that he had information that a large quantity of cigars in the schooner Atlantic were intended to be smuggled. Holmes Hole is a port of the collection district of Edgartown, and has a custom house under the charge of a deputy collector. The collector resides at Edgartown, some eight miles from Holmes Hole. Mr. Beetle, the deputy collector, received this despatch on Saturday evening, and read it, and at once put Mr. Andrews, an inspector of customs, on board the schooner with instructions not to permit anything to be taken out of her. The next morning, the wind coming fair, the schooner sailed, after sending the inspector on shore; but the wind again changing, soon returned, and the inspector was put on board a second time by Mr. Beetle, with the further instructions not to leave the vessel. In the course of the day, Mr. Beetle, as he says, sent Mr. Luce, another inspector, to Edgartown, to inform Mr. Vinson, the collector, of the facts, and to ask the assistance of the revenue cutter J. C. Dobbin, then at that port. This course he took to save the expense which would be incurred in calling upon persons not in the employ of the government. But he was resolved to stop the vessel at all hazards, if she should attempt to sail before the cutter arrived. The cutter came round that night with orders from the collector to make a thorough search for cigars, and if any were found to bring the vessel to Edgartown; and upon careful examination the cigars were found carefully concealed behind a bulkhead. Mr. Beetle, Mr. Luce, Mr. Andrews and Capt. Usher, of the cutter, all claim as informers under the act; the two last on the ground of their diligence and success in searching for and discovering the goods; Mr. Luce, partly on that ground, and partly for having given information to the collector before the search was ordered, which is also Mr. Beetle's ground for claim. Mr. Washburn makes no claim, and says he acted at the suggestion and as the agent of Mr. Smith, whom he supposes to be, in point of fact and law, the sole informer.

Now it is very clear, in the first place, that some officers of the customs other than the collector himself and the surveyor and naval officer (all of whom share in all these forfeitures), may themselves be informers. This has been decided so far as inspectors and officers of revenue cutters are concerned, and perhaps it is true of deputy collectors.][2]

That this court has jurisdiction of this controversy is clear. Hooper v. 51 Casks of Brandy [Case No. 6,674]; Westcot v. Bradford [Id. 17,429]; McLean v. U. S., 6 Pet. [31 U. S.] 404.

It is not denied that some officers of the customs, other than the collector himself and the surveyor and naval officer, all of whom share in all these forfeitures, may themselves be informers. This has been decided so far as inspectors are concerned, and perhaps is true of deputy-collectors. Hooper v. 51 Casks of Brandy, ubi supra; Brewster v. Gelston, 11 Johns. 390; Sawyer v. Steele [Case No. 12,406]. And, as to officers of revenue cutters, the act itself is explicit in their favor. But I am not aware that it has ever been said or thought that an officer, being charged with the special duty of searching a vessel, in purusance of definite information given by another person, could become the informer by reason of the diligence, fidelity, and success with which he prosecuted the search, and found what he was sent to seek. To allow this would be contrary to the general principles of law, and to the intent of the revenue laws, which expect the collector and his subordinate officers to pursue the course indicated by the information with all the means and effort that may be necessary.

Who, then, gave the collector the information in pursuance of which this search and seizure were made, and the forfeiture was recovered? Mr. Beetle and Mr. Luce each says that he did; the former, because he received the telegram and sent it to the collector; and the latter because he carried the telegram, and gave, as he says, some oral information. Mr. Luce denies that Mr. Beetle "sent" him to the collector, and says that he agreed with Mr. Beetle, that, as the wind would keep the vessel in port, it was better to consult with the collector, and to procure the services of the cutter. There is no doubt that he carried the telegram, with Mr. Beetle's consent; and whether he is to be considered as Mr. Beetle's messenger, or not, is immaterial, in the view I take of the case. Mr. Vinson says, in his deposition, that, acting on the despatch, and on oral information received from Mr. Luce, he ordered the search and conditionally the seizure, and that either information would have been sufficient. It is to be regretted that Mr. Vinson should have made this general statement, which is calculated to leave an erroneous impression. The evidence shows quite conclusively that Mr. Luce had no informa-

[2] [From 2 Int. Rev. Rec. 108.]

tion to give, beside the telegram and its contents, which was of any importance. Neither he nor Mr. Beetle knew any thing about the vessel or her cargo or papers, excepting that no cigars were set down in the manifest; a fact of no importance in itself, and which had not attracted Mr. Beetle's attention before he read the despatch, and was not calculated to do so, any more than the absence of all other goods which might, by possibility, have been on board. When the despatch was received, he recollected, or found by examining his records, that no cigars were mentioned in the manifest. But this fact was included in the information given by the despatch; for, if there were cigars on board intended to be smuggled, they would certainly not be found in the manifest. So that this fact, independently known to him, only confirmed the despatch to this extent, that if it were true, as therein stated, that a large quantity of cigars were on board, then its further statement that they were intended to be smuggled, was also probably true. I say this is abundantly evident from all the testimony in the case, including Mr. Luce's affidavit and from the subsequent particular explanation of the collector himself to what Mr. Luce did tell him. Now it is not to be believed that a prudent collector would have seized this vessel or have searched her on the mere information that she had no cigars on her manifest. So, then, in point of fact, the information which Mr. Luce orally gave, besides the above-mentioned fact, unimportant of itself, could only have been that he had read the despatch and believed, from the known character of Mr. Washburn, that it was likely to be well founded. But this was information which Mr. Vinson hardly required, and the giving of which cannot constitute Mr. Luce the informer in this case.

Again, it is assumed, that the collector must personally receive the information which is the foundation of such a claim; and thereupon it is argued that Mr. Beetle and Mr. Luce, or one of them, as the evidence may be thought to favor the views of one or the other, appropriated the information contained in this telegram, and gave it out again to the collector, as their own, and so became the informers. But, on this supposition, they had no right to read the telegram, or reading it, to do any thing but forward it as quickly as possible to the collector. The law does not recognize a title to telegrams, or their contents, acquired by appropriation by persons intervening between the sender of the despatch and the person to whom it is addressed. The telegraphic operator, who has not filed a claim, would stand, in this respect, full as well as these petitioners: he was nearer the source of knowledge, and his position was not more confidential. But the assumption is itself without warrant. The deputy-collector has, in law, a recognized position, with all or nearly all the powers of a collector; insomuch that, for example, an oath required by statute to be taken before the collector is well taken before his deputy, without proof of the absence or inability to act of the principal; U. S. v. Barton [Case No. 14,534].

It is plain, therefore, that Mr. Beetle had power to receive this despatch for the collector, and to act on it. He was the collector, for all purposes, at Holmes Hole, and the moment he received the despatch, the collector had, in law, received it; the information had been officially communicated, and the inchoate right to the reward had attached. All that was done after that was executive, and was in pursuance of the information so given and received.

I must decide, therefore, that Mr. Smith was the person and the only person who gave to the collector of the district of Edgartown the information, in pursuance of which the forfeiture of the cigars was recovered, and is entitled to one-fourth of their net proceeds. The evidence does not clear up the question about the sugars, and their value is comparatively trifling. I cannot say that any one informed against them, as the case is presented. The form of decree is shown in Jones v. Shore, 1 Wheat. [14 U. S.] 475.

Mr. Smith adjudged sole informer.

FIFTY THOUSAND CIGARS (UNITED STATES v.). See Case No. 4,782.

Case No. 4,783.

FIFTY THOUSAND FEET OF TIMBER.

[2 Lowell, 64.][1]

District Court, D. Massachusetts. Sept., 1871.

SALVAGE SERVICE—SAVING RAFT OF TIMBER.

1. A salvage service is performed when a raft of timber is saved from peril on navigable waters.

[Cited in Maltby v. Steam Derrick Boat, Case No. 9,000; Cope v. Vallette Dry-Dock Co., 119 U. S. 630, 7 Sup. Ct. 338; Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. 597; Bywater v. A Raft of Piles, 42 Fed. 918.]

2. A claim for such salvage service may be maintained in a court of admiralty, if there is no local custom making the service gratuitous.

[Cited in Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. 596.]

In admiralty.

LOWELL, District Judge. These two rafts of timber were found floating in the harbor of Boston during the ebb tide in the evening, at a considerable distance from the place where they had been moored, and services were rendered by the libellants which would

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

enable them to secure reasonable compensation, at least pro opere & labore, if the court has jurisdiction of the suit as one of salvage, and if salvage services can be performed to a raft of timber. Decisions can be cited against the view that this is a case for salvage; but I am of opinion, nevertheless, that it is of that character. A salvage service is performed when goods are saved from peril at sea, or on other navigable waters, or cast upon the shores thereof. And this case is within the definition.

There are two judgments that a raft of timber is an exception to the general rule. Nicholson v. Chapman, 2 H. Bl. 254; Tome v. Four Cribs of Lumber [Case No. 14,083]. The first of these cases was decided when the admiralty courts were prohibited from entertaining such actions if the place of performance was in the body of a county; and the court held that there would be great hardship and inconvenience to the trade in permitting such claims to be set up when the services were done so near home; and, as no compensation is allowed by the common law in cases of this kind, it refused to make any distinction in favor of a river. This decision appears to be sound, upon common-law principles. When Taney, C. J., decided the second case above cited, our courts of admiralty had made the discovery that water is water, even within the limits of a county; and he gave no force to the point of locality as a jurisdictional fact, but he thought that Nicholson v. Chapman was well decided upon general grounds of convenience, especially as he found a custom to prevail in the timber trade of the Susquehanna, by which there was to be no salvage in such cases. He said that the salvors must seek their remedy for a reasonable compensation in the courts of common law; forgetting that these courts never allow any compensation, unless there is evidence of a promise.

Another decision sometimes cited is A Raft of Timber, 2 W. Rob. Adm. 251, which turned merely upon a question of jurisdiction; the courts of admiralty having been prohibited from entertaining such a claim arising, as this arose, within the limits of a county, and parliament having granted them jurisdiction, even within those sacred precincts, in respect to salvage services rendered to any ship or sea-going vessel, Dr. Lushington very properly decided that a raft was not a ship or sea-going vessel. Another statute soon remedied the defect pointed out by this case; and gave the admiralty jurisdiction to decide upon all claims and demands in the nature of salvage for services performed, whether in the case of ships, goods, or other articles found at sea or cast on shore, and whether the services had been performed on the high seas, or within the body of a county. 9 & 10 Vict. c. 99, § 40. It is perfectly clear from this statute, and from the concessions of counsel and court in the case in 2 W. Rob. Adm., that salvage services may be performed to a raft of timber as well as to any other property, and that the only difficulty was one of locality. And so it was held by Judge Betts, in a well considered judgment. A Raft of Spars [Case No. 11,529].

A suit for salvage is neither contract nor tort. It resembles the latter in being a proceeding for unliquidated damages, and in depending on locality. No personal action will lie without either an express promise or an acceptance of the goods subject to the maritime lien, and in the latter case it is only maintainable to the extent of the lien, and only in the admiralty. If the services are rendered, it is of no consequence whether the goods are a ship or part of a ship, or were ever on board a ship. A great many of the cases are of mere derelict goods picked up at sea; and no one ever heard that it would be a defence to a proceeding for salvage, that the goods had been washed out to sea from the shore by a gale or flood, or had been dropped from a balloon. I have had a case of the former kind; though, to be sure, the subject-matter was an unmanned vessel. If it had been a barrel of oil, the principle would have been the same.

No custom has been proved in this case for timber merchants to assume their own risks. Nothing whatever has been advanced in evidence to distinguish this from any other case of salvage. The arguments which prevailed in the two cases first cited find no support from the facts of this case. Most of them will apply to any salvage services performed near the shore; and to all of them the sufficient answer is, that the admiralty court has full power to regulate the compensation, or to deny it altogether, as circumstances may require. To my mind it is entirely clear that the only adverse case in this country depends, and can only be supported, upon the custom proved to exist in that case; and that the English cases, which failed solely from a defect of jurisdiction, have been remedied by the healing power of parliament, which has restored the old jurisdiction of the admiralty.

Salvage decreed.

FIFTY-THREE BOXES OF HAVANA SUGAR (UNITED STATES v.). See Case No 15,098.

Case No. 4,784.

FIFTY-TWO BALES OF COTTON.

[Blatchf. Pr. Cas. 309.][1]

District Court, S. D. New York. Dec. 31, 1862.[2]

PRIZE—PURCHASE OF COTTON IN ENEMY'S COUNTRY BY LOYAL CITIZEN.

Cotton condemned, having been purchased by the claimant, a citizen of the United States and of a loyal state, in the enemy's country, during the war, and having been arrested while water-borne and in the act of being exported from there in violation of the blockade.

In admiralty.

BETTS, District Judge. The cotton proceeded against in this suit was captured, July 15, 1862, in Aransas bay, Texas, on board a scow or lighter, by the United States bark Arthur, and sent into this port for adjudication, where it was libelled, October 1, 1862. The claimant intervened, and filed his claim to the property, November 3, 1863. It is useless to recapitulate in detail the facts stated in the libel and proofs, as the claim interposed and attested to by the claimant states, and substantially admits, all that is asserted by the witness of the libellants, as well as the supposed grounds or excuse for the acts done by the claimant. The evidence shows that the war and the blockade were known to the master and owner of the Monte Christo, and that she was chartered by the claimant to transport this cotton from Aransas to the port of New York. The claimant admits that he is a native and resident merchant of New York, and that he purchased the cotton in Texas, with Confederate funds, since the war and the blockade with intent to bring it from Texas north, and chartered the Monte Christo to that end. The vessel was placed in the harbor of Aransas in order to receive this cotton on board. While the cotton was in the act of being carried in flat-boats or lighters to the vessel, and before it was laden on board, it was captured by the United States, and the Monte Christo was burned.

Upon these facts, it results that the cargo was arrested while it was in the act of being exported from the enemy country in evasion of the blockade of the port. But in addition to that, the claimant, being a citizen of the United States, was disabled from obtaining a lawful ownership of the cotton, by purchasing it from the enemy in the enemy country. He was interdicted from all trade with the enemy, and the cotton remained liable to capture as enemy property, being water-borne at the time.

These points of law have been repeatedly considered and passed upon in prize suits during this war. The claimant has no legal defence to the suit. If he has any remedy, it must be by a remission of the forfeiture of the government.

Let there be a decree of condemnation and forfeiture.

This decree was reversed, on appeal, by the circuit court [Case No. 4,785].

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Reversed in Case No. 4,785.]

Case No. 4,785.

FIFTY-TWO BALES OF COTTON.

[Blatchf. Pr. Cas. 644.][1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—PROPERTY OF LOYAL CITIZEN IN ENEMY'S COUNTRY AT COMMENCEMENT OF WAR.

The property was captured on a flatboat fastened to a wharf in Texas, and belonged to a citizen and merchant of New York, who went to Texas before the war to collect debts due to him. The cotton was the proceeds, and claimant used all diligence to collect his effects, with a view to leave the hostile country after the breaking out of the war. [*Held*, that the cotton was not enemy's property, and should not be condemned.]

[Appeal from the district court of the United States for the southern district of New York.]

In admiralty.

NELSON, Circuit Justice. This cotton was captured from on board a flatboat fastened to the wharf at the town of Lamar, at the head of Aransas bay, Texas. The flatboat was not captured, but a schooner, called the Monte Christo, lying in the same waters, undergoing repairs, and on board of which, as is claimed, it was intended to place the cotton, was captured. This vessel was afterwards burned, but her master was brought to New York, and has been examined in preparatorio. The cotton belongs to a citizen and merchant of New York, who had gone to the south, just before the breaking out of the war, to make collection of debts, and was engaged, at the time, in gathering together the funds realized from these collections, with a view to make his way home. The cotton in question comprised a part of these funds. He was not a resident south, nor engaged in business there. The war found him there temporarily, for the purposes above stated. The property was not enemy's property, nor is it pretended that there was any intention to run the blockade. The court below and its officers seem to have been in some doubt whether the proceedings against the cotton were on the prize or the instance side of the court. It was not on board of the vessel captured, which was undergoing repairs, nor was it to be placed on board unless, after she was repaired, she should prove seaworthy; and, if it had been on board, there is no proof of any intent to run the blockade.

The only pretext for condemnation is, that

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Reversing Case No. 4,784.]

the property in question was enemy's property, which I think is not sustained. It appears to me that the claimant used all diligence to collect his effects, with a view to leave the hostile country, after the breaking out of the war, and is brougnt fairly within the principle of international law that protects him.

Decree below reversed.

Case No. 4,785a.

FIKES v. BENTLEY.

[Hempst. 61.] [1]

Superior Court, Territory of Arkansas. May, 1828.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

On an application for a new trial, on the ground of newly discovered evidence, it should appear that it was unknown to the party at the trial, as well as his counsel.

Appeal from the Conway circuit court [in a suit by Fire Fikes against George Bentley].

Before ESKRIDGE, JOHNSON, and TRIMBLE, Judges.

OPINION OF THE COURT. This is an appeal from the Conway circuit court. The appellant moved for a new trial, on an affidavit setting forth newly discovered evidence, and stating that the evidence was not known to his counsel on the trial of the cause. But it does not state that it was unknown to himself, which we think indispensable. Judgment affirmed.

Case No. 4,786.

FILKINS et al. v. BLACKMAN.

[13 Blatchf. 440; [2] Cox, Manual Trade-Mark Cas. 282.]

Circuit Court, D. Connecticut. June 30, 1876.

TRADE-MARKS—ASSIGNMENT FOR LIMITED TERM—TRANSFER OF ASSIGNEE'S RIGHT TO COPARTNERSHIP.

1. B. invented a medicine which he called "Dr. J. Blackman's Genuine Healing Balsam," and made and sold it under that name. In 1865, B. conveyed to F. the exclusive right to use B.'s name in making and selling such medicine, for 10 years, for a sum to be paid every three months during that time, and, if F. performed his contract for the full 10 years, then B. granted to F. "all of the rights and privileges" to use B.'s name in making and selling such medicine, without fee or reward to B., for 50 years: *Held*, that F. acquired, after the 10 years, the same exclusive right which he had during the 10 years, and that his right for the 50 years was exclusive as against B. and subsequent grantees of B.

2. The name of such medicine is a valid trade-mark; and the exclusive right to use such trade-mark will pass, by assignment, to any one who has lawfully obtained from the inventor of the medicine the exclusive right, also, to make and sell, and who does sell, the medicine compounded according to the original formula.

[Cited in Kohler Manuf'g Co. v. Beeshore, 8 C. C. A. 215, 59 Fed. 574.]

3. When a partnership is formed to make an article to which a given trade-mark is properly applied, such trade-mark, if belonging to one partner, becomes, in the absence of special regulations, part of the partnership property.

4. A preliminary injunction granted to restrain the use of such trade-mark.

[Cited in William Rogers Manuf'g Co. v. Rogers & Spurr Manuf'g Co., 11 Fed. 499.]

[This was a bill in equity filed by Morgan L. Filkins and another to enjoin Newton M. Blackman from the use of plaintiffs' trade-mark.]

Chase, Bestow & Holt, for plaintiffs.

Henry T. Blake and E. D. Strong, for defendant.

SHIPMAN, District Judge. In the bill in equity which was originally filed by the plaintiffs, they averred that they were residents of the city of Albany, and citizens of the state of New York, and were, as copartners, manufacturers and dealers in proprietary medicines; that they had long manufactured and sold a well known article of medicine, called "Dr. J. Blackman's Genuine Healing Balsam," which had gone into extensive use, and obtained a high reputation; that they had acquired an exclusive right to the use of that name as a trade-mark, and had also a right to the use of certain labels, which had been devised by one of the plaintiffs, upon the bottles containing the medicine; and that the defendant, a resident and citizen of Danbury, in Connecticut, was using, upon bottles of medicine of his own manufacture, said trade-mark, and labels which were close imitations of the plaintiffs' labels. The bill prayed for an injunction. Upon the hearing of a motion for preliminary injunction, the plaintiffs asked and obtained leave to amend their bill, by the averment, that, on October 14th, 1875, they deposited in the patent office, for registration, a label, of which the following is the title, viz., "Dr. J. Blackman's Genuine Healing Balsam," the right to the use of which they claimed as sole proprietors, and that said trade-mark was then duly registered in the patent office, and a certificate thereof was duly issued to the plaintiffs. The motion was tried upon the affidavits which were presented by the parties, no answer having been filed at the time of said hearing. The affidavits of the defendant deny the right of the plaintiffs to any exclusive use of such name or title, and assert the right of the defendant to manufacture said medicine, and to use said name, and assert that the plaintiffs do not manufacture the medicine according to the original formula, and have abandoned the use of the name "J. Blackman" in their trade-mark.

From the affidavits which are on file, it

[1] [Reported by Samuel H. Hempstead, Esq.]

[2] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Cox, Manual Trade-Mark Cas. 282, contains only a partial report.]

appears that Jonas Blackman is the father-in-law of Morgan L. Filkins, one of the plaintiffs, and was, about the year 1840, the inventor of the article which was called, at the time of the discovery, "Dr. J. Blackman's Genuine Healing Balsam." It was at first sold under said name from house to house, until Dr. Filkins made a contract with Dr. Blackman, by which the former obtained a right to manufacture, or assist in the manufacture and sale of, said medicine. He subsequently entered into the business somewhat extensively, and placed the medicine upon the market. Two or three contracts were made between these parties, which expired by lapse of time or by mutual agreement. The final contract was as follows: "This agreement made and entered into this 28th day of November, A. D. 1865, between Jonas Blackman, of the town of Brookfield, and county of Fairfield, state of Connecticut, of the first part, and Morgan L. Filkins, of the city and county of Albany, and state of New York, of the second part, witnesseth, that, in consideration of the covenants and agreements hereinafter contained, to be performed by the party of the second part, the said party of the first part hereby sells and conveys unto the said party of the second part, his heirs or assigns, the exclusive right to use his name in the manufacture, putting up and sale of certain medicines, known as Dr. J. Blackman's Genuine Healing Balsam, Dr. J. Blackman's Valuable Red Salve, and Dr. J. Blackman's Valuable Strengthening Plasters, for the term of ten years from the first day of January, A. D. 1866; and the party of the first part hereby agrees not to manufacture, or cause to be manufactured, either himself or by his agents, or authorize any other person or persons to use his name in the manufacture of, said medicines, or any other medicine recommended to cure diseases said medicines are said to cure; and the party of the second part agrees, in consideration of the covenants and agreements hereinbefore stated, to pay unto the party of the first part, or his assigns, the sum of $365 annually, lawful money, at Brookfield, in the state of Connecticut, in manner following, to wit, $91 25 on the first day of each of the following months of April, July, October and January, of each year, up to and including the 1st day of January, A. D. 1876; and it is further agreed by the party of the first part, provided always that the party of the second part does well and truly perform the covenants and agreements to be by him kept and performed for the full term of ten years from the 1st day of January, A. D. 1866, thereafter the party of the first part gives and grants to the party of the second part all of the rights and privileges to use his name in the manufacture, putting up and sale of said medicines, without fee or reward to the party of the first part, his heirs or assigns for the full term of fifty years or more; and it is mutually agreed by and between the parties to these presents, that, in case either party shall fail to perform the covenants and agreements by such party to be kept and performed, the party so failing to perform shall pay unto the other party the sum of fifty thousand dollars, which sum of fifty thousand dollars the parties hereto have agreed to fix and liquidate as the damages in case of non-performance."

The medicine has become well known, mainly through the efforts of Dr. Filkins to introduce it to the public, has quite a large sale among druggists, and has been a source of profit. It is now made by the plaintiffs substantially according to the original formula which was furnished by Dr. Blackman, and the plaintiffs have never abandoned the use of the original name. The name of the inventor, "J. Blackman," is the distinctive part of the name or title of the medicine, and gives to the title its peculiar value. Newton M. Blackman, who is the son of Jonas Blackman, has engaged in the manufacture of the same medicine, which is put up in bottles encircled with labels closely resembling those which are used by the plaintiffs, and containing the same title or name—"Dr. J. Blackman's Genuine Healing Balsam." The defendant states, in his affidavit, that his father has sold him the formula, and the right to manufacture the medicine, and to use the father's name.

The question in the case is, whether or not the plaintiffs now have a clear and exclusive continuing right, under the contract which was entered into between Jonas Blackman and Morgan L. Filkins, to the use of the name which was originally given to the medicine by the inventor, and whether or not, therefore, the plaintiffs held the right, at the time of the registration of the trade-mark, to its exclusive use after January 1st, 1876.

The following general principles in regard to the assignment of the exclusive use of trade-marks are applicable to this case. The name "Dr. J. Blackman's Genuine Healing Balsam," which was originally given to the medicine by the inventor, "points out distinctly the origin or ownership of the article to which it is affixed," and the words "were appropriated as designating the true origin or ownership of the article or fabric to which they are attached." Canal Co. v. Clark, 13 Wall. [80 U. S.] 311. The name, as a whole, was his trade-mark, which he had the exclusive right to use, and the exclusive use of which would pass, by assignment, to any one who had lawfully obtained from the inventor the exclusive right, also, to manufacture and sell, and who did sell, that particular article compounded according to the original formula. "The property or right to a trade-mark may pass, by an assignment, or by operation of law, to any one who takes, at the same time, the right to manufacture or sell the particular merchandise to which said trade-mark has been attached. As a mere

abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and, so, cannot pass by an assignment, or descend to a man's legal representatives." Dixon Crucible Co. v. Guggenheim, Am. Trade-Mark Cas. 331. If the assignee should make a different article, he would not derive, by purchase from Jonas Blackman, a right which a court of equity would enforce, to use the name which the inventor had given to his own article, because such a use of the name would deceive the public. The right to the use of a trade-mark cannot be so enjoyed by an assignee, that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached. It is not, however, necessary that an article to which a trade-mark, personal in its inception, was originally affixed, should always be manufactured at the same place where it was originally made. This particular trade-mark, being the name of the inventor, was personal to Dr. Blackman, in its inception, but has been permitted by him to be applied, and to be appropriated, to the same article when manufactured by Filkins Bros. Under the circumstances in which the medicine has been manufactured and sold, the use of the trade-mark does not imply that the medicine was manufactured by Jonas Blackman, but that it is the same article which he originally invented and manufactured. Bury v. Bedford, 10 Jur. (N. S.) pt. 1, p. 503; Leather Cloth Co. v. American Leather Cloth Co., 11 Jur. (N. S.) pt. 1, p. 513. It is also to be noticed, that an assignee of a trade-mark does not obtain a right to restrain copyists of his mark, merely by virtue of his assignment, but he must also show that it has actually been used and applied upon an article, so that the public have come to understand that "the article to which it is attached is the manufacture or production which is generally known in market under that denomination." Walton v. Crowley [Case No. 17,133].

In this case, an agreement was made on November 28th, 1865, between Jonas Blackman and Morgan L. Filkins, by which, in consideration of the agreement of the latter to pay specified royalties, Blackman sold and conveyed to Filkins, his heirs or assigns, the exclusive right to use the name of the inventor, in the manufacture and sale of certain medicines, for the term of ten years from January 1st, 1866. Blackman further agreed not to manufacture, or cause to be manufactured, and not to authorize any person to use his name in the manufacture of, said medicines; and, in case the said Filkins performed his covenants for the term of ten years, Blackman further granted "all of the rights and privileges to use his name in the manufacture, putting up and sale of said medicines, without fee or reward, for the term of fifty years or more." There is no question that an exclusive right was granted for the ten years ending January 1st, 1876; but it is claimed that thereafter a bare right or privilege was granted, in common with Jonas Blackman, to use his name and to manufacture said medicines. The determination of this question depends upon the construction which shall be given to the grant of "all of the rights and privileges to use my name." An exclusive right had been given for ten years, upon the payment of royalty, and, thereafter, "all of the rights and privileges" to use the name of the grantor were given, without royalty, for the term of fifty years. The terms "an exclusive privilege," and "all of the rights and privileges," as used in this contract, are synonymous, and, by the words "all of the rights and privileges" are meant all the rights, or the entire right, which the grantor had at the expiration of the term of ten years. Each word in the phrase "all of the rights" is to have the force which naturally belongs to such word, and, by construing the words to mean a conveyance of a bare right, the same effect is given to the language as if it had been "I convey the right, or a right, to use my name," which construction leaves the word "all" without any significance. If the grantor retained the right in common with Filkins to use the name of the inventor, he did not convey all of his rights, but retained as much as he granted. The grantor intended to convey, in a certain contingency, all the rights, for fifty years, which he had previously conveyed for the term of ten years. If the same language which is used in this entire contract had been used in an assignment of a patent or of a copyright, although it is true that "property in a trade-mark, or in the use of a trade-mark, has very little analogy to that which exists in copyrights or in patents for inventions" (Canal Co. v. Clark, 13 Wall. [80 U. S.] 311), the assignment would, it is believed, convey the exclusive right for the specified term. The grant is unlike a grant of an easement, for, there, the title to the land is retained, and in this case, the grantor parts with his entire right to the thing which is the subject-matter of the conveyance—the use of the trade-mark. I am of opinion that Filkins obtained, by the contract, an exclusive right to use this name, in the manufacture of the medicine, for the term of fifty years from January 1st, 1876.

The contract was made by Blackman with Morgan L. Filkins alone, and it is suggested, that, inasmuch as the bill is brought by Filkins Brothers, and as Welcome L. Filkins was not a party to the contract, or to the grant, the firm has no legal right to the use of the mark. When a partnership is formed in regard to the manufacture of the article to which the trade-mark is properly applied, "the trade-mark of one partner, in the absence of special regulations, becomes part of the partnership property." Bury v. Bedford, 10 Jur. (N. S.) pt. 1, 503.

In regard to the propriety of granting a preliminary injunction, it is obvious that the plaintiffs have expended a good deal of money in advertising and in bringing this medicine into public use. They have made its manufacture profitable, and have invested their property in the business. The defendant has but recently, and not extensively, engaged in the manufacture, but is seeking to take advantage of the reputation which the efforts of others have given to the article. The contest between the parties is plainly the result of a family quarrel, in which, I think, the defendant is seeking to obtain a position to which the previous contract and business relations between his father and brother-in-law have given him no right.

Let a preliminary injunction issue, restraining the defendant from the use of the trade-mark "Dr. J. Blackman's Genuine Healing Balsam," and from the use of any label containing that name, or the name of Dr. J. Blackman.

Case No. 4,787.

FILLEY v. CHILD.

[16 Blatchf. 376; 4 Ban. & A. 353;[1] 16 O. G. 261; 8 Reporter, 230.]

Circuit Court, S. D. New York. June 4, 1879.

TRADE-MARKS—ABANDONMENT.

G., having a patent for an improvement in stoves, acquiesced, during the entire duration of the patent, in the manufacture and sale by M., of stoves containing said improvement, with the name "Charter Oak" upon them. After the patent expired, M. continued to make and sell stoves containing said improvement, and to put the name "Charter Oak" upon them, but did not represent them as made by G. G., claiming the name "Charter Oak" as a trade-mark, applied to stoves containing said improvement, brought a suit to restrain the use of it by M., on such stoves: *Held*, that M. ought not to be so restrained.

[Cited in Gaily v. Colt's Patent Fire-Arms Manuf'g Co., 30 Fed. 122; Coats v. Merrick Thread Co., 36 Fed. 327.]

[This was a bill in equity by Giles F. Filley against Perley A. Child.]

Samuel S. Boyd, for plaintiff.

Esek Cowen, for defendant.

BLATCHFORD, Circuit Judge. The bill alleges, that the plaintiff, in 1851, "conceived of applying" the name of "Charter Oak," as a trade-mark, to cooking stoves embodying certain improvements in their internal construction, which he had invented, for the purpose (1) of securing to himself more completely and exclusively the benefits to be derived from the manufacture and sale of such cooking stoves, and (2) of giving to the same a particular name, to enable the general public and purchasers to distinguish the same from all other cooking stoves. It is not alleged in the bill that the plaintiff has ever applied the name "Charter Oak" to any other cooking stove than the one embodying said improvements, nor that the cooking stoves sold by the defendant, bearing upon them the name "Charter Oak," embodied said improvements. nor that the said improvements were patented to the plaintiff. It is shown that said improvements were patented to the plaintiff June 14th, 1853; that the patent was reissued to him December 27th, 1859; and that it was extended for seven years from the 14th of June, 1867. There is no evidence that any one, prior to the plaintiff, applied the name "Charter Oak" to a stove containing said improvements; and it is shown that all the stoves sold by the defendant have been stoves containing said improvements, and having upon them the name "Charter Oak." The suit is not brought upon the patent, for a violation thereof. The bill alleges, that the use of said trade-mark by the defendant "is intended and designed and well calculated to deceive the public into the belief that the stove bearing it is the genuine stove" of the plaintiff, "since by said name 'Charter Oak' alone is the said stove bought, sold and known." There is no evidence that any person buying one of such stoves as the defendant has so sold, would believe that he was buying a stove made by the plaintiff, although he would believe that he was buying a stove containing the improvements so patented to the plaintiff. As the patent has expired, and the defendant has a right to sell cooking stoves embodying the patented improvements, the sole question is, whether the defendant has a right to sell them with the name "Charter Oak" upon them. The evidence satisfactorily shows, that the plaintiff, during the entire twenty-one years' duration of the patent, knew of, and acquiesced in, the manufacture and sale, by M. L. Filley and those under whom he claims, of cooking stoves containing the patented improvements, with the name "Charter Oak" upon them. M. L. Filley made the stoves now complained of. He has built up a business through such acquiescence, in the manufacture and sale of such cooking stoves, with such name. Under such circumstances, the plaintiff cannot, after his patent has expired, and when M. L. Filley has the right to make stoves containing said improvements, prevent him from calling them by the name of "Charter Oak," so long as he does not represent them as being made by the plaintiff, or induce others to believe that they are made by the plaintiff.

The bill is dismissed, with costs.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 353; and here republished by permission.]

FILLEY (WRIGHT v.). See Case No. 18,077.

Case No. 4,788.

FINCH v. RIKEMAN et al.

[2 Blatchf. 301.][1]

Circuit Court, S. D. New York. Sept. 1851.

PRODUCTION OF BOOKS AND PAPERS — AUTHORITY OF FEDERAL COURTS — ACT OF SEPT. 24, 1789— LIABILITY OF DEFENDANT TO PENALTY.

1. Under section 15 of the act of September 24, 1789 (1 Stat. 82), the courts of the United States have power, on the application of a party to an action, to require the production of books or writings in the possession or power of the adverse party, which contain evidence pertinent to the issue, only in cases and under circumstances in which a court of chancery, by the ordinary rules of proceeding in that court, would compel the production of the same.

[Cited in U. S. v. Younge, Case No. 16,783.]

2. The authority conferred by the act can be exercised, therefore, only in cases where the relief might have been had by a bill of discovery, and as a substitute for that proceeding.

[Cited in Kirkpatrick v. Pope Manuf'g Co., 61 Fed. 47.]

3. Where, in an action at law for the infringement of a patent, the plaintiff applied to this court for an order requiring the defendant to produce his books, for the purpose of enabling the plaintiff to establish therefrom the quantity and value of certain machinery made by the defendant, which the declaration charged to have been made in violation of the patent: *Held*, that the application could not be granted, because the direct consequence of the evidence, if obtained, would be to subject the defendant to a penalty under section 14 of the act of July 4, 1836 (5 Stat. 123), and the plaintiff had not relinquished his claim to the penalty.

4. A bill of discovery will not be allowed in any case where the discovery will subject the defendant to a penalty, unless the bill relinquishes all claim to the penalty.

This was an action on the case, to recover damages for the infringement of letters patent for an improvement in railroad cars. The plaintiff [Reuben R. Finch] set forth, by affidavit, that the action was at issue; that the defendants [Cornelius Rikeman and David L. Seymour] had made the patented cars in whole and in part, and had sold the same to various persons in different states, and had kept books of account, in which were entered the numbers of cars or parts of cars sold by them; and that the production of those books would show the extent of the damages or loss sustained by the plaintiff, for which the action was brought. On this affidavit, the plaintiff moved, that the defendants be ordered to produce, under oath, their books of account; that the plaintiff have leave to take copies of such parts thereof as related to the matters stated in his affidavit; and that, on the failure of the defendants to produce their books, final judgment be rendered against them in the action. The defendants, by affidavit, denied the infringement complained of, and set forth that they were iron-founders and machinists by trade, and kept only one set of books, in which were entered all charges for goods sold and work done in their line of business, and that they kept no separate entry or account of any particular jobs of work or articles sold.

BETTS, District Judge. The provisions of the act of congress under which this motion is made are, that the courts of the United States shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. Act Sept. 24, 1789 (1 Stat. 82, § 15). It is plain, from the language of this statute, that congress did not intend to vest in parties litigant an unrestricted right to all written evidence in the possession of an adverse party, which might be pertinent to an issue in a trial at law; the qualification being explicit, that the right is allowable only in cases and under circumstances in which the court of chancery, by the ordinary rules of proceeding in that court, would compel the production of books and documents.

We find no decision of the courts of the United States upon the effect of this qualifying clause in the statute. The practice in this court, so far as it has come to our knowledge, has been uniform, to regard the summary authority given by this statute as one to be exercised only in cases where the relief might have been had by a bill of discovery, and as a substitute for that proceeding. This act of congress was probably the earliest regulation of the subject, within the United States, by positive law. The substance of its provisions has since been adopted in most of the states, either by express legislative enactments or by rules of court authorized by existing laws or usages. The English practice, however, obtained in some of the states long after the passage of this act, and the party claiming to use the contents of papers in the hands of his adversary, was obliged to resort to a notice to produce them, and, on non-compliance, to secondary evidence of their contents; or, under particular circumstances, he might have an order of the court compelling their production. 1 Tidd, Pr. 639; 1 Greenl. Ev. §§ 559, 560. But the practice in England and in the state courts did not enable one party to bring from the possession of the other party, as a matter of course, documents to be used on a trial, nor to compel the latter to disclose whether they were in his hands or under his control. The relief proposed to suitors by that practice was, however, more especially defective in affording no summary sanction to an order to produce papers, which should apply to and affect the cause itself. The act of congress remedies this deficiency, by authorizing a final judgment or a judgment of nonsuit, as the case may require, so that the

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

rights of the party in the suit are made dependent on his compliance with the order against him to produce the books or papers. These are stringent conditions, and require from courts a careful consideration of the provisions of the act, before enforcing them. The plain limitation to the right to the interposition of this court by giving final judgment, is, that the application by a party for the production of papers be one which a court of equity would sustain on a bill of discovery. The right, in our opinion, rests entirely on that condition.

This motion demands the production of the defendants' books, to establish the quantity and value of the manufactures of machinery made by the defendants, which manufacture is charged in the declaration to be an infringement of the plaintiff's patent. The effect of the evidence sought for will be not only to enable the plaintiff to recover his entire damages, but its direct consequence will be to subject the defendants to a penalty of three times the amount of those damages, under section 14 of the act of July 4, 1836 (5 Stat. 123). We think it against the rules of equity, to allow a bill of discovery in such a case, unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books, and, for that cause, the motion must be denied. 2 Story, Eq. Jur. § 1494; Story, Eq. Pl. § 575, and notes; 2 Daniell, Ch. Pr. 625, 821.

Case No. 4,789.

In re FINDLAY.

[5 Biss. 480;[1] 9 N. B. R. 83; 6 Chi. Leg. News, 94.]

District Court, W. D. Wisconsin. Nov. 1873.

PLEADING AND PRACTICE IN BANKRUPTCY.

1. The answer of the debtor to an involuntary petition must be in writing and verified.

2. The rules governing pleadings in common-law cases apply to the pleadings under the 41st section of the bankrupt act [of 1867 (14 Stat. 537)], and the allegations of the debtor should be presented and embodied in substantially the same form as defenses in common-law cases.

3. The court may in its discretion issue a special venire and impanel a jury to try the issue at any time, without waiting for a regular term.

A petition was filed in this court against the above debtor, alleging as acts of bankruptcy, that he, being a merchant, had suspended and not resumed payment of his commercial paper for a period of fourteen days, describing the particular paper upon which the allegation was founded. Whereupon an order was issued that he show cause on the 17th inst., an injunction granted, and provisional warrant issued for the seizure of the debtor's property. The debtor appeared on the return day, and after moving for a continuance, which was denied, presented a general denial of the acts of bankruptcy set up in the petition, together with the demand that the same be inquired of by a jury, as provided in section forty-one of the bankrupt act, properly signed by the debtor, but not verified. The counsel of the petitioner objected to the answer, because not verified, and insisted that the answer of the debtor to allegations of the petition should be verified before it was filed or admitted as constituting an issue for trial either by court or jury.

Orton, Keyes & Chynoweth, for petitioning creditors.

S. U. Pinney, for debtor.

HOPKINS, District Judge. This question has been raised on other occasions before me, and on intimating that I thought it a better practice to add a verification, parties have complied, and in that way the practice here has become settled to annex affidavit. But in this case the counsel for the debtor challenges the authority of the court to require a verified answer. So I have to examine and determine the question in a more considerate manner than I have heretofore done.

The section under which these proceedings are had is quite vague, and the meaning somewhat uncertain. It does not provide in what form the issue between the petitioning creditor and the debtor shall be framed. That seems to be left for the courts to arrange and determine. It ordains that the court shall "proceed summarily to hear the allegations of the petitioner and debtor, and * * * if the debtor on the same day so demand in writing, order a trial by jury * * * to ascertain the fact of such alleged bankruptcy."

This is all there is on the subject of forming the issue for trial, in the act. But it is claimed that "form 61," in general forms adopted by the supreme court under the authority contained in the act, being all there is in relation to that matter, is all that is necessary to constitute an issue for trial.

I can not adopt that view. That is the form of the order to be entered by the court. It is not an act or allegation of the debtor, but is an order of the court, based upon the allegation the debtor previously presented or communicated to the court in some form, either orally or in writing. The court is required to hear the "allegations of the petitioner and debtor."

The question is, what is meant by the word "allegations." On the part of the petitioner it must mean those stated in his petition on file, so as to him it means written allegation, and if so, for what reason should the courts permit or hold that the allegations of the debtor should be presented in a less formal and certain manner? I am unable to discover any. A reasonable construction

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

would require the debtor's allegations to be reduced to writing, and in such form as to raise an issue analogous to issues in other cases triable by a jury.

The word "allegations" is used in the act in the sense of "pleadings," as meaning a formal statement of the acts of bankruptcy in the petition, and a like formal defense of the debtor thereto, either a general denial which would put in issue all facts stated in the petition, or a statement of any matters in avoidance according to the rules governing pleadings in common-law cases. Construed in this way, it gives the proceedings the essential form used in other judicial proceedings, whereas the construction contended for by the debtor's counsel makes the proceeding anomalous, and not subject to any known rules relating to the forming of issues for trial before courts, and especially before juries. I think, in view of the objects to be obtained, and the manner of obtaining them, that the section should be construed as requiring the debtor to answer the petition in writing, and in courts where defenses are admissible upon oath of party only, that the same rule should apply to the answer of debtors to petitions filed against them under the provisions of the bankrupt law.

There has been some contrariety of opinion among the district judges on this question, and the practice in the different districts is not uniform.

But since the construction given in the case of Knickerbocker Ins. Co. v. Comstock [16 Wall. (83 U. S.) 258], by the supreme court of the United States, I am satisfied that in those courts where a verified answer in common law cases is necessary, it is equally imperative to file a verified answer in cases of this character.

Justice Clifford, who wrote the opinion of the court in that case, in considering the proceedings under this section, says: "Such a provision is certainly entitled to a reasonable construction, and it seems plain when it is read in the light of the principles of the constitution and of analogous enactments, and when tested by the general rules of law applicable in controversies involving the right of trial by jury, that the process, pleadings, and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law."

I understand from this language that the allegations of the debtor should be presented and embodied in substantially the same form as defenses in common-law cases.

The learned judge, in another part of his opinion, speaks of the petition as the "first pleading" of the moving party. If a pleading, it should be answered in the same way as other pleadings—in writing. Such a construction gives to the proceedings a judicial character, and harmonizes them with the proceedings ordinarily taken in suits in courts.

A general denial is tantamount to the general issue, and casts the burden of making out the case upon the petitioning creditor, and special matter in avoidance should be set up and presented in form of special pleas, as in other cases.

If the pleadings are to be governed and controlled by the rules and regulations in common-law cases, the answer must be verified, for the code practice of this state is now the law governing pleadings in the federal courts in common-law cases. [Act June 1, 1872;] 17 Stat. 197.

And the Code requires all answers to be verified when the first pleadings of the moving party are verified; so, if I am right in my understanding of the decision of the supreme court, the debtor must verify his answer to the petition, else it may be treated as a nullity. Debtors are required to put in verified answers in the northern district of New York. In re Safe-Deposit & Sav. Inst. [Case No. 12,211].

In Re Sutherland [Case No. 13,638], it is held that whether the answer should be verified or not, depended upon the general rules of the court in regard to pleadings in bankruptcy. That case concedes the power of the bankrupt court to make rules requiring it. But under the decision of the supreme court supra special rules are not necessary, for it is there held that the "process, pleadings and proceedings are governed by the rules prescribed in common-law cases." In reaching this conclusion I have followed certain well-settled rules and principles in relation to pleadings and issues in courts of justice.

The general rule in all courts is to require a pleading or petition to be answered in as solemn a manner as it is required to be made—if made under oath to require the denial or answer to it to be under oath.

This was always the rule in equity, and latterly has commended itself to courts of law, so that the rule, in states where the improved system of pleading is adopted, is to require verified pleadings to be answered only upon the oath of the other party. Therefore requiring a sworn answer from the debtor is but assimilating the practice in cases and proceedings under this section to the practice of the courts in other cases and controversies.

It seems to me that the reasons for requiring a sworn answer in these cases are very apparent and cogent, as is well illustrated in this case.

This debtor is an extensive grocery merchant, with a large and valuable stock of goods. They were seized, and are now in the custody of the marshal under a provisional warrant, being held at a large expense for rent, etc., and also subject to material deterioration, which, if the debtor is a bankrupt, as is alleged in the sworn petition of the creditor and affidavit of another party filed with it, must be at the expense of his creditors; hence, to require the alleged bankrupt to meet such an allegation with a sworn de-

nial, is not unreasonable, or a hardship that he can very meritoriously complain of.

But this is not all. In this district we have but two stated terms a year, and unless a special jury is ordered the issue can not be tried until next June, and if one is ordered, as the justice of the case would almost seem to demand, it will be at a large public expense, which certainly ought not to be incurred unless there is a real defense to allegations or acts of bankruptcy set out in the petition. And if a debtor is permitted to answer without verification, I do not see any way of escape from the most vexatious and unreasonable delays on his part, destitute of merit or advantage to him, and burdensome and expensive to his creditors, besides casting an additional charge upon the public, and occupying the time of the court in the trial of frivolous issues. Such unjustifiable practice by a debtor can not be allowed, according to my understanding of the true intent and meaning of the section of the act under consideration. I therefore hold that the answer of a debtor to the petition must be verified the same as pleadings in suits at common law, and reject the proposed answer of the debtor until verified.

NOTE. After this decision, the debtor filed a sworn denial of the acts of bankruptcy; whereupon the petitioner's counsel moved for a special venire to summon a jury to try the issue. The court held that the first section of the bankrupt act authorized such a practice, and directed the clerk to issue a special venire for that purpose, returnable at an early day, to be agreed upon to suit the parties.

Contra:—Neither the bankrupt law nor form sixty-one require that the answer to a creditor's petition, to entitle the debtor to demand and have a hearing by the court or a trial by jury, should be verified, or even in writing. In re Heydette [Case No. 6,444].

FINDLAY (POTTS v.). See Case No. 11,345.

FINDLAY (STOKES v.). See Case No. 13,478.

Case No. 4,790.

FINDLAY et al. v. The WILLIAM.

[1 Pet. Adm. 12.][1]

District Court, D. Pennsylvania. June 21, 1793.

PRIZE—JURISDICTION OF COURTS OF A NEUTRAL COUNTRY.

A British vessel captured by a French privateer, within the territorial jurisdiction of the United States. The owners of the vessel claim her, with damages, but their claim dismissed, the court having no jurisdiction.

[Cited in Hopner v. Appleby, Case No. 6,699.]

PETERS, District Judge. The libel states that the libellants [Robert Findlay and others, subjects of Great Britain] are owners of the ship mentioned in the libel, and that the said ship being on her voyage from Bremen to Potowmac river, in the state of Maryland, and within nine miles of the sea coast of the United States, received an American pilot on board, for the purpose of conducting her to the place of her destination. That, after receiving the pilot on board, she continued her course until she arrived within two miles of Cape Henry, in five fathoms water, and as near the shore as the pilot thought proper to go; when she was seized by a number of armed men, under the command of Peter Johannene, captain of the schooner Citizen Genet, and bearing the national colours of France, as a prize, and the captain and crew made prisoners. That they do not admit, but pray that it may be enquired into, whether the schooner was commissioned or not. That the said ship was, at the time of her capture, within the territorial jurisdiction, and under the protection of the United States; who are now at peace with the king and people of Great Britain. That the persons so capturing had no authority from or under the United States, to capture British vessels within that distance of the sea coasts, to which, by the laws of nations, and the laws of the United States, the rights and jurisdiction of the United States extend. They therefore pray that, as the capture and detention are unjust, and against the laws of nations, and of the United States, the ship and cargo be discharged, and the prisoners liberated, and satisfaction given in damages for the capture. To this a plea was offered on the part of Pierre Arcade Joannene, a French citizen, on behalf of himself and all concerned in the capture, setting forth, that he was at that time, &c. commissioned by the French republic, to attack &c. the enemies of the said republic wherever he might find them, and take them prisoners with their ships, &c. That he took the ship, &c. and the persons on board, who were subjects of his Britannic majesty, then at open war with the republic of France, and brought the ship as prize, and the people as prisoners, into the port of Philadelphia; and alleges that, by the laws of nations, and the treaty between the United States and the said republic, it doth not pertain to this court, nor is it within the cognizance of this court to hold plea respecting the said ship and property, so taken as prize, or the British subjects on board her, and prays that he may be dismissed, and the ship and cargo discharged. To this the libellants put in a replication in the nature of a demurrer to the plea, and because the ship &c. were captured in the territory of the United States, prayed a sentence and decree, according to the force, form and effect of their libel. The commission from the French republic, whereby it appears that the said schooner Citizen Genet was duly commissioned, &c. was produced, and a copy thereof filed among the proceedings of the court.

In this cause it has been contended, in sup-

[1] [Reported by Richard Peters, Jr., Esq.]

port of the plea to the jurisdiction of the court: 1. That the treaty between France and the United States, in its 17th article, forbids any examination of the lawfulness of prizes taken by either party when at war, by the officers, which include judges or courts, of the other; and that such prizes may enter into the ports of either party, and depart at pleasure, without search or any impediment; and that this court should immediately stay proceedings when the commission is produced under which the capture in question was made. 2. That, by the laws of nations, to which the treaty is conformable, a neutral nation has no right to be the judge, either of the lawfulness of the war between belligerent powers, or of their conduct towards each other in the prosecution of hostilities. That undertaking to determine on the question of prize, in this case, would be interposing our judgment not only illegally, but in a manner unprecedented; there being no instance to be found, in which the courts of a neutral nation have ever exercised jurisdiction in such cases. 3. That, by the voluntary law of nations, every war is considered by parties, as well as neutrals, just as between such parties, and all acquisitions lawful. If these acquisitions are disputed, it must be in the courts of the nation to which the captor belongs, and cannot be the subject of enquiry in those of a neutral nation, even at the instance of the neutral sovereign, much less at the suit of private subjects of one of the belligerent powers, against those of the other. 4. That the right of entry and sale of prizes, in neutral ports, is lawful; and it is sufficient for the neutral that the prize is found in complete possession of one of the powers at war, or their subjects. No judiciary enquiry should be made on the occasion. But if, in the capture, an invasion of the territorial rights of the neuter has been made, it must be canvassed by the diplomatic body, and finally settled by the sovereigns of the neutral and of the belligerent nation whose subjects have done the wrong. It is an offence against the neutral nation, and not an injury to the captured.

To shew that the court have jurisdiction in this case, the advocates for the libellant contended: 1. That every sovereign and independent nation has a right to vindicate a wrong done to its dignity, and to repel, and obtain satisfaction for, invasions of its territory. 2. That the attacking and capturing the vessels of a friend, coming into the ports, or acting in a hostile manner, by one belligerent power against another, within the limits of a nation at peace with both, is a wrong done to the nation so at peace, an insult on its sovereignty, and an invasion of its territorial rights. 3. That we are bound, by the laws of nations, to seek reparation for the wrong thus committed, as well on our own account, as to enable us to give satisfaction to a friendly nation, the property of whose subjects has been taken within our limits. 4. That all captures made within the territories of a neutral, either on land, in their ports or harbours, or on their coasts to a certain distance from the land, are unlawful, and ought by the laws of nations to be restored. 5. That the word "prizes" in the treaty means "lawful prizes," and illegal captures are as none, so far as relates to the subject matter of the treaty, and, therefore, were not the objects of the contracting parties, at the time of making it: and it could not have been the meaning of the treaty to let captures in a neutral country pass without enquiry. 6. That this is not judging of the war between the neutral powers; it is an enquiry into an allegation of an invasion of territorial rights. Every nation is obliged to take care of its own preservation; it has a right to prevent any other injuring its security, and may make use of force to retaliate injustice, to prevent injury to its territory, and to punish the invaders of its privileges. 7. That we are bound by treaty to be at peace with the sovereign whose subjects and their property have been captured, and, unless restoration is made, and the property of these subjects protected, our engagements may be considered as violated. We are also bound to protect and defend the ships and merchandise of Prussia, Holland and Sweden, if attacked on our coasts, &c. and if captures take place, to use our endeavours to cause restitution to be made. 8. That the best mode of causing restitution is through the courts of admiralty, by process in rem, when the capture is within their power. These courts proceed according to the laws of nations, and, in a government like ours, are the only tribunals that can properly be applied to. In despotic sovereignties, force may immediately be applied; but here ours is a government of laws, and our executive is not vested with the authority exercised by sovereigns in such cases. All he can do is to represent and negociate, and his representations may be slighted, and our government treated with indignity. If there is no power in this court to effectuate the purpose required, it does not exist any where. The reason why cases of admiralty adjudications and interferences cannot be produced, is that captures have seldom been carried into the ports of the injured neutral. And those who commit these outrages will take care not to put the property into the power of the injured, unless it shall appear they can do it with impunity. If they can dispose of their prizes here, they will not go to their own courts to have them condemned. 9. That though it is true that a remedy may be applied by negotiation and diplomatic discussion, and ultimately by force, yet the remedy through the courts of admiralty jurisdiction is a concurrent one. It is also the less liable to objection, as these are courts regulated by the laws and customs of all nations, and not liable to political bias, or entangled in political considerations. They are also courts, to

whose decisions, for reciprocal benefit, all nations pay a particular respect.

I have given this subject every consideration I am capable of, and have deliberated on the arguments and authorities brought forward by the advocates on both sides the question, with the attention they justly merit. But it seems to me that much has been said not immediately applicable to the only point I have now to determine, to wit: Whether this court is vested with the power to enquire into the legality of the prize, and to investigate the fact on which all the reasonings are founded? If this fact is established, and the extent of our territorial limits ascertained, so as to make it clear that a capture has been made within the territories of the United States, there is not a doubt but that a flagrant violation of the rights of neutrality has been committed. Vatell, l. 3, § 132; Lee, c. 9, p. 151. And this is followed by many of the consequences mentioned by the advocates for the libellants, so far as they respect our national dignity and duty towards a friendly power, in endeavouring to cause restitution or recompence to be made. Nor does this seem to be denied by the other side of the question. But the embarrassment still exists. Who is to enquire into the matter, and either give or attempt the redress? It is difficult for a neutral nation, with the best dispositions, so to conduct itself as not to displease one or the other of belligerent parties, heated with the rage of war, and jealous of even common acts of justice or friendship on its part. Neither is it easy for the nations at war to restrain their subjects from acts of violence, even in the territories of their friends. The least under control are those whose object is not honourable conflict, or patriotic exertion. These are actuated by a spirit of lucre, which not only incites to plunder the base and lawless freebooter, but tarnishes even heroism, by seducing into unjustifiable actions the bravest men. It would be for the interest of nations, and the happiness of mankind, if, by universal consent, the quarrels of nations were prevented from being turned to the purposes of private advantage. But the swords of those who fight for gain will not, in our day, be beaten into ploughshares. We must take nations and men as we find them, and consider as lawful what those at war authorize, so far as it respects the parties engaged. After all, it depends much on the interest, the convenience, or the good temper of governments, whether a neutral shall or shall not be engaged in war. A prudent and just conduct, on the part of the neutral particularly, is the surest preventive. But how to evidence this, is a matter of consideration with those to whom the government is delegated. The simplest mode of evincing our impartial disposition, is to confine ourselves to the customs of other nations in our predicament; an over anxious zeal to avoid contests may otherwise lead us into errors; and, while we are endeavouring to avoid one rock, we may split on another. Mutual toleration must be exercised; for those who are at war, and those who are not, have their share of difficulties on this subject. Under this view of the matter before me, I have given a patient hearing to both sides; and have particularly attended to the arguments by which it has been endeavoured to establish a jurisdiction in this court. It must certainly be allowed, by the advocates for the libellants, that they have not been able to shew any direct authority upon the point. For the two cases of the Duke of Tuscany (Lee, 131) seizing the vessel committing the outrage near the port of Leghorn, and that of the king of England (Bynk. c. 8, p. 177; Molloy, 85) ordering restitution of the effects taken out of the houses of the inhabitants, and belonging to a ship of a friendly power, driven by its enemy on his shore, appear to have been acts of power and not done in consequence of decrees or orders of courts of admiralty. Yet these jurisdictions existed, in both the countries above mentioned. The case of Captain Landy, in the American frigate Alliance, who was ordered by the court of France to restore a ship taken by him, is not in point (2 Code de Pris, p. 877), for the Forsters, who appeared as owners, were either subjects of, or persons resident and domiciliated in, France, and the ship was sailing under a passport of that nation. They, therefore, could not be considered as enemies; and, the capture not being made from enemies, the case was not comprehended in the treaty, or the capture authorized by the laws of nations. In the case falling under the notice of the king of England (except that of his having the powers of peace and war, as an appendage to which he might have exercised this kind of authority) I should not have supposed him vested, without an act of the legislature, with the authority he used; and it is doubted, by Bynkershoek, whether he did right in interfering at all on the occasion. If it be consistent with treaties, and otherwise right, our legislature can vest the executive in future with similar powers. I should suppose, too, that the liberty of selling prizes, in a neutral country, is not a perfect right; and may also be considered, by our national legislature, as a subject of regulation. If any captures are made within our limits, and the vessels or plunder is brought within our ports, the sale may be forbidden. They must then be either abandoned or carried within the jurisdiction of the captors, where the proper courts will consider of their legality. Yet this is a matter, not of judicial, but political arrangement; and must be left to those who have the authority to direct. The sovereignty of our nation is as complete as that of any other; therefore, whatever other sovereigns can do, we have in our power. But because, at this time, the authority, supposed necessary on this occasion, is not,

as it is alleged, to be found in the executive branch, I do not see that the judiciary ought to exercise it, as a consequence resulting from political convenience, or the necessity of the particular case. This, I fear, would be a novelty dictated by our zeal, and might give cause of offence to one, while we were aiming at justice to ourselves, or gratification to the other. I hesitate not to use any plain authority I know this court to possess, let the consequence be what it may; but this is a question too important in its effects, to be acted on but on the surest grounds. I agree here, as I do in many of their other positions, with the advocates for the libellants, when they say that "courts of admiralty jurisdiction are less liable to objection, as these courts are regulated by the laws and customs of all nations, and not liable to political bias, or entangled in political considerations." This should induce the greater caution in their determinations. I have not seen any proofs that "the laws and customs of all nations" warrant the interference of this court. If they do not, no authority can be derived from our own laws, if they were not silent on the subject. In the existing arrangement of our government, we did not calculate on our relative situation, as to contests between other nations. If, for this reason, no immediate remedy is at hand, who can justly censure the executive, when he has given decided evidence of his impartial and just inclinations? Who can with reason blame the judiciary, if they will not assume a power not conceived to be vested in them? Not the government of the country, whose subjects are the libellants, and to whom I wish every degree of justice may be done. The principles established in the decisions of their own courts, and the opinions of their most celebrated lawyers in the contest with the king of Prussia in the Case of The Silesia Loan, in a great degree reach the point, as to judiciary authority in a neutral nation. In Palachie's Case, 1 Rolle, 175, I am aware that it is only said the vessel "was taken at sea," but if not, it rather appears, that it would be more proper for a diplomatic than a judiciary examination. The general principle, as to the capture, is agreed; and is similar to that established in our treaty with France, which ought to have its proper weight. 4 Inst. 154. "It was resolved, by the whole court of king's bench, upon conference and deliberation, that the Spaniards (whose ship had been taken by an enemy and brought into England, a friend to both parties) had lost the property of the goods forever, and had no remedy for them in England; and it relied principally upon the book in 2 Rolle, 3, ubi supra, being of so great authority; for, by that book, he that will sue to have restitution of goods robbed at sea, ought by law to prove two things: 1. That the sovereign of the plaintiff was, at the time of the taking, in amity with the king of England. 2. That he who took the goods was, at the time of the taking, in amity with the sovereign of him whose goods were taken: for, if he who took them was in enmity with the sovereign of him whose goods were taken, then was it no depredation or robbery, but a lawful taking, as every enemy might take from another." It is true that, by the laws and customs of nations, the capture, if taken in neutral bounds, is not lawful prize. Woodeson, 443. But I do not see that this court can get at that circumstance, without holding plea as to the lawfulness of the prize.

It is the original question, and not collateral matter, which determines jurisdiction. The courts of common law in England will not take cognizance of anything arising out of the question, prize or no prize (Le Caux v. Eden, Doug. 612), "because the original cause must all come into question again:" and yet the admiralty had determined that the ship was no prize. This will be a proper subject of enquiry on the part of our government, or in a court of the country of the captor. Every nation has established these courts, and knowing that, if at war, they are answerable to a nation at peace, or in amity; if violations of territory happen in captures, care is taken to examine into this circumstance. If, on this account, the capture is illegal, it is so adjudged; and the party taking is liable to damages. Whether such damages shall exceed the amount of the security given by commanders of private ships of war, or whether one nation is answerable to another for injuries done by its subjects to others, contrary to or without its orders, is a matter in which there are differences of opinion among civilians (Lee, 226–231, 222; Grotius de J. B. & P. l. 2, c. 17, § 20), and which it is unnecessary for me now to investigate. It is doubtless contrary to the instructions of the French government, that any of the ships, commissioned by them, act in a hostile manner in a friendly and allied territory. It is to be expected by one power from another, that her courts and her administration will do justice to the rights of sovereignty and neutrality. It will be the more to be lamented if a friend and ally should disappoint this expectation. But, should this be the case, it is not for me to say what proceedings should be had. I have subjoined to this decree some extracts from the "expositions of the motives, &c." from the duke of Newcastle, the British minister's letter to Mr. Mitchell, the minister of Prussia, and from the report and opinion of Sir George Lee, Dr. Paul, Sir Dudley Rider and Mr. Murray, the late Lord Mansfield, on the subjects I have mentioned, which are to be found in Magens, 463, 482, 487, 491, 496, 505.[2]

[2] 1 Magens, 505. Each crown has no doubt an equal right to erect admiralty courts for the trial of prizes taken by virtue of their respective commissions, but neither has a right to try the prizes taken by the other, or to reverse the sentences given by the other's tribunal. The

Other authorities from British and other writers might be added, by which it appears, that when two powers have any difference between them, the affair must be treated by negotiation, and not through the instrumentality of their courts of justice. That affairs of prizes are only cognizable in the courts of the power making the capture: these courts being generally styled courts of admiralty; and, that it never was attempted, before the subject of that controversy happened, to erect in a neutral state courts for the trial of prizes, taken by belligerent powers, even where neutrals were concerned; and that, of course, no court of one sovereign has a right to try the prizes taken by the ships, public or private, of another.[3] A dispute of this nature, in which the king of Prussia could not prevail, who, though weak at sea, was powerful at land, and had a propensity for war, would not very well suit us. We have, indeed, shewn that we know how to make war, but it is now our interest and inclination to cultivate the arts of peace. Much has been said, on both sides, to shew the importance of this cause, and the necessity of caution in its determination. I am sufficiently impressed with those considerations; but I feel myself at ease in this view of the subject. I am persuaded that any thing which affects the sovereignty and rights of our country will not be passed unnoticed by those who have the power to regulate our national concerns. On my own account, I have no disquietude; for no error of mine can affect the nation. There is an appeal, from any determination I may give, to a superior tribunal. I am anxious for the peace and dignity of my country, but not deeming myself authorized to decide in a matter growing out of the contests between belligerent powers, nor considering this court, in this instance, the vindicator of the rights of our nation, I leave in better hands the discussion on the subject of national insult, and the remedy for any invasion of territorial rights.[4] The instance side of this court seems to have other objects; and a prize court, called into activity when

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only regular method of rectifying their errors is by appeal to the superior court.

1 Magens, 491. If a subject of the king of Prussia is injured by, or has a demand upon, any person here, he ought to apply to your majesty's courts of justice, which are equally open and indifferent to foreigner or native; so, vice versâ, if a subject here is wronged by a person living in the dominions of his Prussian majesty, he ought to apply for redress in the king of Prussia's courts of justice. If the matters of complaint be a capture at sea, during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, convenience and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in cases of violent injuries, directed or supported by the state, and justice absolutely denied in re minime dubia, by all the tribunals, and afterwards by the prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful cases, different men think and judge differently, and all a friend can desire is, that justice should be as impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried.

1 Magens, 496. For as to the Prussian commission to examine these cases ex parte, upon new suggestions, it never was attempted in any country in the world before. Prize or no prize must be determined by courts of admiralty, belonging to the power whose subjects make the capture. Every foreign prince in amity has a right to demand that justice shall be done to his subjects in these courts according to the law of nations, or particular treaties, where any are subsisting. If, in re minime dubia, these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral state has a right to complain of such determinations. But there never was, nor ever can be, any other equitable method of trial. All the maritime nations of Europe have, when at war, from the earliest times, uniformly proceeded in this way with the approbation of the powers at peace.

1 Magens, 487. By the maritime law of nations universally and immemorially received, there is an established method of determination, whether the capture be or be not lawful prize. Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize in a court of admiralty, judging by the laws of nations and treaties. The proper and regular court for these condemnations is the court of that state to whom the captors belong.

1 Magens, 482. First, that affairs of this kind are and can be cognizable only in the courts belonging to that power, where the seizure is made, and consequently that the erecting foreign courts or jurisdictions elsewhere, to take cognizance thereof, is contrary to the known practice of all nations in like cases, and therefore a proceeding which none can admit.

1 Magens, p. 463, § 47. When two powers have any difference between them, neither of them can on either side appeal to the laws of the country, because one of the two parties does not acknowledge them. The affair then must be treated in the way of negotiation from court to court, and the difference can only be decided with the consent of both parties according to the laws of nations, or by the means founded thereon.

[3] See on this point the case of The Flad Oyen, 1 C. Rob. Adm. (Philadelphia Ed.) 135, Id. (English Ed.) 137. In the case the question is discussed with great learning and ingenuity by Sir William Scott. See, also, the case The Kierlighett, 3 C. Rob. Adm. (Philadelphia Ed.) 96, Id. (English Ed.) 29.

[4] When this cause was decided, no territorial limits were established by any national act. The facts were not accurately investigated. On the exhibition of the testimony, it did not appear to me to be clearly ascertained that the place of capture was left without doubt, as to its distance from the shore. The whole of the case was novel in the United States. There is no point on which the writers on maritime laws and privileges so much disagree, as on that of the extent of the territorial rights of the sovereign possessing the shores, into the contiguous sea. All maritime people deem the nation in rightful possession of the coast, sovereign of the adjacent sea; yet there is no general agreement as to the nature or extent of this sovereignty. Time has not matured or settled opinions on this subject among jurists; nor have particular compacts established any general principle. From the period of the compilation of the Digest of Justinian, to this day, the point has been uncertain, and open to controversy. Some early commentators on that work assert that the territorial sea extended 60 miles from the shore. A majority of ancient writ-

a nation is at peace, appears to be a solecism in jurisprudence. I do, therefore, decree, order and adjudge, that the libel in this cause be dismissed; and that the ship therein mentioned be discharged from the arrest, the plea in this case being relevant.

NOTE. The case of The William became a subject of diplomatic discussion, which may be seen in the publications of that period, containing the correspondence between the then secretary of state, Mr. Jefferson, and the ministers of France and England.

M. Azuni, in his celebrated work, "The Maritime Law of Europe" (volume 2, pp. 330, 331), asserts, that the English are the only nation who have been guilty of seizing ships of their enemies in the ports or within the territorial jurisdiction of neutrals. The candour and accuracy of the learned translator of this work would have induced him to notice the case of The William had it been known to him.

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ers carry it to 100 miles. Valin endeavours to ascertain it by the sounding lead; whether the coast be composed of extensive shallows and flats, or bold and deep shores! Others fix the distance at the point capable of being defended from the shore. Hubner, the champion of neutral rights, thinks the limit ought to be the range of a cannon shot; and of this opinion is Bynkershoek, Vattel and other eminent civilians, and among them Azuni; who, in volume 1, pp. 193–208, discusses the point, and cites many authors, and some treaties and documents. It seems to be a claim of power in extent, though of justice in its origin: and when viewed according to the contradictory opinions of writers, it appears difficult, doubtful, and often visionary. It is even left by some to the determination of those, whose wants, or convenience, require a greater or less distance from the shore. Some have need of more sea room for fishing; and it suits others to distinguish between extent for operation of revenue laws, and that for protection of neutral trade; the latter, these say, must be at the greatest distance. The range of a cannon shot is generally accounted about a sea league. Our act of congress (3 Stat. 91), fixes that distance, on the maritime territorial limits, for our nation: and gives the district courts jurisdiction to that extent, of captures made in violation of our territorial rights; by the law, passed after the foregoing decree, to wit, in June 1794, as opinions were various on that point, the extent might have been declared greater, without violating the pretensions or just claims of others. There is no doubt of the right (if they have the power) of any nation, to forbid and prevent captures, at a greater distance than the sea league from their coast. Nor can it be fairly questioned that, where coasts are indented, or firths or bays are included in the territory of a nation, what are called chambers, by Sir L. Jenkyns, may be established. These are parts of the ocean included within lines drawn from promontory to promontory, or perhaps from points a league distant from each. And it is not a question to be made by any other nation, whether some parts of the space included be or not more than a sea league from the shore. It seems, on the whole, a point for treaty or compact, or one left to the discretion of sovereign states. But, in fixing extent of maritime territory, they must not invade the rights of others; or pass into, so as to disturb or obstruct, the common path-way of nations, in its freedom of navigation. To this freedom all are entitled on the high seas, which are called the high road, through an expanse given by the creator, to be held in common; indivisible and incapable of allotment, in separate ownership, or propriety. In a case of similar circumstance, this subject was, at the time, discussed more at large. But the notes of that case (The Fanny [unreported]) are mislaid.

Case No. 4,791.

FINDLAY'S EX'RS v. BANK OF THE UNITED STATES et al.

[2 McLean, 44.][1]

Circuit Court, D. Ohio. Dec. Term, 1839.

JURISDICTION — CITIZENSHIP OF DEFENDANTS — JUDGMENT AGAINST ACCOMMODATION INDORSER AND MAKER—PAYMENT BY INDORSER—CREDITOR WITH RIGHT TO TWO FUNDS — RESTRICTED TO ONE IN FAVOR OF CREDITOR OF THE OTHER FUND.

1. To give jurisdiction, the citizenship of the defendants is as necessary to be stated as that of the complainants.

2. Where the complainants, being citizens of the state, brought their bill against the Bank of the United States, and certain individuals whose citizenship is not named, the court cannot take jurisdiction.

3. A judgment against an accommodation indorser, who is considered as a surety, and, also, the drawer, merges the relation of principal and surety. In such a case, the only remedy is for the surety to pay the judgment, and ask to be substituted to all the rights of the principal.

[Cited in Re Kitzinger, Case No. 7,861.]

[Cited in Dunham v. Downer, 31 Vt. 263.]

4. A creditor who looks to two funds may be restrained to the use of one, if sufficient, at the instance of a creditor of one of the funds; or, if satisfaction be obtained by the creditor of both funds, out of the common fund, equity will give the other creditor a lien on the fund not exhausted.

5. A debtor has a right, without the assent of his surety, to convey his property, fairly, in payment of his debts. And the court will not set aside such conveyance at the instance of the surety, unless there has been fraud.

[Cited in Ashby v. Steere, Case No. 576.]

[Cited in Marshall v. Aiken, 25 Vt. 335.]

6. Parol evidence not admissible to vary an agreement in writing.

In equity.

N. Wright and Mr. Worthington, for plaintiffs.

Mr. Chase and Mr. Fox, for defendants.

OPINION OF THE COURT. This bill was filed by the complainants to procure certain credits on certain judgments obtained by the Bank of the United States, against Findlay, in his lifetime, as the surety of Sutherland. Findlay, and one Thomas Irwin, who some years ago deceased, indorsed three several notes to the Bank of the United States, for Sutherland, on which judgments were entered the 13th July, 1824, for $5,619 71; the 7th June, 1825, for $5,330 13; the 23d July, 1828, for $5,508 75. To secure the payment of these notes a mortgage to the bank was executed by Sutherland, the 25th September, 1829; and at December term, 1828, a decree was entered for $20,623 32, and a sale of the mortgaged premises ordered. Another mortgage, bearing the same date, was executed by Sutherland to the bank, to secure the payment of four several notes—two of which were indorsed by Joseph Hough. On the two unindorsed notes

[1] [Reported by Hon. John McLean, Circuit Justice.]

judgment was entered the 15th July, 1824, for $2,726 25, and the 23d July, 1827, on one of the other notes for $4,841 36. On the other note, for $4,346 00, due 25th August, 1827, no judgment was obtained. A scire facias was issued on this mortgage, and a judgment obtained for $16,011 00 at July term, 1828. The judgment for $5,619 71, against Findlay, Sutherland and Irwin; and that for $2,726 25, against Sutherland only, were levied 10th November, 1824, on certain real property. On the 5th November, 1821, John Busenbach obtained a judgment in the court of common pleas, for Butler county, against Sutherland, which was levied 27th October, 1826, on a part of the property covered by the prior levy. The above judgments against Findlay, were, also, levied on his property the 16th June, 1827. In the spring of 1829, Findlay and Sutherland frequently solicited the bank to take the property mortgaged and levied upon at certain prices stated; and afterwards, the 29th June, 1829, an agreement, in writing, was made between the bank and Sutherland, by which the latter agreed to convey to the bank the property levied upon, and, also, that covered by the mortgages, for the sum of $25,794. This sum was produced, probably, by adding to the prices originally talked of, $1,000 upon a lot in Cincinnati, and deducting from the same $1,260, the balance due on the Busenbach judgment.

In addition to the above sum, the bank agreed to pay Mrs. Sutherland $3,000 for her right of dower; and it was agreed that the proceeds of the land covered by the mortgage, to secure the payment of the two unindorsed notes of Sutherland, and the two notes indorsed by Hough should be first applied in payment of Hough's liability; and that the residue of such liability should be discharged out of the proceeds of the property conveyed, exclusive of that which was mortgaged to secure the payment of the notes indorsed by Findlay; and it was stipulated that the property should be offered by the marshal at public sale. Sutherland executed the conveyances in pursuance of the agreement; and the property was publicly sold by the marshal, and credited by him on the several executions and order of sale, under which it was sold. The proceeds of the mortgaged property were applied in discharge of the liabilities which the mortgages were intended to secure; and the proceeds of the levied property were apportioned between the judgment against Sutherland and Hough, and the two against Sutherland only. The bank purchased the property at the marshal's sale, for less than the contract price. For the property levied on, the bank agreed to give the sum of $5,939, and this property was struck off by the marshal at the sum of $5,206 53. On the 10th September, 1830, the bank conveyed the lot in Cincinnati (conveyed to it under the contract with Sutherland for $10,000) to D. Griffen for the consideration, as named in the deed, of $19,000. These are the principal facts out of which this controversy has arisen.

Before the merits of the case are considered, it may be proper to notice an objection which arises to the jurisdiction of the court, from the parties to the suit. The complainants are citizens of Ohio, and Timothy Kirby, alleged to be the agent of the bank, and Samuel Gray, administrator of Sutherland, and Thomas D. Carneal and Lewis Whiteman, administrators of Irwin, whose citizenship is not alleged, are made defendants. To give jurisdiction to the court, it is as necessary to allege the citizenship of the defendants as of the complainants. This is in the nature of an original bill, and calls for the exercise of chancery powers; and if the defendants named are citizens of Ohio, it is clear the court, cannot, as the parties now stand, take jurisdiction of the case. It is true, the whole object of the bill is to have certain credits entered on judgments of this court; but the right of the complainants depends on the construction of an instrument, dated long after the judgments, and of certain equitable liens as between the sureties of Sutherland. This objection may be obviated by discontinuing the bill as to Kirby, who is not a necessary party; by making the administrators of Irwin co-complainants, and by discontinuing the bill as to the administrators of Sutherland. If the estate of Sutherland cannot be affected by a decree in this case, as it most clearly cannot be, his administrators are not indispensable parties in the case. In addition to this, the proof in the case shows that Sutherland died insolvent. With this intimation, which may be a matter for future consideration, the questions made in the argument will be examined.

The complainants insist that they are entitled to a credit on the judgments against Sutherland and Findlay, for the fair value of the Cincinnati lot, or the sum for which it was sold by the bank, deducting therefrom a reasonable amount on account of dower. At the time Sutherland conveyed this lot to the bank, the title was, to some extent, embarrassed; and there is no proof that the sum at which it was estimated was less than its value. There is no allegation of fraud in the conveyance of the lot to the bank, for the price agreed; and if such an allegation were made, it would not be supported by the fact that some fifteen months afterwards, the lot was sold by the bank at an advance of eight thousand dollars. Within this time an outstanding claim was bought in by the bank, the right of dower was paid for, and the property may have risen in value.

A debtor has an undoubted right fairly to convey his property in satisfaction of a debt, without the assent of his surety. If such conveyance be made fraudulently, with the view of injuring the surety, it should be set

aside. But if the parties act in good faith, and the transaction is characterized by fairness and propriety, though without the knowledge of the surety, he has no ground to complain, much less to set aside the conveyance. But in this case there is satisfactory evidence that Findlay, admitting him to be the surety of Sutherland, was desirous that the lot should be conveyed to the bank for a sum less than that which was agreed to be paid for it. The conveyance of this lot, and the other property, was made by Sutherland under the agreement which fixed the price at which the whole property was taken by the bank; and if this agreement, in so material a part as this, shall be set aside, how can any part of it be enforced? And if the agreement does not stand, the sales by the marshal, being public and in pursuance of legal process, must stand. This would reduce the gross sum for the property much below the price allowed in the agreement. In no point of view, as it regards the price of the property conveyed, is there any ground on which to set aside this agreement. There is neither hardness, unfairness, fraud, nor want of assent of the surety, on which to give relief.

The counsel for the bank insist that the evidence in the case does not show that Findlay was the indorser on the notes, without any interest in them, for the benefit of Sutherland. The notes were indorsed by Findlay and Irwin, and were discounted for the benefit of Sutherland. He is treated as the principal by the bank, in the negotiations respecting the property, in giving the mortgages, and, finally, in the conveyance of the property to the bank. In the agreement between Sutherland and the bank, respecting the property to be conveyed, the judgments are referred to as "against Sutherland and others as his securities." It is true that the judgments are not in form entered against the indorsers as sureties, but this does not lessen the force, and, indeed, the conclusiveness of the facts admitted. The parties to the agreement evidently looked more to the facts, with which they were familiar, than the technical description of the judgments. But, independently of this admission, there is enough in the facts of the case to show that Findlay was surety. If Sutherland were not principal, why did he give the mortgages to secure the payment of all the notes? Why did he negotiate with the bank to take property in payment of them? and why did he, finally, convey all his property to the bank? No doubt is entertained of the suretyship of all the indorsers on the notes specified. The relationship of principal and surety being established between Sutherland and Findlay, if this relationship continue, under the circumstances of this case, it may be proper to inquire whether the complainants would be entitled to the priority of the judgment against Sutherland and Findlay first levied, of which they have been deprived to some extent, under the agreement. The proceeds of the property, bound by this lien, were applied to pay the judgment and note for which Hough was liable.

This great head of equity is derived from the civil law, and is founded upon the immutable principles of justice and benevolence. It protects the rights of sureties as between themselves, compelling a just contribution from each; and as against their principal, by subrogating them, on the payment of the debt, to all his rights. And it will, under certain circumstances, interpose its powers, and prevent the principal from impairing or destroying the collateral indemnities which he holds from his debtor; or, if destroyed, will, to the same amount, relieve the sureties. And this does not embrace securities taken at the time the debt was created only; for where the principal in a bond having been sued, gave bail, against whom judgment was entered, the original sureties having paid the debt, obtained a decree for the assignment of this judgment. Parsons v. Briddock, 2 Vern. 608; Wright v. Mosly, 11 Ves. 22; 3 Bligh, 590, 591; 6 Ves. 805; 1 Story, Eq. Jur. 477; 1 Ves. 339; 2 Ves. 569, 570; 2 Johns. Ch. 560; 4 Johns. Ch. 323.

But the great question in this case is, whether, after judgment, the relationship of principal and surety exists. The affirmative of this question is earnestly and ingeniously maintained, by the complainants' counsel. They rely upon certain statutory provisions, and the decision of the supreme court of the state.

By the 8th section of the act to regulate judgments and executions, passed 24th February, 1824, it is provided, that in all cases where judgment is rendered upon any bond, sealed bill, promissory note, or other instrument of writing, in which two or more persons are jointly and severally held and bound, if it shall be made to appear to the court that one or more of said persons so bound, signed the same as surety or bail for his or their co-defendant, it shall be the duty of the clerk, in entering the judgment, to designate the principal and sureties, and the execution is required to issue first against the principal whose property shall be exhausted, before execution shall issue against the surety. And in the 9th section of the act to regulate proceedings where banks or bankers are parties, passed February 2, 1824, it is provided, that a bank may bring a joint action against all the drawers or indorsers and declare for money lent, &c. These statutes introduce a new principle in pleading, and in the rendition of judgment in certain cases; and they seem to have been, in the mind of the legislature, in some degree connected. They were passed at the same session. That which authorized a joint proceeding against all the drawers or indorsers, and which, by construction, authorizes a procedure against all drawers and indorsers be-

ing first enacted, seemed to require a protection to sureties which was given in the second statute. This statute provides a new remedy for sureties unknown to the law, but it does not establish any general principle, or change the relation of principal and surety as it before existed. The remedy affords summary relief to a surety against the hardship or inconvenience of a joint judgment, as authorized by the previous statute; but it does nothing more than this. And it might be a matter of doubt, if the relationship of principal and surety exist after judgment, whether equity could interpose in a case where this plain and adequate relief at law had been neglected. Unless this be made an exception to the general rule, equity could give no relief except upon special ground of fraud or circumstances, which prevented or rendered ineffectual the remedy at law.

The case of Dixon v. Ewing's Adm'rs, 3 Ohio, 280, is considered by the counsel as conclusive of the present question. That was a bill in chancery which stated that the complainants joined in a title bond to Ewing, as the securities of one Foot, for the conveyance of a tract of land. They had no interest in the transaction. Foot failed to convey the land. Suit was brought on the bond and a judgment obtained. Execution on the judgment was issued and levied on the personal property of Foot. The levy was afterwards discharged by the plaintiffs' attorney, without their knowledge, and the property was returned to Foot. And the court enjoined the plaintiffs at law to the amount of the value of the property levied on. In their opinion the court say: "Our statute for the relief of bail and sureties is a beneficial one, and although this case, as it now stands, is not within its letter, it is within its spirit, at least, so far, as injurious preferences are attempted." This decision rests upon general principles, and not upon the construction of a statute. If it involved the construction of a statute of the state, it would, under our practice, constitute a rule of decision for this court. But standing, as it does, upon principles of general law, it can only be considered as the authority of a high and enlightened court. In this view it will be regarded, and if it shall fail to establish the rule on this subject, it cannot fail to command the highest respect. The decision is in point and if it be conformable to law, it is conclusive of the question under consideration.

A case similar in principle, and not very dissimilar in facts, came before the supreme court of the United States, and is reported in [Lenox v. Prout] 3 Wheat. [16 U. S.] 520. In that case a judgment was obtained against the maker of the note, and a separate judgment against the indorser. The indorser fearing the failure of the maker of the note, called upon the agent of the plaintiff and requested an execution to be issued. It was issued, and the indorser offered to point out property to the marshal on which he might levy the amount of the judgment; and proposed to indemnify him for so doing. The execution was recalled by the plaintiff's agent, and the maker of the note became insolvent. In their opinion the court say: "Although the original undertaking of an indorser of a promissory note be contingent, and he cannot be charged without timely notice of nonpayment by the maker, yet, when the holder has taken this precaution, and has proceeded to judgment against both of them, he is at liberty to issue an execution or not, as he pleases, on the judgment against the maker, without affording any cause of complaint to the indorser; or, if he issues an execution, he is at liberty to make choice of the one which he thinks will be most beneficial to himself without consultation with the indorser." And they add: "If the indorser suffers any injury, by the negligence of the judgment creditor, it is clearly his own fault, it being his duty to pay the money, in which case, he may take under his own direction the judgment against the maker." The assignment of the judgment was provided for by the statute of Maryland. It is insisted that the language of the court, in this case, means nothing more than to "distinguish the position of the indorser after judgment, from that of conditional liability, which he occupies before it." But is this the full import of the decision? Do not the court say, after judgment, the plaintiff is not bound to take out execution against the principal, or if issued, to have it levied, though property be shown to the marshal, and an offer be made to indemnify him; and this in a case where the principal became insolvent, and all recourse against him was lost? If the relation of principal and surety existed after the judgment, and the surety had an equitable right to do what he did do, he had good ground for relief. But the court take this position from the surety. They tell him that his liability is in no respect affected by the conduct of the creditor, and that he is bound, absolutely bound to pay the judgment.

The same principle is decided by Chancellor Kent in the case of Bay v. Tallmadge, 5 Johns. Ch. 312. That was a case where there was a postponement of an execution against the principal, without the assent of the sureties, and to their injury. But the chancellor says "the postponement did not discharge the sureties from their obligation to pay the judgment against them." "Their privileges as bail," he says, "were lost and they had become fixed as principal debtors." And he further remarks: "I am not aware of any case that has ever imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still subsisting relation of principal and surety, after judgment and execution against the bail or surety. It becomes then too late to inquire into the antecedent relations between

the parties. Those relations become merged in the judgment."

My researches have not enabled me to find a single case, except the one cited from the Ohio reports, where relief has been given on the ground that the relation of surety subsists after judgment. There are many cases where a court of chancery has acted on this relationship and given relief before judgment. In some instances, under very peculiar circumstances, it has required the principal to use peculiar diligence. And in all cases where the surety has paid the debt of his principal, equity will substitute him to all the rights of the creditor. This doctrine is learnedly discussed by Chancellor Kent, in the case of Millard v. Cheeseborough, 1 Johns. Ch. 408; and by Mr. Justice Story, in his treatise on Equity (volume 1) under the head of "Substitution." 2 Johns. Ch. 562; 3 Mer. 579; 2 Fonbl. Bankr. Cas. 302, note 1; 17 Ves. 517, 520, are, also, full on the point. In the case of Hayes v. Ward, 4 Johns. Ch. 123, Chancellor Kent, under peculiar circumstances, enjoined a suit at law against a surety, until the creditor had pursued his remedy on a mortgage for the same debt. But these cases all proceed upon equities held to exist prior to the judgment, or upon the fact of payment of the judgment by the surety. And this doctrine, when examined, will be found consistent with the principles of justice.

A rule which would make the liability of a surety depend upon contingencies until all the resources of the principal were exhausted, and that by a strictly legal course, would seem to regard the protection of the surety more than the safety of the creditor. It would be inconvenient in practice, and not suited to a commercial community. The accommodation indorser agrees to pay on condition of demand and notice. And why should he be permitted to vary his contract, or excuse himself from its performance? By paying the money he is substituted to all the means of coercion against the principal which the creditor could use; and, also, to all the collateral indemnities he holds. And after judgment against him, this is the only relief, it would seem, which the law gives him. It is as ample a one as can be afforded, and imposes no hardship, of which the surety has a right to complain. In the present case Findlay's character, as surety, was merged in the judgments; and he could claim, as surety, no equities but the right of substitution on the payment of the judgments. If Findlay be regarded as a principal, and equally liable with Sutherland to pay the judgments, it is not perceived on what ground he can ask the interference of this court. The position assumed by the counsel is admitted, that where a creditor has a claim on two funds, and another creditor has a claim on one of the funds, equity will either restrain the creditor from going against the fund liable to both, or, on its exhaustion, will substitute the creditor of this fund to the rights of the other.

But how can this doctrine be made to apply in the present case? The defendants are all principals, and Sutherland, the owner of the property, is bound to pay all the judgments. And by a conveyance of his property he does pay one in full and others in part. Now, is there any principle of equity which will restrain him from doing this? I confess I know of none. The complainants insist that it was not the intention of the bank to make an application of the proceeds of the lands conveyed to it by Sutherland, different from that which the law would make. Mr. Jones, the agent of the bank, does state in his deposition, that he objected to the clause in the agreement, which provided that Hough's liabilities should be first discharged, and that it was agreed that this clause should be altered. But this statement is not corroborated by Mr. Wood, who drew the agreement, and no alteration of it was ever made. On the contrary, it appears that the bank permitted satisfaction to be entered of the judgment against Hough, which sanctioned this part of the contract. It would be extremely dangerous to admit parol evidence to vary, or alter, a written agreement. The rule is well settled, that such evidence cannot have this effect, especially where the written agreement has been acted on and confirmed, and there is no fraud.

The marshal, it appears, credited the amount of his sales on the respective executions and order of sale; and this, it is insisted, is obligatory on the bank, and must fix the rule by which the proceeds of the lands conveyed must be applied. The credits thus entered show, it is urged, the election of the bank, which, being made, cannot be changed. On the other side, it is contended, that the credits were entered by the marshal without the direction of the bank, which looked to the agreement for the application of the proceeds, and not to the marshal. It is very clear that the act of the marshal, in this respect, cannot bind the bank, especially where a different application of the proceeds had been made by the parties. The marshal's sale was provided for in the agreement, probably, with a view to perfect the title, and give to Sutherland the benefit of any advance of price for which the lands might sell. They sold for less than the contract price, and, of course, the sale could have no effect on the contract. We must look to the contract, and not to the marshal's sale and return, for the sum to be credited, and the mode of its application. The agreement does not change, except as to the judgment against Sutherland only, the legal application of the proceeds of the mortgaged premises. It provides that the judgment, including interest and costs, of $5,462 20, and the note, including interest, amounting to $4,779 88, shall be first satisfied and discharged out of said sum of $25,794, so far as derived from the

property mortgaged to secure said judgment and note; and the residue to be satisfied out of the proceeds derived from the other property, not interfering with the amount received from the property mortgaged for other purposes. The balance remaining due on the above judgment and note, after exhausting the mortgage given to secure their payment, is, by the agreement, to be paid out of the proceeds of the lands not mortgaged. And no ground is perceived which authorizes this court to change this application of the proceeds of this property. It disregards the priority of the judgment against Findlay, but of this, as has been stated, his representatives cannot complain. He stands as a principal in the judgments, and can be considered in no other light, until the judgments shall be satisfied. The judgment against Sutherland, only, was secured by mortgage, but the proceeds of this mortgage, under the agreement, were applied in the payment of Hough's liabilities. So that that judgment stands without any special provision for its payment.

It is insisted, that this judgment shall be paid out of the proceeds of the property not covered by the mortgages, on the ground that the bank had a right to make such an application. The bank, undoubtedly, might have provided in the agreement for the payment of this judgment in the manner stated, but it has not done so; and the court, under the peculiar circumstances of this case, will not direct the credit to be thus entered. This judgment must stand with the judgment against Findlay, both of which were entered on the same day, and levied at the same time, to be discharged in proportion to their respective amounts, out of the proceeds of the property levied on. It is agreed in the contract that the premises described shall be taken by the bank, subject to the judgment of Busenbach. If the bank, in the language of the agreement, received the property subject to this judgment, no deduction should be made, from the consideration stated, on account of it. Indeed, it would seem that this judgment was deducted from the general amount, before the contract was drawn. The calculations can be made, and the credits entered, in conformity with this opinion. Decree. &c.

Case No. 4,792.

FINDLEY et al. v. SATTERFIELD.

[3 Woods, 504; 7 Cent. Law J. 365; 7 Reporter, 6.] [1]

Circuit Court N. D. Georgia. Sept. Term, 1877.

REMOVAL OF PROSECUTIONS AGAINST FEDERAL REVENUE OFFICERS—CONSTITUTIONALITY OF ACT.

1. Section 643, Rev. St., in so far as it provides for the removal to the United States circuit court of prosecutions against federal revenue officers in the state courts, is a constitutional enactment.

2. The provisions of said section apply to every case of a federal revenue officer indicted in a state court for an act done under color of the United States revenue laws, but charged to be in violation of the criminal law of the state, and are not restricted to cases where an attempt is made by a state legislature to nullify a law of the United States.

Habeas corpus. Findley, Gaston and Prater were indicted in the superior court of Lumpkin county, Georgia, for the offense of assault with intent to murder, charged to have been committed on one Thomas, and were arrested to answer the indictment. The facts of the assault, as they alleged, were that Findley, a deputy collector of the internal revenue of the United States, and his assistants, Gaston and Prater, were going to a small distillery that was running illicitly, for the purpose of seizing the still. Discovering their approach, the distillers and their friends, of whom Thomas was one, took the still and made off with it, and were pursued by the revenue party. Thomas aimed his gun at one of the pursuers, and seemed about to shoot, when one of the pursuers shot a pistol and wounded him, and on this shooting the indictment was founded. Upon these facts the prisoners petitioned the circuit court of the United States for the northern district of Georgia—the district in which Lumpkin county lies—for the removal of the prosecution into that court, and the writ of habeas corpus cum causa was duly issued under section 643 of the Revised Statutes of the United States, and was served on the superior court of Lumpkin county. The judge of that court disregarded it, and directed the sheriff to retain the accused in prison. The prisoners then petitioned the circuit court for the writ of habeas corpus directed to Satterfield, the sheriff, alleging that they were held in custody by him in violation of the law of the United States. The writ was issued and served. Satterfield produced the prisoners before the circuit court, and returned that he held them under the authority of the superior court of Lumpkin county, as above set forth.

A. T. Akerman, for petitioners.

R. N. Ely, Atty. Gen. of Georgia, for respondent.

Before WOODS, Circuit Judge and ERSKINE, District Judge.

WOODS, Circuit Judge. The petitioners do not deny that it was lawful for the sheriff to arrest them, and to hold them until the writ of habeas corpus cum causa was served on the superior court of Lumpkin county. But they say that, under the laws of the United States, the effect of that writ, when served, was to remove the indictment, and with it the lawful custody of their persons from that court to this; and that, therefore, the holding of them since by the officer of

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 7 Reporter, 6, contains only a condensed report.]

that court, the sheriff, has been in violation of the law of the United States. On the other hand, the attorney-general of Georgia, for the respondent, contends that the jurisdiction of Lumpkin superior court over the prosecution, and the attendant right of that court to hold the prisoners for trial, have not been displaced by the proceedings which have been had for removal, because, first, the act of congress which is supposed to authorize those proceedings is not warranted by the constitution of the United States; and, second, that the act, even if constitutional, is not applicable to such cases as the present. He concedes that if the act is constitutional, and is applicable to this case, the custody of the prisoners belongs here, and the sheriff has no right to hold them.

The first question, then, for our consideration, is whether congress has constitutional power to remove from the state courts into the United States courts for trial there, criminal prosecutions under the state laws commenced in the state courts, against persons executing the revenue laws of the United States, for acts done under color of those laws, or on account of rights claimed by such persons under those laws, and to prohibit the state courts from proceeding further with such prosecutions after the prescribed steps for removal have been taken.

If a question of this kind can be settled by the practice of the government, and by the authority of eminent men, the answer must be in the affirmative. The history of the legislation in which congress has undertaken to exercise this power has been brought to our notice. We find that the temporary act of February 4, 1815, approved by President Madison (3 Stat. 195), contained, in section 8, provisions similar to those of section 643 of the Revised Statutes. In January, 1833, President Jackson recommended that congress should re-enact the law of 1815, with some amendments, and accordingly the act of March 3, 1833, was passed (4 Stat. 632), section 3 of which is repeated in section 643 of the Revised Statutes. This act was passed under circumstances which drew upon it the serious attention of the country, and caused its provisions to be thoroughly considered. The material part of the third section received its final shape from an amendment proposed in the senate by that wise and learned jurist, Thomas Ewing, of Ohio. The test vote upon the bill in the senate was thirty-two yeas to eight nays, and the vote in the house of representatives was one hundred and twenty-six yeas to thirty-four nays. Among the yeas were John Quincy Adams, James K. Polk, John M. Clayton, George M. Dallas, Thomas Ewing, John Forsyth, Theodore Frelinghuysen, Felix Grundy, William C. Rives, Peleg Sprague, Daniel Webster, Hugh L. White, William Wilkins, John Bell, Edward Everett, Richard M. Johnson and the name, ever to be revered in this court, of James M. Wayne, with others of scarcely less note, representing different parts of the country and different political parties. President Jackson approved the bill, his legal adviser at the time being Roger B. Taney. This act remained in force until superseded by the Revised Statutes in 1874. As it was held to apply only to the customs revenue, section 67 of the act of July 11, 1866, approved by President Johnson, extended its provisions to the internal revenue. 14 Stat. 98.

We should not feel at liberty to pronounce unconstitutional a course of legislation so long continued, so deliberately maintained—sanctioned by so many venerated names and by the general approbation of the country, unless its unconstitutionality was made very clear to our minds; and, aside from this weight of authority, our reflections have brought us to the opinion that these statutes are fully warranted by the fundamental law.

The judicial power extends to all cases arising under the laws of the United States. It is argued that no criminal case can arise under those laws, except when a person is accused of violating them. But we think that, when an officer, executing in a lawful manner a law of the United States, meets with resistance, and, to overcome that resistance, uses necessary force, and, for such use of force, is charged with crime against the state, the case arises under the law of the United States. To hold that a case arises under that law, when it forbids the act under investigation, but does not arise under that law when it produces and justifies the act under investigation, is to take the words of the constitution in a sense too partial and limited. Congress can give criminal jurisdiction to the courts of the United States, when the law of the United States is the ground of defense, as well as when it is the ground of accusation.

Congress has power to levy and collect taxes and excises, and to make all laws necessary and proper to carry that power into execution. This includes the power to employ suitable officers and agents, and to protect them from accountability in the state courts for acts done, or in good faith alleged to have been done, in the course of their duty. We can not say that this protection is not necessary and proper for the prompt and effective collection of the revenue. It is obvious that, where a local sentiment, adverse to a particular revenue law, could exert itself in irremovable prosecutions in the local courts against persons executing that law, the collection of the revenue might be seriously impeded. Congress has thought proper to guard against such impediments by the law that we are now considering, and we are satisfied that it is a constitutional means to a constitutional end.

We do not overlook the objection that no tribunals but those of the state can try for crime against the state. This objection does not appear to us well founded. To try, is to

ascertain by a jury whether a criminal law of the state has been violated. In civil cases, congress has directed the courts of the United States to apply the law of the state, and they do it daily. In the criminal cases under consideration, congress has directed the circuit courts to apply the law of the state, and we do not see why they may not do it as well as in cases of the other class. To learn what is the criminal law of the state is no more difficult than to learn what is its civil law. Juries are, in the courts of the United States, composed of the citizens of the state, of the same qualifications as jurors in the state courts, and selected by similar rules. The courts of the United States ascertain facts by evidence substantially the same as that received in the state courts, and have the like aid of counsel for the prosecution and for the defense. In case of conviction, the accused could not decently object to a jurisdiction to which he had himself appealed. If any difficulty should arise in executing a sentence, congress could provide against its recurrence by further legislation; but, until such a difficulty shall occur in practice, we need not apprehend one.

We would not suffer the right of removal to be abused. We shall enforce it only when it has been claimed in good faith and on good grounds. Should we discover, either before or during trial, that the facts of a case did not bring it within the act of congress, we should proceed no further with it, and should remand it to the state court.

But suppose that the circuit court can not try such cases, it would not follow that congress could not deliver the prisoners from the custody of the state court, and stay proceedings there. The power to do this is distinct from the power to give the courts of the United States a jurisdiction for trial. A notable instance of the exercise of such a power by congress is found in the act of August 29, 1842 (5 Stat. 539), re-enacted in the Revised Statutes (section 762), empowering the judges of the United States to deliver, by the writ of habeas corpus, foreigners confined by the state courts for acts done under the authority of foreign powers. The confinement and trials of such prisoners by the state court for such offenses was deemed by congress incompatible with the international obligations of the United States, and accordingly provision was made for discharging them by habeas corpus. This act was drafted by Mr. Webster and was introduced and advocated in the senate by Mr. Berrien, and though it did not escape criticism at the time, we believe that the intelligent minds of the country now approve of it.

If a prisoner can be delivered from the custody of the state courts by habeas corpus, in order that the government may be unembarrassed in its international duties, he can be similarly delivered when congress so provides in order that the government may be unembarrassed in the collection of its revenue. If the law of the United States and the law of the state can not both be executed, the latter must give way. But in the case now before us, we think that the state law can be executed, though not by the state tribunals.

The present case falls within the letter of section 643. It is argued that this section applies only to cases of attempts by state legislatures to nullify a law of the United States. It is not so limited in its terms. Indeed, the act of 1866 was passed when no such attempt existed or was apprehended. We, therefore, think that the law is applicable to this case.

It is, therefore, adjudged that the detention of the petitioners by the sheriff is in violation of the law of the United States, and it is ordered that the marshal hold them in custody, subject to the further order of this court, for trial under the indictment found against them by the superior court of Lumpkin county.

FINDLEY v. VINT. See Case No. 16,950.

FINK (LA MOTHE v.). See Case No. 8,032.

FINK (SALENTINE v.). See Case No. 12,250.

FINLAY (UNITED STATES v.). See Case No. 15,099.

Case No. 4,793.

FINLAYSON v. CHICAGO, B. & Q. R. CO.

[1 Dill. 579;[1] 5 West. Jur. 342.]

Circuit Court, D. Iowa. May Term, 1871.

RAILROADS — LIABILITY FOR INJURY TO PERSONS IMPROPERLY UPON THEIR TRACK — DUTIES AND LIABILITIES OF PARTIES.

1. A railroad company, whose train is approaching a man, walking lengthwise upon its track, which rings its bell, and sounds its whistle, in time to enable him to get off, is not liable for an injury which happens to him under such circumstances.

2. The duties and liabilities, under such circumstances, of the company, on the one hand, and of the person injured on the other, stated by Mr. Justice Miller.

The plaintiff [Mary Finlayson] is the administratrix of her deceased husband, and brings this action [against the Chicago, Burlington & Quincy Railroad Company] under a statute of the state, to recover damages for his death, which is alleged to have been caused by the wrongful acts of the defendant. The defendant's road at the place where the accident happened, runs parallel to the county road, and upon the same general level, and about thirty feet from it. The deceased had been a laborer upon the public canal, in the vicinity, and on the day he was killed had left the wagon with his wife to do some business, and the wagon passed along. The de-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

ceased, when he had finished his business, started to overtake the wagon, and went upon the railroad track instead of on the public road. He had walked along it about six hundred feet before he was injured, and was walking along it at the time of the injury. There was no reason why he did not take the public road. The railroad was in a straight line, or nearly so, for the distance above mentioned. The deceased was struck and killed by the passenger train, running on time, and which approached him from behind. There was conflicting evidence as to the distance from the deceased at which the bells were rung, and the whistle sounded, and the brakes applied. The wind was blowing in the face of the deceased, and in the direction of the approaching train. The injury did not happen at a public crossing.

Gillmore & Anderson, for plaintiff.

Henry Strong and Thos. F. Withrow, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice (orally charging jury). This case which you have heard with patience, and which has been very ably presented to you, belongs to a class which is becoming very common in this country. All great motive agencies, when brought into dense communities, endanger life and property to some extent. Railroads, in their motive power, and in the manner in which they are necessarily conducted, are powerful instruments of good, and, also, to some extent, of evil. It is, or it ought to be, the object of all good citizens, to increase the good and to diminish the evil.

Those of you who have traveled here from a distance to attend this term of court, on railroads, and who remember the inconvenience, and, I might say, the suffering of the same journey in the old stage coaches, can well appreciate the good which railroads do; and those of you who have listened to the detailed testimony in this case have seen the capacity of a railroad for evil. There can be no question, however, but that they are necessary and useful. We should, therefore, by a just administration of the law, so far as it depends upon courts and juries, and by proper legislation, so far as it depends upon legislative bodies, do all we can to diminish the evils which seem, in some sense, to be incidental to these great motive powers.

I am, gentlemen, happy in the consciousness that I am addressing a jury who will consider the case before it without being influenced by any prejudice against railroads, on the one hand, or by any undue sympathy for the unfortunate woman who is the plaintiff in this case, while you would do her full and complete justice. If the case presented to you is, unfortunately, not altogether new in some of its features, certainly not new in the fact that human life has been destroyed by a railroad train, it is, on the other hand, according to the researches of counsel engaged in the case, novel in one feature at least; and that is, that those researches have not enabled counsel to present any reported case where suit has been brought to recover for an injury to the person, received while the party was walking along on the track of the railroad company voluntarily. In that respect the case before you is novel, and presents to me, at all events, who am to declare the law applicable to it, something of an embarrassing question.

The action upon which you are now to render a verdict is founded essentially in its nature upon the charge of negligence on the part of the railroad company in performing some duty which is required of them by law, in regard to the transaction presented to you. But this class of cases nearly always presents two questions which are correlative, and this case is not an exception to that general rule. These questions relate in the first place to the negligence and want of care on the part of the defendant, and in the second place to the care and diligence on the part of the plaintiff. The first question to be determined is, whether the defendant, in the sense of the law, has been negligent in regard to the transaction which has been presented to you, and if this is found to be so, the second question arises whether the plaintiff, on his part, used such care and diligence that he is exempt from blame in the matter. In the case before you, then, you are first to consider whether, under all the circumstances, the defendants were guilty of negligence. The question of negligence, by which, of course, is always meant that want of care and diligence which it is the duty of a party to observe, is always one which must be considered in regard to the circumstances. There is no absolute rule of negligence or diligence. The diligence required of a party is, that care and attention to the matter in hand which an ordinarily prudent, careful man would exercise in regard to his own transactions. In this case the uncontradicted evidence on both sides is, that the man who was killed was walking on the track of the defendant corporation along the same course the train was going that struck and killed him, and the question arises, what degree of precaution or care a railroad company or its servants are bound to take to guard against injuring a man under such circumstances.

I instruct you as a matter of law, in the first place, that the officers of this corporation, the men who had charge of this train, had a right to presume that this man was a man of sound mind and good hearing, and that the case is not to be considered by you in regard to the diligence of these officers as if he were a dumb man, known to the parties, nor as if he were a child which the parties could see was incapable of taking care of itself.

I instruct you that the agents of the railroad company had a right to suppose he was such a man, of sound mind and sound hearing, and that he would take reasonable care to protect himself in case of danger. Under that view of the case, I further say to you that these agents or officers of the company were bound to give a reasonable and fair notice of their approach, when they found that the man was not taking steps to get out of the way—such a notice as would reach a man under ordinary circumstances of good hearing, and who had his attention alive to his situation. If, then, you believe that the bell was rung and that the whistle was sounded, in time to enable this man to get off the track, these parties are guiltless, and the company is not liable. If, on the other hand, you believe they delayed making any signal at all until it was entirely too late for him to get off the track, that they being aware of his presence, delayed to ring the bell or sound the whistle, until he could not have stepped aside and saved himself—in that case there was negligence on the part of these employés, for which the railroad company is responsible. And I further say to you that the fact that in the place, and at the time where this accident occurred, there was a noise arising from the work on the canal, and a confusion arising from other trains running along the canal bank they were working on, which might be confounded with other trains, and that this fact was well known to the man who was killed, does not vary the matter. That was reason for additional care and diligence on his part; for knowing that he was traveling along a place where there was a loud noise that would impair his power of hearing any bell from a train, or a whistle from a train, it was his duty to be more vigilant and more careful, and to watch closely to protect himself. If you find that within this definition of what the duty of the railroad company was, they discharged that duty; if you find that they blew the whistle in time for this man to get off,—not to run to some place that he might choose to get off,—but if they rang the bell and blew the whistle, in such time as any reasonable man of good hearing could have heard it, and got off instantly, without deliberation or trying to go farther to select a place to get off, then the defendants are not liable.

If they delayed ringing the bell or sounding the whistle until they were right on him, then that delay would constitute negligence.

If, however, you find that the railroad company's agents were guilty of negligence, there is still a farther inquiry before you can find a verdict in behalf of the plaintiff, and that is the amount of care and precaution which he took to avoid this accident. I lay it down to you that he had no legal right to be on that railroad track; the track at that place not being a crossing or any part of a public highway, was private property; that it was built for other purposes; that it was not built to be walked upon by the public, and the fact that persons did walk upon it, however frequently and however common, does not change the proposition of law. This man had no right to be there, and he should not have been there. It does not follow, however, because he was there unlawfully, that the other party could run him down; but it does follow that he being on private property of the company, on a track which is used for a purpose which is dangerous to human life, well known to him, that he being in a place where he ought not to be, that he was bound to use every precaution, every diligence, every care, against the possibility or probability of any danger which might happen to him there.

This was his duty, and it was imperative; and if you find, in the language of one of the counsel for the plaintiff, that he was going along the track with his hands in his pockets, his head down, and his attention abstracted from everything around him, then he was guilty of such negligence as forbids recovery. No man has a right to go upon a railroad track in such a place, and go along in a state of abstraction, careless of what might happen to him; and then turn around and say to the railroad company, however negligent they may have been, You are responsible for my safety. If he is careless himself, it cannot be expected that the railroads can be made to take care of him, and pay for him if he is killed. Being on the track, and walking in a direction where a railroad train might overtake him, reasonable care required of him that he should be vigilant and watchful to discover the approach of any train, and especially from behind; and this vigilance on his part should be increased, from the fact that the noise from the trains and the blasting on the canal, would tend to prevent his hearing the noise made by the approach of a car or train, or its bell, or its whistle.

The jury found a verdict for the defendants. Judgment accordingly.

Case No. 4,794.

FINLEY v. McCARTHY.

[1 Cranch, C. C. 266.][1]

Circuit Court. District of Columbia. Nov. Term, 1805.

ADMINISTRATOR OF APPEARANCE-BAIL.

The administrator of appearance-bail cannot be allowed to appear as appearance-bail and plead for the principal.

The appearance-bail died before the appearance-day. Motion by Mr. Youngs, for the administrator of the appearance-bail to appear as appearance-bail, and not as special

[1] [Reported by Hon. William Cranch, Chief Judge.]

bail, and plead for the principal, according to the 26th section of the act of 12th December, 1792.

Refused by THE COURT. There cannot be the same judgment against the administrator of the appearance-bail as against the principal.

Case No. 4,795.

In re FINN.

[8 N. B. R. 525.][1]

District Court, E. D. Michigan. April, 1873.

BANKRUPTCY—FRAUDULENT PREFERENCE—ADVICE OF COUNSEL—DISCHARGE.

1. The discharge of a bankrupt was refused where it appeared that he had made an illegal and fraudulent preference of one of his creditors, although it appeared he had acted under advice of counsel, and the transferee had surrendered the goods without suit by the assignee.

2. If the advice of counsel will be a protection in any case, it must be shown that the bankrupt acted on it in good faith, believing he had a legal right to do what he did, and the question must be one of sufficient delicacy to rebut all possible fraudulent intent in seeking the advice.

[Cited in Re Jessup, 19 Fed. 96.]

In bankruptcy. On petition for discharge [of Michael Finn] and specifications in opposition thereto. The specifications of opposition are three in number: 1. A fraudulent preference to Edward Ryan and Peter Ruppe, who were creditors of his or under liability for him, by way of a chattel mortgage of his goods. 2. A sale to the same parties of goods of the value of about one thousand dollars, with a view to prefer them and to prevent the said property from coming to the hands of the assignee, and being distributed under the bankrupt act in satisfaction of his debts. 3. The collection of moneys due the estate after the bankruptcy, and applying the same to his own use.

LONGYEAR, District Judge. The bankrupt, on his final examination, states as follows: "Some few days previous to the filing of my petition in bankruptcy I gave a chattel mortgage to Edward Ryan and Peter Ruppe for one thousand dollars, to secure them for a note for that amount which they had previously endorsed for me. After filing the petition I sold the same parties goods to the amount of one thousand and ten dollars. I suppose their object was to secure themselves for their endorsement, and my object was not to prevent their doing so if they could get it. The mortgage was cancelled at the time of the sale of the goods to the said parties." He also states that the value of goods so sold to Ryan and Ruppe was afterward paid by them to the assignee, and that what he did in giving the chattel mortgage and sale of goods was done by him under advice of counsel. He also states that after the bankruptcy he collected about six hundred dollars in money, four hundred and fifty dollars of which he paid over to the assignee, eighty dollars converted to his own use, fifty dollars "for sundry small bills previously incurred" and the balance to his attorneys for services in connection with the bankruptcy proceedings.

It does not need argument to show that the foregoing fully sustains the specifications The fact that the property was surrendered by Ryan and Ruppe in no manner does away with the effect of the bankrupt's act in giving them the fraudulent preference. As to the statement that he acted on the advice of counsel, it is sufficient to observe that it is not made to appear that he did so in good faith, believing that he had a legal right to do what he did; neither can it be well conceived that so flagrant a violation of law, and of the most common principles of honesty and fair dealing toward his other creditors, could have been done in good faith, whether with or without legal advice. The petition for a discharge is denied.

[1] [Reprinted by permission.]

FINNAGAN (CARROLL v.). See Case No. 2,453.

FINNIE (RUMFORD CHEMICAL WORKS v.). See Case No. 12,130.

FIRE ASS'N (HARRINGTON v.). See Case No. 6,106.

FIRE INS. CO. (LEWIS v.). See Case No. 8,323.

FIREMEN'S FUND INS. CO. (ROBBINS v.). See Cases Nos. 11,881 and 11,882.

Case No. 4,796.

In re FIREMEN'S INS. CO.

[3 Biss. 462; 8 N. B. R. 123; 5 Chi. Leg. News, 265; 6 Am. Law T. Rep. 111; 7 Am. Law Rev. 567.][1]

District Court, N. D. Illinois. Feb. 1873.

INSURANCE — ASSIGNEE IN BANKRUPTCY CANNOT WAIVE CONDITIONS — SHOULD EXAMINE PROOFS —YEAR-CLAUSE — EFFECT OF PROOF OF DEBT— ADJUSTMENT—EFFECT OF WAIVER BY COMPANY —CONTESTED CLAIM—PRACTICE.

1. The terms and conditions of an insurance policy remain binding upon the insured after adjudication of bankruptcy to the same extent as before. The policy holder is bound by the terms of his contract.

2. Though an insurance company may, while solvent, waive the performance of conditions the assignee has no such power.

3. Even where proofs have been furnished and losses adjusted before adjudication, it is the right and duty of the assignee to examine and revise such proofs and adjustment, and to call for further proof if the claim is not clearly

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 Am. Law Rev. 567, contains only a partial report.]

made out, or there is any evidence of lack of entire good faith.

4. A clause in a policy limiting the right of action to one year from the loss is valid as a limitation, but proof of the debt in bankruptcy is equivalent to the commencement of a suit. Failure or neglect to make such proof, or bring suit, however, within the time limited, bars the claim as effectually as failure to sue if the company were solvent.

[Cited in Re Brunquest, Case No. 2,055.]

5. If the loss has been adjusted before the filing of the petition in bankruptcy, such adjustment is a settlement and a waiver of the limitation clause.

[Cited in Re State Ins. Co., 16 Fed. 758.]

6. After such adjustment in good faith, the claim can be proven without regard to the limitation clause in the policy.

7. If, however, the proof was not submitted until after petition filed, the assignee cannot make an adjustment or agreement upon which an action can be maintained.

8. A company while solvent may waive the proofs required by the policy, and where there is clear evidence of such waiver shown in the proof of debt in bankruptcy the debt should be allowed, subject to the right of the assignee to make inquiry into all the facts touching such alleged waiver.

9. If the assured shows such waiver regularly made in good faith by the company while it had the right so to do, the assignee should allow the claim, otherwise not.

10. The proper practice where the assignee wishes to contest any claim of the above classes is to ask that the claim be expunged under the 34th rule in bankruptcy.

In bankruptcy.

Tenneys, Flower & Abercrombie and Geo. W. Smith, for creditors.

Hoyne, Horton & Hoyne, for assignee.

BLODGETT, District Judge: Several questions of importance in the settlement of the affairs of this company, as well as other bankrupt insurance companies now in this court, have been certified up from the register for the opinion and direction of the court. The policies issued by the Firemen's Insurance Company contain the following clauses:

"Ninth—Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property—giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interests therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the same time of the loss; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate or notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss; knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices, the invoices of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination, to any person or persons named by the company."

"Twelfth—It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur, and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claims, any statute of limitation to the contrary notwithstanding."

These clauses, with some slight modifications of phraseology, have been inserted for many years past in nearly all policies issued by fire insurance companies, and their binding effect as essential parts of the contract has been frequently sustained by the courts.

The ninth clause imposes a condition precedent to be performed by the assured before any right of action accrues under the policy. It is true the company may waive the performance of this condition, and many cases are found in the books where the courts have decided what acts amounted to a waiver in those cases, but the principle is well established that, unless waived by the company, the notice and proofs of loss must be furnished by the assured, as a prerequisite to his right of action on the policy. Mason v. Harvey, 8 Welsb., H. & G. 819; Wellcome v. People's Ins. Co., 2 Gray, 480; Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1; Boyle v. N. C. Mut. Ins. Co., 7 Jones (N. C.) 373; Smith v. Haverill Ins. Co., 1 Allen, 297; Desilver v. State Mut. Ins. Co., 38 Pa. St. 130; 2 Greenl. Ev. § 406, and notes. The questions now submitted to the court are as follows:

1. Ought the assignee to allow and pay a claim for a loss arising under a policy where no proof of loss, as required by the ninth clause, has been submitted to the company

or assignee, nor any proof of debt made in the proceedings in bankruptcy, nor suit commenced, within twelve months after the loss occurred?

2. Ought the assignee to allow and pay a claim for a loss arising under a policy where the assured has furnished either to the company before adjudication, or to the assignee afterwards, the proofs of loss required by the ninth clause of the policy, but has not proved his claim in bankruptcy nor commenced suit within twelve months?

3. Ought the assignee to pay such claim where no proofs of loss have been furnished either to the company or assignee, but the assured has proved a claim in bankruptcy in the ordinary form prescribed by the rules within twelve months after the loss occurred?

There can be no doubt that the terms and conditions of the policy remain binding upon the assured to the same extent whether the company is adjudicated bankrupt or remains solvent; in other words, the policy holder must recover, if at all, by the terms of his contract.

The ninth clause was undoubtedly adopted by the insurance companies for the purpose of compelling the assured to furnish the company with all the facts and details in regard to the nature and extent of the loss sustained, and a full disclosure of all the circumstances affecting the right to indemnity; and the assignee in bankruptcy, who must be supposed to be an entire stranger to the transaction up to the time of his appointment, must certainly need the information called for by this clause much more than the company, who, through its agents and officers, placed the risk. They may be presumed to know something about the nature of the risk and probable loss under it, but no such knowledge can be presumed against the assignee. It is the duty of the assured to furnish such proof as the terms of his policy require, and bring himself within the terms of his contract. As I said before, the company, by its officers, can waive this proof, but I am very clear that an assignee can make no such waiver. His duty requires him to allow and pay no claim for losses unless the assured first furnishes all the proofs and submits, on request, to the examination provided for. As an officer of the court, he can allow no claim or debt upon his own information or knowledge, and can waive the performance of no condition which the assured is bound to perform in order to vitalize his demand. Even where proofs have been furnished, and losses adjusted before adjudication, especially if such adjustment was made after the intervention of actual insolvency, as is the case in most of the companies before this court, it would undoubtedly be the right and duty of the assignee to examine and revise such proofs and adjustments, and call for further proof if the claim was not clearly made out, or there was any evidence of the lack of entire good faith in the adjustment.

The twelfth clause, commonly spoken of as the "year clause," has been so frequently held valid by the courts as a limitation of the right of action by contract as hardly to require authorities. Fullam v. New York Union Ins. Co., 7 Gray, 61; Brown v. Roger Williams Ins. Co., 5 R. I. 394; Brown v. Hartford Fire Ins. Co., Id.; Brown v. Savannah Mut. Ins. Co., 24 Ga. 97; Northwestern Ins. Co. v. Phoenix Oil & Candle Co., 31 Pa. St. 448. As no suit can be maintained against the bankrupt after adjudication, except such as may be prosecuted by leave of the bankrupt court, proof of debt in bankruptcy must be deemed equivalent to the commencement of a suit, within the spirit and meaning of the twelfth clause, and if the company is in bankruptcy, a failure to make such proof, or bring a suit, within twelve months from the time loss accrued, bars the claim as effectually as would failure to sue if the company were not in bankruptcy.

I do not intend now to determine the effect of bringing suit against the company after adjudication as a saving act against the limitation of the twelfth clause, as such cases are probably not numerous, and may rest on facts peculiar to themselves.

From what I have already said, it is clear that a negative answer must be given to the first question. As to the second proposition, where proofs of loss have been furnished either before adjudication to the company, or afterward to the assignee, but no proof of the claim made in bankruptcy, it seems to me that if the assured has furnished his proof of loss, and his loss has been adjusted, the amount determined and agreed upon before the petition in bankruptcy is filed, and while the company is acting through its officers, a suit may afterwards be maintained upon such adjustment for a balance struck on settlement. The parties have agreed upon the amount due under the policy while they were both competent to make such agreement, and a suit may be maintained on such agreement at any time within the statutory limitation. And I am of opinion that if the loss had been duly and regularly adjusted in good faith, before the company was adjudicated a bankrupt, the claim can be proven like any other debt, without regard to the year clause of the policy. But if the proofs of debt were not submitted or acted upon until after the petition was filed in bankruptcy, I think that, while the assignee may examine and pass upon such proofs for certain purposes, he cannot make an adjustment or agreement to pay, upon which an action could be maintained, and the assured, in order to preserve his claim, must not only present his proofs under the ninth clause, but must also make his proof in bankruptcy, as the substitute or equivalent for the commence-

ment of a suit within twelve months under the twelfth clause. The principle on which I hold that an adjustment of the loss by the company is a waiver of the year clause, is, that the law will imply a promise by the company to pay the sum at which the loss is adjusted as a new contract arising out of the old one; but this principle does not apply to the assignee, as he has no right to make an express promise of that kind, and the law will not imply one against him from what he may do. I therefore think that when the assured has furnished his proofs of loss to the assignee, but has failed to follow them up by proofs of his claim in bankruptcy, within twelve months from the time of loss, his claim is barred by the year clause.

As to the third proposition, where no proofs of loss have been furnished to the company or assignee, but the assured has proved up his loss as a debt against the estate in bankruptcy, under the rule of the bankrupt court. This case is similar in principle to the bringing of a suit against the company for loss on a policy without compliance with the ninth clause.

As I have said before, a company while in control of its affairs may waive the proofs required by the ninth clause, and cannot afterwards insist upon such proof as a condition precedent to bringing a suit; and in cases where there is clear evidence of a waiver of the preliminary proof shown in the proof of debt, I think the debt should be allowed, subject to the right of the assignee to have inquiry made into all the facts touching such alleged waiver; or, to illustrate my meaning, if suit is brought on a policy, the plaintiff must aver and prove that he has given notice and proof of loss as required by the ninth clause, or aver and prove a waiver of such notice and proofs. When he substitutes proof of a claim in bankruptcy for such suit, he must show either compliance with the ninth clause or a waiver of it; and if the waiver is aptly alleged, and stands the ordeal of investigation as to whether it was regularly made in good faith, the assignee should pay the policy. But if there is no evidence of waiver by the company while it had the right to make such waiver, it appears very clear to me that the assignee has no right to pay the claim unless the assured shows that he has complied with the prerequisites of the ninth clause, and the allegations of the assured in that regard may be inquired into by the assignee, and if it appears that the proofs of loss have not been duly furnished, or waived, he should not pay the claim.

The proper practice in cases where the assignee wishes to contest any claim of the nature referred to under either of the foregoing propositions, is to ask that the claim be expunged under the thirty-fourth rule of the general orders in bankruptcy, and proceed as in that rule directed.

Case No. 4,797.

FIREMEN'S INS. CO. v. HEMINGWAY et al.

[8 Ins. Law J. 520; 8 Reporter, 741.]

Circuit Court, S. D. Mississippi. Nov. Term, 1878.

FOREIGN INSURANCE COMPANIES—FUND DEPOSITED FOR PROTECTION OF DOMESTIC POLICY HOLDERS —ASSIGNMENT — INSOLVENCY OF COMPANY — BANKRUPTCY—DUTY OF STATE TREASURER.

[1. The sum of money which a foreign insurance company is required by the Mississippi statute (Code 1871, § 2446 et seq., as amended by the Acts of 1873 and 1874) to deposit with the state treasurer is intended, under the scheme of the statute, as a protection to domestic policy holders insured by agents authorized to do business in the state in the manner prescribed by the statute; and in case of the company's insolvency or withdrawal from further business in the state the fund is only to be charged with unpaid losses and unearned premiums due to such policy holders, as distinguished from policy holders insured by other agents outside of the state.]

[2. The company, on withdrawing from business in the state, and giving the required notice of intention to withdraw the fund, may make a valid assignment thereof to another company which succeeds to its business in the state; nor is such assignment invalidated, either in equity or under the state statute, by the fact that it is made expressly subject to all accrued charges in favor of the domestic policy holders.]

[3. The fact that within four months after making the assignment the company is declared a bankrupt does not render the assignment void as to foreign creditors who seek to attach the fund, for the assignee in bankruptcy is the only person entitled under the bankrupt law to question the validity of the assignment.]

[4. A subsequent assignment of the fund, made by the assignee in bankruptcy to the original assignee, is but a confirmation of the original title, derived from the same source, and is no more to be questioned than the original assignment.]

[5. The state treasurer, in determining pursuant to the statute what claims constitute charges upon the fund, acts in a quasi judicial capacity, and is not personally liable for money paid out under an honest mistake as to his duty, especially when advised by the law officers of the state that the claims in question are a proper charge on the fund.]

[6. Another insurance company, which takes the balance of the fund by a valid assignment, is entitled thereto, as against subsequent attachments for claims upon policies issued outside the state, and which did not, therefore, constitute charges upon the fund under the state statute.]

The following additional facts, from E. R. Bowen, of counsel for plaintiff, will more fully explain this case. The bill for injunction was originally drawn to be filed in a United States court, but no United States judge could be found in the state at the time, and it was deemed necessary to resort to a state court to save the fund. The state supreme court, in a suit by one of the claimants, has held that the language of the statute, "at the expiration of thirty days from the publication" the treasurer "shall proceed to pay," etc., means thirty days after the expiration of the sixty days notice. About $3,000 had been paid out within five days

after the expiration. The claimants under policies issued in other states insisted that by transferring the ownership to citizens of Mississippi they were within the protection of the deposit law. It appears that but one of the claims by agents for unearned premiums had been returned canceled with the agent's certificate, while the claims included policies previously canceled and taken up by the insolvent and its reinsurer. Some of the claims were in suit by attachment, and were paid before trial.

Marcellus Green and George F. Harding, for plaintiff.

T. C. Catchings, Atty. Gen., Nugent & McWillie, Pitman & Pitman, Smith & Klein, O. B. Sansom, and Barrows & Smythe, for defendants.

HILL, District Judge. This cause is submitted upon bill amended, and supplemental bill, answers, exhibits, and proofs, from which the following facts appear:

The Globe Insurance Company, chartered and doing business under the laws of Illinois, desiring to transact business as insurers against loss by fire in this state, through agencies located in this state, in pursuance of the statutes of this state, on or about the 15th day of April, 1875, complied with said statutes, under the requirements of which said company deposited with the treasurer of this state the sum of $15,000 in the warrants of this state, drawn upon the treasurer, who gave a certificate therefor as required by law, drawing six per cent. interest, the payment of which the statute guaranteed to whoever might be determined entitled thereto as provided by the statute. [Laws Miss. 1875, p. 72.] Whereupon said company, through its duly appointed agents, Messrs. Barrows & Smythe and others, commenced taking risks and issuing policies of insurance against loss by fire within the state of Mississippi, and so continued until March 1, 1876, when said business ceased, and after which time no further policies were issued or business done in this state through said agents. Soon thereafter the company notified the defendant, W. L. Hemingway, the then treasurer of this state, of its intention to cease doing business in this state, and to withdraw said deposit as provided by statute.

On the 27th day of April, 1876, the Globe Insurance Company for certain considerations transferred and assigned said certificate of deposit to the Union Insurance Company, the name of which was afterward changed to the "Firemen's Insurance Company," the present complainant. A part of the consideration of such assignment was that the complainant should reinsure the policy-holders who had taken out policies through the agents so appointed in the state of Mississippi, and doing business under the statutes of this state, and which was accordingly done. Said assignment was made subject to all the legal claims and demands on said fund binding thereon under the statutes of this state. Notice of said assignment was given to Hemingway, as treasurer, about the 29th of May, 1876. The state treasurer, on the 31st of May, 1876, being satisfied that the Globe Insurance Company had become insolvent, in pursuance of the statutes of the state as amended in relation to such insurance company, gave notice by publication in the Clarion, a newspaper published in Jackson, to all persons having claims upon said company, and founded upon losses on policies issued, and for unearned premiums thereon, to the end that the same might be allowed and paid out of said fund as provided by law; and on August 4th, 1876, said treasurer did allow and pay to claimants upon said fund as follows: to Sherman H. Parisot, $2,099.16; to Wm. Mullen, $105.62; to Barrows & Smythe, $240.32; to Morris Bros., agents, $459.57, and to A. L. Davis, $27.19. It further appears that on or about the 27th of May, 1876, a petition was filed by creditors of the Globe Insurance Company in the district court of the United States for the northern district of Illinois, to have said company declared a bankrupt, and upon proceedings had thereunder said company was adjudicated a bankrupt [case unreported], and Robert E. Jenkins was duly appointed assignee thereof. That a litigation was afterward had between said Jenkins, as such assignee, and said complainant in reference to said fund, in said district court in which said adjudication was had, which resulted in a conveyance of all the interest which said assignee took in said fund to the complainant.

On May 22, 1876, Peyton S. Davidson, Nicholas Springer, and E. C. Carroll, and on May 27, 1876, Wm. E. & W. B. Hamilton and James La Burge, Jr., respectively instituted their several suits in the circuit court of Warren county, in this state, by original attachments against said Globe Insurance Company, and said Hemingway as garnishee, and to which said Globe Insurance Company interposed its plea of general issue, and said Hemingway made answer as such treasurer that he had in his hands said funds. These several suits were brought to recover the amount of losses alleged to be due upon certain marine policies of insurance issued by the Globe Insurance Company through its agents in the city of Chicago. On November 29, 1876, judgments were rendered in said suits, and against Hemingway as garnishee, in favor of La Burge for $661.40 and costs; in favor of W. E. & W. B. Hamilton for $625.25 and costs; in favor of E. C. Carroll for $1,694.35 and costs; in favor of Nicholas Springer for $662.44 and costs; in favor of said Davidson for $2,175 and costs. On August 16, 1876, complainant filed her bill in the chancery court of Hinds county, against Hemingway, treasurer, and other defendants, with some others whose claims have been compromised and need not be further noticed in the progress of this cause.

The bill charges a combination between Hemingway and his co-defendants to defraud complainant out of her just rights to said fund; charges that Hemingway paid out the sums on the 4th of August to those not entitled, and without proof of their being a lien upon the fund, and in fraud of complainant's rights, and seeks to hold him personally liable therefor; charges that the sums claimed under the attachment suits were not charges upon the fund. The bill prays for the writ of injunction to restrain said Hemingway, as such treasurer, from further proceeding to pay out said fund until the matters in relation thereto should be heard and determined by the court, which writ was duly granted, issued, and served, and is now in force. The bill further prays that upon the hearing, the said contract and assignment made on the 27th of April, 1876, between complainant and the Globe Insurance Company, be held valid and binding; that the legal and equitable rights of the claimants to said fund under the law be determined and settled by the court, and the residue of the fund, after all proper charges are paid, to be paid over to complainant. Hemingway answered the bill, admitting that he had made the payments to Parisot, Barrows & Smythe, Morris Brothers, Davis, and Muller, as charged; but denying all fraud, and insisting that said payments were a lien upon the fund, and properly paid upon legal and proper proof; that in his action in regard thereto he acted in a quasi judicial capacity, and hence was not personally responsible for any mistake of judgment into which he may have fallen. The other defendants answered denying the fraud charged, and insisted that they were respectively entitled to the payments received by them. The attaching creditors also answered denying all fraud, and insisting that the claims upon which their suits were founded were just, and a lien upon said fund. Parisot by cross bill set up a claim for loss paid for salvage of a steamer covered by his policy. After issues were made, and before hearing, the cause was removed to this court. Complainant filed her amended and supplemental bill, which, after reciting the allegations of the original bill, charges that after the filing of the original bill, by fraud and collusion between Hemingway and the plaintiffs in said attachment suits, the said judgments against the Globe Insurance Company and Hemingway, treasurer and garnishee, were obtained, and that the same are void, and constitute no just demand or charge upon said fund as against complainant's rights.

To this bill Hemingway answered, reiterating the statement of his original answer, and denying all fraud in relation to obtaining the judgments in the attachment suits. The plaintiffs in said judgments in attachment, answered the amended and supplemental bill denying all fraud, insisting that said judgments are valid, and a demand, and a legal charge upon said fund, and that the judgments are res adjudicata, and cannot be inquired into in this suit. Complainant has filed her answer to the cross bill of Parisot, and issues joined on the several answers. The pleadings and proofs are unusually voluminous, but the foregoing comprises all that need be stated to an understanding of the questions presented, and argued with ability by the different counsel representing the respective interests involved.

The first question presented is as to the title of complainant to the funds deposited with the treasurer; for if she has no title the bill must be dismissed. Neither of the conveyances under which complainant claims is denied; but it is insisted by defendants' counsel that the assignments were made subject to the claims that might be on the fund under the laws of this state. Whilst a negotiable instrument must be unconditional, such is not necessary to transfer a claim of the kind under consideration. The assignments are good on their face under the state statute, and are certainly good as equitable assignments. It is, however, urged that the first assignment was void under the bankrupt law, and that the second cannot be set up under the amended and supplemental bill. To the first objection it is only necessary to state that no one except the assignee in bankruptcy could maintain this objection, and this, under the sanction of the bankrupt law, he has waived by assigning all the interest he took under the assignment to him, to the complainant.

To the second objection it is only necessary to state that the assignment by the assignee in bankruptcy was but a confirmation of the same title, derived from the same source, and is unlike a title derived from a different person, and of a different character. I am satisfied that nothing is shown to defeat complainant's title to whatever balance may remain of said fund after all the legal claims upon it existing on April 27, 1876, shall have been satisfied, which brings us to the much more difficult question of determining what these claims are, and this involves a construction of the insurance laws of this state, but few of which have received a construction by our supreme courts. Section 2442 of the Code of 1871, reads as follows: "It shall not be lawful for any agent of any insurance company incorporated by any other state than the state of Mississippi, directly or indirectly to take risks or transact any business of insurance in this state without first procuring a certificate of authority from the auditor of public accounts; and before obtaining such certificate, such agent shall furnish to the said auditor a statement under the oath of the president or secretary of the company for which he may act, which statement shall show: 1. The name and locality of the company. 2. The amount of its capital stock. 3. The amount of its capital

stock paid in. 4. The assets of the company, including first, the amount of cash on hand, and in the hands of agents or other persons; second, the real estate unincumbered; third, bonds owned by the company, and how they are secured, with the rate of interest thereon; fourth, debts of the company secured by mortgage; fifth, debts otherwise secured; sixth, debts for premiums; seventh, all other securities. 5. The amount of liability due or not due to banks or other creditors by the company. 6. Losses adjusted and due. 7. Losses adjusted and not due. 8. Losses unadjusted. 9. Losses in suspense waiting for further proof. 10. All other claims against the company. 11. The greatest amount insured in any one risk. 12. The greatest amount allowed by the rules of the company to be insured in any one city, town or village. 13. The greatest amount allowed to be insured in any one block. 14. The act of incorporation of the company. 15. The certificate of deposit of the state treasurer, as hereinafter provided. The statement shall be filed in the office of said auditor, together with a written instrument under the seal of the company, signed by the president and secretary, authorizing such agent to acknowledge service of process for and on behalf of such company, consenting that the service of process upon such agent shall be taken and held to be as valid as if served upon the company, according to the laws of the state, and waiving all claim of error by reason of such service, and no insurance company or agent of any insurance company incorporated by any other state shall transact any business of insurance in this state, unless such company is possessed of at least one hundred and fifty thousand dollars of actual capital invested in stocks of at least par value, or in bonds or mortgages of real estate, with double the amount for which the same is mortgaged; and upon filing the aforesaid statement and instrument with the auditor, and furnishing him with satisfactory evidence of such investment as aforesaid, it shall be the duty of said auditor to issue a certificate thereof, with authority to transact business of insurance to the agent applying for the same." Section 2444 provides that such agent, before taking any risks or transacting any business of insurance in this state, shall file in the office of the chancery clerk of the county in which he may desire to establish an agency for such insurance company, a copy of the statement filed with the auditor, which also must be published in some newspaper in the county. Section 2445 requires this statement to be served, filed and published annually. Section 2446 requires that agents of such insurance companies before commencing business in this state should deposit state warrants, or cash, with the treasurer of the state, whose capital does not exceed $250,000, $15,000, and those of larger capital $20,000, and for which the treasurer shall issue his certificate, and which shall remain on deposit as long as the company shall continue to do business in this state, and shall not be withdrawn until all losses upon such life, fire or marine risks shall be adjusted and paid, or adjudged by a court of competent jurisdiction in favor of said company, and then not until six months' notice shall have been given the treasurer of an intention of such withdrawal. Section 2447 provides that when such deposit shall have been made, the treasurer shall issue his certificate of deposit therefor, with a statement on its face that the faith of the state is faithfully pledged for the redemption of the same, and bearing interest at the rate of six per cent per annum, payable annually. Section 2450 provides that when a judgment or decree shall remain unsatisfied for the space of thirty days after the rendition thereof, that the plaintiffs may file with the state treasurer a transcript thereof, accompanied with the certificate of the clerk and sheriff of the county; that such judgment or decree remains unpaid, and that the fi. fa. has not been suspended by writ of error or appeal; that thereupon the treasurer shall pay the amount of said judgment or decree, including costs, and credit to the amount of the deposit, to be replaced in sixty days on notice to the agent, provided the treasurer shall not pay out more than the deposit in his hands, and shall not pay over any amount on such judgment or decree which may be stayed by injunction, appeal or writ of error, until the same shall have been finally determined. Section 2451 makes it a criminal offense to violate any of the provisions of the chapter of which these sections compose a part. It was soon found that companies making the deposit could withdraw and leave unearned premiums unprovided for, to amend which the act of 1873, amendatory to the foregoing sections, provided that such unearned premiums should be a charge upon such deposit, and entitled to payment under section 2450. That act further provides that when any such insurance company shall become insolvent, or shall appear so to the treasurer, he shall immediately give notice by advertisement in some newspaper of general circulation for sixty days, notifying all persons holding claims against such company for losses and unearned premiums to present the same to the treasurer duly certified, as required by the first section of the act, which is a certificate from an agent of the company that the policy has been canceled or surrendered to an agent of the company, and showing the amount of the unearned premiums so due. That at the expiration of thirty days from the publication, (which means after the end of the sixty days, and ninety days from the first publication,) he shall proceed to pay the claims against said fund, provided, if the fund is insufficient to pay all, first to losses; and if not enough for all of these,

then pro rata among them; if a residue shall remain after payment of losses, then to pay unearned premiums if enough for that purpose; if not, then pro rata upon them, and if enough to pay all these demands, and a surplus remains, to pay the same to the holder of the certificate of deposit.

Another defect in these statutes soon appeared by the agents of the company leaving the state, or absconding, or concealing themselves, so that the process provided for by section 2442 of the Code, above stated, (could not be served); so the act of 1874 [Laws Miss. 1874, p. 16] amended this section, and provided for proceedings by attachment as in cases of foreign corporations and proceedings thereunder, and subjecting the treasurer to the writ of garnishment. I have given this full recital of these statutory provisions because all of them have more or less application to the questions here involved. These statutes form a scheme to a certain end, and must be construed together. That end is to give to insurance companies chartered and doing business in other states an opportunity to establish agencies and do business in this state; but as a protection to our citizens from fictitious or insolvent companies created and doing business in other states, and to give to our citizens an opportunity to examine the law of their creation and their condition in every way, the sworn statement of their condition by their principal officers, with a copy of their charter, is required to be filed with the auditor, and also in the office of the chancery clerk in each county in which the companies by their agents may desire to do business, and where liabilities may be incurred upon policies issued through such agents, that the companies may be sued, judgment obtained, and satisfaction had without the policy-holder having to go out of the state to obtain it; hence, the agreement for service of process, and the deposit to be made with the treasurer, and the mode of reaching the funds so deposited with him; and that those taking risks may know the amount of the risks for which the deposit is liable. In other words, it is to give as far as possible these foreign insurance companies the privileges, coupled with the liabilities, of companies chartered by this state. Such being the case, the deposit is intended only for those who may obtain their policies through the agents appointed and doing business in the state, and under the provisions of our statutes. No assignment or transfer of the fund so deposited can be made so as to defeat the claims upon it for satisfaction of losses or unearned premiums upon the policies issued by such agents as provided by these statutes. Nor can such company revoke the powers of their agents so as to defeat the remedies provided by the statute, although it may for any other purpose.

So that in case such company shall cease to do business in this state, either by withdrawal of agencies or insolvency, any person holding a policy issued through such agent or agents, which has not expired, may cancel the policy or surrender it to the agent, and demand the unearned premium, which I understand to be the amount of premium due for the unexpired term of the policy. The agent is required to estimate and certify the amount due, and that the policy has been canceled or returned, which has the same effect. This certificate is by law made evidence of the cancellation or return, and the amount of the unearned premiums, but if the agent should refuse to do this duty, the policy-holder, I have no doubt, may cancel or tender the return of the policy, and make proof of its value; his redress cannot be defeated either by the failure of the agent to do his duty or by the want of such agent. After, however, all these demands have been satisfied, the fund in the hands of the treasurer is to be returned to the depositor or its assignee. It is the company and not the agent that makes the deposit, although the company acts through her agent, being incapable of any other action. After those are satisfied who have this special lien on this fund, I incline to the opinion that it is liable to other creditors of the depositor or its assignee, but under my view of the right of the parties to this suit the decision of this question is unnecessary.

Let these rules of law be applied to the facts of this case, and first as to the claims paid by the treasurer. It is admitted that the claims of Parisot are not founded upon a policy or policies issued by an agent doing business under the provisions of the statutes in this state, hence, under the construction given to this statute, are not liens or demands upon this fund, and were improperly paid by the treasurer. The claim of Muller is of the same character, and its payment was consequently improperly made. The payment made to Davis was upon a policy issued by Phelan, an agent in Tennessee, who had no authority to do business in this state, and consequently was improperly made. The payment made to Morris Bros. was upon a certificate of Phelan, whose certificate should not have been received as evidence, and there being no other evidence of the facts necessary to entitle any of said policy-holders to this fund, the payment of said claim was improper. The payment to Barrows & Smythe was made upon their own certificate for unearned premiums. The amount which is now shown by the proof to be for fees due them from the Globe Insurance Company was clearly not a claim upon the fund. It does not appear whether their claims for unearned premiums were upon policies issued by themselves or any other agent of the Globe Insurance Company doing business in this state under the statute, nor does it sufficiently appear whether or not the holders of the policies had canceled or surrendered them, as provided by

law, to entitle them to these unearned premiums, so that the evidence upon which the payment was made is insufficient, and the payment was improperly made. The result is that complainant is entitled to a decree against each of the parties to whom said payments were made, and who are parties to this cause, for the sums so improperly received by them, reserving, however, to Barrows & Smythe, and to Morris Bros., the right, if they can show by proof before the clerk as master, that any of the sums received by them were for unearned premiums on policies which had been canceled or surrendered by the policy-holders, and which policies had been issued by an agent doing business in this state under the provisions of the statute.

Complainant's counsel insist that she is entitled to a personal decree against Hemingway, the treasurer, and whether she is or not, is a question of no little difficulty. I have no doubt that in all he did he acted in good faith, and did only what he believed to be his duty. The responsible and delicate duties imposed upon him by law are of a twofold character, partly ministerial and partly quasi judicial. The reception and payment out of the fund is ministerial; that of determining the question of insolvency, of to whom payment should be made, when not ascertained by a judgment or decree of some court, is in its nature judicial, and for a mistake on this subject, honestly made and free from fraud, as I believe was the case, I can not see that he should be any more liable than a referee or any other person exercising judicial or quasi judicial functions. The action of the treasurer in such case, it is true, is not that of a court, nor does his decision bind or conclude parties, who are left free to invoke the courts to determine and enforce their rights. No construction of the statutes has been given by the courts to guide him in his action. The complainant was requested to apply to the court to guard its interests, which she declines. The treasurer consulted the law officer of the state, who advised him it was his duty to make payment on the proofs he had. Under these circumstances I do not think the complainant should ask a personal decree against the treasurer, and I decline to make it, especially as the parties to whom the money was paid are able to return it. This brings us to the consideration of the judgments rendered in the attachment proceedings by the circuit court of Warren county. It is conceded that the policies upon which these judgments were obtained, were issued by agents in St. Louis, Missouri, therefore constituted no charge upon the fund, nor do the judgments thereon, unless it be upon the surplus after payment of all the claims provided for by the statute.

It is insisted by complainant's counsel, that the attachments were dissolved by the operation of the bankrupt law, having been sued out within less than four months of the commencement of proceedings in bankruptcy. As against the assignee in bankruptcy this would be true, but this is not a proceeding by the assignee in bankruptcy to set them aside. The complainant claims the fund by a title acquired prior to bankruptcy, and prior to the issuance of the attachments, and not having been a party to these attachment suits, is not affected by them; so that it is unnecessary to consider whether they are or are not valid judgments against the Globe Insurance Company, which is not dischargeable under the law, or is a valid and fixed claim upon the assets of the Globe in bankruptcy. As already held, the title of complainant became fixed upon this fund on the 27th of April, 1876, subject to any prior demands upon it; hence these attachments and the judgments thereon could no more affect complainant's rights than such attachments and judgments would have affected the rights of any other third party, who was a stranger to the liability and suit, and whose property had been seized under the attachments.

The result is that the complainant must be declared entitled to this fund free from these judgments. This leaves but a single question, and that easily disposed of, being the cross bill of Parisot, setting up his claim for the amount claimed to have been paid him for salvage. The policy, under which it is claimed, was not issued through an agent in this state under the provisions of the statute; the claim, therefore, does not attach to this fund, and must be disallowed, and the cross bill dismissed at the cost of the complainant therein. Each of the defendants to the bill will be taxed with the costs of making him a party, and those accruing in his defense respectively, and the remaining costs by the complainant. There being no claims shown to exist upon the remaining funds in the hands of the treasurer having priority to those of the complainant, they will be paid over to her duly authorized officer, attorney, or agent, being first subject to such costs as may be taxed upon the complainant.

FIRST BAPTIST SOCIETY OF ESSEX (DAVIS v.). See Case No. 3,633.

FIRST NAT. BANK (BLAIR v.). See Case No. 1,485.

FIRST NAT. BANK (BURPEE v.). See Case No. 2,185.

Case No. 4,798.

FIRST NAT. BANK v. CALDWELL et al.

[4 Dill. 314.][1]

Circuit Court, D. Nebraska. 1876.

EQUITABLE MORTGAGE—DEPOSIT OF TITLE DEEDS—JUDGMENT LIEN.

The plaintiff corporation, holding as security from its debtor certain railroad coupons, which were convertible into lands at the option of the holder, and which were so converted, and the deed taken in the name of the debtor, and not recorded, but deposited, in pursuance of an agreement to that effect by the debtor with the plaintiff, as a substituted security in place of the coupons, was *held* to be an equitable mortgagee, and to have an equity in the lands obtained for the coupons and embraced in the deed, superior to the lien of a general judgment creditor of the common debtor.

The bill in this case is filed to establish an equitable lien upon certain lands described therein. The material facts are these: The defendant [Jonas] Gise, January 1st, 1874, made a loan of money from the plaintiff, and, after various payments and renewals, the amount became $2,500 on July 15th, 1875, evidenced by two notes, payable in sixty and ninety days thereafter. Upon these notes a judgment was recovered by confession in this court, on November 15th, 1875. An execution was thereupon issued on the 20th, and returned on the 23d of November, 1875, no property found. It appears that Gise, being the owner of certain railroad bonds with coupons attached, deposited the coupons with the plaintiff, as security for payment of this demand. These coupons being convertible into lands at the option of the holder, by an arrangement between the parties interested, these coupons were withdrawn by Gise, and located by him upon the lands mentioned in the bill, with the agreement between the plaintiff and defendant Gise, that the deed from the railroad company, as soon as obtained, should be deposited, and the lands described therein become security for the payment of the debt in lieu of the coupons. Gise obtained a deed from the company, which was deposited with plaintiff in pursuance of the agreement of the parties, and this deed is now held by the plaintiff. This instrument was never recorded. Upon this state of facts the plaintiff claims a lien, in the nature of an equitable mortgage. The defendants, Caldwell, Hamilton & Co., obtained a general judgment, in the district court of Douglas county, against the defendant Gise, October 29th, 1875, for $2,142.40 and interest, and on the 3d day of November, 1875—twelve days before the plaintiff obtained its judgment—filed a transcript thereof in the clerk's office of Nuckolls county, where these lands are situated, and thereby the judgment became, it is claimed, a lien upon the property of the debtor in that county. It appears that the consideration of the note upon which this judgment was obtained, was money loaned in July, 1873, to Gise, by the defendants. This judgment remains unpaid. It is sought by the bill to postpone the lien of this judgment to the equitable lien claimed by plaintiff. The bill alleges notice of this equity of plaintiff, on the part of Caldwell, Hamilton & Co. The answer fully denies notice on the part of the defendants. The plaintiff failed to make any proof to support the allegations of the bill in that regard.

J. M. Woolworth, for plaintiff.

G. W. Ambrose and Clinton Briggs, for Caldwell, Hamilton & Co.

DILLON, Circuit Judge. Counsel have largely argued this cause as if it involved the question whether the English doctrine of equitable mortgages, arising from the mere deposit of title deeds, prevails in the state of Nebraska. It may be admitted, for the purposes of this case, that the deposit of recorded title deeds, without more, will not create an equitable lien against the debtor, or a general judgment creditor of his, and yet the equity of the present cause is with the plaintiff.

The plaintiff corporation held coupons, convertible into lands, as a specific security for its debt. Without the debtor's consent, it could have converted these coupons into lands, and taken the deed in its own name. Both the plaintiff and Gise, however, thought it advantageous to exercise the option of exchanging the coupons for lands. Gise made the selection of the lands, and the deed was taken in his name, but not recorded, and was delivered at once to the plaintiffs, and is now held by them in virtue of an agreement with Gise, made at the time, that the deed should be a substituted security in lieu of the coupons. Gise does not controvert the plaintiff's rights. The defendants, Caldwell, Hamilton & Co., do not dispute the above facts, but contend that their rights, as a general judgment creditor of Gise, without levy or sale, are superior to the plaintiff's. There is no statute of Nebraska which, in terms, gives such effect to a general judgment lien, nor any decision of the supreme court of the state that a judgment lien overrides existing specific equities in lands, in favor of others. The plaintiff's rights, as the equitable mortgagee of the lands, or having an equitable lien upon them, are superior to the rights of a general judgment creditor, who has not become a purchaser under the judgment, in good faith, and without notice of the rights of the equitable mortgagee. Brown v. Pierce, 7 Wall. [74 U. S.] 205, 217. Decree for the plaintiff.

NOTE. The question, in the foregoing cause, as to the respective rights of the equitable mortgagee and the judgment creditor, was very fully argued, and the following, on that point, is condensed from Mr. Woolworth's brief:

The rule in England is stated by Sir Edward

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Sugden, when lord chancellor of Ireland, in Abbott v. Stratten, 9 Sugd. Dec., 3 Jones & L. 603, 614. He says: "Does such a mortgage take precedence, or not, of the subsequent judgments, however bona fide they may be, and supposing them to have been obtained for valuable consideration, and without notice of the equitable mortgage? I can only say that, ever since I have been in the profession, I have considered that a settled point; and down to the time a question was raised upon it, in Whitworth v. Gaugain, reported in Craig & P. 330, I never entertained a doubt upon the subject; and I have repeatedly acted in this court upon the rule that an agreement binding property for valuable consideration, though equitable only, will take precedence over a subsequent judgment, whatever may be the consideration for it, and whether obtained in invitum or by confession. This is not denied to be so in the case of a purchase, and an equitable mortgage is, pro tanto, a purchase in the strict sense of the term. The agreement (for that is really the question) is, in this court, the mortgage—it is the pledge. The mere legal operation of the instrument goes for nothing; the agreement itself is, in the view of a court of equity, equivalent to the execution of a mortgage. It would be pedantry to go through the cases on this subject, after the full review of them in the case to which I have referred, when it was before Vice Chancellor Wigram. I must, therefore, overrule the master's report, and declare that this is a valid, equitable mortgage, binding on the property as against subsequent judgment creditors."

The case referred to by the lord chancellor, in Whitworth v. Gaugain, 3 Hare, 416, states not only the rule, but the reason of the rule, with that satisfactory fullness and precision for which Vice Chancellor Wigram was very distinguished; and as in his judgment he considers all the arguments which might be in any way alleged, I shall set them out here:

"The more I consider the case, the more satisfied I feel that I stated the general principle correctly, in Langton v. Horton [5 Beav. 9], when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, nothing more. He stands in the place of his debtor. He only takes the property of his debtor subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the cestui que trust against the judgment creditor of the trustee. The judgment of Lord Cottenham, in Newlands v. Paynter [4 Mylne & C. 408], is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. Lodge v. Lyseley [4 Sim. 70] is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor. Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest, except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrance to be preferred to the judgment creditor of the debtor in whom the legal estate in the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of Williams v. Craddock [unreported] the counsel, as well as the court, were of the opinion that an interest by way of an equitable mortgage was entitled, in this court, to the same protection against judgments as other equitable claimants.

"In the argument of this case both parties referred to, and drew conclusions from, the proposition that, in a court of equity, a purchaser for value, who obtains a conveyance of the legal interest without notice of an equity affecting the specific subject of his purchase, in equity as at law, has a better title to that subject than the mere equitable claimant. The proposition thus admitted, and necessarily admitted by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by elegit is (as was argued) to be considered as a purchaser for value without notice under a conveyance, all trusts and all equitable interests of every description, must be subject to the judgments against the trustee; for a purchaser for value, without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in equity to the cestui que trust; and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust, or other equitable interest, from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary cestui que trust. Again, it follows, conversely, that if the equitable interest of an ordinary cestui que trust, or any other equitable interest, is not subject to judgments against the trustee, though executed, then those judgments are not analogous to purchasers for value. In other words, the judgment creditor of a trustee is not a purchaser for value, in the contemplation of a court of equity. The proposition that a judgment creditor is a purchaser for value would prove too much for the defendants' purpose. It would affect all equitable interests alike.

"But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary cestui que trust, and other equitable interests (charges, for example, to pay debts and legacies paramount to the title of the debtor), which it was admitted would be preferred in equity—that the interest of the equitable mortgagee was imperfect, that of the cestui que trust perfect. In what respect is the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgage, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think is not) in the one case than in the other.

"The most plausible way of stating the case in favor of the judgment creditor is by supposing his right to be founded in contract, and not the result of a proceeding in invitum; and this, no doubt, may be true of the case, when the judgment is voluntarily confessed; and I paid the greatest attention to the arguments of counsel on that point. But, admitting that view to be correct, how does it alter the case? The question remains: what was the contract? It was a general contract for a judgment, and the fruits of a judgment; and the original question, therefore—what right does a judgment confer?—remains wholly untouched by the concession.

"If a party contracts specifically for a given property, pays the purchase money, and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money, that may give him a right to be preferred to an equitable claim which is prior in point of time. But there is no principle upon

which a court of justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor. If the trustee were to confess a judgment, am I to imply that it amounts to a specific contract to give the creditor an interest in that which belongs to the cestui que trust? That appears to me to be the true distinction. In one case a party contracts for a specific thing; in the other he merely takes a judgment; that gives him nothing more than a right to that which belongs to his debtor. The above propositions, which, separately taken, I believe to be unimpeachable, will be found to meet every argument that was addressed to me in support of the defendant's case independently of the late statutes. I am clear that the late statutes make no difference in the case. So far as the judgment creditor claims to be a mortgagee, in writing, under the statute, he is posterior, in point of time, to the plaintiffs. But it was said that the equity of the judgment creditor was equal to that of the equitable mortgagee, and that he has, by the force of the elegit executed, an estate at law in addition to his equitable interest, and therefore it is to be preferred. I need not, after what I have already said, proceed to expose the fallacy of this argument; it takes for granted the whole question in dispute. That the tenant, by elegit, has an estate in that which he may lawfully take (that which belongs to his debtor), I do not deny; but to say that, by force of the elegit, he acquires a rightful interest, in this court, in that which in equity does not belong to his debtor, is taking the whole matter in contest for granted; the whole question being what he may take.

"I can only repeat that it appears to me impossible, except on the most arbitrary distinction, to say that the interests of an equitable mortgagee are not to be protected, and yet that that protection is to be afforded to the interests of an ordinary cestui que trust, and other equitable interests. I do not go into the reasoning of the cases which have been cited; all of them, however, appear to me to support the view I have taken. If my judgment cannot be supported upon propositions which are indisputable in themselves, whether properly applicable to the case or not, no explanation I can give of the cases will at all strengthen the foundation of that judgment. I must hold that the plaintiffs have a right to the payment of their debt out of the estate comprised in the deed."

This case was affirmed by Lord Chancellor Cottenham. 1 Phil. Ch. 728. In Beavan v. Earl of Oxford, 6 De Gex, M. & G. 492, it is held that the judgment creditors were not purchasers within the meaning of St. 27 Eliz. c. 4, and the same rule has been held in many other English cases.

There are many American cases on this subject, but the supreme court of the United States has spoken decisively upon it in Pierce v. Brown, 7 Wall. [74 U. S.] 205. The court says, at page 217: "Express decision of this court is, that the lien of a judgment constitutes no property in the land; that it is merely a general lien securing a preference over subsequently acquired interests in the property; but the settled rule in chancery is that a general lien is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands, or in the proceeds thereof. Specific liens stand upon a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. Correct statement of the rule is that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person," etc.

As to the deposit of title deeds as security for a debt, the English rule was first enunciated in Russel v. Russel, 1 Brown, Ch. 269, by Lord Loughborough. The other early English cases are Plumb v. Fluitt, 2 Anstr. 438; Ex parte Coming, 9 Ves. 117; Ex parte Haigh, 11 Ves. 403; Norris v. Wilkinson, 12 Ves. 196; Ex parte Mountfort, 14 Ves. 606; Ex parte Coombe, 17 Ves. 370. In Ex parte Hooper, 1 Mer. 9, Lord Eldon regretted the latitude to which it had extended to cover future advances in Ex parte Langston, 17 Ves. 230. Although from the first the judges animadverted upon the doctrine, it has been enforced in England. Some of the most recent cases in which the doctrine has been applied without observation on its propriety are De Rochefort v. Dawes, L. R. 12 Eq. 540; Shaw v. Foster, L. R. 5 H. L. 321. At page 340 Lord Cairns says: "It is a well established rule of equity that a deposit of a document of a title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to." L. R. 7 H. L. 135.

The same reluctance to admit the doctrine into the jurisprudence of this country was shown by the American courts, but it has received recognition by many of the judges who have dealt with it: In New York, in Rockwell v. Hobby, 2 Sandf. Ch. 9; Chase v. Peck, 21 N. Y. 584; Jackson v. Dunlap, 1 Johns. Cas. 114 (Chief Justice Kent); Jackson v. Parkhurst, 4 Wend. 369. In South Carolina, in Welsh v. Usher, 2 Hill Eq. 166. In Georgia, in Mounce v. Byars, 16 Ga. 469. In New Jersey, in Robinson v. Urquhart, 1 Beasley [12 N. J. Eq.] 523, and Griffin v. Griffin, 18 N. J. Eq. 104. In Wisconsin, in Jarvis v. Dutcher, 16 Wis. 327. In Maine, in Hall v. McDuff, 24 Me. 311. In California, in Hill v. Eldred, 49 Cal. 398. In Mississippi, in Williams v. Stratton, 10 Smedes & M. 418. In Rhode Island, in Hackett v. Reynolds, 4 R. I. 512. In the United States court for Wisconsin, in Wright v. Shumway [Case No. 18,093],—and see Meador v. Everett [Id. 9,376],—the doctrine has been applied. In Pennsylvania, in a series of cases, it has been denied. In Ohio, it has been denied upon the peculiar terms of the recording act as construed by the court in Bloom v. Noggle, 4 Ohio St. 45. In Kentucky, it has been disapproved, but not rejected. Washburn, in his treatise on Real Property (volume 2, 4th Ed. 82), speaks as if in his view the doctrine had recently become established in this country (Id. p. 84, pl. 4).

The following authorities were referred to by Mr. Ambrose and Mr. Briggs as to deposit of title deeds: Brown, St. Frauds, 60; Story, Eq. Jur. § 1020; Coote, Mortg. 222; 2 Washb. Real. Prop. 85. As affected by the recording acts in Ireland: Agra Bank v. Barry (house of lords) 9 English, 106; Lee v. Clutton, 3 Cent. Law J. 177, before Sir George Jessel, M. R.

FIRST NAT. BANK (CROCKER v.). See Case No. 3,397.

Case No. 4,799.

FIRST NAT BANK v. DOUGLAS COUNTY.

[3 Dill. 330;[1] 1 Thomp. Nat. Bank Cas. 268; 1 Cent. Law J. 584.]

Circuit Court, D. Nebraska. 1874.

TAXATION OF NATIONAL BANK SHARES.

Under the legislation of Nebraska, shares in national banks may be taxed, and the tax enforced by distraint against the property of the bank.

J. M. Woolworth, for plaintiff.

J. C. Cowin and J. M. Thurston, for defendant.

DILLON, Circuit Judge. This is a bill by the First National Bank of Omaha to restrain the collection of a tax assessed and levied under the revenue laws of the state, for the year 1873, upon the shares of the shareholders in the bank, and which tax, it is alleged, the collector is about to collect by entering the banking-house of the plaintiff, and seizing its property.

The bill avers that the capital of the plaintiff is $200,000, and that this amount is wholly invested in bonds, issued by the United States; the stock is divided into shares of $100 each, and is valued for taxation at that sum. The object of this bill is to have the whole tax declared void, and to restrain its collection.

The principal ground for the relief asked, is, that the act of the legislature of the state, passed February 27, 1873 [Gen. St. Neb. 1873, p. 938], which provides for the taxation of shares in national banks, is void, for non-compliance with the conditions upon which, under the acts of congress, such taxation by the state, or under its authority, is permissible.

The third section of this act is in these words: "The stockholders of every national bank located in this state, or of any bank incorporated under the laws of the state, shall be assessed and taxed on the value of their shares of stock therein, in the precinct where such bank is located, whether the stockholders reside in such place or not. Such shares shall be listed and assessed with regard to the ownership thereof, subject, however, to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this state, in the county or precinct where such bank is located. The shares of capital stock of national banks not located in this state, held in this state, shall not be required to be listed under the provisions of this act. Each national bank shall furnish to the assessor a full and correct list of the names and residences of its stockholders, and the number of shares held by each, and the assessor shall report the same to the county clerk in his assessment return. The taxes against such shares shall be levied against the holder of the same, in the list of personal property, and shall be paid by the bank."

The revenue law of the state further provides that the value of stock in corporations shall be taxed, and that "in assessing the value of such stock, the actual value, in cash, of all the property that is represented, shall be considered, and no deduction shall be made in such valuation by reason of debts owing by said corporation, unless, as in other cases, such deductions be made from the item of money and credits listed by such corporation."

The plaintiff contends that the act of February 27, 1873, is void, and no tax can be lawfully levied thereunder, because:

1. The act does not provide that the tax imposed on the shares shall not exceed the rate imposed upon the shares of banks organized under the authority of the state.

2. The act in effect provides for the taxation of the capital of the national bank, and not of the shares in the hands of the stockholders thereof, forasmuch as, thereunder, the valuation of the entire property of the bank is to be first ascertained, and the bank itself is to pay the taxes—the name of the stockholder being used merely to give to the proceedings the color of a tax upon the shareholder's interest.

The act of congress, in express terms, allows the states to impose taxes upon the shares of national banks, and the only substantial limitation upon the power of the states is that they shall not subject these shares to taxation to an amount greater than they assess upon their own banks, or upon moneyed capital in the hands of their own citizens.

The first objection above stated to the state enactment is not well taken. The act provides in terms that the stockholders in all banks, state and national, shall be assessed and taxed on the value of their shares therein. This is equivalent to a provision that there shall be no discrimination in favor of the state banks, and against the national banks, and it is not necessary that there should be added a clause that the tax imposed on the shares in national banks shall not exceed that imposed on shares in state banks.

It is next urged as an objection to the state legislation above mentioned, that it in effect provides for a tax upon the capital instead of the shares of the banks, and that as the capital of the plaintiff is invested in United States securities, which are exempt from taxation, the taxation under the law of the state is illegal. By recurring to the act of the state, it will be seen that it does not undertake to tax capital, but only shares, and that this mode is prescribed for shares in both classes of banks. It is settled by the decisions of the supreme court of the United States that, as respects the power to tax,

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

there is a distinction between capital and shares; and that the shares may be taxed, although the entire capital of the bank is invested in United States bonds, and that in the valuation of such shares for taxation, such valuation is not illegal because the assessing officers have not deducted the value conferred upon the shares by the non-taxable United States securities owned by the bank. Van Allen v. Assessors, 3 Wall. [70 U. S.] 573; People v. Tax Commissioners, etc., of City of New York [4 Wall. (71 U. S.) 244]; Lionberger v. Rouse, 9 Wall. [76 U. S.] 470.

The above cases are decisive against the objection we are now considering to the act of the state. It does not attempt to discriminate against the national banks, but provides one and the same mode for ascertaining the value of shares in the stock of all corporations, and more than this, the legislation of congress does not require. Lionberger v. Rouse, supra.

The bill does not state that the valuation of the shares in the plaintiff's bank is in excess of their actual value, nor that the valuation of the shares in the State Bank of Nebraska is less than their real value, and states no fact showing that the taxation, which the plaintiff seeks to avoid, is in fact excessive or disproportionate. It is therefore destitute of any substantial equity.

It is alleged on information and belief, that the capital of the banking partnership of Caldwell, Hamilton & Co. has not been assessed for taxation, but it is not stated that this has been intentionally done, nor does the bill negative that this may have been an accidental omission, and hence makes no case entitling the plaintiff to relief against the payment of the taxes in question.

It is, however, insisted that the bank can not be made liable in respect of the taxes on the shares, and that the collector ought to be restrained from making distress of the property of the bank. But the act of the state in terms provides that the taxes on the shares "shall be paid by the bank," and it is competent to make such a provision. National Bank v. Com., 9 Wall. [76 U. S.] 354; Lionberger v. Rouse, supra. Undoubtedly the bank could be made liable to pay such taxes by suit, and no reason is seen why the collection may not be enforced by distraint in the same manner as other taxes are collected. The demurrer to the bill is sustained and the bill dismissed. Decree accordingly.

NOTE. Taxation of capital stock in national banks. See First Nat. Bank of Omaha v. Douglas Co. [Case No. 4,809].

FIRST NAT. BANK (FRENCH v.). See Cases Nos. 5,099 and 5,100.

FIRST NAT. BANK (HOUGH v.). See Case No. 6,721.

FIRST NAT. BANK (HYDE v.). See Case No. 6,970.

FIRST NAT. BANK (MARKSON v.). See Case No. 9,097.

FIRST NAT. BANK (SARGEANT v.). See Case No. 12,359.

FIRST NAT. BANK (WRIGHT v.). See Case No. 18,078.

Case No. 4,800.

FIRST NAT. BANK OF ASHLAND v. CLEAVER et al.

[4 Wkly. Notes Cas. 480.]

Circuit Court, E. D. Pennsylvania. Oct. 20, 1877.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSER—PAROL EVIDENCE.

[An accommodation indorser of renewal notes given to a bank is entitled to show by parol that he indorsed the notes only upon the cashier's assurance that the bank owed a considerable sum to the maker, who was also engaged in rendering it services, all of which should be set off against the notes, so that defendant would be held for nothing, and that the indorsement was required only because the bank wanted two-name paper.]

[This action was brought by an indorsee of promissory notes against the indorser. The case was heard upon a rule to open the judgment.]

The following facts appeared: In the absence of defendants' attorney, in the summer vacation, the defendants, without legal advice, made and filed their own affidavits, and judgment was given for plaintiff, for want of sufficient affidavits of defence. The court subsequently permitted supplemental affidavits of defence to be filed, which set forth that at the time the notes in suit (which were renewal notes) were indorsed, the defendant, who was on the original notes as an accommodation indorser, refused to indorse the said renewal notes, now sued on. He was thereupon assured by the plaintiff's cashier, that there was due by the plaintiff to the maker a considerable sum, which the cashier then agreed should be set off against the amount of the notes. He further stated that the maker was from time to time rendering services to the plaintiff, and that the value of such services should be set off against the balance of the notes; so that defendant should not be held liable for any part of the notes by plaintiff, but the latter wished to have two-name paper; and that it was upon this express understanding that the defendant indorsed.

R. Schick, for plaintiff.

The affidavit must be read most strongly against the party making it. The promise of the cashier, as stated in the affidavit, was without consideration and void. He had no authority to make such a stipulation.

(McKENNAN, Circuit Judge. Was not the alleged agreement of set-off the real consideration and inducement?)

The facts alleged cannot be shown by parol to contradict the writing.

(McKENNAN, J. If the oral agreement of

set-off made by the plaintiff's agent were the consideration of the indorsement, would not a use of the indorsement by the plaintiff, contrary to the stipulation of set-off, be such a fraud on the defendant as to enable him to file a bill to restrain an action at law by the plaintiff against him?)

As a matter of fact the maker was indebted to the plaintiff largely in excess of the note, for another account, and the cashier had no right to agree to apply the set-off against this debt.

(McKENNAN, J. Granted that position as between the maker and the plaintiff, but how does it alter the defendant's equitable right, as between himself and the plaintiff, to have the set-off made as agreed upon?)

A. Sidney Biddle and M. P. Henry (with whom were James and Bartholomew, of Schuylkill county), contra, were not called on.

THE COURT (McKENNAN, Circuit Judge, and CADWALADER, District Judge) ordered that the judgment be opened, and that the case be tried before a jury.

FIRST NAT. BANK OF ASHLAND (McELHENNY v.). See Case No. 8,779.

Case No. 4,801.

FIRST NAT. BANK OF CHICAGO v. THIRD NAT. BANK.

UNION NAT. BANK v. THIRD NAT. BANK.

[1 Chi. Law J. 524.]

District Court, N. D. Illinois. Jan. Term, 1878.

CHECK—ALTERATION OF—INDORSEMENT.

1. Where A. gives his check to B. for $10, and B. raises that to $100 by the addition of a cipher to the ten, and B. then deposits the check with his banker, and his banker in the due course of business collects the check from A.'s banker, each party has a reclamation against the other till it falls upon the party who is to blame in the transaction. The loss must fall finally upon the party who stands nearest in relation to the party who committed the offence.

2. Where a bank, by indorsing the draft which was raised by their depositor and deposited with them, gave it a credit upon which the plaintiff paid, it was *held*, that there could be a recovery.

At law.

BLODGETT, District Judge. These two cases were submitted to the court for trial without a jury. I have not time to give an elaborate opinion, but from the facts in the case I am satisfied that the plaintiffs ought to recover; mainly from the consideration that I think the defendant bank by indorsing the draft which was raised by their depositor and deposited with them gave it a credit upon which the plaintiffs undoubtedly paid.

The point was made upon the trial that the drawer and drawee of this bank were guilty of negligence, and such negligence as released the defendant by reason of their not using proper precautions to prevent drafts from being raised, the drafts being drawn for $25.23 and raised to $2,500.23, but I think that was an obligation equally upon them. The defendant put this draft in circulation, and it was equally bound with the plaintiffs to see to it that proper precautions had been used to prevent the draft from being mutilated or altered as well as the plaintiffs, the drawees of the draft. I take it that if A. gives his check to B. for $10, and B. raises that to $100 by the addition of a cipher to the ten, and B. then deposits the check with his banker, and his banker in the due course of business collects the check from A.'s banker, that each party has a reclamation against the other till it falls upon the party who is to blame in the transaction. And it was the misfortune of the Third National Bank, in this case, that their depositor, who seems to have been the party who manipulated these alterations in these checks, is not to be found. The loss must fall finally upon the party who stands nearest in relation to the party who committed the offense. I can see no other solution of a difficulty of this kind. It strikes me that the authorities cited on the part of the plaintiffs are sufficiently in point to sustain this view of the case, although, of course, they are like any other case, or nearly every other case, that arises in a court of justice, not on precisely all-fours. Judgment for plaintiffs.

FIRST NAT. BANK OF DENVER (FIRST NAT. BANK OF TRINIDAD v.). See Case No. 4,810.

Case No. 4,801a.

FIRST NAT. BANK OF HANNIBAL v. SMITH et al.

Circuit Court, D. Massachusetts, Sept. 6, 1879.

[See 6 Fed. 215.]

FIRST NAT. BANK OF JAMESTOWN (LAKIN v.). See Case No. 7,999.

Case No. 4,802.

FIRST NAT. BANK OF MANHATTAN v. CITIZENS' BANK OF TOPEKA.

[2 Cent. Law J. 757;[1] 21 Int. Rev. Rec. 382; 1 N. Y. Wkly. Dig. 511.]

Circuit Court, D. Kansas. Oct., 1875.

CONSTRUCTION OF BANK CHARTER—POWER TO RECEIVE SPECIAL DEPOSITS—CASE IN JUDGMENT.

1. The Citizens' Bank of Topeka, Kansas, was chartered, with power, among other things, "to carry on the business of receiving money on deposit, and to allow interest thereon, giv-

[1] [Reprinted from 2 Cent. Law J. 757, by permission.]

ing to the person depositing credit therefor." *Held*, that this language did not confer upon the bank the power to receive special deposits.

2. The plaintiff caused an attachment to be levied upon the cattle of a debtor, and subsequently agreed to permit him to drive them to the Indian Territory, the plaintiff assuming the risk of any other creditor attaching the cattle, before they should arrive at their destination, not later than November 27; in consideration of which the debtor executed, with others, a note, which, together with a sum of money, he deposited with the defendant bank, subject to the condition that if the cattle should be attached before they reached the Indian country, by other creditors of the debtor, and before November 27, then the note and money were to be handed back to Johnson, one of the makers. If, however, the cattle were not so attached, then the note and money were to be delivered to the plaintiff. A sham attachment was sued out and levied on the cattle while en route for the Indian country; and thereupon the cashier of the defendant bank was induced to deliver the note and money to Johnson. *Held*, that the cashier acted in a position analogous to that of a stakeholder; that in so doing he was not acting within the scope of his implied authority; that the bank could not legally undertake such a transaction; it was ultra vires, and therefore the bank was not bound.

Motion for a new trial. In the month of November, 1874, the First National Bank of Manhattan levied an attachment on a lot of cattle belonging to Andrew Wilson, taken for a debt owing by Wilson to the bank. Thereupon Wilson and the Manhattan Bank made an arrangement in substance as follows: The bank was to release its attachment on the cattle, and Wilson was to be permitted to drive them to the Indian country, and the bank to take the risk of any other creditor of Wilson attaching said stock before it arrived at its destination, not later than November 27, and in consideration thereof Wilson was to make a note for the sum of $6,424, with certain other names to it, and this note, together with $750 in money, was to be placed, and was placed, in the hands of J. Thomas, cashier of the Citizens' Bank of Topeka, to be held under certain instructions, and to be paid over to either the Manhattan Bank or to E. Johnson, one of the signers on the note, as the following contingency might determine, to-wit: If the cattle should be attached before they reached the Indian country by Wilson's creditors, and before November 27th, then said cashier was to deliver the note and money back to Johnson. If, however, the cattle were not so attached, then the note and money were to be delivered to the said First National Bank. Under this arrangement the cattle were turned over to Wilson and Johnson; and those parties, in order to cheat and defraud the said First National Bank, while said cattle were en route for the Indian country, got up a sham attachment, and pretended to have the sheriff of Sumner county seize said cattle, and thereon induced Mr. Thomas, cashier of the Citizens' Bank, on the strength of said attachment, to deliver back to them the said note and money. The evidence showed that the attachment was a mere sham; that the cattle were all the time held by Wilson and Johnson, and were safely got into the Indian country; and that Mr. Thomas was warned by the attorney of the Manhattan Bank before delivering the deposit, that such was the case, and was cautioned not to pay the deposit to Johnson or Wilson. The agreement was not in writing, nor did the cashier give any receipt for said deposit, nor was any consideration to be paid the said cashier or the Citizens' Bank. After the delivery of the note and money as aforesaid, and in March, 1875, the plaintiff, the First National Bank of Manhattan, brought this suit against the Citizens' Bank to recover the value of the note and money; and at the April term of this court the case was tried before a jury, and plaintiff obtained a verdict against defendant for $7,200.

G. C. Clemens, for plaintiff.
W. P. Douthitt, for defendant.

FOSTER, District Judge (after stating the facts as above). The question presented by this motion is briefly this: Did Mr. Thomas, the cashier of the defendant bank, act within the scope of his authority as such cashier in this transaction? In other words, did the Citizens' Bank become liable to the Manhattan Bank by reason of the action of said cashier? The defendant bank was organized under an act of the legislature of the state of Kansas. Gen. St. p. 225, § 127. The law gives the power to the bank, among other things, to "carry on the business of receiving money on deposit, and to allow interest thereon, giving to the person depositing credit therefor."

The question resolves itself into two points: 1. Had the bank the power under its charter to receive special deposits? 2. Was this a special deposit?

1. The law is well and definitely settled that a corporation is a creature of the law, and possesses only such powers as the charter of its creation confers upon it, either expressly or incidentally thereto. Trustees of Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 636; Perrine v. Canal Co., 9 How. [50 U. S.] 172. The act of incorporation is to them an enabling act; it gives them all the power they possess. Head v. Insurance Co., 2 Cranch [6 U. S.] 169. The power to receive special deposits is not expressly given by the law; is it incidental to the powers given? Perhaps I need go no further on this question than to say it is extremely doubtful. There is a line of decision starting with the Essex Bank Case, 17 Mass. 497, which holds it to be one of the incidental powers of a bank to receive special deposits. However, by several late and well reasoned cases of the highest courts of different states, this doctrine is

denied or questioned. In Wiley v. First Nat. Bank [47 Vt. 546], it was decided that national banks created under the act of congress have no power to bind themselves by receiving special deposits, and no action can be maintained against the bank for any such deposit left with the cashier and not returned. In First Nat. Bank of Lyons v. Ocean Nat. Bank, the court of appeals of New York very clearly foreshadows its views, and refers to the Vermont decisions approvingly. 60 N. Y. 278. In Weckler v. First Nat. Bank [42 Md. 581], the court of appeals of Maryland held that national banks cannot, under the powers conferred by the act of congress, engage in the business of selling railway bonds on commission. By the act of congress [Act June 3, 1864 (13 Stat. 101)] the powers conferred on national banks are fully as comprehensive as the powers given by the act of the legislature under which that defendant bank is incorporated. The act of congress uses the words "receiving deposits." The act of the legislature uses the words "receiving money on deposit." It would seem that if the former words would not comprehend a special deposit, the latter certainly could not.

2. But was this transaction a special deposit with the defendant bank, within a fair construction of those terms? The object of depositing money, papers, or other valuables in a bank, is safety from loss by theft, fire, or other means. The cashier receives the deposit and undertakes to deliver it on demand to the person making the deposit or his order. There is no risk assumed of delivering it to the wrong person, and no controversy as to who is to receive it. How was it in this case? The purpose of placing this deposit in Mr. Thomas' hands, was not safety alone, but to place it in the possession of a person in whom both parties had confidence and in whose judgment and integrity both parties could rely, judgment sufficient to determine and decide when the contingency should arise which was named in the agreement and to deliver it to the person entitled thereto. The property was beyond the reach of either party, until an uncertain event should occur which was to decide which party was entitled to it, and in determining which party was entitled to the deposit, the cashier was called upon to decide which party was the owner of it—a question about which the parties might and did actually disagree. The cashier occupied very closely the position of a stake-holder, and was compelled to decide who was the winner; and he assumed the liabilities of one occupying that position. It seems to me impossible to hold that in assuming such responsibility he was acting for the bank of which he was cashier, or within the scope of his implied authority, or that by any fair construction of the law the defendant bank could legally undertake such a transaction. It was ultra vires, and the motion to set aside the verdict must be sustained.

Case No. 4,803.

FIRST NAT. BANK OF MANHATTAN v. KING WROUGHT IRON BRIDGE CO. et al.

[2 Cent. Law J. 505.][1]

District Court, Kansas. 1875.

REMOVAL OF CAUSES UNDER ACT OF 1875 — MANNER OF REMOVING CAUSE — APPOINTMENT OF RECEIVER.

1. An action was brought in the district court of Kansas, by a bank located in Kansas, claiming to be the assignee of a certain mortgage, against a corporation which was a citizen of Kansas, and also against one King, who was a citizen of Ohio, and also against four other defendants, who were citizens of Kansas. It appeared from the pleadings that the only defendants who retained an interest in the suit, were the defendant corporation and the defendant King. The interest of King consisted in the fact that he was a mortgagee of the defendant corporation, and also the assignee of the mortgages of several of his co-defendants, and that, subsequently to the execution of these mortgages, he had purchased the entire property of the defendant corporation. *Held*, that the main controversy was between the plaintiff and the defendant corporation, and the controversy between the plaintiff and the defendant King was but incidental to the main controversy, and therefore that the cause was not subject to removal to the federal court, under the act of March 3, 1875 [18 Stat. 470].

[Cited in Donohoe v. Mariposa Land Co., Case No. 3,989.]

2. The affidavit for removal, and bond having been filed in term time, but during a temporary recess of the state court, and the record not having been filed in the federal court, *held* by the state court, a proper case being shown, that it had jurisdiction to appoint a receiver. Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604] examined and denied.

Motion to vacate order appointing receiver.

Alfred Ennis and C. M. Foster, in support of motion.

A. L. Williams and Ross Burns, contra.

MORTON, J. The First National Bank of Manhattan, in the state of Kansas, commenced its action against the King Wrought Iron Bridge Co., a corporation organized under the laws of the state of Kansas, and Zenas King, Chas. N. Rix, Geo. F. Parmelee, Stephen French, and Alfred Ennis. King is a resident and citizen of Ohio. The other defendants are residents and citizens of Kansas. The petition alleges that the King Wrought Iron Bridge Co. executed a mortgage (upon real and personal property), to defendants, King, Rix, Parmelee, French and Ennis, to secure to them respectively, different amounts owing by the company to each—as evidenced by separate notes of the company, executed to each—that the note owned by defendant French amounting with interest to over $6,-

[1] [Reprinted by permission.]

000, has been duly assigned to plaintiff and is due, and the action is brought to obtain a judgment against the company upon this note, and to subject the mortgaged property to its payment. The petition alleges that the defendants King, Rix, Parmelee and Ennis refused to join in the action and they are therefore made defendants. The only necessity for bringing them into court is found in the fact that they, too, have an interest as mortgagees in the property mortgaged. They have no interest, and claim none, in resisting the personal judgment against the company, sought by the plaintiff. It is none of their business whether the plaintiff recovers such personal judgment or not. They need not take such personal judgment on their respective claims against the company unless they wish. In fact they need not take judgment at all against the company—even for their pro rata interest in the mortgaged property, unless they choose to formally demand it. But they have such rights under the mortgage, in that property, by way of lien, that they are necessary parties. They occupy the same position precisely as if they were prior or subsequent mortgagees. The plaintiff must bring them into court, and give them an opportunity to set up their respective claims. But when they do this, they are entitled to no affirmative relief, if the plaintiff fails to establish its lien on the property. In the latter case, they simply step out of court, with all their rights against the company unimpaired and unaffected. When A. brings his action against B. to foreclose a mortgage, and makes C. a party, as another mortgagee—if A. fails in his action, or dismisses his suit, C. can not obtain a judgment on his mortgage, against B. So much for the facts as alleged in the petition.

The defendants Rix, Parmelee and Ennis answer that they had transferred their interest in the mortgage, and their respective claims secured thereby, to the defendant, King, before the commencement of this action, and disclaim all interest. For the purposes of this opinion, the answer of the bridge company may be stated to set up payment as a defense. The defendant French makes default. The defendant Zenas King answers, alleging that subsequent to the mortgage he purchased the mortgaged property of the bridge company (and this is admitted by the plaintiff). He further alleges the assignment to him, by Rix, Parmelee and Ennis respectively, of all their interest in the subject-matter of the action. He alleges that the sale of the property to him by the bridge company was with the consent of the plaintiff and its assignor, French, and denies that plaintiff is the owner of the note sued on. Practically, then, the parties to the action are these: The bank as plaintiff, and the bridge company and Zenas King as defendants. The bank seeking to obtain a judgment against the bridge company on its claim, and to subject the mortgaged property to the payment of that judgment. The bridge company resisting that claim. The defendant King, by his own showing, having merged his mortgage in the legal title, by purchase, but resisting the claim of the bank to any lien upon the property. It seems to me that he has thus placed himself in the position of the purchaser of land subsequent to a mortgage upon it, and that he is only authorized to resist and deny the liability of the land to the debt. On the 29th of April the defendant King files with the clerk of this court his petition, setting forth the substance of the pleadings, alleging the residence of the parties as stated above, and praying that the cause be removed to the circuit court of the United States, for the district of Kansas. At the same time he files his bond with sureties for such removal. The application is made under the act of March 3, 1875. The sureties in the bond justify in the usual affidavit. The petition is not verified by affidavit. Neither the judge nor clerk of this court is applied to, to approve or accept the bond or the sufficiency of the sureties. This court is in regular session at the time (but had taken a recess of three or four days), but its attention is not called to the petition. All that is done in that matter is simply the filing of the papers with the clerk. And it is claimed that this, ipso facto, removes the cause to the United States circuit court. It may be added that no transcript has yet been filed in the federal court, and indeed none has been yet obtained from the clerk of this court. On the first day of May, upon affidavit made that some of the defendants were removing the personal property included in the mortgage, from the state of Kansas, the sheriff was, by the judge of this court at chambers, appointed receiver thereof and took possession. It may be stated, though not material, that the judge and the attorneys for the plaintiff were not, at the time, aware of the filing of the petition and bond for the removal of the cause, stated above.

The defendant King now moves the court to vacate the order appointing a receiver, and assigns the following reasons: 1st. That the affidavit is insufficient. 2d. That the order was made without notice, and that there was not such an emergency shown as authorized such appointment without notice. 3d. That the filing of the petition and bond above referred to, removed the cause to the United States circuit court, and that therefore this court had no jurisdiction to make such appointment.

As to the first two reasons assigned, I will only say that the affidavit seems to be amply sufficient and to show a pressing necessity for immediate and prompt action. It alleges that the defendant King was already engaged in removing the personal property mortgaged, out of the jurisdiction of the court. This is also openly avowed by his

attorneys upon the hearing of this motion. It is true that he claims that the chattel mortgage has become void as against his rights as a subsequent purchaser, by certain alleged laches on the part of the plaintiff. But this is denied by plaintiff and constitutes part of the issues to be tried and decided upon the trial of the action—and not to be adjudicated upon the hearing of a motion at chambers or in an interlocutory proceeding. The order can not be vacated for the two causes first assigned. The other reason assigned seems to present more difficulty and calls for an examination and construction of the recent act of congress of March 3, 1875. The second section of said act states when a case can be removed to the federal court. The amount in dispute exclusive of costs, must be $500. A certain class of cases are described, which may be removed, no matter where the residence of the parties may be. It is then provided that any suit of a civil nature at law or in equity, in which certain conditions of residence of the parties exist, and in which they bear certain relations to the actual controversy, may be removed. As to these cases, the first clause of the section provides that the suit must be one in which there shall be a controversy "between citizens of different states." This clause refers to a removal by either party; that is by the whole of what constitutes the one side or the other. The second clause states when a case can be removed by either party less than the whole. There must be in a suit in the state court, "a controversy which is wholly between citizens of different states, and which can be fully determined as between them." If so, then either one or more of the plaintiffs or defendants actually interested in the controversy may remove said suit into the circuit court of the United States. It is perfectly plain that it is under this second clause of the section that the defendant King claims the right of removal. The mode of removal is thus prescribed: The party desiring to remove the suit shall file a petition in the state court, and with it a bond with good and sufficient surety for entering a copy of the record in the federal court, by its next session, and paying all costs awarded if the removal is improperly made. It is then provided that "it shall be the duty of the state court to accept said petition and bond, and proceed no farther in such suit, and the said copy being entered as aforesaid in the said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

The cases subject to removal, and the mode in which the removal is to be effected being thus stated, two questions arise, which will be stated here in an order different from that which would naturally occur.

First. If the case is one which is properly removable, have the proper steps been taken by the defendant King to remove it, and at the date of the appointment of the sheriff as receiver, could it be considered as removed? In other words if removable, did this court, at that date, have any jurisdiction to act in the matter? If this court had, between the time when the petition and bond for the removal were filed in the office of the clerk of this court, and the time when the record might be filed in the federal court, no power to proceed with the trial of the issues made in the case, had it or had it not, the power to act during that time, in the preservation of the property, in a case over which it had once acquired unquestionable jurisdiction? And it will be remembered that the act seems to specify the time at which the record is filed in the federal court, as the date at which that court shall proceed with the case.

Second. Is the case one which could be removed? It is believed that but one decision has been rendered in any court of the United States, since the passage of this act, which has given to it a construction—that is by Judge Drummond in the United States district court for the northern district of Illinois. It may seem rash to criticise the opinion of a judge of such recognized learning and ability. One who for twenty-seven years has occupied so prominent a position in the district and circuit courts of the United States. But it seems as though in the event of his opinion being sustained, it would be the imperative duty of congress to make haste to repeal, or at least to materially amend, the statute. The results of the construction given to it by him, could not have been foreseen. In the case of Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604]. Judge Drummond decides that in effecting the removal of cases under that act, the petition need not be sworn to; that the security need not be approved by the judge of the state court, that that court need not take any action on the petition or the bond, and in substance need not know anything at all about those two important papers (the petition and bond) which have the magical effect—though the one be utterly false in fact, and the other totally worthless in a pecuniary point of view—of ousting one court of its acquired jurisdiction without its knowledge, and vesting it in another which has as yet no information of the fact. I do not care to comment upon this further than to say that if this theory of the law is sustained, a new mode for distressed debtors to obtain continuances "over the term" commonly called "staving off cases," is presented to the profession, if they happen to have no scruples as to the professional propriety of adopting it. The filing of a petition alleging a substantial party in a case to be a resident of another state, though intimately known to the judge as his next door neighbor—coupled with a bond embodying the practical principle of "straw bail," is all that is need-

ed. If the case at bar is to be decided as urged by the defendant King, and is a fair exemplification of the workings of the law, it will be unnecessary and even imprudent for the party who desires to obtain a continuance in this novel way, to file a copy of the record in the federal court, for the chase of the adverse party, in his attempt to again impound his escaped cause, will be a more exciting and uncertain one. It does not seem that such results could have been contemplated by congress in framing this act.

In examining carefully the opinion of Judge Drummond referred to, it appears that a copy of the record had been filed in the United States circuit court. This is only disclosed incidentally, and no stress is laid upon that fact in the opinion. I can not follow the construction of the statute given, even by such an able jurist, further than to apply it to just such a case as he had before him. In this case the record is not yet filed in the federal court. The act authorizes that court to "proceed" when the record is filed. Until that time, indeed, it seems difficult to comprehend how that court can have jurisdiction. We unquestionably apply this rule to cases of change of venue, and do not consider the court to which the change of venue is taken as having jurisdiction until the record is received. If it be possible that the mere act of filing these two papers—known only to the clerk and attorney—deprives this court at once of its power to try the cause, I must still cling to the idea that until the record is filed in the federal court, there is as much power in this court to make an interlocutory order, providing for the preservation of the property, and for retaining it within the grasp of whichever tribunal the lot of trying the cause may fall to, as there is to remand a prisoner to custody after ordering a change of venue.

Is the cause one which can be removed? I have stated the nature of the action and the position which Mr. King, the defendant, who desires to remove it, occupies as a party. It seems that the controversy is really between the plaintiff and the bridge company. The defendant King is only brought into court for the purpose of enabling him to set up a lien on the property. If the plaintiff fails to recover a judgment against the bridge company, or even if it fails to subject the mortgage property to its alleged lien, King can obtain no affirmative relief. While upon the other enquiry, I have been embarrassed by the fact that Judge Drummond's opinion, in the case quoted, is so different from that at which I would have otherwise readily arrived, in this he sustains the view I am giving. In that case the plaintiff was a citizen of Massachusetts; the railroad company a citizen of Illinois. Certain judgment and other creditors were made defendants, one of whom filed a cross-bill—and the opinion proceeds to lay down the true rule for deciding whether the status of the parties is such as to make the cause removable, by declaring the true rule to be, to ascertain whether that court had jurisdiction of what may be regarded as the main controversy, and whether the other questions between citizens of the same state are mere incidents of such controversy. In that case the main controversy was between citizens of different states. In this it is between citizens of the same state. It is not at all probable that there will be any controversy in this action between the two courts. The defendant King, after filing in the federal court a copy of the record (or even without such filing, if he deems the transit complete without that step), can renew his motion in that court to vacate the order appointing the receiver. Upon that motion, or upon a motion to remand by the opposite party, that court can express its decisions upon the question of jurisdiction and removal, and I do not doubt that the views of a United States court upon the construction of a United States law, will be regarded as authoritative in the case in which they are enunciated. The motion to vacate the order must be overruled.

Case No. 4,804.

FIRST NAT. BANK OF MT. PLEASANT v. DUNCAN et al.

[35 Leg. Int. 251; 25 Pittsb. Leg. J. 169; 24 Int. Rev. Rec. 206; 7 N. Y. Wkly. Dig. 63; 6 Reporter, 69; 6 Wkly. Notes Cas. 158.] [1]

Circuit Court, W. D. Pennsylvania. June 3, 1878.[2]

INTEREST — NATIONAL BANKS — STATE BANKS OF ISSUE—REV. ST. § 5197—COMPETITION.

A national bank is entitled to the same privileges in regard to charging interest as is extended to state banks of issue in the state in which it is located.

[In error to the district court of the United States for the western district of Pennsylvania.]

D. T. Watson and Geo. Shiras, Jr., for plaintiffs in error.

John Dalzell (John H. Hampton with him), contra.

Before STRONG, Circuit Justice, and McKENNAN, Circuit Judge.

STRONG, Circuit Justice. In the court below this was an action brought by [William] Duncan and Brother, partners, to recover the penalties prescribed by the acts of congress relating to national banks, for charging and taking usurious interest on loans made by the First National Bank of Mt. Pleasant to the plaintiffs. At the trial in the district court [Case No. 4,135] evidence was given tending to prove that at different times the bank had made sundry loans to the plaintiffs,

[1] [Reprinted from 35 Leg. Int. 251, by permission. 7 N. Y. Wkly. Dig. 63, and 6 Reporter, 69, contain only partial reports.]

[2] [Reversing Case No. 4,135.]

reserving and charging therefor interest at the rate of nine per cent. The plaintiffs claimed that interest had been paid at that rate, and that in consequence thereof they were entitled to recover from the banking association twice the amount thus paid. Numerous grounds of defence were taken by the bank, none of which were sustained by the court, and the jury was instructed to return a verdict for the plaintiffs. The record having been removed into this court, and errors having been assigned to the rulings of the district judge, we are brought to a consideration of the defences set up and overruled. It is, however, unnecessary to refer to more than one of them, for if it should have been sustained, as we think it ought to have been, if proved, it is fatal to the plaintiffs' right of recovery.

It appears by the record that at the trial the defendants offered to prove that since the year 1869, and prior to January 1st, 1873, many state banks of issue had been organized in the state of Pennsylvania under the law of the state; that they had carried on business under such organization ever since, and that the rate of interest limited by the laws of the state for these several banks, at the time of their organization and ever since was "such an amount of interest as should be agreed upon between the bank and the borrower, or customer." This offer was made in connection with evidence already given, and other to be offered, showing that the First National Bank of Mt. Pleasant is located in Pennsylvania, and that all the interest charged the plaintiffs for which this action was brought was at a rate agreed upon between the plaintiffs and the defendant bank. The offer was overruled, and it was then renewed in different forms. Among others, the defendants offered to prove "that there is no general statute in Pennsylvania limiting the rate of interest for state banks specifically, but that there had been organized under the laws of the state, in the state since 1869, at least sixteen state banks of issue, which since 1871 have carried on and still carry on business under the said organization and laws, and that by the laws of the state of Pennsylvania all of the said banks are allowed, and have been since 1871, and still are allowed to charge a rate of interest and discount of ten per centum per annum." All these renewed offers were also overruled, and the court charged the jury as follows: "The legal rate of interest in Pennsylvania is six per cent., the rate of discount allowed to banks of issue is also six per cent., and no more. It is true that there are some banks that, by special acts of assembly are allowed to charge more, but these are exceptions to the general laws of the state. Congress deals with general rules, and when it excepts banks of issue under the state laws, it means the general law applicable to the whole state, and relating to banks of issue all over the state. The special acts authorizing banks of issue, if there are any, apply only to the particular banks created by them, or permitted by them to take more than six per cent., and these laws are laws unto these banks only. The general banking laws of Pennsylvania prohibit the taking more than six per cent. discount. The national banking law prohibits a national bank in Pennsylvania from taking more."

This instruction given to the jury, and the rulings of the district court by which the evidence offered was excluded, were erroneous. They were founded upon a misconception of the provisions of the acts of congress under which national banking associations are organized, and exist. The limitations of the rates of interest which such associations may charge and take are such only as are prescribed in those acts. The associations derive no power from the states and they are not subject to restrictions imposed by the states. The rates of interest prescribed by the states for their own institutions or for the public generally, are rules for national banks only so far as they are made such by congress, and only in force of the acts of congress. The national banking act has enacted that any banking association "may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title." Rev. St. § 5197. The purpose sought to be accomplished by this exception is very evident. It was fully stated in Tiffany v. National Bank of Missouri, 18 Wall. [85 U. S.] 409, to which it may be well to recur. The supreme court of the United States there said: "It cannot be doubted, in view of the purpose of congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, if state statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, national banking associations could not compete with them unless allowed the same. . . . The only mode of guarding against such contingencies was that which, we think, congress adopted. It was to allow

to national associations the rate allowed by the state to natural persons generally, and a higher rate, if state banks of issue were authorized to charge a higher rate. This construction accords with the purpose of congress and carries it out. It accords with the spirit of all the legislation of congress. National banks have been national favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks. On the contrary much has been done to insure their taking the place of state banks. The latter have been substantially taxed out of existence." Certainly their circulation has been. We have quoted thus fully from the language of the supreme court, because it bears directly upon the present case and shows the meaning of the act of congress. It shows what indeed seems very plain on the face of the act itself, that national banks are authorized to reserve and take interest on loans made by them at such rates as are allowed by state law to state banks of issue in the states where the national banks are located. In reserving and taking interest at such rates they act within the authority given them, violate no law, and render themselves liable to no penalties.

The learned judge of the district court was of opinion that because it was not shown, or offered to be shown that the state banks of issue incorporated under the state laws, and severally authorized to reserve and take interest at the rate of ten per cent., or at any rate agreed upon with the borrowers, are authorized, by general law, to charge more than six per centum, therefore national banks are not. His charge to the jury was, as has been stated, "Congress deals with general rules, and when it excepts banks of issue under the state laws, it means the general law applicable to the whole state, and relating to banks of issue all over the state." In this opinion we do not concur. It interpolates in the statute words which are not there, and it disregards the plain purpose for which the excepting clause was inserted. The act of congress declares that where, by the laws of any state, a rate of interest different from the general rate shall be limited, or allowed, for state banks of issue, national banks shall be allowed the same. It says not a word of allowance to the banks by general law. Charters offered by special law, granting special privileges to those who accept the offer, are as clearly laws of the state as are the most general enactments. Until recently in Pennsylvania state banks were always organized under special laws applicable solely to each bank. There was no general banking law, and no rate of interest limited by general enactment for banks as such, and as a class. Each bank had its own peculiar privileges though prior to 1869 generally restricted to charging the rates of interest allowed for natural persons. And in many other states all state banking institutions are organized under such laws, and they derive all their powers from such legislation. Whatever authority they exercise under their charters is limited or accorded to them by the law of the state. And if we look to the purpose of congress exhibited in the national banking act (the purpose of which we have spoken), what difference does it make whether state banks are authorized to take more than the interest allowed to natural persons, by special, or by general laws? In either case they would encounter favored rivals, and a destructive competition, against which they could not stand, if they are not permitted to reserve and take interest at the rate accorded to the state institutions. In either case the unfriendly state legislation, and the ruinous competition, against which congress intended to guard, would be equally possible. States might establish banks along side of every national bank, and give them powers against which the national banking associations could not compete. A construction of the act of congress that opens the door to such results cannot be accepted as the true one. It is inconsistent with the letter of the act, and still more with its purpose and spirit.

We hold therefore that the evidence offered by the defendants should have been received. If there are state banks of issue in Pennsylvania, authorized either by general or special law to take interest on loans made by them at such rates as may be agreed upon between them and the borrowers, the defendants have transgressed no act of congress, by taking nine per cent. from the plaintiffs (that have been the rate agreed upon), and they are not liable in this action. The judgment of the district court is reversed, and a new trial is ordered.

FIRST NAT. BANK OF MT. PLEASANT (DUNCAN v.). See Case No. 4,135.

FIRST NAT. BANK OF MT. PLEASANT (MELLINGER v.). See Case No. 4,135.

Case No. 4,805.

FIRST NAT. BANK OF MOUNT PLEASANT v. TINSTMAN.

[36 Leg. Int. 228;[1] 2 Browne, Nat. Bank Cas. 182; 26 Pittsb. Leg. J. 95.]

Circuit Court, W. D. Pennsylvania. Jan 20, 1879.

NATIONAL BANKS—USURY—RATE OF INTEREST CHARGED BY STATE BANKS.

The several acts incorporating certain state banks, taken in connection with the several

[1] [Reprinted from 36 Leg. Int. 228, by permission.]

banking laws of the state, gave these banks the power to issue; the charters of these banks permitted them to receive on the discount of notes, &c., such an amount of interest as was agreed upon between the customer and the bank. *Held*, that therefore under section 5197 of the Revised Statutes of the United States, any national bank in Pennsylvania could take and charge the same rate of interest as any state bank of issue is authorized to charge. First Nat. Bank of Mt. Pleasant v. Duncan [Case No. 4,804]. Strong, J., followed.

The plaintiff is a national bank, duly organized and incorporated in 1868 under the acts of congress of the United States providing for the incorporation and regulation of national banks, and is located at Mt Pleasant, in the state of Pennsylvania, where it has been carrying on business since 1868. On the 1st day of October, A. D. 1875, the defendant being then indebted to the plaintiff gave to it in good faith to secure said pre-existing debt a mortgage dated October 1st, A. D. 1875, and duly recorded in the recorder's office of Westmoreland county, Pennsylvania, in Mortgage Book, vol. 9, page 28, which is the mortgage upon which the above suit was brought.

The indebtedness originated in manner as follows: The defendant, desirous of procuring a loan from the plaintiff, procured his (defendant's) brother, A. O. Tinstman, to endorse defendant's note for him (defendant), and defendant took this note to the plaintiff. Whereupon the plaintiff, knowing the endorsement to be for the accommodation of the maker, took the note, deducted from the face of it the amount of interest agreed upon, to wit, at the rate of nine per centum per annum, and paid to the defendant the balance in money. This note was renewed from time to time at same rate of interest until the mortgage was given on the 1st day of October, 1875, which was given for the amount then due on said loan for debt and interest as aforesaid. The total sum of the said precedent debt, principal and interest, was $8233.79. The rate of interest taken, charged and received by the bank on account of said indebtedness was agreed upon between said bank and said defendant, and was nine per centum per annum, and amounts in the aggregate to the sum of $3134.20, and was so taken by said bank between the 28th day of July, A. D. 1871, and the 1st day of October, A. D. 1875. The defendant admits that plaintiff is entitled to a judgment in this case for $5099.59, being the whole of said principal, less said $3134.20, but the plaintiff claims a judgment for the whole of said $8233.79, with interest from June 4, 1876.

The following named banks of the state of Pennsylvania have from the date of their respective charters, by special acts of assembly, been organized and carrying on business under said charters and acts in the state of Pennsylvania, and said acts of assembly of the state of Pennsylvania herein referred to by title and date of approval shall be considered as though they were each recited at length herein, and may be so regarded for the purposes of this case: An act entitled "An act to incorporate the Manayunk Bank, located in the city of Philadelphia." Approved June 14, A. D. 1871. An act entitled "An act to incorporate the Bank of America." Approved April 27th, A. D. 1870. An act entitled "An act to incorporate the People's Bank of Philadelphia." Approved February 25th, A. D. 1870. An act entitled "An act to incorporate the United States Banking Company." Approved June 2d, A. D. 1871. An act entitled "An act to incorporate the Twenty-second Ward Bank of Germantown." Approved May 17th, A. D. 1871. An act entitled "An act to incorporate the Iron Bank of Philadelphia." Approved May 19th, A. D. 1871. An act entitled "An act to incorporate the Iron Bank of Phoenixville." Approved May 4th, A. D. 1871. An act entitled "An act to incorporate the State National Bank." Approved June 2d, A. D. 1871. An act entitled "An act to incorporate the Tenth Ward Bank of Philadelphia." Approved March 12th, A. D. 1872. An act entitled "An act to incorporate the City Bank of Scranton." Approved March 20th, A. D. 1871. An act entitled "An act to incorporate the State Bank of Delaware County." Approved May 19th, A. D. 1871. An act entitled "An act to incorporate the Butchers' and Drovers' Bank." Approved April 27th, A. D. 1870. An act entitled "An act to incorporate the Market Bank." Approved April 27, A. D. 1870. An act entitled "An act to incorporate the Quaker City Bank." Approved May 23d, A. D. 1871. An act entitled "An act to incorporate the Franklin Bank." Approved April 1, A. D. 1870. An act entitled "An act to incorporate the West End Bank of Philadelphia." Approved November 20th, A. D. 1871. An act entitled "An act to incorporate the Southwark Banking Company." Approved June 2d, A. D. 1871. True copies of three of the charters of these banks are hereto attached as part hereof.

Each of said banks claims the right to issue its own bank notes under the said acts of assembly and the acts of assembly hereinafter referred to; but no one of said banks ever issued its own bank notes, and the defendant claims that under said acts of assembly none of said banks have the right to issue. And the following acts of assembly of the state of Pennsylvania, referred to by title and date of approval, shall be considered as though they were each recited at length herein, and may be so regarded for the purposes of this case: An act entitled "An act for reducing the interest of money from eight to six per cent. per annum." Approved March 2, A. D. 1823. An act entitled "An act regulating banks." Approved April 16, A. D. 1850. An act entitled "An act regulating the rate of interest." Approved May 28th, A. D. 1858. An act entitled "An act

to establish a system of free banking in Pennsylvania, and secure the public against loss from insolvent banks." Approved March 31, A. D. 1860. An act entitled "A supplement to an act to establish a system of free banking in Pennsylvania, and to secure the public against loss from insolvent banks, approved March 31, A. D. 1860." Approved May 1, A. D. 1861. And the supplements and amendments to any and all of said acts and all of the aforesaid acts and the various supplements thereto may be copied and added hereto and made part hereof by either party at any time during the pendency of this suit, and the other party shall consent thereto. If the court should be of opinion on the above stated facts that the plaintiff could lawfully take, charge and receive of and from the defendant by agreement between the plaintiff and defendant on such a direct loan interest at the rate of nine per centum per annum then judgment shall be entered in favor of the plaintiff for the sum of $8233.79, with interest from June 4, 1876; but if the court should be of opinion that the plaintiff could not legally take, charge and receive by agreement as aforesaid interest at the rate of nine per centum per annum, but that the same was usurious, and that the offset of $3134.20 was claimed by the defendant in due time under the act of congress, then judgment shall be entered for the plaintiff for the sum of $5099.59, with such, if any, interest it may be entitled to under the above stated facts, either party reserving the right to sue out a writ of error.

[Signed] D. T. Watson,
Att'y for plaintiff.

[Signed] Welty McCullough,
Att'y for defendant.

Dec. 21, 1878.

For the plaintiff, it was argued that the several acts incorporating the state banks, taken in connection with the several banking laws of the state, gave these banks power to issue. That having the power it was immaterial whether it had ever been exercised. That as the charters of these banks permitted them to receive on the discount of notes, &c., such an amount of interest as was agreed upon between the customer and the bank; that therefore under section 5197 of the Revised Statutes of the United States any national bank of Pennsylvania could take and charge the same. First Nat. Bank of Mt. Pleasant v. Duncan [Case No. 4,804], Strong, J. Plaintiff further contended, that congress intended national banks to be national favorites; that they intended to give them the vantage ground as against state banks. Tiffany v. Bank of Missouri, 18 Wall. [85 U. S.] 410. It therefore gave to the national bank in each state the power to take, receive, &c., such a rate of interest as by the laws of the state is allowed to banks of issue. It is obvious that the mere fact of the state banks of issue being incorporated, each by a special act, or all under general act, is immaterial, if the power is given to them to charge more than the general rate fixed for natural persons by general law of the state; otherwise the state banks would have the vantage ground.

The defendant claimed that section 5197 referred to the general laws of a state, and not to any special law incorporating and granting any special privilege to one particular bank, and that as the general law, in reference to interest, limited in Pennsylvania the rate to six per cent., a national bank in Pennsylvania could take or charge no more. Act May 28, 1858, § 1 (P. L. 622); Purd. Dig. p. 803, pl. 1.

D. T. Watson, for plaintiff.
Welty McCullough, for defendant.

McKENNAN, Circuit Judge. Judgment is hereby rendered for the plaintiff in the within case for $8233.79, with interest from June 4th, 1876.

[NOTE. This case was taken to the supreme court on writ of error, and was there dismissed for want of jurisdiction, the difference between plaintiff's claim, and the amount defendant admits to be due, or $3,134.20, being the actual amount in dispute, which is less than the $5,000 required to give the court jurisdiction. 100 U. S. 6.]

Case No. 4,806.

FIRST NAT. BANK OF NORTH BENNINGTON v. ARLINGTON.

[16 Blatchf. 57.][1]

Circuit Court, D. Vermont. Feb. 25, 1879.

MUNICIPAL CORPORATIONS—RAILROAD AID BONDS SIGNED BY MAJORITY OF SELECTMEN — REGISTRATION — FOLLOWING STATE DECISION — EVIDENCE—DECLARATIONS TO TAX PAYERS.

1. In an action against a town in Vermont, on coupons from bonds issued by it in aid of a railroad, it appeared that the bonds were signed by only two of the selectmen of the town, although there were three in office at the time, the statute requiring the bonds to be signed by the selectmen. The highest court of Vermont having held that, under the General Statutes of Vermont (title 2, c. 4, § 2), a majority of the selectmen had as full authority as a full board to issue such bonds under such a statute, this court followed that decision.

2. A provision in the statute, that the bonds should be registered in the office of the town clerk, was *held* to be directory merely, and a want of compliance with such provision was held not to affect the validity of the bonds.

3. Evidence excluded of declarations made to tax payers before they assented to the issuing of the bonds, which induced them to assent.

[Cited in First Nat. Bank of North Bennington v. Dorset, Case No. 4,808.]

At law.

Edward J. Phelps and George W. Harman, for plaintiff.

Charles N. Davenport and James K. Batchelder, for defendant.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

WHEELER, District Judge. This is a motion for a new trial, in an action of assumpsit upon coupons from bonds of the defendant, after a verdict for the plaintiff at the last term, heard at the same time with the motion in First Nat. Bank of North Bennington v. Bennington [Case No. 4,807]. All the reasons urged in behalf of the motion in that case have been urged in this, and are disposed of here upon the same grounds, in the same way. In addition, it is insisted, that the motion should be granted, because but two of the selectmen of the defendant signed these bonds, although there were three in office at that time; because the bonds were not registered in the town clerk's office; and because the defendant's offer to prove, that, before the assent of the tax payers was executed, Mr. Park, to whom the bonds were delivered, as director of the Lebanon Springs Railroad Company, and who was president of the plaintiff, addressed a public meeting of the tax payers, and said, that, if they did not assent, he should tear up the track of the Bennington and Rutland Railroad, which ran through the town, and in which he had a controlling interest, and they had heard the last whistle, which induced some to assent, was excluded.

In the General Statutes of the state, it was and is provided, in respect to the construction of statutes, that, "all words purporting to give a joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority." Title 2, c. 4, § 2. This has been construed, by the highest court of the state, as giving as full authority to a majority of the selectmen as the full board would have, to issue bonds like these, under a like statute. First Nat. Bank v. Town of Concord, 50 Vt. 257. That construction is sufficient for and binding upon this court, as if it was a part of the statute itself, even if there would be any fair question about it otherwise. Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175; Leffingwell v. Warren, 2 Black [67 U. S.] 599.

By this act (No. 1) of the Special Session Laws of Vermont, 1867, these towns were authorized and empowered to subscribe for, purchase and acquire, upon the conditions in the act specified, the bonds of the Lebanon Springs Railroad Company. The conditions specified were, that no such subscription, purchase or contract should be made, unless the assent in writing thereto of a majority of the tax payers, both in number and amount of tax, should be obtained, to be certified to by the commissioners named in the assent, of which fact the law further provided that their certificate should be conclusive evidence. In this case, the purchase of the bonds of the Lebanon Springs Railroad Company was assented to by the requisite majority of the tax payers, as shown by the certificate of the commissioners, and the purchase was made. The purchase of these bonds was within the scope of the corporate powers of the town, as enlarged by the act, and the bonds became the corporate property of the town, which the town was holden to pay for. The bonds of the town in question were issued and delivered in payment for those railroad bonds. So, they were executed and delivered upon a sufficient consideration, if any was required, and however valueless the railroad bonds ultimately turned out to be, and in satisfaction of a debt which the town had become bound to provide for. And the selectmen may have had power, under the provision of the General Statutes of the state which gives them authority to "audit, and, in their discretion, allow, the claim of any person against the town, for money paid or services performed for the town," and to draw orders on the treasury for the sum so allowed, to allow and draw orders for this debt. Title 9, c. 15, § 52. The powers of the selectmen, under this section, are held to be very broad. Dix v. Dummerston, 19 Vt. 262; Hollister v. Pawlet, 43 Vt. 425; Cabot v. Britt, 36 Vt. 349; Burton v. Norwich, 34 Vt. 345. Still, the selectmen would not have power, under that general statute, to issue these bonds, and much more would the treasurer lack power, under any general provision, to issue the coupons. The nature and effect of these instruments is quite different from any they could find any color for executing. So, the authority to issue them must be looked for only in this special act, and, when found, it could be exercised only in the mode provided by the act. The act (section 4), after authorizing the making and issuing the bonds by the towns, with coupons, for the purpose of making any purchase or fulfilling any subscription or contract authorized by the act, or of raising money so to do, provides: "which said bonds or notes shall be signed by the selectmen, and countersigned by the treasurer, of the town issuing the same, and shall be dated, numbered and registered in the town clerk's office of such town. And said coupons shall be signed by said treasurer. And said notes or bonds so made and issued shall create a valid obligation against such town, according to their tenor." This registry of the bonds would not mean a record of them at large, as the word used in other connections and places might indicate, but here, as used in connection with the requirement that the bonds should be numbered and dated, would seem to mean that the number and date of the bonds, with the amount, probably, should be entered of record in the town clerk's office. The object, doubtless, was to afford a place where all interested could ascertain readily the particulars of such bonds. There is no provision requiring the entry of the fact of registry upon the bonds, nor

expressly pointing out who should procure the registry to be made. Nor is there any providing that they shall not be binding until registered. As to that, the provision is, that they shall create a valid obligation when "so made and issued." The registration would be no part of making the bonds, for it would have nothing to do with their structure. It would be making the record in the clerk's office. It would have nothing to do with issuing them, literally, for that would be sending them out, putting them into circulation, or delivering them from authority. So, the registration is not any part of what the law requires to make them binding, unless it is impliedly brought in for that purpose from usage, or in some other mode. The law of the state requires the selectmen of towns to keep a record of all accounts by them allowed, and of all orders drawn on the treasury, under the provisions authorizing them to draw orders. Gen. St. tit. 9, c. 15, § 53. Still, it has never been heard to be claimed or thought, that their failure to keep such records would in any manner affect the orders drawn, or their validity. A statute of Kansas required that such bonds should be registered in the municipality issuing them, and in the office of the auditor of state, who was required to certify thereon, among other things, that they had been registered in his office according to law, and provided that they should not bear interest or be negotiable until after delivery and registration thereof. In Rock Creek Tp. v. Strong, 96 U. S. 271, the action below was on bonds of the township issued under this statute, in favor of a purchaser, and the defendant offered to show that they had never been registered in the office of the auditor of state, although his certificate that they had been so registered was endorsed upon them. The auditor of state was not an officer nor an agent of the township, and his certificate could not estop the township from showing the fact. The purpose of the registration must have been the same as of that provided for these bonds. And it would more clearly appear to be a part of the transaction of issuing them, for, they were not, by the law, to bear interest, or be negotiable, until it had been done. Still, the court below, in that case, excluded the evidence, and the decision was affirmed in the supreme court. As the law there required a certificate of the registration to be endorsed upon the bonds and the law here did not, the bonds here, without such endorsement, would stand the same as those there would with it, when there was no registration in fact in either case. The requirement of registration seems to be directory merely, and want of compliance was not made by the terms of the act, and cannot justly be held, to affect the validity of the bonds themselves.

If Mr. Park did say what the defendant offered to prove he said, and it had the effect offered to be shown, there was no accompanying offer to show it was not true, not but that it was said in good faith, in the course of legitimate discussion. Hence, it could not affect the bonds, even if the plaintiff is so situated as to be affected the same as Mr. Park would be.

The motion is overruled and judgment is entered on the verdict.

Case No. 4,807.

FIRST NAT. BANK OF NORTH BENNINGTON v. BENNINGTON.

[16 Blatchf. 53;[1] 2 Browne, Nat. Bank Cas. 437.]

Circuit Court, D. Vermont. Feb. 25, 1879.

ASSUMPSIT — ACTION ON COUPONS OF MUNICIPAL AID BONDS—CONSTITUTIONALITY OF STATE STATUTE—STATE DECISIONS—AUTHORITY OF NATIONAL BANKS TO HOLD COUPONS.

1. A town in Vermont issued bonds under seal, in aid of a railroad, with interest coupons attached, not under seal. Each coupon contained an express promise by the town to pay, and was payable to bearer, and was signed by the proper officer: *Held*, that assumpsit was a proper form of action on the coupons.

2. The statute of the state of Vermont, under which the bonds were issued, having been held to be valid under the constitution of the state, by the highest court of Vermont, this court followed such decision.

3. A national bank has, under section 5136 of the Revised Statutes of the United States, authority to take and hold and sue upon such coupons.

[Cited in First Nat. Bank of North Bennington v. Dorset, Case No. 4,808.]

At law.

Edward J. Phelps and George W. Harman, for plaintiff.

Charles N. Davenport, Tarrant Sibley, and A. B. Gardner, for defendant.

WHEELER, District Judge. This is a motion for a new trial, in an action of assumpsit upon coupons from the bonds of the defendant, issued in aid of the Lebanon Springs Railroad Company, a corporation existing under the laws of New York, under No. 1 of the Special Session Laws of Vermont, 1867, after a verdict for the plaintiff, directed by the court, at last term.

The grounds urged in support of the motion are, that, upon the evidence in the case, the action cannot be maintained, because the bonds are under seal, and, therefore, assumpsit is not the proper form of action; that the statute under which the bonds were issued is contrary to the constitution of the state; and that the plaintiff is without authority under the law to take and hold such instruments and maintain any action upon them.

The statute authorized the issuing bonds or notes, with interest coupons attached, the

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bonds to be signed by the selectmen, and the coupons by the treasurer, of the towns. The bonds are under seal; the coupons are signed as the statute requires, and are not under seal. Each coupon contains an express promise to pay. It reads: "The town of Bennington will pay to the bearer," &c. It was intended to be separated from the bond, and to be evidence in itself of a debt, and to be paid and taken up as such. It is a negotiable instrument, and, if valid, constitutes a cause of action in the hands of any holder. Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Knox Co. v. Wallace, Id. 546. Therefore, a judgment upon one coupon, or a set of coupons, from a bond, is not conclusive between the same parties, or their privies, for or against the validity of other coupons from the same bond, unless the validity of all of them was tried and determined. Cromwell v. County of Sac, 94 U. S. 351. When a coupon is sued, an appropriate action to recover upon it, according to its nature, must be brought. These coupons are, in their nature, simple contracts, and assumpsit, although not the only remedy, for debt would lie, is a proper remedy. It was maintained upon similar coupons in Aurora v. West, 7 Wall. [74 U. S.] 82.

All questions as to the validity of the statute under which the bonds and coupons were issued arise under the constitution of the state, and not at all under that, or any law, of the United States. There is no federal question involved. This court has jurisdiction because the plaintiff has been organized as a corporation, and exists, under the laws of the United States, and those laws have given jurisdiction of suits by and against it. Rev. St. § 629, tenth. This jurisdiction is concurrent with, and, although independent of, not over, that of the state courts. The laws of the states, under the constitutions of the states, when they do not conflict with the constitution or the laws of the United States, are wholly matters of state concern and subject to state control. Of necessity, the construction given by the highest court of a state, constituted for that purpose, to the constitution and laws of the state, must stand as a part of them. A state would not be sovereign and independent as to a constitution and laws which it could not, by its own appointed tribunals, construe, any more than it would be if it could not adopt or enact them. This right of the states to have their courts of last resort construe their laws, both legislative and organic, has always been conceded. Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175. There never appears to have been any question about the right, nor any about following the decisions, unless they were fluctuating. And the decision of the highest tribunal of a state, maintaining the validity of a statute, under the constitution of the state, is always followed. Pennsylvania College Cases. 13 Wall. [80 U. S.] 190; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359; County of Henry v. Nicolay, 95 U. S. 619. The question as to the validity of this statute, under the constitution of the state, has been before, and been determined by, the highest judicial tribunal of the state, and at a general term of the highest court, when all the judges sit together for the consideration of important questions, thus constituting it not only the highest in name, but also in ability, that can be had in the state. It would not be decorous toward, nor in accordance with the great respect entertained for, that court, to examine the grounds of its decision, or do more than ascertain what it was, especially if in favor of the validity of the law. And it was so. Bennington v. Park, 50 Vt. 178; Bank of St. Johnsbury v. Concord, Id. 257. The defendant has no rights in this behalf, except those which the tribunals of its own state, under whose laws it exists, would accord to it. The plaintiff had the right to invoke the aid of the courts of either jurisdiction, but there the right of choice ended, as to both parties. The rule for determination must be the same in each.

The statute (Rev. St. § 5136, seventh) authorizes national banks, of which the plaintiff is one, to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, &c. These coupons are doubtless promissory notes, within St. 3 & 4 Anne, c. 9, and of this statute, both of which use the term in the same sense, unquestionably. They are also evidences of debt. The coupons, and the right to sue upon them, are all that are now in question. No intimation of any views concerning the right to take and hold the bonds is intended by this discrimination, however.

The motion is overruled, and judgment entered on the verdict.

[NOTE. See First Nat. Bank of North Bennington v. Arlington, Case No. 4,806.]

Case No. 4,808.

FIRST NAT. BANK OF NORTH BENNINGTON v. DORSET.

[16 Blatchf. 62.][1]

Circuit Court, D. Vermont. Feb. 25, 1879.

MUNICIPAL AID BONDS — ASSENT OF TAX PAYERS — AUTHORITY TO WITHDRAW SUCH ASSENT — VALIDITY OF BONDS.

After a majority of the tax payers of a town in Vermont had assented in writing to the issuing of bonds by the town in aid of a railroad, and before the commissioners had certified to that fact, enough of the tax payers to destroy the majority executed in writing a withdrawal of their assent and sent it to the commissioners,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

without going before them in person. The statute made no provision for dissent after assent. The commissioners disregarded the withdrawal and made the certificate: *Held*, that such withdrawal did not affect the validity of the bonds and that the decision of the commissioners was final.

At law.

Edward J. Phelps and George W. Harman, for plaintiff.

Charles N. Davenport and Tarrant Sibley, for defendant.

WHEELER, District Judge. This is a motion for a new trial, after a verdict for the plaintiff at the last term, and involves no question not involved either in First Nat. Bank of North Bennington v. Bennington [Case No. 4,807], or in Same v. Arlington [Id. 4,806], heard at the same time with this, except that in this it appears, that, after the required majority, or what the commissioners found to be such majority, had assented in writing, executed as required, and before the commissioners had certified to that fact, some forty of the tax payers executed, in the same manner that the assent was executed, what they called a recantation, notwithstanding their assent, which was shown to, and a copy of it taken by, the commissioners. The withdrawal of this number would leave the number assenting clearly below a majority. It is urged, that, after this, the commissioners had no authority to proceed with making the certificate, and that it was void, and that this would invalidate the bonds.

The provisions of the act, affecting this question, are, that no subscription, purchase or contract shall be made, "unless the assent in writing thereto of a majority of the tax payers * * * shall be obtained," and that, when obtained, the persons named in the assent for commissioners shall be commissioners, who shall append their certificate that a majority have assented, and that any contract made by such commissioners in pursuance of the terms of the assent, and not inconsistent therewith, shall be binding upon the town. There is no provision for any dissent after assent by any person, or for any mode of making such dissent known to the commissioners, if it should arise.

This method of obtaining an expression of the sense and will of the tax payers is treated by the supreme court of the state, in Bennington v. Park, 50 Vt. 178, and National Bank of St. Johnsbury v. Concord, Id. 257, as a mode of voting, in which all those assenting vote for, and all those not assenting vote against, the proposition in the instrument of assent. In that view, when a tax payer had executed the instrument of assent, he had exercised his right of voting and voted on that question. In all deliberative assemblies, each member has the right to change his vote upon any question, at any time before the vote is declared. Perhaps the voters, in this mode of voting, would have the same right at any time before the result should be certified to by the commissioners. They would probably have it, unless the provisions for this method of voting have cut it off. Perhaps the legislature intended, by not providing any mode for changing any votes, that it should be cut off. But, if not, and the right was left, it could only be exercised in some proper mode. None of the dissenters went in person to the commissioners and made known their wish, or claimed any right to dissent. They merely executed an instrument in writing expressing their dissent, and sent that. If a voter in town meeting, or a member of a legislature, should, in absence, after voting on any question, and before the result of the vote should be declared, send, in writing, a change of his vote, probably no notice would be taken of it, however formal and solemn the execution of it might be. He would be required to be personally present, or compelled to leave the subject to stand, so far as he should be concerned, as it was when he was present. State v. Tudor, 5 Day, 329. In that case, Ingersoll, J., said: "I agree most fully, that, by the common law, every vote given in a corporation instituted for the public good, either the good of the whole state, or of a particular town or society, must be personally given. So, also, every vote given by a freeman for his representative, must be given by him in person. There is no deviation from this rule; the authorities on this subject are uniform." Even the right to vote by proxy in private corporations is not a general right, and authority for it must be shown by some law or by-law made pursuant to law. Ang. & A. Corp. § 130. Perhaps, if those desiring to dissent had gone personally to the commissioners, and claimed the right to withdraw their assent, and to take their names or have them taken from the assent, the commissioners would have been bound to heed them, and perhaps not; but, if they would, nothing of the kind was done, nor anything that would be an equivalent for it in fact, and nothing was provided by law that should, in law, be an equivalent. What they sent was, in its nature, mere hearsay. It was authenticated the same as the assent, but the law made the assent so authenticated equal to a vote, and did not make a withdrawal so authenticated equal to a change of vote. There was no law requiring the commissioners to regard, or authorizing them to act upon, the recantation.

Further than this, the law made the decision of the commissioners final; and the supreme court of the state has construed this law as making it final for all purposes, where others are concerned, however erroneously they may have acted in making it. Aldis v. Lamoille Valley R. Co., cited 50 Vt. 281. And, still further, if there was misconduct, or fraud even, of these commissioners, as their recorded proceedings were regular on their face, it would not affect the rights of a

bona fide holder of the bonds. East Lincoln v. Davenport, 94 U. S. 801.

The motion is overruled and judgment entered on the verdict.

Case No. 4,809.

FIRST NAT. BANK OF OMAHA v. DOUGLAS COUNTY.

[3 Dill. 298;[1] 1 Thomp. Nat. Bank Cas. 267; 1 Cent. Law J. 257.]

Circuit Court, D. Nebraska. May Term, 1873.

TAXATION OF NATIONAL BANKS—JURISDICTION OF EQUITY TO RESTRAIN ILLEGAL TAXES—FEDERAL JUDICIAL JURISDICTION IN RESPECT OF NATIONAL BANKS.

1. National banks may, by reason of their character as such, sue in the federal courts.

[Cited in Foss v. First Nat. Bank of Denver, 3 Fed. 186.]

2. Where no remedy exists to recover back illegal state taxes when paid into the treasury, equity will restrain their collection, the plaintiff being otherwise without adequate remedy at law; and equity, having jurisdiction in such a case, will determine the validity of county as well as state taxes, embraced in the same collection warrant and levy.

[Cited in Union Pac. R. Co. v. McShane, Case No. 14,382; Third Nat. Bank of St. Louis v. Harrison, 8 Fed. 723.]

3. Taxation by state authority of the capital stock of a national bank, invested in United States securities, restrained.

This was a bill in equity [against the county of Douglas and Edward F. McShane, its treasurer] for an injunction to restrain the collection of taxes levied by the commissioners for the defendant county, on behalf of the state of Nebraska and of the county, upon the capital stock of the plaintiff.

A motion was made by Mr. Woolworth, counsel for the bank, to the court, Mr. Justice Miller presiding, for an injunction, which motion was opposed by Mr. Cowin, counsel for the county, on the ground of want of jurisdiction.

MILLER, Circuit Justice, held:—

1. National banks may, by reason of their character as such, sue in the federal courts.

2. A part of the taxes sought to be restrained being for the state of Nebraska, and the county treasurer being by the revenue law of the state required to pay the same into the state treasury when they are collected, and no provision being made by law for an execution or other proceeding against the state for the recovery of them back if illegally exacted, the plaintiff has no adequate remedy at law, and equity will intervene by injunction to restrain the collection of such illegal taxes.

3. When a county treasurer holds one warrant in which he is commanded to enforce payment of both state and county taxes, which for a common reason are illegal, equity, having jurisdiction to restrain the treasurer from enforcing the payment of the state taxes, may proceed to the determination of the validity of the county taxes as well, and restrain them also.

4. The First National Bank of Omaha filed its bill against the county of Douglas and its treasurer, to have it declared that the taxes of 1870 and 1871, levied by the state of Nebraska and the county of Douglas upon the capital stock of the bank, were illegal, and to restrain that officer "from making distress upon the property of the plaintiff, as he threatened to do, and from all other proceedings to enforce the payment" of the taxes. On motion for an injunction the defendant objected to the jurisdiction of the court as a federal court, and also as a court of equity. Held, that there was jurisdiction to entertain the bill and allow an injunction.

Injunction allowed.

NOTE.—Suits by National Banks in Federal Courts: Mr. District Judge Welker, of the northern district of Ohio, in the case of Commercial Bank of Cleveland v. Simmons [Case No. 3,062], has recently decided that a national bank may sue in the United States circuit court of the district where the bank is located, upon notes endorsed to it by the payee, though the defendant is a resident of the same district. The United States circuit court for the eastern district of Missouri, at the March term, 1875 (present Dillon, Circuit Judge, and Treat, District Judge), decided the same point. Taxation of shares in national banks, see First Nat. Bank v. Douglas Co. [Id. 4,799]. Equity jurisdiction to restrain illegal taxation, considered in the Missouri tax cases [Cases Nos. 732, 10,767, and 10,768].

Case No. 4,810.

FIRST NAT. BANK OF TRINIDAD v. FIRST NAT. BANK OF DENVER.

[4 Dill. 290;[1] 7 Amer. Law Rec. 168; 6 Reporter, 356; 10 Chi. Leg. News, 388; 2 Tex. Law J. 74; 7 Cent. Law J. 170; 26 Pittsb. Leg. J. 24.]

Circuit Court, D. Colorado. July, 1878.

DUTY AND RESPONSIBILITY OF A BANK AS A COLLECTING AGENT—NEGLIGENCE—USAGE—CUSTOM—MEASURE OF DAMAGES.

1. A bank which acts as the collecting agent of another bank must use reasonable diligence and care, and if, in consequence of a failure to do so, a loss happens, it is liable.

2. The defendant bank received from the plaintiff bank a sight draft for collection, drawn by the plaintiff on a third bank against funds actually to the credit of the drawer; the defendant received this draft for collection January 10th, and transmitted it directly to the drawee, its correspondent, on the same day; it ought to have reached the drawee in two days; the drawee continued good until January 29th, when it failed; the drawee did not acknowledge the receipt of the draft, and in fact the draft miscarried and never reached the drawee; the defendant made no inquiries about it until February 9th; the plaintiff and defendant both supposed, meanwhile, that it had been paid: the defendant gave the plaintiff no notice of any

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kind in respect of the draft until February 11th; the plaintiff sued the defendant for its negligent omission to give it notice: *Held*, that the defendant was liable.

[Cited in Levi v. National Bank of Missouri, Case No. 8,289; First Nat. Bank of Circleville v. Bank of Monroe, 33 Fed. 411.]

3. The usage or custom set up by the defendant, to the effect that it was not required to make inquiries concerning such remittances prior to the receipt of the regular monthly statement of accounts between banks, was not established by the evidence.

4. Under the special facts, the measure of damages was the amount of the draft.

On the day of its date, the plaintiff bank drew the following:

"$5,000. Trinidad, Col., Jan. 9, 1878. Pay to the order of D. H. Moffat, cashier (of defendant bank) five thousand dollars. Geo. R. Swallow, Cashier. To the First National Bank, Kansas City, Mo."

The plaintiff was the correspondent of the defendant bank, and both were the correspondents of the above named bank at Kansas City. Defendant (to the order of whose cashier the draft was payable) received the same, in due course of mail, January 10th, and without delay transmitted it on the same day, for credit and advice, directly to the drawee—the Kansas City bank. When the draft was drawn by the plaintiff it had more than the amount actually on deposit with the Kansas City bank, and it at once credited the last named bank with the amount. According to usage, the defendant, on the receipt of the draft, credited, January 10th, the amount to the plaintiff and charged the amount to the Kansas City bank. This was done in anticipation that the draft would reach the drawee and be duly paid when it arrived. The letter containing the draft which was sent by the defendant to the Kansas City bank would, in due course of mail, have reached the drawee on January 13th, at the latest on January 14th. The Kansas City bank never received the letter containing the draft. That bank continued to do business until January 29th, 1878, when it closed its doors, and afterwards the comptroller of the currency appointed a receiver, and the bank is now in process of liquidation. If the draft had been presented at any time before January 29th, it would have been paid. The Kansas City bank did not, of course, acknowledge the receipt of the draft, since its president testified that it was never received. Singularly enough, another draft for $5,000, drawn about the same time by the plaintiff on the same Kansas City bank, and forwarded for collection through a bank in Pueblo, Colorado, was never received by the Kansas City bank—so its officers testify.

The defendant bank made no inquiries prior to February 9th, 1878, concerning the draft here in question, or why the receipt of it had not been acknowledged by the Kansas City bank. The defendant's officers assumed that it had been received and credited, until February 9th, when, on receiving the monthly statement, or account current, of the Kansas City bank, it learned therefrom that it was not credited with the draft in question. The defendant immediately (February 9th) telegraphed the Kansas City bank that it had, on January 10th, transmitted the draft, which did not appear in their statement just received. On February 10th, the Kansas City bank wrote the defendant that it had never received the remittance. This letter being received by the defendant February 11th, the defendant at once, on that day, notified the plaintiff and charged back the amount to it. Until this, the plaintiff supposed the draft had been paid. The plaintiff objected to the defendant charging back the amount, but the defendant insisted, and refused, upon demand, to restore the credit, or to pay the amount to the plaintiff.

The plaintiff's action is against the defendant to recover the amount, and is based upon the defendant's alleged negligence, as the agent of the plaintiff, in omitting to give the plaintiff notice that the draft had not been credited or received prior to the failure of the drawee. The defendant denies the imputed negligence, and sets up, in its answer, a custom or usage among the banks in Colorado, to the effect that in transmitting bank checks and drafts to correspondents, on whom they are drawn, it was usual and customary to await, for advices, the regular and usual monthly statement, and that such custom or usage did not require the defendant to make any inquiries concerning such remittances prior to the receipt of the regular monthly statement. The replication denies the existence of any such custom or usage, or any knowledge thereof, by the plaintiff.

A jury was waived, and on the trial to the court the facts appeared substantially as above set forth.

Wells, Smith & Macon, for plaintiff.
Sayre, Butler & Wright, for defendant.

DILLON, Circuit Judge. The plaintiff treats the defendant as its agent to collect the draft in question, and the ground of the action is the alleged negligent omission of duty on the part of the defendant, resulting in loss to the plaintiff. I have fully examined the adjudged cases relating to the duty and responsibility of a bank which undertakes to act as a collecting agent for its customers, or for other banks. They clearly show that the defendant bank ought to have ascertained, within a reasonable time, whether the draft transmitted had been received by its correspondent; and if not, to have advised the plaintiff thereof. The practice of banks to send such checks or drafts directly to the drawee (as in this case), is attended with some obvious additional peril, and does not weaken, if, indeed, it does not increase, the diligence required of the collecting bank in respect to inquiry and notice. The de-

fendant bank allowed an unreasonable time to elapse before it made inquiry concerning the draft, and more than a reasonable time had elapsed before the failure of the Kansas City bank occurred. It was this negligence that caused the loss, since it is established by the evidence that the draft would have been paid if it had been presented at any time before the suspension of the drawee, on the 29th day of January. Here, then, was an unexcused delay for fifteen or sixteen days to make any inquiry, or to give any notice. Aside from the custom or usage pleaded in defence, to be noticed presently, the decisions in England and in this country are uniform, that such delay to make inquiry, and omission to notify the party interested, as occurred in this case, impose a liability, if loss is thereby occasioned.

The alleged custom or usage, in derogation of the otherwise legal rights of the plaintiff, is one which scarcely seems consistent with reasonable vigilance, or the well known practice of business men and banks, to acknowledge promptly the receipt of money remittances. The evidence in this case showed that it was the uniform practice to make such acknowledgments. The defendant claimed that all the banks in Denver and Colorado relied on the monthly statements, and that it was not customary or usual to inquire after remittances in the interim between monthly statements. The evidence failed to show any such custom or usage common to all, or even to the majority, of the banks in Denver. In fact, it failed to show that there was any such uniform usage in the defendant bank, whose business seems to be well regulated. The cashier of the defendant frankly testifies that, if his attention had been called to the fact that no letter of advice had been received, in due course, from the drawee, he would have made inquiries. At all events, the usage of the defendant was, at most, its private usage or mode of doing business. It was not known to the plaintiff, and if it was invariably adhered to by the defendant, it was of such a nature that the plaintiff was not bound to take notice of it. It was shown in evidence that the defendant bank did a very extensive business; and it was claimed by the cashier, on the witness stand, that it was impracticable to look after all the paper sent forward to correspondents for credit in the interval between the transmission of such paper and the receipt of the monthly statement. But the evidence did not sustain this claim. On the contrary, it showed that banks in general were in the habit of so keeping their books as to have their attention called to a failure to receive advices, in order that they might institute the needful inquiries, and that it was the usual practice to make such inquiries unless upon the eve of the time when the monthly statement was due. The fact that the defendant transacts a large business cannot relieve it from the duty of giving due attention to every piece of paper it undertakes to collect. The measure of diligence cannot fluctuate with the amount of business which a given bank may do. And the defendant would not, perhaps, like to be discharged from liability on the ground, judicially declared, that it was not bound to the same degree of care as smaller banks, in transacting the business of its correspondents. I consider the liability of the defendant beyond any reasonable doubt.

Under the circumstances, I regard the rule of damages as equally clear. The plaintiff had more than the amount actually on deposit, subject to draft, in the Kansas City bank. The draft would have been paid if it had been presented in time; if plaintiff had been notified within a reasonable time that the draft had miscarried, it could have protected itself against loss. The Kansas City bank has failed. There was no evidence what dividend, if any, its creditors will receive. The draft in question was drawn in favor of the defendant, and it had, and has, the legal title thereto. The plaintiff, when it drew the draft, credited it to the drawee and charged it to the defendant, and received in turn credit from the defendant therefor. The defendant having the legal title to the draft, will be entitled to prove it as a lost instrument against the Kansas City bank, and to receive all dividends which may be declared. Under these circumstances, the defendant is liable for the full amount of the draft, and will be entitled to hold the draft as its own, or to have a duplicate if it desires. There is no other practicable rule of damages in the posture in which the case stands, and this rule cannot fail to measure the exact loss which may eventually ensue.

Judgment for plaintiff.

Case No. 4,810a.

FIRST NAT. BANK OF UNIONTOWN v. STAUFFER.

[See 1 Fed. 187.]

FIRST NAT. BANK OF WARREN v. PALMER. See Case No. 17,207.

FIRST NAT. BANK OF WILMINGTON (LOUDON v.). See Case No. 8,525.

Case No. 4,811.

FIRST NAT. BANK OF YOUNGTOWN v. HUGHES et al.

[5 Cin. Law Bul. 515; 2 Browne, Nat. Bank Cas. 176.]

Circuit Court, N. D. Ohio. 1878.

NATIONAL BANKS—PRODUCTION OF DEPOSIT BOOKS FOR EXAMINATION.

National banks cannot be compelled by the auditor or probate judge to present for inspection the deposit books of the bank.

[This was a bill in equity by the First National Bank of Youngtown, Ohio, against James B. Hughes, auditor of Mahoning county, and Monroe W. Johnson, prosecuting attorney of Mahoning county, Ohio, praying for an injunction and for other relief.[

The auditor of said county, under section 2782 of the Revised Code of Ohio, issued a process against the cashiers of said banks, requiring them to appear before him to give testimony in reference to persons who were depositors in said banks, and the amount of such deposits, in order to reach such sums for taxation to the depositors, and also a compulsory process to require the cashiers to bring before him for inspection the books of the banks showing such deposits. The cashier appeared in person, willing to testify, but refused to bring the books, under the orders of the board of directors. The auditor, then, under section 2783, made application to the probate judge for such compulsory order, which was duly issued by the probate judge, requiring said officer of the bank to appear before him, and bring with him the books of the bank for inspection and examination. Application was made to the circuit court of the United States for a restraining order against said auditor and prosecuting attorney, under section 5241 of the Revised Statutes of the United States (act relating to United States banks).

WELKER, District Judge. Held, that the officers of national banks cannot be compelled to present for inspection, either to the auditor or probate judge, books showing the deposits of the bank, and, therefore, defendants were restrained from compelling the same to be done.

Injunctions were issued, in accordance with the order of Judge WELKER, to be served by the marshal.

[NOTE. This cause was subsequently heard before Baxter, Circuit Judge, on demurrer, and motion to dissolve the injunction. The demurrer was sustained, and complainant's bill dismissed, with costs (First Nat. Bank of Youngstown v. Hughes, 6 Fed. 737), whereupon complainant appealed to the supreme court. On motion to dismiss, which was granted, Mr. Chief Justice Waite, in delivering the opinion of the court, said that it is supposed the books of the banks contain evidence pertinent to the inquiry, and, appropriate measures having been taken to have them produced for examination, the case is in no respect different in principle from what it would be if the evidence was called for in an ordinary suit in a court of justice between individuals. Id., 106 U. S. 523, 1 Sup. Ct. 489.]

FIRTH (HARRIS v.). See Case No. 6,120.

Case No. 4,812.

FISCHER v. WILSON et al.

[16 Blatchf. 220; 4 Ban. & A. 228; 16 O. G. 455.] [1]

Circuit Court, S. D. New York. April 28, 1879.

PATENTS — VALIDITY — CONSTRUCTION — EQUITY PLEADING AND PROOFS—ESTOPPEL — EVIDENCE OF USE OF INFRINGING MACHINE.

1. The letters patent, No. 74,068, granted to Valentine Fischer, February 4th, 1868, for an "improvement in machine for forming sheet metal mouldings," are valid.

2. The 4th claim of the patent, namely: "Arranging the female die, G, above the male die, E or F, for the purpose of keeping the female die clear, as set forth," claims the described arrangement of the two dies, so that, having such a lower male die as E or F is, the female die shall be above the male die, and thus be kept clear, resulting in keeping both dies clear, instead of having the female die below, in a position to be clogged and mar the work, even though the upper male die should clear itself.

[Explained in Fischer v. Hayes, 6 Fed. 77.]

3. Where a defendant in a suit in equity puts in proofs to sustain the allegations of his answer, and allows the plaintiff to put in proofs in rebuttal, and proofs in contradiction of the allegations of the answer, without entering any objection on the record that there was no replication to the answer, he is estopped from raising such objection at the hearing.

[Cited in Re Thomas, 45 Fed. 787.]

4. Sufficient prima facie evidence of the use by a defendant of a machine infringing a patent, *held* to have been given.

[Cited in Fischer v. Hayes, 6 Fed. 69.]

[This was a bill in equity by Valentine Fischer against Henry Wilson, Gunther K. Ackerman, and John Borkel for the alleged infringement of a patent.]

Charles F. Blake, for plaintiff.

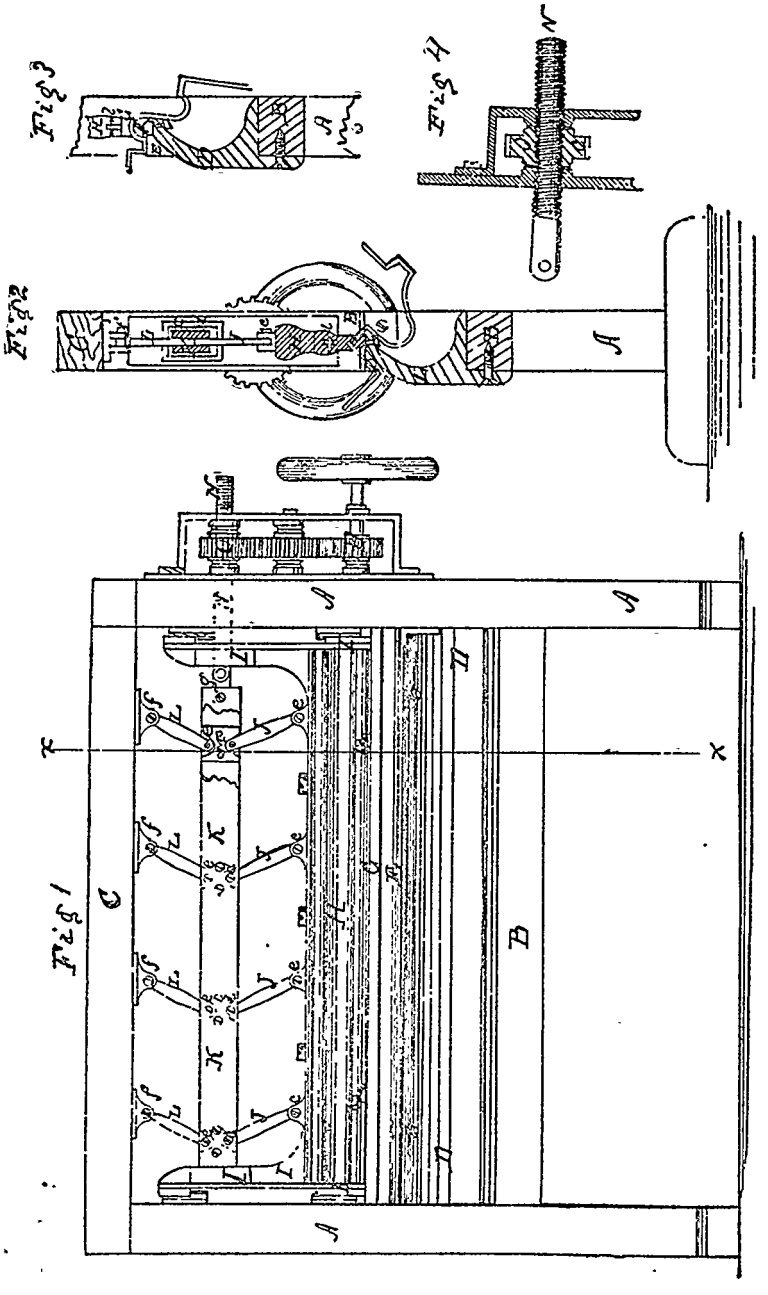
Charles B. Stoughton, for defendants.

BLATCHFORD, Circuit Judge. This suit is brought on letters patent No. 74,068, granted to the plaintiff, February 4th, 1868, for an "improvement in machine for forming sheet metal mouldings." The bill was originally filed against the defendant Wilson alone, on the 19th of May, 1869. He put in an answer and a replication was filed to that answer. Proofs on the part of the plaintiff were taken in February, 1871. Nothing further was done till November, 1873, when the plaintiff closed his opening proofs. The defendant took some proofs in November, 1873. At the April term, 1874, a decree was entered for the plaintiff, by default. On the 13th of May, 1874, a written stipulation, en-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 228; and here republished by permission.]

titled on the original suit, was signed by the solicitors of the respective parties, stipulating that said decree "shall be vacated and the taking of proofs herein be opened;" "that the testimony herein, and in this case as amended by the insertion of Gunther K. Ackerman and John Borkel as defendants, together with said Wilson, shall close by the first day of August, 1874, and that said cause shall be brought to hearing before either judge of this court, and at any place, thereafter, as counsel for complainant shall elect;" "that the bill of complaint herein may be amended by making Gunther K. Ackerman and John Borkel, both of the city of New York, co-defendants with said Henry Wilson, against whom the bill was originally filed;" "that, if said cause, as amended by the insertion of above new defendants, shall not be heard before the October term of this court, and if the defendants shall not answer ready at said term, a decree may be entered in said cause against the defendants herein, those made defendants by amendment, as well as against said Wilson, the original defendant, and that there will be

[Drawings of Patent No. 74,068, published from the records of the United States Patent Office.]



no motion made by defendants to vacate the decree by default, but that an accounting and injunction may be obtained by complainant without opposition by defendants, the accounting against said Ackerman and Borkel dating from the time of the purchase by them of the business of said Wilson, in which the infringing machine or machines were used;" "that no advantage shall be taken, or exceptions made, from the fact that said Ackerman and Borkel were not joint infringers, and that the bill has been amended, making them defendants;" and "that, if at any time after due notice from the defendants of the taking of testimony, the complainant cannot attend for said testimony, or will not consent that defendants go on, then the time for closing proofs shall be extended as many days as the notice covered, or as the defendants may be delayed." An amended bill was thereupon filed, making Wilson, Ackerman and Borkel defendants, and containing all proper averments for a complete bill. It was filed in pursuance of a written consent, entitled in the original suit, and signed by the solicitor for the defendant therein, consenting that it be filed in place of the original bill, without costs, and it was annexed to such consent. A joint answer by the three defendants, to the amended bill, was filed in May, 1875. It was signed by the same solicitor who was solicitor for the defendant in the original suit. No replication to the same was filed. The defendants took proofs in June and July, 1875, and in February, 1876. The plaintiff took rebutting proofs in April, July and October, 1876.

The specification states the invention to be "a new and improved machine for forming sheet metal mouldings." It says: "This invention relates to a new machine for pressing mouldings for cornices, &c., from galvanized or other sheet metal, and consists in so arranging the machine, that but two kinds of dies for all kinds of smooth mouldings that may have to be formed are needed, viz., rounded and square dies. Of the latter, but one set is required for making all sorts of angles, while, of the rounded dies, as many sets must be provided as there are different sized curves to be represented in the mouldings. The dies are easily removed and replaced. The male die is arranged stationary, while the female die is secured to a slide or other reciprocating device. The male or stationary die is underneath the female or movable die, for the purpose of preventing the latter from being clogged or made imperfect by dirt or other foreign matter. The standard of the male die is made concave on one side, to allow the forming of three sides of a square by the apparatus." It further states that the invention consists, also, in the construction and arrangement of the device for moving the upper die. This is not important in the present case. The specification further says: "D is a standard for the lower stationary die. It is, by means of screws or otherwise, firmly secured upon the bar B, and is made in the form of the letter C, that is, concave on one side, as shown in fig. 2. The lower die E, which is a strip as long as the distance between the uprights A, is fitted upon the upper edge of the standard D, so as to firmly remain thereon. This die is conical in cross-section, forming a right angle at the apex, and may be formed on (not fastened upon) the standard D, as part of the same, as it need never be removed. When rounded dies, F, are used, they are laid upon this die E, (as in fig. 3,) they being recessed on their under side for the purpose of fitting the die E. The upper die, G, which is of the same length as the lower die, and which is provided with a concave under side that corresponds to the shape of the lower die, (as in figs. 2 and 3,) is provided, at its upper surface, with two or more projecting pins, a a, which are perforated, and which serve as a means for fastening the die to a pendent bar, H, of nearly the same length as the die." Mechanism is described, by which the bar H is moved down and up, and whereby the upper die is "pressed upon the lower die and raised from the same, as may be desired." The specification adds: "The most difficult mouldings can be formed by this machine, as is indicated by red lines in figs. 2 and 3, the standard D being provided with a concave side, to facilitate the forming of such difficult mouldings, as is seen in fig. 2. The dies can be made of steel or other suitable material, and of suitable thickness." There are seven claims. Only claims 2 and 4 are alleged, in this suit, to have been infringed. Those claims are in these words: "2. The standard D, when provided with one concave side, as shown. 4. Arranging the female die G, above the male die, E or F, for the purpose of keeping the female die clear, as set forth."

The plaintiff's expert, Mr. McIntire, in his testimony given February 7th, 1871, describes a machine for bending sheet metal to form metallic cornices, which was a working machine, and which he had seen in operation at the establishment of Ackerman & Borkel, in Worth street, New York. He says: "Q. 3. Will you look at the model, complainant's Exhibit B, and state what it represents? A. I have examined the model marked complainant's Exhibit B. It represents a machine adapted to bending sheet metal to form metallic cornices. Q. 4. Have you ever seen a machine in operation constructed like said model; and, if yea, when and where and by whom? A. I have seen a working machine in operation at the establishment of Messrs. Ackerman & Borkel, No. —— Worth street, New York city, which was constructed and operated similarly to said model, complainant's Exhibit B. Q. 5. Please look at complainant's Exhibit C, and state what it represents? A. It represents a true, full-sized model of a short section of a bar of solid met-

al, which I saw used in, and as part of, the working machine which I have before stated I saw in operation at No. —— Worth street." He then goes on to describe the construction and operation of the working machine he so saw in operation. A longitudinal round bar or rod of metal was secured in a ^ shaped longitudinal groove formed at the lower edge of a carriage which reciprocated up and down, and which groove had its apex uppermost. The bar of solid metal, before mentioned, had, in its upper face, a longitudinal concavity. It was secured, with such concavity uppermost, on a table, and the sheet of metal to be moulded was placed immediately over such concavity, and beneath the round rod above. The latter was then moved downward, and forced the sheet of metal into such concavity, the concavity acting as the lower die, and as a female die, and the round rod acting as the upper die, and as a male die. Thus half-rounds were formed in the sheet of metal. In the above operation, it is not alleged there was any infringement of either the 2d claim or the 4th claim of the Fischer patent. After the above operation was performed, the round rod was removed from the lower edge of the reciprocating carriage, and the bar with the concavity, which had before served as the female die, was mounted edgewise, and secured in the platform, so as to present uppermost an edge instead of a concavity, and to make such edge a male die, and the ^ shaped groove in the lower edge of the reciprocating carriage, from which the round rod had been removed, became the female die. The sheet of metal, with the half-rounds so formed in it, was placed over such male die, and the carriage descended, so that the ^ groove moulded the sheet over the male die, and made angular bends in it. In such position the concavity in the lower bar, being at the side, accommodated the half-round bends previously made in the sheet. When so used to make angular bends, the machine embodied the inventions covered by the 2d claim and by the 4th claim of the plaintiff's patent, containing the same arrangement of the female die over the male die that is covered by the 4th claim, and the concave side of the male die being a substantial equivalent for the standard with one concave side, covered by the 2d claim. The foregoing testimony of Mr. McIntire was given before Ackerman and Borkel were made defendants. In November, 1873, it was admitted on the record, by the counsel for the defendant, (Wilson then being the only defendant,) "that the machine mentioned by the witness McIntire, in answer to question 4, had been used by the defendant since the date of the patent upon which this suit was brought, and before the commencement of this suit." After Ackerman and Borkel were made defendants, the plaintiff put in no direct testimony to show that they had ever used the infringing machine.

The defendants now contend, that there can be no decree against Ackerman and Borkel, because, (1) no replication has been filed to their answer; (2) because the use proved is a use by Wilson alone, and not a use by Ackerman and Borkel, or either of them. It is contended, that the evidence taken before Ackerman and Borkel were made defendants cannot be read against them, and that the patent is not, in fact, in evidence against them.

As to the replication, the putting in of proofs by the defendants to sustain the allegations of their joint answer, after such answer was filed, and their allowing the plaintiffs to put in proofs in rebuttal, and proofs in contradiction of the allegations of such joint answer, without entering any objection on the record that there was no replication to such joint answer, estops the defendants from now raising such objection.

As to the other objection, the reference in the stipulation of May 13th, 1874, signed by the solicitor on behalf of Ackerman and Borkel as well as on behalf of Wilson, (and under which Ackerman and Borkel put in their answer,) to the fact that they had bought "the business of said Wilson in which the infringing machine or machines were used," and that the accounting against them was to date from the time of such purchase, and that they were to be enjoined, and that they were not to object that they had not infringed jointly with Wilson, taken in connection with the fact, that, in the joint answer, which is sworn to by Borkel, the machine charged in the bill as infringing is spoken of as "the machine used by these defendants," is sufficient prima facie evidence of the use of the machine by Ackerman and Borkel.

The defendants claim to have shown that the machine used by Wilson, and sold by him to Ackerman and Borkel, embodied the 2d and 4th claims of the plaintiff's patent, before the plaintiff made the inventions. But, the whole evidence of the witness Conolly, taken together, shows that such machine did not embody either of those claims until after the plaintiff completed, and put into the shape of a model, the inventions covered by those claims.

The plaintiff's lower or male die, whether E, forming a right angle at the apex, or F, a rounded die on the upper surface, is of such a form that it cannot be "clogged or made imperfect by dirt or other foreign matter." This being so, it is apparent, that, if the female die is placed above the male die, so that the female die cannot be "clogged or made imperfect by dirt or other foreign matter," the resulting smooth sheet metal mouldings will not have their surface marred by the interposition of dirt or foreign matter between the dies. Mr. McIntire, the plaintiff's expert, testifies, that the state of the art, prior to the plaintiff's invention, was, that, so far as he knows, all machines had been made with the dies so arranged that opportunity was afforded for the collection of dirt, chips, &c., in or

about the lower die; that the consequence was more or less injury to the dies, and imperfection in the work produced; that the plaintiff, in fact, arranged the female die, as shown and described, over a male die which had no concavities or surrounding hollows in which any "dirt or other foreign matter" could collect; and that, merely placing the female die over the male die would not effect the objects of the invention, unless the male die were so made and arranged as to afford no chance for the collection of dirt that would destroy the perfection of the work. This testimony is not contradicted. In view of it, and of the fact that the 4th claim claims "arranging the female die, G, above the male die, E or F, for the purpose of keeping the female die clear, as set forth," and, as the object of the invention would not be attained by putting the female die above, and thus keeping it clear, if the male die were one so arranged as to retain dirt or foreign matter in or about it, the proper construction of the claim is, that it claims the described arrangement of the two dies, so that, having such a lower male die as E or F is, the female die shall be above the male die, and thus be kept clear, resulting in keeping both dies clear, instead of having the female die below in a position to be clogged and mar the work, even though the upper male die should clear itself. In this view, nothing is shown that affects the novelty of the 4th claim. In the J. S. Beach patent, though the female die is above, dirt can collect in the working parts of the lower die. The plaintiff's 4th claim is not anticipated by the Seely patent, or by either of the Lamplugh patents, or by the Worthen and Renwick patent, or by the Johnson patent, or by anything else put in evidence. Nor is the novelty of the plaintiff's 2d claim affected by any of the above patents, or by any other evidence.

There must be the usual decree for the plaintiff.

[NOTE. For other cases involving this patent, see Fischer v. Hayes, 6 Fed. 63. 76, 22 Fed. 529; Fischer v. Neil, 6 Fed. 89; Fischer v. O'Shaughnessey, Id. 92.]

Case No. 4,813.

FISH et al. v. The BLACK WARRIOR.

[N. Y. Times. Nov. 24, 1853.]

District Court, S. D. New York. 1853.

COLLISION — STEAM AND SAIL—DUTY OF STEAMER IN—THOROUGHFARE OF VESSELS AT NIGHT.

[1. The running of a steamer in a thoroughfare of vessels, and in the darkness, with no more precaution than is usual in the daytime, raises an inference that she could have discovered an approaching vessel in time to avoid collision.]

[2. A night of unusual darkness demands extraordinary diligence on the part of a steamer in guarding against collision with sailing vessels.]

[3. Negligence in lying in the track of a vessel gives rise to the same degree of liability for collision as any other fault.]

[This was a libel for collision by Joseph Fish and others, owners of the schooner Sarah Emma, against the steamship Black Warrior (the New York & Alabama Steamship Company, claimants).]

E. H. Owen and E. C. Benedict, for libellants.

Before BETTS, District Judge.

The schooner Sarah Emma and the steamship came in collision in the evening of November 16, 1852, near Barnegat, and, the schooner being sunk by the collision, her owners bring this suit to recover their damages. The wind at the time was about W. by N. The schooner was going about three knots an hour, close-hauled, heading about S. S. W., with lights set, and a competent look-out. The steamer was heading N. by E., bound into New-York, going about nine knots an hour. Each party alleges that the other vessel, at the time she was discovered, was inshore of their own. When the schooner was discovered by the steamer, the steamer's helm was immediately put a-port, and she claims that the schooner improperly starboarded her helm, and thereby threw herself under the bows of the steamer, in the act of hauling further away from her.

The following points were decided by THE COURT: First. That the steamship was running with no more than ordinary precautions, such as she used even in the daytime, and upon her own proofs, was in a thoroughfare of vessels; and she becomes thereby chargeable with the responsibility of proving that she could not have discovered the schooner sooner than she did, and after discovering her, could not, with the exercise of the utmost diligence, avoid her. Second. That the testimony is so balanced as to whether the schooner or the ship was inshore of the other, when the light of the schooner was first seen on the ship, that the court must consider that point undecided by the evidence. But it is proved that the schooner was running close-hauled on the wind, with her sails flat aft, and held that course until the collision, or so near it as to leave her without responsibility for any change of her direction, which might have occurred in the alarm and confusion incident to the inevitable striking together of the two. Third. That the testimony in respect to the state of the atmosphere, whether starlight and moonlight, or cloudy and dark, is so contradictory as to leave it doubtful if the schooner could be discerned a sufficient distance off, without her displaying a light, to be safely cleared by the steamer. Yet, taking the evidence from the ship as most

reliable in this particular, and that the night was so obscure and dark as to prevent the hull or sails of the schooner from being discovered more than a quarter of a mile from the steamer, the duty was imposed upon the latter to employ extraordinary diligence in increasing her look-outs, in placing her engine under strict supervision, and so manning the deck that the utmost promptitude might be secured in discovering danger and using the power of the ship to stop her headway and recede from it, or to be turned out of its way when it made its appearance, and that the steamer has failed to show any such preparations on her part. Fourth. That it was the right and duty of the schooner to hold the course she was running when the ship was known to be approaching her, and there is no satisfactory evidence on the part of the steamer that the obligation was not observed by the schooner. The ship had no knowledge of that course until the hull and sails of the schooner came in sight, and then she was heading south by east, and she is not charged by the proofs with deviating from it, other than being southeast at the moment of striking. Her general course was on the wind, and there is no proof that a variation from south and east to southeast, if made, disconcerted any manoeuvre of the steamer, or produced the collision; and the proof that the steamer turned off more east several points, and going in that new direction, then received the blow at right angles, would indicate that the schooner was only east of south, and would corroborate her evidence that she did not change her course until the instant of striking. Fifth. It is plain upon the proofs that the speed of the steamer would have enabled her, by starboarding or porting her helm, when the light of the schooner was first seen, to have gone safely clear of her; and that the collision was caused by allowing the steamer to approach too near her before taking the appropriate measures for keeping her out of the way. Sixth. That the steamer is responsible to the same degree for placing herself, unjustifiably, across the schooner's track, although she thus receives the blow from the latter, and does not inflict one by her direct motion, as she would do, if propelled upon the schooner. Seventh. That the collision cannot properly be adjudged an inevitable accident, because the steamer had notice by the schooner's light, in time enough to avoid her, and the collision was caused by the delay of the steamer to act upon that warning. Eighth. The court does not now consider and determine whether the loss of the vessel was a necessary consequence of the collision, or resulted from the blamable negligence or misconduct of her officers and crew. That particular will be matter of inquiry on the reference to ascertain the damages sustained.

Decree for libellants accordingly, with a reference.

Case No. 4,813a.

FISH v. FOND DU LAC.

[12 Reporter, 295.][1]

Circuit Court, E. D. Wisconsin. July 12, 1881.

FEDERAL COURTS — QUESTION OF CONSTITUTIONAL LAW—STATE DECISIONS.

A federal court, when determining the rights of parties under a state law, will never, in a doubtful case, adjudge the statute to be in conflict with the state constitution, unless sustained by some distinct adjudication of the highest court of the state.

Action by the holders of coupons attached to certain bonds issued by the city of Fond du Lac in payment of a subscription made by the city to the capital stock of a railway company now known as the Northwestern Union Railway Company. The subscription was authorized by a statute (March 21, 1871) of Wisconsin which contained no restriction as to amount [Laws Wis. 1871, p. 841]; the terms, conditions, and amount of the subscription being, however, previously set forth in a written proposition by the company, and approved by a popular vote at an election duly called. It was contended that the statute was in conflict with section 3, art. 11 of the state constitution, as follows: "It shall be the duty of the legislature and they are hereby empowered to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

HARLAN, Circuit Justice, in delivering the opinion of the court, said: In support of the proposition that the act of 1871 is repugnant to the constitutional provision, and therefore void, we are referred to Foster v. City of Kenosha, 12 Wis. 688, decided in the year 1860, and to Fisk v. City of Kenosha, 26 Wis. 23, decided in 1870. (His honor then read from the opinion in the first case, and continued:) I have read somewhat fully from the opinion in Foster v. City of Kenosha, because upon that case counsel for the city mainly rely. Now it is quite clear, to my mind, that the supreme court of Wisconsin has not gone so far as the learned counsel for the city contends that it has. The point there decided was that the legislature could not, constitutionally, confer upon a municipal corporation authority to contract debts, without limit as to amount, as well as without any other restriction as to purposes than the judgment of a common council, sustained by a majority of voters, that the common interest of the municipality will be thereby promoted and secured. The court held that "such unlimited power of

[1] [Reprinted by permission.]

taxation, such unrestrained ability to contract corporate indebtedness," embracing, as it did, purposes confessedly non-municipal, was inconsistent with the object and design of imposing upon the legislature the duty of restricting municipal powers "so as to prevent abuses in assessments and taxation, and in contracting debts." That decision by no means justifies the conclusion that the legislature may not authorize a municipal subscription to the capital stock of one designated railroad company, without limit, in one sense, as to amount, but yet to be made only after and in accordance with a formal written proposition by the company, setting forth as well the amount desired to be subscribed, as the terms of the subscriptions, and also after the approval of such proposition by a majority of legal votes cast at an election called and held to pass upon that specific proposition. In the act of March 21, 1871, the purpose of the subscription therein authorized was distinctly stated, namely, to aid in the construction of a railroad in which the city of Fond du Lac had a business or commercial interest; whereas, the charter of the city of Kenosha did not limit taxation and indebtedness to municipal purposes. This difference between the present case and that case is very material. Consequently I do not feel authorized by anything involved or decided in Foster v. City of Kenosha to hold that the legislature of Wisconsin, in passing the act of 1871, transcended the limits by the fundamental law of the state. Nor does the subsequent case of Fisk v. City of Kenosha condemn the act of 1871 as unconstitutional. That case involved a construction of the same section of the charter of Kenosha as the one referred to in Foster v. City of Kenosha, and the court does nothing more than affirm its previous ruling. I do not, therefore, feel obliged, by anything in the decision of the state court, to adjudge that the legislature, in the act of 1871, exercised powers forbidden by the constitution of Wisconsin. In considering this question I have not forgotten what was said by the supreme court of the United States, when required, in Fletcher v. Peck, 6 Cranch [10 U. S.] 128, to determine whether the legislature of Georgia had, in a particular enactment, violated the constitution of that state. The court there said, speaking by Chief Justice Marshall, that "the question, whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case." The more recent decisions of the same court justify me, I think, in saying that a federal court, when determining the rights of parties under a state law, will never in a doubtful case adjudge such law to be in conflict with the state constitution, unless sustained in so doing by some distinct adjudication of the highest court of the state. Judgment for plaintiff.

Case No. 4,813b.

FISH et al. v. The GEORGE THOMAS.

[Betts. Scr. Bk. 561.]

District Court, S. D. New York. Nov. 18, 1857.

BOTTOMRY—FREIGHT EARNINGS—ROUND VOYAGE.

[A voyage to a foreign port, there to discharge cargo; thence to another foreign port, there to take cargo; thence to a domestic port, —is continuous with respect to liability of freight moneys to satisfy a bottomry bond given for repairs in the first part of the voyage.]

[In admiralty. Libel by James D. Fish and others against the bark George Thomas and her freight to recover upon a bottomry bond.]

This was a libel upon bottomry bond. The vessel sailed from Boston, bound thence to Havana, there to discharge her outward cargo, and to go thence to Sagua la Grande for a cargo, and thence to a port in the United States. On her outward voyage she was dismasted, and put into Key West for repairs, to cover which this bond was given by the master. The vessel on being sold did not bring enough to cover it, and the libelant claims to recover the balance out of the freight moneys received on the voyage round from Havana to the United States, while the claimant insisted that Havana was to be deemed the terminus of the voyage for which the master had power to bind the cargo and freight.

HELD BY THE COURT: That the voyage was a round one from Boston back to the United States, and the vessel was employed earning freight the entire circuit, and this faculty was one of the interests hypothecated by the terms of the bond. No cessation of liability occurred on the vessel's arrival at Havana. That the libelants were entitled to a decree against the freight as well as the vessel.

FISH (HICKS v.). See Case No. 6,459.

FISH (McDANIEL v.). See Case No. 8,744.

FISHER (BLIGHT v.). See Case No. 1,542.

Case No. 4,814.

FISHER v. BOODY et al.

[1 Curt. 206.][1]

Circuit Court, D. Maine. Sept. Term, 1852.

EQUITY—RESCISSION OF DEED—FRAUD — MISTAKE —PROOF—LACHES.

1. Fraudulent misrepresentations by a stranger, not sufficient to rescind a deed of conveyance. They may afford ground for relief, on account of mistake.

[Cited in Spies v. Chicago & E. I. R. Co., 40 Fed. 39; Hardt v. Heidweyer, 14 Sup. Ct. 674.]

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

2. If a bill charges fraud, as the ground of relief, it must be proved; and the proof of other facts, though included in the charge, and sufficient, under some circumstances to constitute a claim to relief under another head of equity, will not prevent the bill from being dismissed.

[Cited in Moore v. Greene, Case No. 9,763; Badger v. Badger, Id. 718; Voorhees v. Bonesteel, 16 Wall. (83 U. S.) 29; Martin v. Smith, Case No. 9,164; Sullivan v. Portland & K. R. Co., 94 U. S. 811; Barr v. Pittsburgh Plate-Glass Co., 6 C. C. A. 271, 57 Fed. 98.]

3. Though lapse of time be not pleaded as a bar, the judgment of the court will be influenced by delay, not accounted for, when the bill seeks to rescind a sale.

[Cited in Ashhurst's Appeal, 60 Pa. St. 308.]

4. Lying by, and acquiescence, may be sufficient to induce the court to refuse to rescind a deed, though not pleaded as a bar.

[Cited in Clark v. Potter, 32 Ohio St. 61.]

5. If a bill to rescind a deed, is filed after a considerable lapse of time, and the exercise by the plaintiff of the powers of an owner over the property, so as to change its character or value materially, the bill must state sufficient reasons for the delay; and those reasons must be made out in proof.

[Cited in Greene v. Bishop, Case No. 5,763; French v. Shoemaker, 14 Wall. (81 U. S.) 335.]

This was a suit in equity, to rescind a sale and conveyance of lands in the state of Maine. The substance of the pleadings and evidence are so fully stated in the opinion of the court, that it is not necessary to recapitulate them.

CURTIS, Circuit Justice. This is a bill in equity, filed by David A. Fisher, a citizen of Massachusetts, against Henry H. Boody, Freeman Bradford, and Joseph Russell, citizens of Maine, to set aside a sale and conveyance of land, on the ground of fraud. The material allegations of the bill, upon which the claim to relief is rested, are, that the defendants, claiming to be the owners of a tract of land in the state of Maine, containing six thousand six hundred and ninety-four acres, known as the 'Bog Brook Tract,' authorized one Nathaniel Miller to make sale of it; that, on the seventh day of August, 1835, the complainant contracted with Miller to purchase one undivided eighth part thereof, at the rate of $4.50 per acre; that, at or near the same time, other persons purchased five undivided eighth parts of the same land; that the complainant received from two of the defendants, Bradford and Russell, a written contract to convey to him what he thus purchased, and paid to them in cash the sum of $1,255.12, and executed three promissory notes for the sum of $836.67 each, one payable in one year, one in two years, and one in three years from the seventh day of August, 1835, and on the ninth day of November, 1835, received the deed of the defendants, purporting to convey to him, in fee-simple, one undivided eighth part of the land; that the defendant paid, at its maturity, the first of his notes, but the others are outstanding. The bill further states, that Miller applied to him, in Boston, to purchase, representing that there were some gentlemen there from Maine, who had a choice piece of timber land, which they offered to sell at a great bargain; that he intended to take part of it, and wished the complainant to take a share, and was desirous of making up a company of his friends, that they might operate on the land, get off timber from year to year, and make a great profit; that Miller exhibited a plan of the land, and stated that the lumber cut therefrom would come to navigation the first season; that, on the complainant's declining to purchase, he induced him to see one Borland, who, he said, had explored the land; and Borland informed the complainant that he had explored it, and found it one of the best tracts of timber land in Maine; that it would yield from four to six thousand feet of choice pine timber per acre, and other timber, such as spruce, juniper, and cedar, to make it average ten thousand feet per acre, and possessed all the advantages of locality and streams to enable those who purchased it to float the timber to market the first season after being cut; that it was a great bargain at $5.50 per acre, and if it could be had at that price, he, Borland, was determined to go into it, to the extent of his ability. That the complainant still declining to purchase, Miller afterwards brought to him a person named Fogg; represented that Fogg had been sent down to explore the land, and he wished the complainant to hear his statement concerning it; whereupon Fogg stated, that the land would average from three and a half to four and a half thousand feet of choice pine timber per acre, and other timber in proportion; that the advantages for getting out lumber were good, and that timber cut therefrom could be floated down to a market the first season.

The bill charges that the land was of no value whatever as timber land, or for the purpose of lumbering, because about all the pine trees of sufficient size to be sawed into boards were wholly unsound and rotten, so much so, that the same could not be got out and manufactured into boards and sold at a sufficient price to pay the expense of the operation, and that this was known to the defendants; that when the defendants contracted to sell, they did not own the land, but only had a right to purchase it at not more than $1.50 the acre, and they knew it was not worth even that price, and obtained this right to buy merely with a view of defrauding some unsuspecting person.

It further charges, that one Lewis L. Miller, having been authorized by the defendants to sell the land, applied to one Cheeseborough to purchase, and they having agreed to have it explored, Miller selected Fogg, and Cheeseborough selected Borland, and sent them down to the land on that business; that Borland and Fogg,

in July, 1835, went on to the land, in company with the defendants, Bradford and Russell, and found it wholly worthless for purposes of lumbering; that the defendants, knowing that Borland and Fogg would so report, while coming from Portland to Boston with them in a steamboat, offered to each of them a deed of one undivided eighth part of the land, or a part of the profits, if they would report that the land was well covered with valuable timber, and was a great bargain at $4.50 per acre, and if they would aid and assist in working off a part, or the whole, of the land at that price; that Borland and Fogg agreed to the proposal, Borland, however, reserving the right to acquaint Cheeseborough, secretly, of the worthlessness of the land, which he did, on seeing Cheeseborough; that the defendants gave Fogg a written promise to perform their nefarious contract, and that Borland and Fogg did report, falsely, to Miller, that they had found the land valuable, that it contained a large quantity of choice pine timber, and other valuable timber, and was a great bargain at $4.50 per acre.

The bill further states, that when Borland and Fogg made the above-mentioned representations to the complainant, they were under the corrupt contract aforesaid, with the defendants; and that the complainant, being deluded and influenced by the false and delusive declarations and representations made by Nathaniel Miller, Borland, and Fogg, did, on the same day, conclude a bargain, as above-mentioned. There is another charge in the bill, concerning an incumbrance on the land, which will be noticed hereafter.

This is a succinct statement of the substance of the case made by the bill; and as there can be no doubt a sufficient case is stated, the first inquiry must be, whether it is made out in proof.

It should be observed, at the outset, that the bill does not aver that either of the defendants, in person, made any misrepresentation; the charge is, that the false representations, which misled the complainant, were made through Nathaniel Miller, Borland, and Fogg. We have, therefore, to ascertain from the evidence, not only what each of these persons represented to the complainant prior to his purchase, but also, whether at the times of such representations, each was so connected with the defendants as to render the defendants responsible for his acts in respect to this land. It has been urged, that if a third person, wholly unconnected with the defendants, made fraudulent representations, which induced the complainant to purchase, he is entitled to relief. I will not say a case for relief might not be made, resting on such a basis; but it must be on the ground of mistake, and must be brought within the principles applicable to that head of equity. There can be no responsibility for the fraud of a mere third person, acting without any authority from the defendants. And this bill states no case of mistake. It is true, that in summing up the grounds for rescinding the sale, this language occurs: "And although such gross and palpable fraud has been committed and practised upon your orator, or such gross and palpable mistakes mutually made and committed in regard to the value of said land and timber." But there is nothing in the bill to which these words concerning mistakes can be referred. No mutual mistake is anywhere described, and the averments throughout are of positive and intentional fraud and deception. I assent to the rule laid down by the lord chancellor, in Price v. Berrington, 7 Eng. Law & Eq. 254, that when a bill sets up a case of actual fraud, and makes that the ground of prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts, quite independent of the fraud, which might of themselves create a case under a distinct head of equity. I return, therefore, to the inquiry, whether Nathaniel Miller, Borland, or Fogg, made to the plaintiff, before the purchase, the representations charged in the bill; and if so, whether he was so connected with the defendants, or either of them, as to give a title to relief on the ground of fraud.

And first, as to Nathaniel Miller. The only evidence of representations made by him comes from himself, as a witness for the plaintiff; and he fails to prove that he made the representations alleged in the bill. He admits that he urged the plaintiff to buy, told him he intended to purchase, and that he and some of his friends, who were to purchase the other parts of these lands, would join the defendant in operating, that is, getting off the timber. But he does not remember telling him it was a choice piece of timber land, or that it was a great bargain, or that great profits could be made. In short, he proves no material representation charged in the bill, even of the most general character, which was not true. It was urged by the plaintiff's counsel, that as he declares he said as much to the plaintiff as he did to others, and it is proved he made some more specific representations to others, and as it is apparent that, from the age of the witness and the lapse of time since the occurrences, his memory was not clear, the court should presume that he did make to the plaintiff, the declarations charged in the bill. But having been carefully interrogated, by a set of very pointed, not to say very leading questions, upon each representation alleged in the bill, and having declared that he did not remember making them, it would be exceedingly dangerous to assume that his subsequent loose statement, that he said as much to the plaintiff as to others, is evidence that he made to the plaintiff the representations

charged in the bill. If his memory was not sufficient to enable him to say whether he did or did not make those representations, it was not sufficient to enable him to prove the fact that he made them; and how much he said to others, is quite immaterial.

There is some ground laid by the bill for the inquiry, whether the plaintiff was not influenced by the belief that Miller was to pay, for his eighth of the land, as much as the plaintiff; but I am spared the necessity of investigating this, by the disclaimer of the plaintiff's counsel of all intention to impute to Doctor Miller, any intentional concealment of the fact, that a discount was to be made to him, and by the frank admission, which, indeed, Miller's testimony seems to render necessary, that his client has nothing to complain of in this particular.

I proceed, therefore, to examine, what relation Borland bore to these plaintiffs, at the time when the interview took place between him and the plaintiff and Miller, on the seventh day of August. This was the only interview with Borland, before the plaintiff's purchase, which was concluded on that day. The bill charges, that Borland and Fogg, having been sent to explore these lands by Miller and Cheeseborough, who proposed to purchase them, were bribed by the defendants to make a false report to their employers, and to aid in selling the lands, by making misrepresentations. The answer of each defendant explicitly denies this charge and all connection with Borland, at any time prior to the thirteenth day of August; and they deny that Borland then had any agency for them, or either of them; but they admit that Russell and Bradford then agreed, that if he and his friends should take up the residue of the land, which Miller and his friends should not buy, at the rate of $4.50 the acre, they would give him one eighth of the land. So far as respects the denial of the bribery of Borland and Fogg, by the defendants, to make a false report to their employers, the answers are supported by the testimony of Fogg, taken by the plaintiff, who swears he knew nothing of it, and, so far as he was concerned, it was not true; and this very grave charge is not supported by any proof; nor is there evidence of any relation whatever between Borland and the defendants, prior to the time when the plaintiff made his purchase. That before the interview between himself and the plaintiff, Borland intended to have some connection with the sale of these lands, and hoped, as he declared, to make something out of it, is highly probable. That these plaintiffs had in any way employed him in reference thereto, before the plaintiff made his purchase, or knew that he had busied himself about the sale, or were at any time informed that he had made any representations to the plaintiff, does not appear. In respect to Fogg, the principal evidence in the cause comes from himself; he having been examined as a witness on the part of the plaintiff. His testimony, while it negatives, decidedly, any fraudulent purpose on the part either of himself or of any of the defendants, does clearly prove an employment, by Bradford, to give information to the plaintiff and others concerning these lands. And it shows, at the same time, a direct interest to promote the sale to the extent of one thousand dollars, which he was to receive, in case the sale should be effected for the price of $4.50 the acre. He says there was a written contract between himself and Bradford and Russell to this effect, the manner of obtaining which he thus describes: "I invited Bradford, on the day of the date of the obligation, to walk with me; he talked on various subjects. I told him I expected he was making a great deal of money by this bargain, and I would stay, till it was decided whether they sold, if he would give me $1,000. I told him I could say nothing more in praise of the land than I had already said; but I could blow up the bargain, and would, unless they gave me an obligation for $1,000." A copy of an obligation to Fogg, signed by the defendants, Bradford and Russell, is put into the case by the plaintiff; but it purports to relate to a tract of land materially different in quantity from the one in question, not identified with it by any certain description, and the answers of Bradford and Russell, which in this respect are responsive to the bill, aver that it does not relate to this land. I do not pause upon this; my present purpose being to declare how far there was an employment of Fogg, in behalf of the defendants, or any of them, in reference to these lands, so as to make them responsible for his representations. Nathaniel Miller testifies that Fogg told the plaintiff the land had from three and a half to four and a half thousands of good pine, per acre. Fogg himself declares he made no representation he did not believe to be true; that he gave a correct account of the land, as near as he had been able to learn; that he considered the land a bargain at the price asked; and that he had made his report, and told all he knew about the land, before he was employed by the vendor.

It is necessary, to a correct understanding of the case, to state that the gravamen of the plaintiff's complaint does not respect either the soil, or local position, or even the quantity of timber on the land; but its quality. As to the quantity of timber, though there is some conflict of opinion among the practical lumbermen who have worked on the tract, yet the general result of the evidence is, that the quantity was large; and the plaintiff's counsel explicitly declared, at the bar, that he did not make a question on that point; and the bill states, in terms, that it was the unsound and rotten condition of the pine timber which rendered the land of no value, and that it was in that particular the plaintiff was and continued to be deceived, even for the space of two years after he

made his purchase. Indeed, it is only upon this ground the bill can stand, because during the years 1835-36, and 1836-37, the plaintiff and his associates had sufficient means of knowledge of the quantity of timber, and the bill alleges no concealment by the defendants in this particular; and as the plaintiff and his associates continued to operate on the land during both those seasons, and this bill was not filed until August, 1844, it would be impossible to maintain the suit upon the ground of a deficiency in the quantity of timber. The real cause of complaint is, that the quantity of sound merchantable pine timber was not equal to what was represented. Upon this point, the testimony of Miller and Fogg, taken together, is, that Fogg represented there was from three and a half to four and a half thousand of good pine per acre, and that he believed what he said to be true. In point of fact, I think the evidence shows this representation was not substantially correct; a considerable part of the pine timber then standing on the land being more or less decayed. But it is a very material inquiry here, whether this assertion by Fogg was of a matter of fact, or a matter of opinion merely. An honest but mistaken assertion of a fact, to another's loss and his own gain, by a vendor or his agent, may be a constructive fraud; but this principle does not extend to assertions of what are known to both parties to be matters of opinion only. And an assertion may appear to be a matter of opinion, either from its being made in that form, or from the very nature of the thing asserted. It is shown, by the evidence in this case, and I think is so obvious, that it must be taken to have been known to the plaintiff, that a representation of the quantity of sound pine timber standing on the land, was of a matter of opinion. Many persons, of practical experience in such matters, and better acquainted with these lands than one merely sent to make an exploration could be supposed to be, have testified in this cause on this subject. They differ very widely. The result may be summed up in the words of one of the witnesses, who says some lumbermen thought the best and most valuable timber had been cut, and others thought differently. The very representation relied on showed it to be somewhat loose and conjectural; three and a half to four and a half thousand feet per acre, does not convey the idea of a precise statement of a matter of fact. According to the bill, the plaintiff had just before been told by the other explorer, Borland, that the land would yield from four to six thousand feet of choice pine per acre. Such a wide discrepancy between the two persons employed to explore, and to whom the plaintiff resorted for information, must at least have apprised him that they were speaking from loose estimates. It must be observed, that the assertion relates to the quantity of sound timber. This involves, not merely the question how much pine timber was on the land, but what part was sound, and what unsound. The latter is very difficult to be determined, with any approach towards precision, by a mere exploration of the land. No doubt, some estimate may be formed; but the nature of the thing, as well as the very considerable discrepancies among the witnesses, show it to be purely a matter of opinion, upon which honest and skilful men will greatly differ.

I have examined the substantial allegations in the bill respecting the misrepresentations relied on, in order to see what their character was; whether they are supported by the proofs, and how far the defendants are responsible therefor. There are many allegations concerning the representations made to others, which are material only as tending to show, if proved, a general fraudulent purpose on the part of one or more of the defendants, and of Borland. But inasmuch as no representations by the defendants themselves are alleged, and as Borland is not shown to have been their agent, or to have been in any way connected with them before the plaintiff purchased, I have not thought it necessary to detail them. There are also circumstances in the case tending to show, that some of these transactions, with others than the plaintiff, were not conducted fairly by all who were concerned in them. It is very extraordinary that one eighth of the whole tract should have been given to Borland. It is not quite clear to my mind, that the promise to Fogg referred to the sale of another tract of land; it is proved, I think, that Borland deluded some of the other parties; but the great difficulty in the plaintiff's case is, that he does not connect himself with these circumstances, and show himself to have been deluded into making this purchase, by such evidence as will enable me to set aside this conveyance after the lapse of so much time, and after the acquiescence by him which appears; all fraud being explicitly denied by the answers.

This sale was made in August, 1835, and nine years elapsed before the bill was filed. It is true, no statute of limitations is pleaded, and the lapse of time is not specifically relied on in the answer. But I apprehend the true doctrine on this subject is given by Lord Brougham, in Irvine v. Kirkpatrick, 3 Eng. Law & Eq. 24, decided in the house of lords in 1851. "A party, say they, meaning to avail himself of the topic of time, must do it by a plea, and must succeed altogether, or, I suppose they mean to add, fail altogether. I cannot go so far as that. I, too, say that a court of equity will overleap the barrier of time to get at the fraudulent practice. I, too, say the length of time which has elapsed is not a bar to this suit. But that it should not enter into our consideration; that it is to be wholly dismissed; that as a suggestion, it is to have no effect in moulding, as it were, in influencing the frame of mind, in which we shall be when we are to consider the

rest of the case, either as a jury upon the facts, or as judges upon the law,—to that proposition I cannot assent. Am I to dismiss that fact from my mind, and deal dryly with all the facts and all the law of this case exactly as if it had occurred three or four years, or as many months before the action was brought? I cannot go that length. On the contrary, I hold it is most material," &c.

This distinction, between a positive bar from lapse of time, and that lying by and acquiescence, which will cause a court of equity to look upon the proofs with some distrust, and to refuse relief unless the delay and acquiescence are satisfactorily accounted for, I consider a most important principle, necessary to be constantly kept in view in wielding the transcendent powers of a court of equity; and it rests upon ample authority, though, in my judgment, it has sometimes not been sufficiently regarded. Prevost v. Gratz, 6 Wheat. [19 U. S.] 481; Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 153; Piatt v. Vattier, 9 Pet. [34 U. S.] 416; Stearns v. Page [Case No. 13,339]; Wagner v. Baird, 7 How. [48 U. S.] 234; 1 Madd. 99; Lawrence v. Blake. 8 Clark & F. 504; Hough v. Richardson [Case No. 6,722]. The plaintiff seems to have been quite aware of this difficulty, and has introduced into his bill some allegations designed to avoid it. Their substance is, that by the fraudulent practices of some of the defendants, and of other persons having a common interest with them, the plaintiff and his associates were prevented from discovering the decayed state of the timber until the summer of 1837; and the bill avers, "that he made no discovery of the frauds practised upon him until the fifth day of January, 1839; at which time your orator first discovered and was satisfied, and felt himself able to prove, the many charges set forth in this, his bill of complaint, and has to this time delayed prosecuting the same on account of the poverty the said frauds of the defendants brought upon him, and the hope that his appeals to their justice and equity would save him from the vexation, trouble, and expense of an appeal to this court for redress." This, taken in connection with the facts in the cause, is far from being satisfactory to my mind. It appears that, in the summer of 1837, a large quantity of this timber, taken from the land during the two preceding years by the plaintiff and his associates, was actually sawed into boards; and it is the result of that operation which is now relied on, as showing the worthlessness of the timber. If the plaintiff did not then know that its quality fell so far short of the representations, as to amount to a fraud, he was either guilty of gross neglect, or there was not such a fraud as he relies on. In respect to his first feeling himself able to prove all his charges of fraud in January, 1839, no particular sources of evidence, then first discovered, being in any way indicated by the bill, or appearing in the proof, I can allow no weight to it. Such vague allegations are too easily made to be entitled to any effect. If, at that time, the plaintiff made any particular discovery, the bill should have stated what it was, and why it was not before known, and how it was discovered. Stearns v. Page, 7 How. [48 U. S.] 829. That the delay has arisen from the poverty of the plaintiff, brought upon him by the frauds of the defendants, is not shown. He has paid the plaintiffs less than twenty-two hundred dollars; it does not appear that he lost any considerable sum in the lumbering operations; the evidence tends to show that, in 1835, he was worth about ten thousand dollars, and that he was engaged in other eastern land speculations. His letter to the plaintiff, Boody, written in January, 1838, though it shows he was in want of money, does not indicate poverty; and there is no evidence that this pretence in the bill is well founded. It is not by a statement of imaginary difficulties, or unreal obstacles, that delay is to be accounted for. In this case, I am not satisfied that any thing more substantial is shown.

But this case contains facts still more formidable to the plaintiff's claim than mere delay. From 1837 down to the filing of the bill, lumbering operations have been carried on upon these lands by practical lumbermen, and so large quantities of timber removed, as to affect very materially the value of the land. During this time it has also been injured by fire. In January, 1838, after the timber, taken off by the plaintiff and his associates, had been actually sawed into boards, the plaintiff wrote a long letter to Boody, in which he recognizes his notes as due, and gives assurances of their being paid. And though he does not appear to have been concerned in the profits of the subsequent operation on the land, yet, as late as 1840, he offered to Purrington, one of the witnesses, a permit to cut timber thereon. Here is an amount and kind of acquiescence, and a consequent change in the value of the property, which render the court, through the fault of the plaintiff, unable to restore the parties to their original condition.

There is one other part of the bill which must be adverted to. It is the claim for relief, by reason of an incumbrance on that part of the land purchased of Russell. There can be no doubt that a fraudulent concealment of incumbrances on the land sold may lay the foundation for relief, by a rescission of the sale, even after the execution of a deed of conveyance containing covenants, upon which a remedy might be had at law. But I apprehend that a very different case from the present must be made. The answer of Russell admits that the land was represented, at the time of the sale, to be unincumbered, and that it was his intention to have had an unincumbered

title made by the holder of that title; but that the plaintiff, with a full knowledge of the state of the title, proposed to accept a deed from him, and to rely on his removing the incumbrance, which he afterwards did, by paying it off, and taking a discharge of the mortgage. There is nothing in the proofs sufficient to control this; and it is in part, supported by the record evidence. The plaintiff has not suffered any loss, by reason of the existence of the mortgage; nor does he show that he is now exposed to any. I cannot, for this cause, set aside a conveyance made seventeen years ago.

I have not adverted particularly to some more general grounds of complaint contained in the bill. It is certainly true that the defendants were not the owners of the land when the sale was made, having only a right to purchase it on certain terms. It is true, also, that the price at which they sold, was at a very large advance upon that which they were to pay. I am satisfied that a prudent man, who knew the amount and condition of the timber standing on the land, would not have agreed to purchase at the rate of four dollars and fifty cents per acre. But I am not satisfied, that the defendants knew the condition of the timber, nor that the land was worthless for lumbering operations. The fact that practical lumbermen have operated upon it, so many years since 1835, is quite decisive on this point. These and some other circumstances, would have been entitled to a more rigid scrutiny, if the transaction were recent, and the plaintiff had approached nearer, to making satisfactory proof of the more specific charges of fraud in his bill. But, independent of the fraudulent concealment, by the defendants, of the state of the timber, alleged, but not to my satisfaction proved, they do not of themselves afford ground for relief, by reason of fraud; and I have therefore, not thought it necessary more particularly to allude to them. For similar reasons, I have not spoken of some of the points made in behalf of the defendants, and particularly of the defendant Boody. But it may be proper to state, what was conceded by the plaintiff's counsel, that his connection with these transactions was, if any, a mere legal relation, he not having, at any time, actually participated in them.

The bill is to be dismissed; and as to costs, I shall follow, what I understand to be a settled rule, that if a bill charges fraud, which is not proved, and the bill is dismissed, the plaintiff must pay costs.

Case No. 4,815.

FISHER v. CARTER.

[1 Wall. Jr. 69.] [1]

Circuit Court, E. D. Pennsylvania. Nov. 8, 1843.

MONUMENTAL AND TRADITIONARY EVIDENCE.

1. At no time in the history of Pennsylvania, neither before October 13th, 1760, nor since, have islands in her larger rivers been open to settlement on the same terms with fast-land generally. They could be settled only on agreed terms.

[Cited in Jones v. Tatham, 20 Pa. St. 403.]

2. The court speak of acts and monuments, and of judicial and professional tradition viewed as evidence; and, in the absence of more direct testimony, regard them as an authoritative means of ascertaining ancient opinion of fact.

At the junction of the Susquehanna and Juniata rivers in Pennsylvania, stands a very valuable island called, sometimes, "Baskin's" or "M'Elcar's Island," and sometimes "Duncan's Island;"—the subject of the present ejectment. The plaintiff shewed title by residence, improvement and cultivation from 1749 to 1802. In the year last named, the Penns, being indebted to Thomas Duncan, Esquire (subsequently one of the justices of the supreme court of Pennsylvania), for professional services, conveyed this island to that gentleman. These services, the value of which did not exactly appear, were the principal consideration of the conveyance. The defence was, that admitting the plaintiff's ability to recover on other grounds,[1] yet that islands in the great rivers of Pennsylvania had never been open to settlement on what are called common terms; the terms on which lands in general were settled, and by which the plaintiff claimed title in this case. The plaintiff admitted that after October, 1760 (when, as will hereafter appear, the proprietaries took possession of a large amount of this sort of property), islands were not thus open to settlement; but contended that prior to that time they were. And this point it was which was in issue in the case.

It is here necessary to present a view of the juridical history of this subject.

In one case (Carson v. Blazer, 2 Bin. 475; decided in 1810) the supreme court of Pennsylvania decided that the great navigable rivers of the state were never the subject of riparian ownership, but belonged to the commonwealth. In his opinion in that case, Chief Justice Tilghman, speaking of the proprietary, said: "No doubt he retained the entire right of the river and of every thing in the river, in order that he might make such use of it as would be most conducive to the public benefit." Page 476.

In another case (Hunter v. Howard, 10 Serg. & R. 243, 245; decided in 1823),—not absolutely requiring such a dictum,—Mr. Justice Duncan, delivering the opinion of the court (the chief justice being absent), said, that "islands in the great rivers of Pennsylvania, under the provincial government, were never the subjects of appropriation either by office right or settlement. The proprietaries appropriated them to their

[1] [Reported by John William Wallace, Esq.]

[1] It is clear that the plaintiff could not, in any event, have recovered; his title being but equitable.

own use by special warrants." And afterwards: "Thus, from the first settlement of the country, we see, these islands were withdrawn from appropriation." At the time when this sentiment was delivered, his honour was the owner of the island now in suit; and the question in controversy had, at that time, been agitated in regard to it. In a third case (Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. 71, 79; decided in 1826), Chief Justice Tilghman, giving the opinion of the court upon a point respecting rivers, argued against one of the parties' rights, because if he had such rights in the river he "would have a right to the islands also, contrary to universal opinion and practice. These islands," continues the chief justice, "have never been open to applicants under the common terms of office either under the proprietary or state government; but have always been sold on special contract, and for higher prices;" and his honour refers to the case of Hunter v. Howard, last cited, "for a particular account of the manner in which islands have been granted." Chief Justice Tilghman, it is necessary to state, was born in the year 1756, and began the study of the law in the year 1772, in the office of Benjamin Chew, Esquire, then at the head of the profession and afterwards chief justice of Pennsylvania. His father removed from Maryland in 1762, and was, some time subsequently, appointed secretary of the proprietary land-office; a situation which he held with distinguished reputation for several years. Mr. Justice Duncan was born in 1760.

It appeared, on the other hand, that the point now in issue had twice arisen in the inferiour courts of the state; but that the decisions there were in direct contrariety to each other. It had also been twice before the supreme court, but no opinion was given in either case; the point not being in issue in one case (McElear v. Elliott, 14 Serg. & R. 242, 250); and in the other (not reported), where it was in issue, the court not being able to agree. The evidence of documents from the land-office made it plain that after October 13th, 1760, islands were not open to settlement on common terms; but it was not so clear from those records how the case had been anteriour to that date. The records did, however, shew that there was something like instances of the same course of general policy in regard to islands before that year as subsequently. For example: after October 13th, 1760, the proprietaries would not allow an island to be returned on a warrant for fast-land. They exacted, for islands, a price much higher than for fast-land. They did not knowingly permit settlements to be made on islands, but regarded persons who made them as intruders. They gave leases under special restrictions, but did not regard such occupancy as giving a right to pre-emption.

After the Revolution, the same course of policy with regard to islands was carefully continued by the commonwealth. See the act of 8th April, 1785, § 13, and of 6th March, 1793. While the course of policy respecting islands, prior to October 13th, 1760, appeared from the evidence which follows: 1680, June 20th. A return of survey of a certain "island" in the Delaware. This paper was endorsed: "Island in the Delaware." 1684, February 2nd. A warrant to survey another certain "island," and certain meadow-land described. The endorsement, however, had no reference to any island, and was simply "The Meadows at" &c. William Penn died in 1718; and the foregoing two were the only warrants for islands in his time. There was abundant evidence of his care to appropriate manors, or tenths of general surveys. 1754, August 29th. A letter from the secretary of the land-office to Lawrence Groden, Esquire, in which the secretary expresses his surprise that a certain person who, it appeared, kept forcible possession of another island in the Delaware river, against the proprietaries' tenant, could not be taken by the sheriff. "I should be sorry," says the secretary, in speaking of the sheriff, "to be obliged to complain against him to the governour; but I must do it if I cannot get process of court executed. However, let the writ be renewed every court, that it may appear how much he is in fault." 1754, October 17th. The proprietaries having granted to two of their agents, a certain number of acres of good land, and well situated; an island, having, as appeared by the surveyor's draft, two houses upon it, was included in the survey; but it did not appear by the caveat books, that any caveat was made by the persons named in the survey as settlers. In 1770, a caveat by some persons claiming under a former warrant and improvement was dismissed. 1758, November 15th. A warrant requesting the surveyor to make a regular survey of a yet different island, that it might be leased "on such terms as may be agreed on." Surveyed accordingly, "on the proprietaries' account." 1760, March 8th. A warrant reciting, that divers persons had presumed to destroy the timber and commit waste on another island (described) in the Susquehanna, and without any license from "us" had taken upon themselves to clear part of the said island; that the proprietaries were desirous to prevent such waste and spoil being made on the said island for the future, and that the same should be forthwith surveyed and returned "for our use." Warrant of survey accordingly. 1760, May 13th. A lease for three years, by the proprietaries, of an island in the Susquehanna, "surveyed and returned for the use of the said proprietaries." The tenant stipulates, in rict terms, that if he commit any waste, or if he assign the island or his lease without a license in writ-

ing from the proprietaries, his lease shall become utterly void. Then came the following warrant from the sons of Wm. Penn; and this document it was (the plaintiff contended) which first withdrew islands from general sale. 1760, October 13th. "Whereas during the life of our late honoured father, William Penn, Esquire, divers orders and warrants were given, &c. to survey or cause to be surveyed to and for his and our use and behoof, the tenth part of all such lands as should be from time to time surveyed and laid out in the several counties of our province. (These tenths composed what are known as "Manors.") And whereas, notwithstanding the said warrants and orders given as aforesaid, and our own repeated orders and warrants &c. since from time to time, they were not executed or observed as they ought to have been, (to our great loss and disappointment:) And we now judge it necessary to revive and renew the said orders: These are therefore to authorize and require you, as soon as conveniently may be, to survey or cause to be surveyed for our proper use and behoof (the tenth part of the before referred to sort of land:) ☞ And that in such future surveys to be made, you take particular care to survey for our own use the several unappropriated islands in the rivers Delaware, Schuylkill and Susquehanna, and the several other rivers and creeks in our own said province, and make returns from time to time of the same premises into our secretary's office for our use agreeable to the said former and this our renewed warrant and orders in that behalf." This warrant was endorsed "A warrant to survey for the proprietaries' use all the islands in the rivers Susquehanna, Schuylkill and Delaware:" and in pursuance of it, 88 islands were surveyed and returned between the years 1760 and 1770. The island now in controversy was among these, and surveyed November 13th, 1760. The surveyor's draft states that the island is called "Baskin's Island," and notes the fact of there being a settlement upon it.

It appeared, further, from the testimony of the deputy secretary of the land-office (who had been connected with that department for thirty-five years) that having been requested by the plaintiff to examine all papers respecting islands in order to give his deposition, he had carefully done so; and that although many patents had issued for islands, he could not find one case where a patent had been founded upon actual settlement. And again, that among the records of the land-office, but separate from its general concerns, are files called "proprietary files," which relate exclusively to the private estates of the Penns; and that among these files he found, when he came into the department, in 1809, all papers, with a single exception, of whatsoever sort, which relate to islands.

Mr. J. Fisher, of Lewiston, and Mr. Randall for plaintiff:

The point before the court has never been decided; nor was it in issue in those cases where we find an expression of opinion from the bench. What has fallen from judges is explained by the fact that notice was not directed to the epoch which is now proved to be an important one. The number of islands granted prior to October 13th, 1760, is comparatively small; for it is matter of common knowledge that the settlement of the state, at that early day, was only along the southeastern part. Ever since October 13th, 1760, or, in other words, since the only time the islands or their history have come to be subjects of notice, we admit what is said. Judges, when speaking on the subject, were speaking in a general way; and we ought not to seek for truth to a certain intent in every particular. It is plain that Chief Justice Tilghman and Judge Duncan cannot be regarded as speaking otherwise than in a general way. They cannot be taken as meaning to make themselves witnesses of a state of things which had passed away several years before either of them was born. They state, at best, what they derived from others; and these, in turn, may have rendered what they had learned but intermediately. How imperfect is such evidence! The speaker may have been unworthy of credit: he may have ill expressed himself; or the hearer may have ill conceived what was well expressed. In short, coming through the open channel of the human mind, all such tradition, even admitting the source to be pure, comes to us with the adulteration of imperfect conceptions, of weak motives; of fancies and foregone opinions; of oblivion and false remembrance, and of those varied springs of errour which must impart themselves to any such mode of transmitting truth. The dictum of Judge Duncan ought not to be cited at all. He could not have meant that his own dictum should decide his own cause. But all these, at any rate, were but obiter dicta: they possess naught of "the solidity of the judgment-seat." How do we find judicial opinion expressed when attention was directed to the point? In one case, the avoidance of any opinion. In two other cases (inferiour courts), one court is in direct opposition to the other: while on the first and only occasion that the point was in issue in the supreme court, there was a divided bench, and no opinion at all. Is the defendant aided by the records from the land-office? We do not deny that the proprietaries could take possession of unappropriated islands prior to October 13th, 1760; though, as we have said, few were so taken prior to that date. Nor do we deny that when once, in any manner, islands had been appropriated, they were subject to whatever terms of tenure or of disposition the proprietaries preferred. But

can one case be shewn where a person, settled on an island prior to 13th October, 1760, with an intention of remaining there, was dispossessed because he had not made a special agreement for it? The only case from which such a notion could possibly be induced, is that of the warrant of October 17th, 1754. Now, there, the marks on the draft are the only evidence of settlement at all; and these were probably made by way of description and for the sake of identification. The settlement may have been abandoned; for no mention is made of occupancy. It may have been an Indian residence. It may have been no residence at all; and temporary in its very origin. It may have been made on behalf of the proprietaries. Who can say when, how, by whom or for what it was made? Sixteen years afterwards, to be sure, some caveat was dismissed; but how prosecuted, if prosecuted, or wherefore dismissed we know not. Besides, our occupancy began five years before this. The great warrant of October 13th, 1760, did undoubtedly withdraw islands from common settlement. But it is a renewal of "said orders." What orders? Orders to survey islands? Not at all; but to survey tenths or manor lands. "They (i. e. those orders) were not executed or observed as they ought to have been." All that relates to islands comes afterwards, and is adjectitious. It is a new and substantive order; and this is sufficiently manifest notwithstanding a careless expression towards the end of the warrant; by which a reference intended to apply to manor lands, is made to include islands likewise. It is manifest, we say; for, otherwise, the warrant of October 13th, 1760, is made to recite that William Penn had issued divers orders and warrants to appropriate islands in general; while the evidence shews that only two warrants were issued in his time about islands at all; both of them for single islands; one of which islands. moreover, the return of survey treats just as it does fast land. But the warrant is to survey unappropriated islands. The survey here did not follow the warrant; for the island was certainly appropriated. It was known as "Baskin's Island." The surveyor's draft thus calls it. So obvious was this appropriation that although the survey was made in 1760, no steps were ever taken to dispossess the settlers at all till 1802. The island was then transferred, not for money (for the title was not marketable), but in liquidation of certain professional services whose value don't appear. This fact shews that the Penns did, themselves, regard their title as, at least, doubtful. An island so valuable as this would not, otherwise, have been thus disposed of. Indeed, it is evident that the surveyor misapprehended his authority. His endorsement shews that he regarded his warrant as a direction to survey all islands.

After full argument on the other side, by Mr. M'Cormick, of Harrisburgh, and Mr. Mallery, the charge of the court was delivered by

BALDWIN, Circuit Justice. The case of Carson v. Blazer [supra] goes far to decide by implication the one before us. It was there declared that the founder of our state, from motives of an enlarged publick policy, had reserved to himself the ownership of all the larger streams of the commonwealth;—the riparian owner coming but to low water mark. The river includes what is in the river, whether above the water or under it. And it is obvious that if any man might, at his pleasure, have taken possession of all the islands in a stream, he would have had it quite within his power to impede what we are told was the wise design of the proprietary owner. But we can scarcely regard the point as one which has been decided. Let it be examined, then, upon the grounds of historical evidence. Thorough research has been made into the early records of the land-office; and the fidelity of counsel has presented to us every thing, probably, which can be gleaned from that field of inquiry. The evidence from those records is not, we may admit, of the most direct kind. It is not wholly irreconcilable with the notion that islands were open to settlement in 1749: but this is not the natural inference from it. On the contrary: though all islands were particularly taken into possession by the great warrant of 13th October, 1760, and were thenceforth the subjects of peculiar and notorious regard, yet we do not discern any striking change in any matter connected with the disposal of them. Nay, so far as we can compare the history of that sort of property before and after the 13th October, 1760, we find that the general policy in regard to it has been always the same. Then, there is this remarkable fact: that diligent search into all these records does not afford one precedent of an island granted upon common terms, though it does furnish to us many grants of islands. Admit that what is thus stated is, in each instance, but negative evidence. The circumstance impairs not its strength; for the case is one where, under any hypothesis contrary to that which we assume, there could scarcely fail to be positive evidence: and in such a case negative evidence is as strong as any that can be conceived. In truth, it is negative in form merely, not in effect.

In the third place, we have evidence in the external order or disposition of the papers relating to islands. This sort of evidence, the evidence of acts and monuments, is justly deemed of a high order. Any mere assertion that such and such opinions were held, or that such and such facts existed, depends for its credibility upon a variety of circumstances. But an external fact, a

course of outward action, performed in observance of an opinion or practice, and testifying to it, indicates a clearness and fixity of idea which can leave but little doubt of its existence. It would, to be sure, be more satisfactory could the defendant shew, affirmatively, that this disposition of things had existed from the beginning; for this would be nearly conclusive. But the presumption from the state of the papers at the earliest date to which we can reach is in his favour. They were found in their present position by the deputy secretary of the land office when he first came into the department; and no effort of the plaintiff's counsel has shewn when any change was made, or that there was, ever, a time when a different state of things from the present existed. Certainly we do know that a course of external practice no where more generally descends than in large state offices. The clerk, on his coming there, finds a practice prevailing: he is trained up in it: he follows it in his gradations upward; and when he is old he will not depart from it. Super-added to all this, are declarations from eminent lawyers of a past day, which accord with what has been already mentioned; and serve both to explain and to confirm it. To be sure, this court is not disposed to regard with favour what an English reporter styles "circuit traditions;" but we are now inquiring what state of facts existed three generations ago; a date beyond that to which the law supposes human memory ever to reach. We are without living witnesses; and in this as in other questions relating to ancient things, what can we do but call to our aid the less perfect lights of tradition? In examining any ancient historical fact, if unable to procure testimony from persons who lived at the very epoch which is the subject of our inquiry, we endeavour to ascertain what has been said by intelligent persons living in the generation immediately or almost next. Such persons, we may grant, are liable to errour; but they are less so than any persons living in a subsequent generation: And we appeal to their declarations, not, of course, as to decisions, from which there can be no appeal, but as to credible witnesses, likely to be informed on the subjects about which they speak. The counsel of the plaintiff has argued against this sort of evidence from the imperfection of the channels through which it comes to us. There would be force in such an argument were the distance great or the links of transmission numerous; but where, as in this case, the witness is separated from the time about which he speaks, only by a single generation, the channel is so short and close that truth may be supposed to reach us in almost the same purity wherewith it issued from the wellhead. It is worth observing too, that the testimony here given is, not as to an opinion, but as to a fact. In regard to the former, it is certainly true, as the plaintiff's counsel argues, that a witness transmits what he understood, or what he remembers, or what he conceives; and there may be great adulteration of truth while its outward shape and seeming is preserved; but the simplicity of notion involved in the existence or non-existence of a fact, admits scarce any variations from truth but in the substitution of another and opposite fact; a matter not to be presumed. The declarations of the late Chief Justice Tilghman the court regards as entitled to particular respect. It has been the just praise of that excellent magistrate that he delivered few dicta; and his statement of any fact (much more of one about which he was so likely, from associations in youth, to be informed) will receive from those who knew him high deference, even though the source of his information be not specially declared. Let it moreover be observed that the chief justice speaks, not only of what he himself thought, but also of that which had been universal opinion—and practice. Indeed, for much of our law we are unable to shew any visible and now existing source. It is tradition attested by monuments; successive judges and sages of the law recording what themselves were taught; was attested by external facts, and was notorious to every one: all consentient in opinion, and so transmitting to the last that which was more perfectly known to the first. We do know, however, that many matters have been solemnly adjudged, of which there is no report; and many statutes have been passed of which there remains not now a record. These remarks apply particularly to the land tenures of Pennsylvania; in regard to which many principles are perfectly settled and have long been, touching whose origin it would probably pass research to discover so much as a dictum.

Upon the whole, while the case does not offer the directest, most connected, and most conclusive testimony that could be desired, we yet possess strong leading facts on which to found opinion; and in regard to things which took place ninety-three years ago, what more ought you to expect? Landmarks remain to us: the connecting links, the cement, the filling up, may naturally have crumbled away in the lapse of a century. And it having passed into maxim, that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted, we are of opinion that your verdict should be for the defendant.

The jury were about to give their verdict, when the plaintiff asked leave and was allowed to suffer a non-suit.

FISHER (COMLY v.). See Case No. 3,053.

Case No. 4,816.

FISHER v. CONSEQUA.

[2 Wash. C. C. 382.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

FOREIGN ATTACHMENT IN PENNSYLVANIA — DEMANDS ARISING EX DELICTO—PENDENCY OF ATTACHMENT PROCEEDINGS IN STATE COURT—DEBT CONTRACTED IN FOREIGN COUNTRY.

1. The plaintiff issued a foreign attachment against the defendant, a merchant of Canton, for the recovery of damages, to the amount of four thousand five hundred dollars, upon a promise made by him, for a valuable consideration, to deliver to the plaintiff a quantity of tea of a certain quality, which promise he had not complied with, but had broken. The law of Pennsylvania of 1705 [1 Laws Pa. p. 58] has received a liberal construction in the courts in the state, so as to extend its remedies to debts contracted in foreign countries, by persons who never resided in the state. The law is remedial, and ought to be so construed as to remove the mischief which is spoken of.

[Distinguished in Clark v. Wilson, Case No. 2,841. Cited in Smith v. Miln, Id. 13,081; Picquet v. Swan, Id. 11,134; Guillon v. Fontain, Id. 5,861.]

2. To constitute such a debt as may be pursued by a foreign attachment, under the law of Pennsylvania, the demand must arise under a contract, without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver, by affidavit, to be due, without which special bail cannot regularly be demanded.

[Cited in Roelofson v. Hatch, 3 Mich. 280.]

3. The remedy by foreign attachment will not lie for demands which arise ex delicto, or where special bail cannot regularly be required.

[Cited in Bausman v. Smith, 2 Ind. 375.]

4. The promise of the defendant to deliver teas of a particular quality, was not complied with, and as the plaintiff swears that the difference between the teas promised and those delivered, amounted to a particular sum, a foreign attachment lies.

5. It is no ground for dismissing a foreign attachment, instituted in this court, that the plaintiff had sued out another attachment against the defendant in a state court, and afterwards discontinued it.

Rule to show cause, why the foreign attachment issued in this case should not be dissolved. The plaintiff showed cause, by filing an affidavit, in which he stated, that he and the defendant, a Hong merchant at Canton, entered into a contract there, by which the defendant, for a full consideration paid to him, agreed to put on board the Pennsylvania packet, as the property of the plaintiff, a cargo of teas of the very first quality, for the Amsterdam market; and if the said teas should not prove of such quality at the sales in Amsterdam, he, the defendant, bound himself to make good all deficiencies. That the cargo so put on board was landed at Philadelphia, and afterwards reshipped to Amsterdam, without having suffered any kind of damage since the purchase; and the plaintiff alleges that he has been informed, and believes that these teas arrived in safety at Amsterdam, and were there landed and storehoused free from all damage. But, upon examination by a sworn officer, they were found, with a trifling exception, to be of the most common and indifferent kinds, and were sold by the East India Company at Amsterdam, for the highest prices that could be obtained, and that the difference between the best price that could be, and was obtained for the same, and that which an equal quantity of the qualities contracted for, according to the rates of sale, at the same time and in the same place and mode, amounted to four thousand five hundred dollars; in which sum, exclusive of interest, the plaintiff avers that the defendant is justly indebted to him. This affidavit being objected to, for not stating positively what the quality of these teas was, at Amsterdam, and the prices for which they sold, the plaintiff filed a supplementary affidavit, affirming that the defendant, Consequa, is indebted to him in the sum of four thousand five hundred dollars, besides interest, upon a promise, made by the defendant, for a valuable consideration, to deliver to the plaintiff a large quantity of teas of a certain quality; which promise he hath not complied with, but hath broken.

Mr. Ingersoll, Mr. Dallas, and Charles Ingersoll, for defendant, contended that the plaintiff's demand was for unliquidated damages, and that neither by the custom of London, nor under the act of assembly, passed in 1705, could a foreign attachment lie, except in cases of debt. Cases cited: [Vienne v. M'Carty] 1 Dall. [1 U. S.] 154, 218, 219; [Respublica v. Lacaze] 2 Dall. [2 U. S.] 123; [Miller v. Leonard] Id. 237; Privileges of London, 253, 267; Vent. 111; 1 Ld. Raym. 727; Lutw. 421; 1 Ld. Raym. 56; Cowp. 56; 3 Wils. 302; 1 Bac. Abr. 689; [Doane's Adm'r v. Penhallow] 1 Dall. [1 U. S.] 219; [M'Clenachan v. M'Carthy] Id. 375.

Rawle, Lewis and Morgan, contra, cited Bin. 25; Cowp. 529; 2 Wils. 335; 2 Strange, 1192; 2 Burrows, 1032; Fortes. 197; [Parasset v. Gautier] 2 Dall. [2 U. S.] 330. They contended, that the 3d section of the act of assembly speaks of the debt or other demands, which enlarges the interpretation of the statute. They admitted, that according to the custom of London, the garnishee must owe a debt to the defendant; but it is not necessary that the ground-work of the attachment should be a debt.

WASHINGTON, Circuit Justice. In deciding the question, whether a foreign attachment will lie in such a case as the present, we shall come at once to the act of assembly, passed in 1705, which first authorized this mode of proceeding, and inquire what is its true meaning, in relation to the point now under consideration? We do not by this, mean to say, that in no instance ought the

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

custom of London, in respect to foreign attachments, to be regarded; it may, and in practice has probably been frequently referred to with advantage. But we should not feel ourselves authorized to extend or to limit this remedy, by rules established under the custom, where such rules are broader or narrower than the law of this state. It must be admitted, that, according to a strict and literal construction of the act of assembly, the foreign attachment is confined to cases of debt; and not only so, but to debts contracted or owing within this state, by persons absenting themselves therefrom. The 3d section, which was much relied upon by the plaintiff's counsel, as extending the remedy to other demands than debt, is in this respect clearly confined to residents about to abscond, or to leave the state, and who refuse to give security to the complainant for his debt or other demand. The nature of the case pre-supposes an inability in a non-resident to give such security. Nevertheless, we find that this law has received in practice a liberal construction, so as to embrace debts contracted in foreign countries, by persons who never did reside here, and who, of course, could not properly be said to absent themselves; and which debts, neither by the terms of the contract, nor by the removal of the debtor hither, could be said to be owing here.

This is a remedial law and ought, upon the soundest principles of construction, to be so extended as to remove the mischief, and to advance the remedy. The mischief, as the preamble informs us, was, that the effects of absent persons were not equally liable with those of persons dwelling on the spot, to make restitution for debts contracted, to the injury of the inhabitants of Pennsylvania. The remedy provided for this evil, was a process by which the property of absentees or absconding persons, found within the province, was rendered liable to make satisfaction. But the same preamble speaks of debts contracted or owing, and it is contended, that the remedy can be extended only to cases of debt. What is a debt? In strict law language, it is a precise sum due by express agreement, and does not depend upon any after calculation to ascertain it. The remedy for recovery of it is by action of debt, and frequently by action of indebitatus assumpsit. But is this the only case within the mischief intended to be remedied by this law? Surely, an inhabitant of Pennsylvania is not less injured by the want of a remedy to recover what is due to him by a foreigner, upon a sale of property, where no price was stipulated, than he would be if a fixed price had been agreed on. In the latter case, the defendant is indebted to the plaintiff in a precise sum; and in the former, a sum equal to the value of the property sold, not then, it is true, liquidated, but depending upon the value to be fixed at the trial. The uncertainty of the sum due, does not, in the common understanding of mankind, render it less a debt. A promise, whether express or implied, to pay as much as certain goods or labour are worth, or as much as the same kind of goods may sell for on a certain day, or at a certain market; or to pay the difference between the value of one kind of goods and another, creates, in common parlance, a debt; and the person entitled to performance does not speak of his claim, as for damages, but for a debt, to the amount which he considers himself entitled to. But it is not every claim, that, upon a fair construction of this law, or even in common parlance, can be denominated a debt. For, in the first place, the demand must arise out of a contract, without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver by affidavit to be due; without which, special bail (which the defendant, by giving, may dissolve the attachment) cannot regularly be demanded. It follows, from this, that a foreign attachment will not lie for demands which arise ex delicto, or where special bail could not be regularly required. Although we meet with no adjudged case, in this state, precisely upon the point of this cause, yet enough may be gathered from what has fallen from the judges, to show how this attachment law has been considered in practice. In M'Clenachan v. M'Carthy [supra] the judge says, that "after judgment against the defendant in the attachment, the plaintiff files his declaration according to the nature of the demand. If in debt, no oath is required; if in case, then a writ of inquiry issues, to ascertain the demand." Now, if indebitatus assumpsit were the only declaration upon which the writ of inquiry could issue, it is hardly to be believed that the judge would have used so comprehensive an expression, as that of a declaration in case. It is most obvious, that his mind took a more enlarged view of the remedy, and considered it as embracing other cases than those of debt, strictly so called. So, too, when the court say, in other cases which have been decided, that it is the practice to inquire into the cause of action in a foreign attachment, as in that of bail on a capias, and to dissolve in the one instance where they would not hold to bail; we consider the practice in relation to bail, as so far connected with that of the foreign attachment, that if regularly bail would be required, in matters of contract, the attachment would not be dissolved.

This is a case of contract, by which the defendant binds himself to deliver to the plaintiff teas of a certain quality, and suited to a particular market; and on failure to do so, to pay the difference between teas of such quality, and such as should be delivered. Teas, agreeably to contract, were not delivered; and the plaintiff swears, that the difference amounts to 4500 dollars. Whatever be the difference, the defendant has

promised to pay it, and of course is to that amount indebted to the plaintiff; and if he were present, and served with a capias, he would be held to bail, as of course. There is, therefore, upon the principles before stated, no ground to dissolve the attachment.

As to the other ground taken by the defendant, that an attachment against his property, by the same plaintiff, and for the same cause of action, was sued out in the common pleas of this state, and afterwards discontinued, there is no evidence of an intention to harass the defendant, so as to induce this court to dissolve this attachment; which (unlike the case of holding to bail, where the second action still proceeds,) would be tantamount to a denial of any remedy at all, to recover what he thinks himself entitled to. I am not prepared to say, that the rule observed in relation to discharging on common bail, on the ground of vexation, is at all applicable to the case of dissolving an attachment. On this point, however, I give no opinion. Rule discharged.

[NOTE. See Gilpins v. Consequa, Case No. 5,452.]

Case No. 4,817.

FISHER v. CRAIG et al.

[3 Sawy. 69; 1 Ban. & A. 365.][1]

Circuit Court, D. California. July 20, 1874.

PATENTS—INFRINGEMENT OF COMBINATION—ANTICIPATION—MECHANICAL SUBSTITUTE.

1. Where the patent is for a combination of several distinct parts, a machine not embracing all the parts that go to make up the combination, does not infringe the patent.

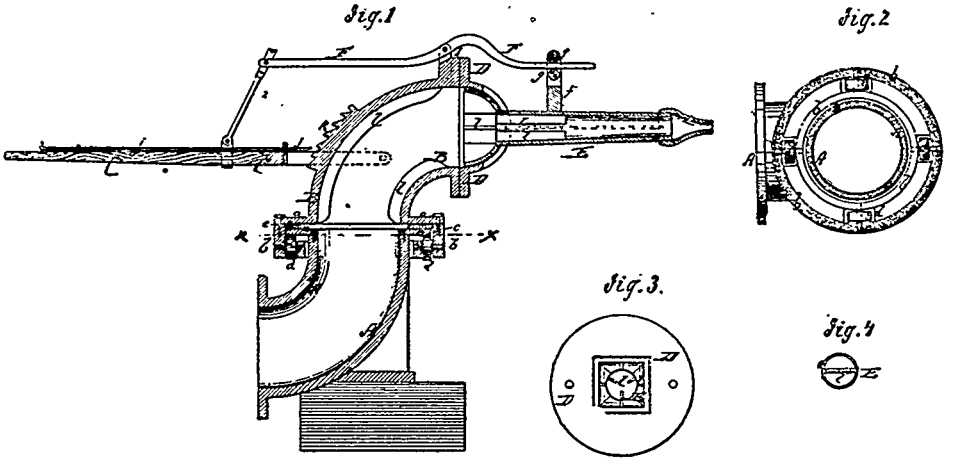
2. Where there are two patented machines for hydraulic mining, each having a supply-pipe and a discharge-pipe coupled by a horizontal swivel-joint in combination with a nozzle, connected by a joint which enables the operator to elevate or depress the nozzle, and the claim is for a combination of these several parts for the accomplishment of the same object, the prior machine will be an anticipation of the later, although the joint in the latter is a semi-universal or knuckle metallic joint, while that in the former is made of india-rubber or other flexible material.

3. The metallic joint in the later machine being old, and it having been long in use for the purposes required in the machine in question, it is but a known mechanical substitute in the combination for the flexible joint in the prior machine, and, for the purposes of the combination, must be regarded as the same thing as the joint in the earlier combination.

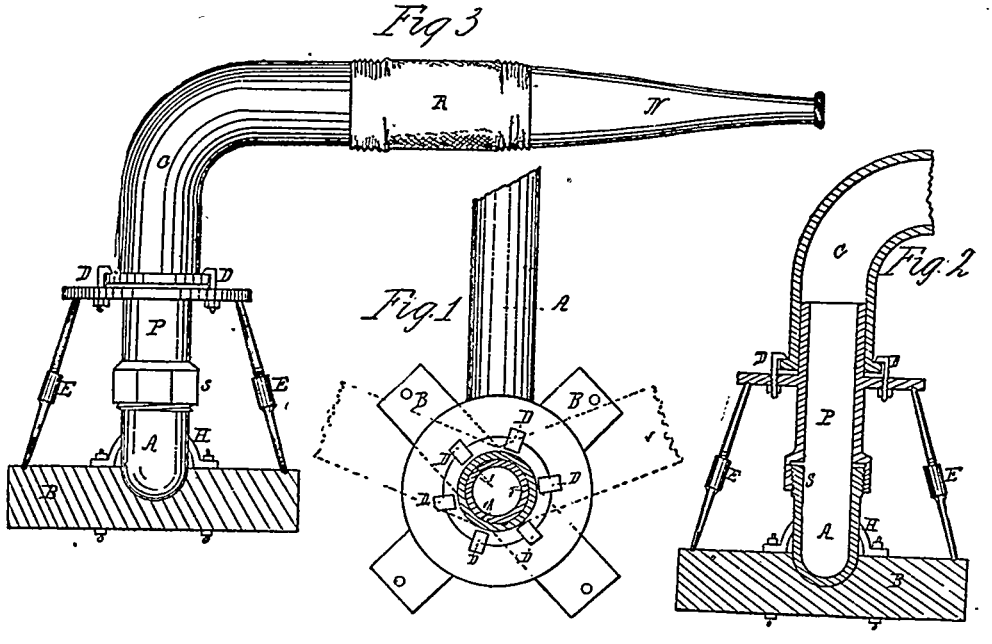
Bill in equity to restrain the infringement of a patent. The complainant [F. H. Fisher] obtained a patent for an "improvement in hydraulic mining apparatus," No. 110,222, dated December 20, 1870, upon which there was a reissue, No. 5193, dated December 17, 1872. In his specifications he says: "My invention relates to an improved construction and arrangement of that class of hydraulic pipes and nozzles which are used for directing and delivering a stream or column of water against a bank in hydraulic mining. My improvement consists in such an arrangement of the pipe and nozzle that the nozzle can have both horizontal and vertical play, through the medium of two moving water-tight joints, for the purpose of facing it to any desired point of the compass, without shutting off the water or stopping the work of the machine." Again: "Heretofore this class of machines has been made with single joints, so that the discharge-pipe will command only the half of a circle; but by using the two joints I can swivel the nozzle around to any point of the compass, and then command the same amount of circle with the nozzle as the ordinary ball-and-socket joint." After describing his invention he states his second claim as follows: "What I claim, and desire to secure by letters-patent, is * * * 2. The two curved sections, A, B, connected by a horizontal swivel-joint, in combination with a nozzle connected by a semi-universal joint, constructed and arranged substantially as set forth." If there was any infringement it was of this combination. The defendants, as one defense, set up a prior patent to one Allenwood, which had before been assigned to defendants and was then owned by them, and claimed that, as to the points covered by the claim in complainant's patent, it was an anticipation of complainant's invention. Allenwood's patent was for "an improved method of constructing the apparatus for hydraulic operations in mining, washing gold-bearing dirt," etc., being No. 43,468, dated July 12, 1864, upon which there was also a reissue, No. 5255, dated January 28, 1873. The third claim is as follows: "3. The combination of the two working-joints or couplings, D and R, with the discharge-pipe N, and a supply-pipe, A, by means of which both the horizontal and vertical motions are obtained, substantially as and for the purposes set forth." The two curved sections A and B in complainant's machine had two corresponding parts, the supply-pipe A, and curved section C in Allenwood's machine, and those parts in both machines were connected by a swivel-joint. They both had a nozzle connected to the corresponding parts in the two machines by joints which enabled the operator to elevate or depress the nozzle at will, while the corresponding horizontal joints in the two machines enabled him to describe an arc of a circle in a horizontal direction; but the complainant's joint coupling the nozzle to the pipe was a metallic semi-universal or knuckle-joint, while the corresponding joint in the Allenwood machine was a flexible joint of india-rubber, gutta-percha, or other flexible material. Both were used in the same relative position, to accomplish the same purpose in the same way—by elevating and depressing the nozzle.

[1] [Reported by L. S. B. Sawyer, Esq.; reprinted in 1 Ban. & A. 365; and here republished by permission.]

[Drawings of Fisher's Reissued Patent No. 5,193, published from the records of the United States Patent Office.]



[Drawings of Allenwood's Patent No. 43,468, published from the records of the United States Patent Office.]



Benj. Morgan, for complainant.
M. A. Wheaton, for defendants.

SAWYER, Circuit Judge. This is a bill in equity to restrain the infringement of a patent. There has been much discussion on both sides, which, when we come to examine the case closely, seems to be irrelevant to the issues. The main question really is, as to whether the plaintiff's patent in certain particulars is patentable, or whether it has been anticipated by prior inventions. It is not always a question of which is the better machine that arises in a case for the infringement of a patent. The question, as in this case, often is, whether the part of the machine which is claimed to be infringed, as in the specifications claimed and as patented, is patentable.

Now, in order to ascertain that fact, it is necessary to scrutinize the patent, scrutinize the claim, and see what it is that is claimed and patented; because the party is confined to the claim he has made, and the patent which is granted.

A general, cursory view of a whole machine

affords very little aid in cases of this kind.

In the case of the Fisher patent, what are the claims made, and what are the points covered by the patent? Is there an infringement upon any of those points? Is the patentee the first inventor as to those particulars which he claims?

The patent sued upon is a reissue. There was a patent at first issued in which there was but one claim presented, and that claim is, substantially, the first in the reissued patent. The reissued patent covers three claims. The plaintiff must have had a patentable improvement in each one of those three particulars in order to be entitled to protection, as to each, and there must have been an infringement of one or the other, or all of those particulars, to entitle him to relief in this case. His first claim, which is substantially the same as in his first patent, is "the swivel-joint, nozzle and pipes, A, B, D, E, combined, as described, with the lever F working through slotted posts f, strap i, lever c, and pawl and ratchet j, k, for the purpose specified." The first claim is a combination of all these elements, these various parts working together in that form. There can be no pretence that there is any infringement of that claim, because there is not a combination of all of those parts found anywhere in the defendant's machine. And there must be the use of the entire combination, a combination of all the parts, in order to constitute an infringement. That this is the settled law, there can be no doubt. Carter v. Baker [Case No. 2,472]; Coolidge v. McCone [Id. 3,186], and cases cited; Gould v. Rees, 15 Wall. [82 U. S.] 194. Now, all of these parts combined together are not found in the defendant's machine. Several of them are entirely omitted. There can be no pretense, therefore, that this claim is infringed, and I am not aware that it is so contended by complainant's counsel. In fact, counsel have not been very specific in pointing out in their briefs or in the oral argument, the precise claims the infringement of which they suppose has been established.

At the argument, I desired counsel to point out the specific claim infringed, and in what particulars they claimed that there had been an infringement. The argument has been very general on that side, and confined generally to the machine as a whole. I am not aware that they insist that this specific claim has been infringed. If they do, it is certainly very clear that such claim is without foundation.

The third claim is, "the levers C and F, in combination with section B and nozzle E, substantially as set forth." I am not aware that that particular claim is supposed to be infringed. It certainly is not, because that combination is not found in the defendant's machine, and it is a claim for a combination, and the combination is not there. There can be no possible pretense, therefore, that that claim is infringed. That disposes of two out of the three claims. There are but three in this patent. There was but one in the original patent, the first claim in the reissue being substantially the same as that in the original patent, and in the new or reissued patent the additional claims have been added.

Then, if there is any infringement at all, it must be of the second claim, and that claim is "The two curved sections A, B, connected by a horizontal swivel-joint, in combination with a nozzle, connected by a semi-universal joint, constructed and arranged substantially as set forth." That, then, is the combination. If there be any infringement of the patent, it is the infringement of that claim, and it is only necessary to examine that claim for the purpose of determining whether there is any feature of the machine covered by the claim that is properly patented, in view of all the facts, and whether there has been an infringement of that feature of the machine.

It is not claimed that this ball-and-socket joint in defendant's machine, or this knuckle or semi-cylindrical joint in complainant's, or that this swivel-joint in both, is new (illustrating by the models). It is not claimed that any one of these parts is new. The claim is, that this combination is new. If the combination which is embraced in this claim is not new, then the complainant is not entitled to a patent for that feature of the machine.

The defendants have set up in their answer that there has been an anticipation of this part of the plaintiff's machine, and among others, that the Allenwood machine is an anticipation. I would say, with reference to this joint in defendant's machine (showing) that it appears from the evidence to have been frequently used, prior to the issue of complainant's patent. This, in complainant's machine, is not a ball-and-socket joint. It is frequently called a knuckle-joint, and a semi-cylindrical joint: that is, instead of a ball and socket there is a section of a cylinder. A ball-and-socket joint has been frequently used in hydraulic mining machines. There are several prior patents in which it will be found. So the swivel-joints have been used in various forms before; that is manifest.

But this is not a claim for the use of any one of those alone, but for the combination. It is claimed that this Allenwood's machine is an anticipation of this particular combination. It is not claimed that it is in the same form precisely. Now, in this Allenwood machine is found this section here which corresponds to that section in complainant's machine; what Mr. Fisher calls the curved section A. That curved section is found in the Allenwood machine. This is the curved section B, as Mr. Fisher calls it in his machine, and this curved section, corresponding to curved section B, is found in this Allenwood machine.

The swivel-joint is here in Fisher's machine; the swivel-joint is here in the Allenwood, a prior machine. There are those

three parts, then, which enter into Mr. Fisher's combination, found in this Allenwood machine (showing). There is the nozzle in complainant's machine, and here is the nozzle in the other machine. There is a joint in the one, and here is a corresponding joint in the other machine, connecting the nozzle with the other parts of the machine: of course a different kind of joint, nevertheless a flexible joint. This nozzle, with this section coupled with some flexible material, such as india-rubber or canvas, or some such flexible substance which joins the two together, and which forms a joint so that the pipe with the nozzle can be operated vertically by elevating or depressing it.

This (showing) is called the Allenwood machine. It is prior in point of time, and it is owned by the defendants. Now, the Allenwood patent has four different claims, and it is an anticipation of the other in several particulars. First, there is "the combination of a discharge-pipe, provided with guides or diaphragms, and the elbow C, connected by a working-joint with the supply-pipe A, substantially as and for the purposes above specified." The second claim in the Allenwood patent is "the combination of two elbows, C and A, with the swiveling joint D." That, then, is precisely the same as the sections A and B in combination with the swivel-joint, in complainant's patent, and this combination is found in both machines; and if this combination described in Allenwood's second claim was patentable, that same combination in complainant's later machine, of course, must be an infringement upon it. Those are both swivel-joints, although of different construction. The third claim in the Allenwood is "the combination of the two working-joints, or couplings, D and R, with the discharge-pipe N, and supply-pipe A, by means of which both horizontal and vertical motions are obtained, substantially as and for the purposes specified." Then fourthly, he claims the combinations of all the parts constituting a new and improved machine.

Conceding this (showing), in the Allenwood machine to be a joint, it is only a different one from this in the Fisher machine; and Allenwood's third claim covers precisely the same parts and same combination of parts as are covered by Fisher's second claim, the only difference being in the material and the construction of the joints. This I will show by reading from the specifications in Mr. Fisher's patent:

"My improvement consists in such an arrangement of the pipe and nozzle that the nozzle can have both horizontal and vertical play through the medium of two moving water-tight joints, for the purpose of facing it to any desired point of the compass, without shutting off the water or stopping the work of the machine." That is precisely what this Allenwood machine does. It has two working-joints, one by which you obtain this horizontal motion, and the other a perpendicular or vertical motion. Now, Mr. Fisher says: "Heretofore this class of machines has been made with single joints, so that the discharge pipe will command only the half of a circle, but by using the two joints I can swivel the nozzle around to any point of the compass, and then command the same amount of circle with the nozzle as the ordinary ball-and-socket joint." He thus recognizes the fact, that the ordinary ball-and-socket joint was in use for that purpose. By using this swivel-joint in combination with the curved sections, A, B (showing), he can get the horizontal motion, and by the other joint he can command the same arc of the circle vertically that he could with the ordinary ball-and-socket joint. Then he says: "I am aware that a discharge nozzle has been heretofore used by Jenkins W. Richards, of Michigan Bluffs, California, in which two joints were made for the purpose of throwing the stream in a circle, but his nozzle proved to be a failure when subjected to the practical test of hydraulic mining."

There is, then, this other machine (Richards), prior also in date to his, but the joints in that are both swivel-joints, and that, the testimony tended to show, did not prove a success; but I read this claim here to show what his idea is, with a view to explaining his combination. That before that time machines were made with one joint, so that the discharge-pipe would command only half of a circle in one direction, but by using two joints he could "swivel the nozzle round to any point of the compass, and then command the same amount of circle with the nozzle as the ordinary ball-and-socket joint." Then in view of that, his second claim comes in: "The two curved sections, A, B,"—here they are in these two (Allenwood's and Fisher's) machines,—"connected by a horizontal swivel-joint, in combination with a nozzle;" —there (showing) they are in both machines. —so far they are identical;—"connected by a semi-universal joint," which is there (showing); this in the Allenwood (showing), is a joint also, which is in the same relative position and answers the same purpose;—"constructed and arranged substantially as set forth." Now, then, all the elements,—these two sections, and these two joints, and the pipe,—are the same in both; all of those are combined in the two machines. They are arranged together relatively, in precisely the same places, and for the accomplishment of the same purposes, in substantially the same mode. This joint in Fisher's machine (showing) is simply a known mechanical substitute for that one in the Allenwood machine. It may be a better joint, and this doubtless is a better machine, and possibly in that respect may be patentable. I am not prepared, and it is not necessary now, to say whether it is or not; but you have all of the elements in the two machines, and combined in the same way and for the same purpose, and the latter

must, in this combination, be an infringement of the first; and if there is anything patentable in this (Fisher's machine) that does not exist in this (Allenwood's) in that combination, it is in the construction of this joint; because this (showing Fisher's) is a differently constructed joint from that (Allenwood's); that, if anything, is the only patentable thing in it. If you leave out of Fisher's claim the words "constructed and"—you have the same thing in both machines substantially: "The two curved sections, A, B, connected by a horizontal swivel-joint, in combination with a nozzle, connected by a semi-universal joint, arranged substantially as set forth." The construction of the joint is not claimed.

Now, the idea expressed in Fisher's claim is to make a combination of the two joints instead of one, with the supply pipe and the nozzle, and that is precisely the same as the idea expressed in Allenwood's third claim, and found embodied in his machine, and if there is any difference between the two claims, it is only in the mode of construction and in the material of the joints. But the idea of both claims is to have these five elements or parts combined. This machine, claimed to be an infringement (referring to defendants), has substantially the same combination of similar parts as the other two—complainant's and Allenwood's (showing). Here is the section which corresponds to this, and this to this. Here is the joint which corresponds to these two joints in the Fisher and Allenwood machines. Here is this part which corresponds to this portion. Here is a ball-and-socket joint instead of the semi-cylinder joint in complainant's machine, or instead of the flexible joint in Allenwood's. Now, then, if there is anything in Fisher's combination which is entitled to a patent over that (Allenwood's), it is because Fisher has substituted a better joint before known. It depends merely upon a different construction and material. In other words, a known mechanical substitute has been used in his machine in the place of one of the parts in Allenwood's, which performs the service better. But when we come to that; the defendants also constructed this joint (showing the infringing machine) differently from that of either Fisher's or Allenwood's. So that we have the same elements, the same parts and things combined, and the only difference is in the form or construction of one of the common parts used in the combination.

This, in the complainant's machine is a plain known mechanical substitute for that in the Allenwood machine, that is all, though it is differently constructed. If there is anything in that claim that can be patented, it is the form or construction of the joint, and this, defendant's joint (showing), does not contain that form or construction, but is only another well-known mechanical substitute for Allenwood's joint—a different known substitute for the same thing from that employed by complainant. It seems clear to me, when we come to analyze and compare the claims of the patents relative to these several machines, that the idea of the combination of the two last, complainant's and defendant's, is embraced in the prior one of Allenwood; and if there is any difference, it is in the form and construction of this joint; and if that is patentable, it is not embraced in the defendant's (the infringing) machine, because this is in a different form, differently constructed. In that respect, both of these joints in complainant's and defendant's machines are really but substitutes for this in Allenwood's. Defendant's is but a different known substitute from complainant's for that in Allenwood's machine. This, in defendant's, may be better or worse than that in complainant's, but it is only another known substitute for the same part, in Allenwood's machine. There may be an infringement by either upon that of Allenwood, and still be a better machine, or it may be a worse machine. It may be conceded, for the purpose of this decision, that Fisher used the same combination as Allenwood, and that it may yet have a patentable element in it; but if there is a patentable element in this combination, it is in the form and construction, by substituting a better known joint than this one of Allenwood's; but if so, that particular construction is not found in the defendant's implement. The Allenwood patent is owned by defendants, and is the first machine embracing the combination of the several parts. This, then, in my judgment, is a protection to the defendants in their use of this combination, in the form adopted by them.

My conclusion is, that the second claim in complainant's patent is the combination of these five elements, before mentioned, and that this combination is substantially in the Allenwood machine, the Fisher machine, and the Craig machine. Those five elements are in all, this Allenwood's being an anticipation of the complainant's machine. The latter in this particular is not a different machine, unless that difference consists in the construction of one of these parts. The patentability of it, if any exists, consists in that change in the construction of that joint. If that construction is the only thing patented, then this joint in defendant's machine has a different construction, although this joint is a known substitute for those in both the other machines (showing).

My judgment is that this Allenwood's invention is an anticipation of this machine, so far as this combination and claim is concerned, other than the form of construction, and protects the defendants in the use of this, which is of a different construction. If I am right in this, and that is the conclusion I have reached, after careful and thorough investigation of this case, there must be a decree for the defendants.

Those other combinations, covered by Fisher's patent, may still make the plaintiff's a

valuable invention, and it may be patentable in those particulars; but I do not think the defendant's machine an infringement of any patentable portion of that machine that is covered by any claim in the patent and specifications.

Decree for defendants, with costs.

[NOTE. See Case No. 3,332.]

FISHER (CRAIG v.). See Case No. 3,332.

Case No. 4,818.

FISHER et al. v. CURRIER et al.

[5 Law Rep. 217; 1 Pa. Law J. 270.]

District Court, D. Massachusetts. June, 1842.

BANKRUPTCY — DEBTOR AIDING CREDITOR IN ATTACHMENT PROCEEDINGS—INSOLVENCY OF PARTNERS—JOINT AND SEVERAL PROPERTY — ACT OF BANKRUPTCY.

1. If a debtor voluntarily aid a creditor in taking his property upon a writ of attachment, or in perfecting an attachment previously incomplete, it is an act of bankruptcy, within the meaning of the statute.

2. Where the partners of a firm are insolvent, and there is sufficient ground for a decree of bankruptcy against any member of the firm, the decree will go against all the members of the firm, and all the joint and separate property of the partners will pass to the assignee.

3. Under the circumstances of this case, it was *held*, that an act of bankruptcy had been committed by a member of a firm, and a decree was passed against all the members of the firm.

This was a petition to have Gilman Currier and Hambleton E. Smith, of Boston, copartners, under the style of Currier and Smith, declared bankrupts. Three acts were relied upon by the petitioners as constituting acts of bankruptcy. 1. The willingly procuring certain attachments to be made March 17, 1842. 2. The fraudulent transfer of notes as collateral security to prefer a particular creditor, March 17, 1842. 3. A similar transfer, May 4, 1842. Evidence was introduced on both sides as to these points.

William Gray, for petitioners.
Benjamin R. Curtis, for respondents.

SPRAGUE, District Judge. This is a petition to have Currier and Smith declared bankrupts. It is resisted on the ground that they have committed no act of bankruptcy. One act relied upon by the petitioners is an attachment, or rather attachments, of all the stock in trade of the respondents, made on the 19th of March last, on two writs, one in favor of Benjamin Smith, the father; and the other in favor of Benjamin Smith, Junior, the brother of Hambleton E. Smith, one of the respondents. There is some discrepancy in the testimony; but I think the following facts are proved. Currier and Smith are now, and were, on the 19th of March, insolvent. They had been previously pressed for means to meet their engagements, and Currier had gone to Maine for the purpose of collecting debts. During his absence, the pressure upon the firm increased, and it is testified by Wells, their clerk, that they appeared to be in embarrassed circumstances. The appearances of embarrassment were such as to attract the attention of Mr. Frothingham, who was, or assumed to be the agent of Benjamin Smith, who was absent at his home in Duxbury. Frothingham asked Smith, the respondent, what was the matter. He said they were "terribly short." A conversation ensued, in which Frothingham asked him if Currier and Smith did not still owe his father and brother; to which he answered in the affirmative, and Frothingham told him he should cause attachments to be made immediately in their favor; to which Smith made objection, but handed him one of the three notes on which the attachments were made, and copies of the two others which Frothingham immediately carried to Mr. Curtis, and procured two writs upon which the attachments were immediately made. Frothingham had no other authority to make these attachments, than "a general authority, given by Benjamin Smith a year or two before, to keep an eye to his interests here." Mr. Curtis instructed Frothingham, that the actions might be maintained if the plaintiffs should ratify them before any other attachment should be laid, and advised him to send to Duxbury immediately to obtain their ratification. This was after two o'clock. On the same day, Smith, the respondent, wrote to his father to come to Boston and "take care of himself, or secure himself:" and the father came the next morning and ratified the proceedings of Frothingham. Frothingham did not write or send to the father. Benjamin Smith, Junior, was absent at sea, and has not returned, nor been informed of the suit commenced in his behalf. Currier returned from Maine on the 20th of March. The actions were entered at the April term of the common pleas in Suffolk. Currier and Smith employed an attorney, who entered on adverse appearance; but a default was entered about the first of May, and judgment on the seventh of that month. Neither of the respondents have petitioned for the benefit of the bankrupt law, and both resist this application.

The first section of the statute [of 1841 (5 Stat. 440)] makes it an act of bankruptcy for a debtor to "willingly or fraudulently procure his goods and chattels to be attached." If a debtor voluntarily aid his creditor in taking his goods and chattels upon a writ by way of attachment, or in perfecting at attachment previously incomplete, he must be deemed to have willingly procured his goods and chattels to be attached, within the meaning of the statute.

There are two things done by Hambleton E. Smith, of very grave import; First, the de-

livery of the note and copies of notes to Frothingham; and second, writing to his father to come and secure himself.

The first is proved by Frothingham, who is a witness for the respondents, and who alone knows the attending circumstances. His testimony therefore, is very material. He says that appearances were such as to excite his suspicions, and on the 17th of March, he asked Hambleton E. Smith what was the matter. And he replied, they were terribly short; and in answer to another question, he said, that they still owed his father and brother;—and upon further inquiry as to ways and means,—Frothingham was so convinced of their great embarrassment that he told Hambleton E. Smith that he should make attachments for the father and brother before he went to dinner. Hambleton E. Smith said, "Oh no, we can borrow; we can get along;" that it would be the breaking of them up, and would ruin them, and they could borrow. Further conversation ensued, in which Frothingham again said he should put an officer into the store, and Hambleton E. Smith objected and protested. Frothingham told him, if he would show him any thing to alter his opinion he would alter it. Smith did not; but delivered to Frothingham the note and copies of notes, which he wanted for the sole and avowed purpose of making attachments, and which he carried immediately to Mr. Curtis, and caused the writs to be made. At what point of time the note and copies were delivered, and what was then said we are not distinctly informed, for, in the first deposition given by Mr. Frothingham, which purports, in answer to the 12th interrogatory, to state all that was said and done between him and Smith, no mention is made of this most material fact, —and, in answer to the third cross-interrogatory, he testified, that he had stated fully all that passed between him and Hambleton E. Smith. It was not until his second deposition was taken, and the question was pointedly put to him, whether Hambleton E. Smith handed him copies of notes, that the fact was disclosed by him. And it further appears, that Frothingham learned from Hambleton E. Smith the amounts of the debts due to the father and brother, and that Hambleton E. Smith had no knowledge that Frothingham had any agency or authority whatever from the father.

In answer to a question by the respondent's counsel, whether H. E. Smith gave the note and copies willingly; he replied "Not very willingly;" and to a cross-interrogatory, he said, that the reason he said so, was, that Smith was not willing he should take the step he did; and refers to his former depositions for the facts on which he made that statement. Now, considering the position which Mr. Frothingham occupies, as the son-in-law of Benjamin Smith, the father, and one who has voluntarily commenced process for securing to him and his brother-in-law a priority, and having a natural anxiety to accomplish that purpose; and considering that he omitted in his first deposition to state the fact of his receiving the note and copies; and considering also, the testimony of Baker as to his declarations, touching the letter written by Smith to his father, and Frothingham's naked denial of such declarations, and his denial of knowledge who wrote the letter to the father coupled with the fact, that Mr. Curtis advised him to send to the father immediately, and that he did not, but Smith, the son, did,—we are irresistibly led to the conclusion, that his wishes are strongly on the side of the respondents, and that, while he has testified truly, in answer to direct and specific inquiries, he has been reserved as to matters adverse to the respondents, and not drawn out by pointed interrogatories.

Now, from the whole testimony in the case, I think it is fairly to be inferred, that, whatever may have been the reluctance of H. E. Smith, in the first instance, to accede to the views of Frothingham in having an attachment made, yet that in the end and before Frothingham left him, he was so convinced or persuaded as to accede to those views, and voluntarily to lend his aid to carry them into effect. And for that purpose, he delivered him the note and copies, and wrote to his father to come and secure himself. His conduct since has been in perfect accordance with this view, and calculated to secure the priority of his father and brother. It is true that the respondent employed counsel to appear in the actions, but for what purpose is left to inference. The debts were not disputed. There could then have been no object but delay; and what benefit could have been anticipated from that is not explained. One of the actions, that in favor of B. Smith, Jr., was commenced and prosecuted without the semblance of authority, and Frothingham testified, that H. E. Smith had no reason to believe that he had authority; yet the plaintiff's appearance was never called for, and no objection interposed to the suit proceeding to judgment without the plaintiff ever having authorized its commencement or having knowledge of its pendency. Before the ratification of the father, his attachment was incomplete. That ratification was procured immediately by the active interference of the respondent Smith. I am constrained, therefore, after a careful consideration of the evidence, to come to the conclusion, that the aid given by H. E. Smith, in commencing and perfecting the attachments, was an act of bankruptcy within the meaning of the statute. But Currier was absent and had no knowledge of these proceedings, or of the attachments until his return on the 20th of March; and it is contended, that he cannot be affected thereby, nor his (separate or joint) property taken without his personal agency or default. Such is not necessarily the law of partnerships; and, in order to see

whether it be so under our bankrupt system, we must recur to the statute. The fourteenth section is peculiar, and could not, I think, have constituted a part of the bill as originally framed, or been prepared by the same hand. Its language is dissimilar, and it refers to an order as being provided by the act which is not in terms found therein. I have had much difficulty in satisfying my own mind as to its true construction in some particulars. But, without undertaking to determine what may be the effect of a mere insolvency of a partnership, I think it is clear, that when the partners of a firm are insolvent and there is sufficient ground, either upon a voluntary or adverse petition, for a decree of bankruptcy against any member of the firm, it is the intention of the statute that all the joint stock and property of the company, and also all the separate estate of each of the partners shall be taken. Indeed, the language of the fourteenth section is in this respect clear and explicit. But if it were less so, still in a case like the present, where the decree of bankruptcy is to pass because of attachments of the property of the company, it would seem that such property ought to be taken by the assignee, otherwise these very attachments may remain in force, and the purpose of the law, in pronouncing them an act of bankruptcy, be defeated. The object to be accomplished, being thus settled by the statute, the only question that remains, is the manner in which it is to be attained, that is, the form of the decree. Shall it be against both the members of the firm as bankrupts, or against Smith only as a bankrupt, and pronouncing the firm to be insolvent, and thereupon all the joint and separate property to be taken by the assignee? The statute is in this respect by no means clear. But as one at least of the prerequisites of the decree is the insolvency of both partners; and the order, which is required in the fourteenth section to be "made in the manner provided in the act," must, I think, refer to the decree or declaration of bankruptcy prescribed in the first section; and, as the fourth section provides for a discharge of those only, who have been declared bankrupts, and by the fourteenth section the certificate of discharge is to be "granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone;" and as uniformity in the proceedings will be thus best preserved, I am of opinion that there should be in this case a decree or declaration of bankruptcy against both the respondents. This precludes the necessity of examining the other questions which have been discussed at the bar.

The following decree was thereupon entered: "Order and decree. And now it appearing to the court here, that due notice has been given to all parties and persons in interest pursuant to the order of court, and that, on the seventeenth day of March, in the year one thousand eight hundred and forty-two, the said Currier and Smith were merchants and partners in trade, and that they were then and still are owing debts to the amount of not less than two thousand dollars, and that they did then and do still owe, to the petitioners, debts, amounting in the whole to not less than five hundred dollars, and that they were then and still are insolvent, and that the said Smith did, on said seventeenth day of March, willingly procure the goods and chattels of the said partners to be attached; it is ordered and decreed by the court that the said Gilman Currier and the said Hambleton E. Smith be and they are hereby declared and decreed to be bankrupts pursuant to the act of congress, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' passed August 19, 1841."

At a subsequent day the respondents demanded a trial by jury.

FISHER (DRAKE v.). See Case No. 4,061.

FISHER v. The GALLOWAY C. MORRIS. See Case No. 5,204.

Case No. 4,819.

FISHER v. HARNDEN.

[1 Paine, 55.] [1]

Circuit Court, D. New York. April Term, 1812.[2]

CONFISCATION OF ENEMY'S PROPERTY—EFFECT OF TREATY STIPULATIONS — JUDGMENT OF FORFEITURE BY STATE COURT—JURISDICTION — LIMITATIONS — CLAIMS OF STRANGERS TO THE FORFEITURE—ALIENAGE OF PLAINTIFFS IN EJECTMENT—SPECIAL VERDICT.

1. The judgments of a court not having jurisdiction are not merely erroneous, and valid until reversed, but are void ab initio.

2. The adoption of a treaty, with the stipulations of which the provisions of a state law are inconsistent, equivalent to a repeal of such law.

3. A judgment of a state court in a case where jurisdiction was acquired, not by the common law, but by a statute of the state, which before the rendition of the judgment had been thus virtually repealed by the adoption of a treaty, was *held* not voidable, but void.

[Cited in The J. W. French, 13 Fed. 918.]

4. In 1780 the ancestor of the lessors of the plaintiff, a British subject, was indicted in the supreme court of New-York, under the act entitled "An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state," &c.; and in October, 1783, a judgment of forfeiture against his estates was rendered. The treaty of peace stipulating against any subsequent confiscation, was signed in September preceding. *Held* that the proceedings were coram non judice, and void.

5. The alienage of the plaintiffs in ejectment cannot be set up to defeat a recovery where their ancestor held the lands at the time of the treaty of 1794. The circumstance of the special verdict's not finding the fact that he held them at that time, not noticed.

[See note at end of case.]

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Reversed in 1 Wheat. (14 U. S.) 300.]

6. The act of New-York, entitled "An act limiting the period of bringing claims and prosecutions against forfeited estates," was not intended to bar those against whom the forfeiture had passed, but to bar the claims of strangers to the forfeiture. The mischief apprehended was the loss of deeds, which was to be feared in the case of strangers only, and not of those who claimed under the forfeited title.

7. Utility of statutes of limitation.

[Cited in Amy v. Watertown, 22 Fed. 420.]

At law.

T. A. Emmett and P. A. Jay, for plaintiff.

C. D. Colden and E. Williams, for defendant.

LIVINGSTON, Circuit Justice. This is an action of ejectment for lands situate at Granville, in the county of Washington, and within this district. The defendant having pleaded not guilty, a special verdict was found, which contains the following facts: Donald Fisher, on the 1st of January, 1777, was seised in fee of the premises in question, and was in the actual possession thereof, and continued so until the rendering of the judgment hereinafter mentioned. Donald Fisher lived and died a British subject, and had issue the lessors of the plaintiff, who were his only children and heirs at law, one of whom was born in 1776, another on the 23d of April, 1785, and the other on the 23d December, 1787, and all of them are and always have been subjects of Great Britain. Donald Fisher resided at Hebron, in the county of Washington, from 1793 until his death, which happened on the 1st of September, 1798. On the 17th of April, 1780, the grand jury of the county of Charlotte presented an indictment against Donald Fisher, for adhering to the enemies of this state, on which such proceedings were had that afterwards, to wit, on the third Tuesday of October, in the year 1783, the said Donald Fisher not having appeared and traversed the indictment, a judgment was rendered against him by the supreme court of this state, by which it was considered that he do forfeit all his estate real and personal, within this state, to the people thereof. On the 28th of March, 1797, the state of New-York passed an act "for limiting the period of bringing claims and prosecutions against forfeited estates." [Laws N. Y. 1797, p. 162, c. 52.] This act, after reciting that, "whereas the title deeds and other documents relative to forfeited estates were generally carried away by the former proprietors, whose conduct occasioned their forfeiture, and the title of the state as resulting from such forfeiture, was thereby peculiarly liable to be obscured or defeated;" therefore it was enacted, that "no person or persons, bodies politic or corporate, who then had, or should or might thereafter have any estate, right, title, claim, or demand in or to any lands, messuages, tenements, or hereditaments supposed to have been forfeited to the people of this state in consequence of the attainder or conviction of any person or persons for any act or crime done or committed during the late war, and which had been theretofore granted or conveyed to any person or persons by the commissioners of forfeitures, or other person or persons duly authorized for that purpose, on the part of this state, should, after the expiration of five years from and after the passing of that act, and where the estate, right, title, claim, or demand should thereafter accrue, then after the expiration of five years after the same should so accrue, have, prosecute, sue, or maintain any suit at law for the recovery thereof against the right or title so granted by the people of this state as abovesaid." The second section of the act declared, that those who did sue for or make any claim to such lands after the said respective periods of five years, should be utterly barred. And by the 3d section it was provided, "that if any person or persons who should be entitled to sue or prosecute such suit or action, or who had or should have such right or title, should be within the age of 21 years, feme covert or insane; that then such person or persons, his, her, and their heirs and assigns, should or might at any time within five years next after his, her, or their coming to full age, or of sound mind or discoverture, bring, sue, and prosecute such suit or action, and at no time thereafter." The defendant purchased the premises, but it does not appear when, for a valuable consideration, of the commissioners of forfeiture, who were duly authorized for that purpose, as forfeited to and vested in the people of the state of New-York, by and in virtue of the judgment aforesaid. This action was commenced the 5th of December, 1809. The lease, entry, and ouster, as stated in the declaration, are also found by the special verdict. On the argument of this special verdict the defendant resorted to two grounds of defense: 1st, he contended, that while the judgment of the supreme court remained in force and unreversed, the present suit could not be maintained; and, 2dly, if it could, that it was barred by the act of limitation passed the 28th March, 1797 [supra].

In arguing the first point, the counsel for the defendant were not understood as vindicating the judgment against Fisher. It seemed to be admitted by both parties, and such must have been the decision of the court, that it was contrary to the treaty of peace (signed the 3d of Sept., 1783; 6th article, 1 Laws [Bior & D.] 205) between Great Britain and the United States; and the only point in dispute was, whether its being so could be brought into view in this collateral way, or whether its reversal by writ of error were not previously necessary to enable the plaintiff to recover the premises in question; or in other words, whether the judgment were merely erroneous, that is, good and valid, until reversed, or void and a nullity ab initio.

Where a court possesses jurisdiction, it has a right to decide every question which oc-

curs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding. But if it act without authority, its judgments are considered as nullities, and form no bar to a recovery which may be sought, even prior to a reversal, in opposition to them. This distinction runs through all the cases on this subject, and is particularly recognised in the one from the third institute. In the present case it cannot be pretended that the supreme court had any authority to pronounce the judgment which is relied on as forfeiting the property claimed in this action. All its powers, as they regarded these proceedings, were derived not from its constitution or common law, but from an act of the legislature of the state of New-York, entitled "An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state, and for declaring the sovereignty of the people of this state in respect to all property within the same." This act, which created the offence, and prescribed proceedings out of the course of the common law, is stated in the judgment itself, as the only source of the jurisdiction. If this act then, were not in force at the time of its rendition, it must have been coram non judice, and absolutely void. Such would have been the case if the law had been previously repealed by the legislature, without any provision as to pending prosecutions. It must be equally so where by a treaty, which is the supreme law of the land, it is provided, that no future confiscation shall be made by reason of the part which any one had taken in the late war. This treaty being as much a matter of record as the law of the state or the present judgment, this court is competent, by its own inspection and attention to dates, to determine whether the authority of the supreme court was not at an end before it undertook to pronounce this judgment. And being of opinion, as has already been perceived, that such was the case, the conclusion is inevitable that the judgment was void from the beginning, and furnishes, although unreversed, no defence to this action.

But if the judgment rendered against the ancestor of the lessors of the plaintiff be no obstacle to a recovery in this action, it is supposed they are barred by the act of limitations, a copy of which appears in the verdict. The lessors of the plaintiffs, on the other hand, contend, that their case is not embraced by the provisions of this act, and that if it be otherwise, two of them at least, on account of their infancy, are within its saving clause. Whether the sense of the legislature in the present case be collected from the title of the act, its preamble, or its enacting words, the court cannot see how the lessors of the plaintiffs are affected by it. Its title is "An act limiting the period of bringing claims and prosecutions against forfeited estates." Now, as the estate of Donald Fisher never was forfeited, the title does not apply to an action brought by his heirs to recover the land belonging to their ancestor. The preamble, which, if it were necessary to resort to it, might in a doubtful case furnish a clue to the meaning of the legislature, discovers an intention to provide for cases of a very different nature. It is in the following terms: "Whereas the title deeds and other documents relative to forfeited estates were generally carried away by the former proprietors, whose conduct occasioned their forfeiture, and the title of the state as resulting from such forfeitures is thereby peculiarly liable to be obscured or defeated, therefore, &c." On this preamble it is sufficient to remark, that it applies only to forfeited estates, and that the mischief intended to be guarded against was not the prosecution of actions for a recovery of property by persons whose estates had been forfeited and sold, but by others whose property might have been sold as belonging to the party whose estate had been forfeited. If the action were brought by the attainted party himself, or his heirs or assigns, no title deeds or documents could be necessary to establish the claim of the state. A valid forfeiture, as they would both claim under the same title, would be all that was wanting; and this being matter of record, might be made out, without difficulty, at any period of time ever so remote. But when strangers to the forfeiture were plaintiffs, then it might be difficult for the public, not being in possession of the deeds relating to the estate of the person convicted, to prove, after some lapse of time, that the property sold in fact belonged to the attainted person, and in such case, a limitation might be reasonable and proper. If no construction favourable to the defendant can be drawn from the title, or preamble of the act, as little will its enacting clause avail him.

The court here disclaims all right or inclination to put on acts of limitation, which are among the most beneficial to be found in our books, any other construction than their words naturally import. It is as much its duty to give effect to laws of this description, with which courts however sometimes take great liberties, as to any other which the legislature may be disposed to pass. When the will of the legislature is clearly expressed, it ought to be followed without regard to consequences. And a construction, derived from a consideration of its reason and spirit, should never be resorted to but where the expressions are so ambiguous as to render such mode of interpretation unavoidable. But whatever may be the intention of the legislature, if such intention be not declared by apt words, no court can be blamed for mistaking it, and giving to the words used their ordinary signification, however wide such interpretation may be from the object which may have been in view. It must be admitted, that if it were intended to bar by this act of limitation

suits brought by the parties themselves, whose estates had been forfeited and sold by the commissioners of forfeiture, a very awkward phraseology has been employed. The persons barred by this limitation of five years can be no others than those who had, or might have any estate, right, title, claim, or demand in any lands supposed to have been forfeited in consequence of the attainder or conviction of any person for any act or crime committed during the late war, and which had therefore been granted to any person by the commissioners of forfeitures. Before this act can be brought to bear on any case, there must have been an actual forfeiture by the attainder or conviction of some person, and a sale by the commissioners, of some property supposed to have belonged to such attainted and convicted person, but in fact claimed by some one else. The terms, "supposed to have been forfeited," cannot without violence, when taken in connexion with those which follow, receive any other meaning. They refer to the estate which had been sold where there might be room for supposition and mistake, but not to the fact of attainder or conviction, which must ever be a matter of record and notoriety; and about which, therefore, there could be no doubt or mistake. Thus the lands of A. might easily and innocently be sold by the commissioners under a supposition of their having belonged to, and of their having been forfeited by, the conviction of B. Such cases no doubt must have occurred, and it was no more than right that the parties thus aggrieved should be barred, if, after a reasonable time, they neglected to assert their rights. But in the case before the court there has been no forfeiture by the conviction of any person, which alone would have been a complete defence, but only a sale by the commissioners, and of course the defendant has altogether failed in making out one essential fact to constitute a case for the application of the limitation prescribed by this law.

It has not been pretended that the parties are barred by the general act of limitations, nor do any facts appear on the special verdict, to authorize such conclusion. It was supposed by the plaintiff's counsel, that the defendant might rely on the alienage of his lessors, but although this ground was not taken, yet as the question is presented by the facts which are found, and lest it may be supposed to have been overlooked, the court has no hesitation in saying, that as Donald Fisher held these lands at the time of the treaty of London, in 1794, neither he nor his heirs, devisees, nor assigns can, so far as respects this property, or the legal remedies incident thereto, be regarded as aliens.

Upon the whole, then, as the judgment rendered against Donald Fisher was coram non judice, and therefore void, and as neither the title of the limitation act which has been relied on, nor its preamble, nor its enacting words, apply to a case where there has been no valid attainder or conviction, the court is of opinion, that judgment must be entered for the plaintiff, but that the writ of habere facias possessionem be stayed until the further order of the court.

NOTE. This cause was carried up to the supreme court, and the judgment of the circuit court reversed. It was very fully argued above, but the court gave no opinion on the points here decided. They held that it should have appeared, as the lessors of the plaintiff were aliens, that their ancestor held the lands, that is, that the title was in him at the date of the treaty of 1794. This fact was not found by the verdict, and although nothing was found to show that he had parted with his title, the court refused to presume that it was then in him. Vide [Harden v. Fisher] 1 Wheat. [14 U. S.] 300.

Case No. 4,820.

FISHER v. HENDERSON et al.

[8 N. B. R. 175.][1]

District Court, S. D. Mississippi. Jan., 1873.

BANKRUPTCY — CONVEYANCE BY BANKRUPT IN TRUST FOR HIS WIFE—RIGHTS OF CREDITORS.

An assignee filed a bill in equity against the wife of a bankrupt and her surviving trustee, to set aside a conveyance of lands and personal property made by the said bankrupt to trustees, for the alleged consideration of an indebtedness to his wife for land, slaves and other personal property, and money belonging to her. At this time the bankrupt was embarrassed in his pecuniary circumstances. The deed gave no power to the wife to dispose of the property during her lifetime, or by will, after her death, without the consent of trustees. It reserved, however, to the grantor the right, and gave to either of the trustees the power to sell and convey any part of the property without the consent of the wife. *Held*, that the conveyance was void, the proof not establishing the trust, the evidence further showing that about fifteen years elapsed after the purchase before this attempted conveyance; that the lands mentioned were subject to the payment of the debts of the bankrupt as they stood at the time the petition was filed, subject to his homestead right.

[Cited in Ex parte Anderson, Case No. 351.]

In equity.

HILL, District Judge. This bill is filed by the complainant, as the assignee in bankruptcy of James Henderson, against Emily A. Henderson and her surviving trustee, to set aside a conveyance made by said bankrupt bearing date 25th of October, 1866, and filed for record on the 26th day of October, 1866, by which he conveyed to the trustees therein named the lands and personal property mentioned therein, and which, from the proof, embraced all his property, real and personal, except one hundred and forty-seven bales of cotton, a portion of which was then in New Orleans, and the remainder on the way to that city, for the alleged consideration of an indebtedness to his wife for land, slaves and other personal property, and mon-

[1] [Reprinted by permission.]

eys belonging to his wife, and appropriated by him to his own use; that the said James Henderson was then largely indebted and embarrassed in his pecuniary circumstances, and that said conveyance was collusively and fraudulently made, with the intent to hinder and delay the creditors of said James Henderson from collecting their just demands against him, and therefore void, and that said conveyance upon its face contains provisions in favor of the grantor which render the conveyance void in law as well as in fact.

Mrs. Henderson, by her answer, denies all collusion and fraud, insists that it was made in good faith and for a valuable consideration, being for real estate, personal property and money belonging to her, and received and appropriated by her husband, the grantor, as well as for the hire of her slaves and income of her estate, which it is insisted greatly exceeded in amount the value of the property conveyed to her. On this issue of fact made by the bill and answer, proof is submitted upon which this cause must be decided, as well as upon the validity of the conveyance as shown upon its face.

The last question presented will be first considered. It is claimed for complainant that the terms and provisions of this conveyance are inconsistent with the assumed consideration, namely: a conveyance to the wife or to trustees for her use, in payment of a debt due from the husband to the wife, and shows upon the face of the conveyance that it was a family arrangement, such as the husband could only make in good faith as a provision for his family out of his own means, without any legal claim upon the part of the wife.

The deed purports to convey the property to the trustees for the use of Mrs. Henderson, but gives to her no power of disposition over it during her lifetime, and not by will, without the consent of her trustees, while it reserves to the grantor, and gives to the trustees, or either of them—that is, reserves to the grantor the right, and gives to either of the trustees the power, to sell and convey any part of the property without the consent of Mrs. Henderson, whose means, it is claimed, purchased and paid for this very same property. These restrictions upon the power of disposition of the wife, of her own property, under the laws of this state, are inconsistent with the ideas of a sale to her; but it is insisted for Mrs. Henderson that her privy examination was not taken on the deed proved as to her, and that she is not barred by these restrictions. But whether that was or was not necessary to bind her, she is now a femme sole, claims under the deed, and is bound by its provisions.

The power reserved by James Henderson in this conveyance, to sell and dispose of this property, was evidently intended as a reservation of a benefit for himself, and therefore, upon well established principles, renders the conveyance void. This is still more apparent when it is found that no provision is made for the reinvestment of the proceeds or the continuance of the trust, as to such proceeds, or requiring the grantor to pay over the proceeds to the trustees; so that if this conveyance is not void for the restrictions upon Mrs. Henderson's disposition of that which, it is claimed, is hers, purchased with her own means, it certainly is by reason of the reservation made by the grantor.

If not void upon the face of the conveyance, is it void by reason of a fraudulent intent in the purpose of its execution? The proof shows that Henderson owed at that time about six thousand dollars; that suits were pending against him which he had manifested an unwillingness to pay, and would probably ripen into judgments in December following: this created a motive to place his property out of the reach of an execution. The conveyance of his whole property is an indication of a fraudulent intent, but it is said that this he did not do; that he then owned cotton of more than twice the value of all his indebtedness. This cotton, however, was either then or soon after removed to New Orleans, out of the reach of the process of the courts in which judgments were expected to be rendered, and there is another significant fact, that is, that there is no evidence that a single dollar of the proceeds of this cotton ever went to pay his debts, but was employed in the name of his wife in purchasing supplies for the farm; indeed, James Henderson dealt with and controlled this, together with the whole estate conveyed, except in name, as though the conveyance had not been made up to the bankruptcy, and to his death, and it is difficult to arrive at any other conclusion than that such was the intention and purpose, at the time the conveyance was made, or that it was for any other purpose than to place his property out of the reach of his creditors, and being so, for this reason, the conveyance must be declared void.

But it is insisted that the proof shows that most of the lands mentioned in the pleadings were purchased and paid for with the money of Mrs. Henderson, and that she is entitled in equity to them, as a resulting trust. It is certainly true that when a husband, without any instruction from the wife, uses her money in the purchase and payment of property, and takes the title in his own name, she may, if she so elect, set up a resulting trust to it, or she may treat it as a loan which she will be presumed to have done unless she take steps within a reasonable time to set up her trust after she shall have been informed of its disposition, at least so far as his creditors are concerned, who may have given him credit upon the faith of his owning it in his own name. But to create this resulting trust it must be made clearly to appear that it was her money, and paid at the time of the purchase, if paid at a subsequent time

to the purchase the trust cannot be maintained. The proof is too vague and uncertain to establish this trust; and besides, according to the proof, about fifteen years elapsed after the purchase before this attempted conveyance, and nearly twenty years before its operation, and on either ground must be denied.

The result is that the conveyance made on the 25th of October, 1866, must be declared void, and the lands mentioned decreed subject to the payment of the debts of the bankrupt as they existed on the 5th day of December, 1868, when he filed his petition in bankruptcy, but subject to his homestead right, which continues to his widow. Three commissioners must be appointed to allot and set off to her so much of said land as would on the 5th day of December, 1868, have been of the value of fifteen hundred dollars, and not to exceed one hundred and sixty acres, including the dwelling houses and improvements occupied by the bankrupt as a homestead at that time. There will also be a decree entered directing the assignee to sell off the remainder of the land in such tracts as will likely produce most advantageous sale. The proceeds will be brought into court to be applied to the payment of the claims of creditors according to their respective priorities. Mrs. Henderson will be allowed to establish any legal demand she may have against the estate, but such claim must be established by the best attainable proof. It is the duty of the court to examine with scrutiny these old family transactions, that justice may be done.

FISHER (HOGE v.). See Case No. 6,585.

Case No. 4,821.

FISHER et al. v. LORD.

[6 West. Law J. 137.]

Circuit Court, D. Massachusetts. Oct., 1848.

EQUITY JURISDICTION—ENJOINING ACTION AT LAW—TITLE OF COMPLAINANT—ASSIGNMENT FOR BENEFIT OF CREDITORS.

[1. A court of equity has jurisdiction of a suit to enjoin the prosecution of an action at law to collect promissory notes, where the complainant shows a prima facie title to the notes, although he is not a party to the action sought to be enjoined.]

[2. The business of a firm was carried on in the name of one partner alone, who, after the other partner had made an assignment under the laws of Maine, sold the partnership goods, and took notes therefor in his own name. His creditors then became parties to the assignment to the extent of $5,000. *Held*, that these facts showed a prima facie title to the notes in the assignee, such as would give him standing to ask a preliminary injunction to prevent their collection at law by one who, as he alleges, purchased them by collusion, and with knowledge of the facts.]

In equity.

This was a motion to dissolve an injunction, restraining the defendant from proceeding in two suits in the court of common pleas for this county, upon certain promissory notes, amounting to about $3000, which suits had been instituted against Charles S. Darrow, the promisor. The injunction was a temporary one, and was issued upon the bill in this case, which was filed in April, 1848. The answer came in on the 15th of May, 1848, and the defendant thereupon moved to dissolve the injunction, on the ground that the answer denied all right or title to the permanent injunction sought in the bill. The facts as stated in the bill and answer were substantially as follows: Franklin Adams & Co., merchants, of Bangor, made an agreement, Feb. 24, 1845, with Josiah S. Hooke, for doing business under the name of "Josiah S. Hooke," sharing the profits equally; which arrangement continued until September 4, 1846. Franklin Adams & Co. then became insolvent, and assigned their property to the complainants [Fisher & Payne], under the laws of Maine. The creditors of Josiah S. Hooke became parties to the assignment to the extent of $5,000; and the firm of Josiah S. Hooke owned a stock of goods, which Hooke, on the day after, i. e., on Sept. 5, sold to Darrow, for $2,678, taking his notes therefor, on six, nine, and twelve months. Hooke, as the bill alleged, then secretly left the state of Maine, taking the notes with him, to prevent the plaintiffs from obtaining the proceeds. In October he entrusted the notes to his brother, Wm. H. Hooke, on whom the plaintiffs made a demand, but he refused to deliver up the notes. The plaintiffs then brought a bill in equity against Wm. and Josiah Hooke, in the state court of Maine, and an injunction was issued Nov. 3, 1846, forbidding Wm. H. to sell the notes or convey them out of the state; and on Dec. 2, a receiver was appointed to collect the notes. Wm. H. on demand refused to deliver the notes; and, the bill alleged further, that Nathaniel Lord, brother of the defendant, combining with the Hookes to defraud the plaintiffs, negotiated for the purchase of the notes, and bought them, in conjunction with Daniel W., the latter being nominally the sole owner, for the sum of $1,100, and a certain debt of no value, due from the insolvent firm of Palmer & Hooke, for $400; that Nathaniel, or the friends of the Hookes, furnished the greater portion of the purchase money; that Samuel Veazie, the father-in-law of Nathaniel, provided the means for that purpose; that all these transactions took place after the injunction, and for the purpose of avoiding the same; and that in September, 1847, Daniel W., at the instigation and with the aid of Veazie, sued Darrow upon the notes in the court of common pleas for the county of Suffolk, in this commonwealth. There were a large number of interrogatories in the bill, which were replied to in the answer; and a quantity of affidavits and other written evidence was introduced on both sides.

Albert W. Payne, of Bangor, and P. W. Chandler, for plaintiffs, in opposition to the motion.

Frederic Hobbs, of Bangor, and S. C. Maine, for defendant, in support of the motion.

WOODBURY, Circuit Justice, delivered the opinion of the court.

The first question was, whether the notes in suit were the property of the complainants or of the defendant. The complainants must make out a prima facie title, in order to sustain their right to an injunction. The respondent objected to the jurisdiction of this court to settle that question, on the ground that the complainants were not parties to the suit at law. But they were as much interested as if they were parties; for if Lord should recover and collect the sum due on the notes, and then prove irresponsible, the amount would be wholly lost to the complainants. The court has jurisdiction therefore, on general principles of equity. There was another difficulty in relation to jurisdiction, and it was that neither the federal nor the state courts can enjoin suits in each other. [Diggs v. Wolcott] 4 Cranch [8 U. S.] 179; [M'Kim v. Voorhies] 7 Cranch [11 U. S.] 279. But this was not a proceeding operating upon the state court itself; the respondent was enjoined in personam, and was within the jurisdiction of the court. This objection was not pressed, and from the result to which the court arrived, became of subordinate importance in the present case. The answer of D. W. Lord denied under oath the plaintiffs' title to the notes, the respondent's knowledge of their claims at the time he purchased, and the allegations of combination and collusion. If the answer were to be taken as true, it was obvious that the injunction must be dissolved. But the plaintiffs, by their testimony, had thrown grave doubts over the correctness of the answer, and the answer itself was defective in its details. And the proof, though objected to, was competent on a hearing to dissolve. Proof was given of the alleged partnership, and it was conceded that Franklin Adams & Co. were to share in the profits of the firm of Josiah S. Hooke. They were therefore liable for the debts; the partnership property must go to pay the partnership debts; and would pass to the assignees, under the laws of Maine. The conduct of Hooke, in selling out and absconding, showed that he so understood the relations of the parties. The fact that Franklin Adams & Co. had sued Hooke for their profits, could not affect the rights of the creditors, who were represented by the complainants. These conclusions were sufficient as to the title of the complainants to the notes, on this preliminary hearing.

The respondent contended that he bought the notes, bona fide and without notice of the partnership, and was entitled therefore to hold them against all the world. This conclusion, even if the facts were so, was rather questionable as matter of law, where the notes were purchased after a failure, and for a very inadequate consideration. But the facts which attended the sale threw many shadows over its fairness. Here were all the standard indicia of a design in the sale to defraud creditors, if not of collusion and actual knowledge of it in the purchasers;—(1) a sale soon after a failure; (2) a sale for a very inadequate consideration; (3) between relatives; (4) with circumstances of concealment. The answer, as well as the evidence, shows that Nathaniel Lord, the brother of the respondent, was, in a few weeks after the date of the notes, the prime mover in the purchase, and was then, and is still, interested in certain proportions. The respondent is defending for Nathaniel as well as himself; and is bound by his knowledge and acts. Yet Nathaniel does not come in or ask to come in as a party, nor does Daniel ask to have him; nor does he offer with his own answer any affidavit of Nathaniel to the want of any knowledge, at the time of the purchase, of the claims of the plaintiffs to these notes. It will be seen that the answer, as an answer, is entirely insufficient without this; as the respondent's denial, without it, amounts to little or nothing. He lived in a place remote from the purchase,—took no part in it,—is ignorant of its terms and of the knowledge, Nathaniel, his agent and coparty in interest, then possessed.

To be sure, some testimony of Nathaniel in another cause, and taken by another party, was introduced bearing on this case; but the court felt constrained to say, that the whole weight of the circumstances in the case was against the direct evidence by Nathaniel Lord and Josiah and William Hooke respectively, that the claim of the plaintiffs was not known by them, or by Nathaniel Lord as well as Josiah Hooke, when the purchase was actually made or completed; and that the transaction was not a combination throughout to keep these notes and their proceeds from the creditors of F. Adams & Co., as well as those of the house of J. S. Hooke. Among other suspicious circumstances were the manner of making the respondent a purchaser, without his knowledge of the price, or his giving any authority to buy; the agency of Veazie, another relative of Nathaniel; several important contradictions in the testimony of Wm. and Josiah Hooke and others; the fact that the purchase was not in the line of Daniel W. Lord's business; the loss of so many original letters; the absence of all post-marks to settle dates, while the attempt, supported by affidavits of some of the parties, was made to fix the purchase in October, or before the bill for an injunction on the 3d of November; the looseness of the dates produced, referring to months and not days; the contradiction in them in relation to the "thanksgiving din-

ner" in November, when in fact it took place in Dec. 3, of that year, after which the notes were still with Josiah S. Hooke; the fact that the first payment was not made till January; the entire absence of the correspondence, originals or copies, as to drawing for a part only on Daniel W.; the institution of the suit in the name of Daniel W. alone, when the interest was in Nathaniel and Daniel W. jointly;—all these circumstances created strong doubts whether the sale could have been till some time after the first injunction, November 3, 1846; and whether both Nathaniel Lord and Josiah S. Hooke as well as William did not know, at the time of the sale, all the material facts which tended to affect the validity of the notes; and they excited strong suspicion and discredit as to the bona fide character of the whole transaction, as set up by the respondent, his agent, and the promisee of the notes. The letters put in subsequently to the hearing did not materially affect these conclusions. Not one letter, written after the 1st of November, bears any date of the day of the month, while all written before, do so. Besides this, and indicating suspicion as to the fairness of the transaction, none of the letters bear now any post-mark or filing, to show when they were written or received.

The court did not therefore feel justified in dissolving the injunction immediately, on so defective an answer, and on such strong circumstances to sustain the right of the plaintiffs to these notes or their proceeds. But as the respondent has the actual possession of these notes and has commenced suits upon them, the court were disposed to let him proceed with those suits, upon filing bonds to pay over the proceeds to a receiver whenever ordered by this court, and to make full indemnity to the plaintiffs for any claim they may establish to the notes, or their proceeds in law or equity, and six per cent. interest on them after collection. This will give the assignees of the creditors of F. Adams & Co., in Maine, all the benefit of the continuance of the injunction and the appointment of a receiver, and will operate no more harshly on Darrow than would a collection from him by a receiver. The court therefore ordered that the injunction be dissolved, upon the respondent's filing a bond to pay over the proceeds of the suits pending in the court of common pleas to a receiver, when he shall be ordered to do so, and to fully indemnify the plaintiffs for any claim to the proceeds, with interest on the money after it is collected; the bond to be approved by a master in chancery; previous to which the bond is to be submitted to the other party; and in case of necessity, the court will further hear the parties thereon. The injunction was ordered to be continued until such satisfactory security shall be filed; and when filed, the temporary injunction is to be considered as dissolved, and the bill will stand for evidence and hearing on the merits.

FISHER (PEDRICK v.). See Case No. 10,900.

Case No. 4,822.

FISHER v. The PLYMOUTH.

[2 Int. Rev. Rec. 109.]

District Court, S. D. New York. 1865.

ADMIRALTY PRACTICE—JURISDICTION—STATE COURT ATTACHMENT—PRIORITY.

[1. A vessel under arrest by attachment from a state court is entirely withdrawn from the cognizance of the federal courts, whether sitting in the same or a different state.]

[2. A vessel attached by a sheriff on process from a state court in suits by several creditors was subsequently seized by the marshal, without opposition from the sheriff, under libels filed in a federal court by other creditors. One creditor, who had attached in the state court, subsequently filed a libel for part of the same claim in the federal court. The vessel was sold by the marshal subject to the attachments levied by the sheriff. *Held*, that the creditor had no right to proceed in both courts, and that, so long as the vessel remained subject to his attachment in the state court, she was within the jurisdiction thereof, and beyond the cognizance of the federal court; but that, if it were shown that his attachment in the state court had been discharged or abandoned, he would then have a right to share, according to the order of his priority, in the proceeds in the registry of the federal court.]

In admiralty.

In this case the facts were as follows: Several libels were filed against the brig for pilotage, supplies, &c. The first one was filed on the 20th of July last. The vessel was seized by the marshal, who returned that he had so arrested her, and on the return of the processes, on August 15, defaults were entered against the vessel upon all the libels. On the 16th August a libel against the vessel was filed by the petitioner [Francis Fisher], but no steps were taken to open the defaults already entered. An order of sale was issued in one of the cases, and the vessel was sold under it on the 19th day of August. On the 19th day of July an attachment had been issued out of the supreme court of the state against one Mullen as owner of the vessel. The attachment was given to the sheriff of New York, who, on the same day, attached the vessel. On the 9th day of August, before filing his libel, the petitioner also procured an attachment from the supreme court against the property of Mullen to recover a part of the same claim for which he afterward filed his libel, and placed it in the hands of the sheriff with directions to attach the brig as his property. The sheriff made no opposition to the seizure of the vessel by the marshal, and when the vessel was sold by him the sheriff attended the sale, and by direction of Fisher and of the other attaching creditor, gave notice that the vessel was "sold subject to" those attachments. The vessel having been sold and the proceeds paid into the registry of the court, Fisher now applied by this petition to the court for an order that his claim should be

first paid out of the proceeds, alleging that his claim was for a foremast which he had supplied to the vessel while she was in the custody of the marshal, and that as the value of the vessel had been thus enhanced by him, his claim should be first paid. The proceeds of the sale were not sufficient to pay the decrees rendered in the other case.

Mr. Goodrich and Mr. Parsons, for petitioner.

Mr. Benedict and Mr. Donohue, for opposing creditors.

HELD BY THE COURT: That it appearing to the court that on the day of the hearing, the vessel still remained in custody of the sheriff by virtue of the attachment in favor of the petitioner, that fact determines irrefragably that jurisdiction over the subject so situated cannot be exercised in this forum. The vessel when under arrest by judicial process of the state of New York, is as effectually withdrawn from the cognizance of the United States courts in this city, as from that of like tribunals in Ohio or Massachusetts. This doctrine is too emphatically settled under the United States law to be longer open to discussion in its courts. [Ex parte Ransom v. City of New York] 20 How. [61 U. S.] 582; [Freeman v. Howe] 24 How. [65 U. S.] 450. That the petitioner having instituted proceedings in the state court by his attachment, his present application would seem to be strikingly incongruous and inapt practice, as he asks a United States court to assume to force a case out of the possession of a state court possessing rightful cognizance of it, with a view to furnish a party litigant in it with a more acceptable or rapid determination of it, or with some other purpose not in consonance with her arrest in the state court. It matters not if the value of the vessel may have been augmented by labor or materials supplied to her by the petitioner, subsequent to her attachment in the state court. Other parties possessing claims against the vessel would be entitled to prevent the petitioner from collecting in the state court, to their prejudice, any debt not collectible upon the vessel at the time she was arrested on the petitioner's process. New debts accruing to him after her attachment on his warrant, could not be annexed to the one on which that proceeding was founded, without an express judgment of the state court authorizing that act to be done. This court assumes no power to restrain the state tribunal in granting such privilege at its discretion. It interferes in no way directly with the proceedings before the state tribunal. Any direct application by petition to this court to that effect is clearly void and utterly beyond the judicial cognizance, whether made directly or by way of a libel like the one filed by the petitioner. That process can have no legal efficiency otherwise than as against remnants and surplus remaining in the registry here after the satisfaction of the judgment charges in this court upon her ratified by decree herein. That the proceeds would be subject to such judgment charges only in the order of their legal priority. That could only be ascertained in this court in respect to the petitioner's claim, by comparing the times at which the competing creditors respectively arrested the property in satisfaction of their several debts. The Angelique v. The Triumph, Noss. Dec. That the petitioner therefore has no right of relief that can be afforded to him as to the vessel, so long as she remains in the custody or jurisdiction of the supreme court of the state at the suit of the petitioner. But if it be shown that such attachment of the vessel by the petitioner in the state court has been lawfully discharged and abandoned by him, then it is ordered that he may have leave to enter his claim to a share in the distribution of the funds in the registry according to the right of priority attaching to him by law. The petition is therefore dismissed with costs.

Case No. 4,822a.

FISHER v. REIDER.

[Hempst. 82.] [1]

Superior Court, Territory of Arkansas. Nov., 1829.

APPEAL—REVERSAL ON TECHNICAL GROUNDS.

1. A party is not allowed to complain of a fault committed by him.

2. An appellate court will not reverse a judgment on technical grounds, where substantial justice has been done.

[Approved in Cook v. Gray, Case No. 3,156a.]

Appeal from Pulaski circuit court.

At law.

Before JOHNSON, ESKRIDGE, BATES, and TRIMBLE, Judges.

OPINION OF THE COURT. This is an action of debt brought by the appellee against the appellant in the circuit court of Pulaski county, and comes to this court by appeal. It appears from the record, that the defendant in the court below filed his plea of payment, to which the plaintiff replied; and the defendant refusing to join issue by adding a similiter, a judgment on that account was rendered against him, and he now contends that this judgment should be reversed.

The judgment, although not strictly and formally correct, is certainly substantially good, and ought not to be reversed at the instance of the appellant, who was in fault in not completing the pleadings. Admitting the English practice, in a case like this, to be, to strike out the plea and enter judgment by default, it is not perceived what advantage it has over the practice heretofore adopt-

[1] [Reported by Samuel H. Hempstead, Esq.]

ed by this court in the case of Russell v. Flanakin [unreported], in which a judgment precisely similar was entered. The defendant in refusing to join issue abandoned his defence, and the plea, though not actually, was virtually, stricken out. It is a mere matter of form, and when substantial justice has been done between the parties, this court would be unwilling to reverse the judgment of the inferior court on mere technical objections of a doubtful character. Judgment affirmed.

Case No. 4,823.

FISHER v. RUTHERFORD et al.

[Baldw. 188.][1]

Circuit Court, D. New Jersey. Oct. Term, 1830.

EQUITY—ABATEMENT—DEATH OF PARTY—AMENDMENT—AVERMENT OF CITIZENSHIP—LIMITATIONS—STALENESS OF DEMAND — REFUSAL TO AMEND—APPEAL.

1. A suit in equity does not abate by the death of a co-plaintiff or co-defendant. If one plaintiff and one defendant survive, the suit is open for amendment. The averment of citizenship of a party may be added at any stage of the cause, if the amendment is moved for in a reasonable time after the defect is suggested.

2. If the statute of limitations is pleaded, and plea overruled, it cannot be again put in by the same parties or their privies.

3. The staleness of a demand, or the want of proper parties, is no objection to amend the bill. Where the refusal to amend will put the plaintiff out of court, and the defendant can avail himself of the matter on which he objects to the amendment, on appeal, the court will allow it.

[Cited in Woolridge v. M'Kenna, 8 Fed. 679.]

The complainants in this suit were originally Samuel R. and Myers Fisher, citizens of Pennsylvania, who in 1795 filed their bill against the respondents, citizens of New Jersey. Their claim was founded on a deed from Jane Waldie, as the heiress at law of Joseph Urmston, conveying to them certain proprietary shares of lands in New Jersey, which had been mortgaged by Urmston in 1720 to certain persons, under whom the defendants claimed. The bill set forth the title of Urmston, the mortgage, and the various proceedings which took place, until the defendants, or some of them, took possession of the mortgaged premises, took a seat at the board of proprietors in right of Urmston, located and sold large bodies of land, and received large sums of money, more than sufficient to pay the mortgage debt. The object and prayer of the bill was to establish the right of the plaintiffs to one propriety or twenty-fourth part of New Jersey, in right of Urmston, for a discovery and account of all locations made in virtue of his proprietary right, of sales made, moneys received for payment of the balance, a reconveyance, a right to a seat at the board of proprietors, for an injunction against further locations, and general relief. The bill was served on the defendants, who lived in New Jersey, they appeared and pleaded the act of limitations, this plea was overruled in 1799, and the defendants ordered to answer over; from this decision a writ of error was taken to the supreme court, which was quashed. Vide [Rutherford v. Fisher] 4 Dall. [4 U. S.] 22. In 1802 and 1803 answers were filed by several of the defendants. In 1803 a rule was entered ordering the plaintiffs to give security for costs and staying proceedings; no replication had been filed. Myers Fisher died in 1819, and in 1825 his executors conveyed to Samuel R. Fisher all the interest of the former to the premises in controversy. Samuel R. Fisher filed a bill of revivor and supplemental bill in 1826, up to which time no proceedings had been had by either party. The defendants, except John Rutherford and John Stephens, had died, and the representatives of some of them lived out of the state. A demurrer was filed to the bill of revivor, for the following causes: (1) That no cause was shown for discovery. (2) That relief was sought as to one of five proprietary rights; which one is not specified. (3) That the bill does not specify what part of the premises is in the possession of each defendant. (4) That there are necessary parties who are not made defendants, and that the heirs of Myers Fisher are not made plaintiffs. (5) That the defendants are not averred to be citizens of New Jersey. (6) That security for costs has not been given. (7) That the proceedings are prolix, indistinct and expensive. In 1827 the demurrer was allowed, whereupon the plaintiffs moved to amend their bills. After argument at April term the court held the motion under advisement, in which state the case has remained till the present time, except that security for costs has been given by the plaintiff.

Mr. Wall, for plaintiff.

The suit has never abated. Samuel R. Fisher, one of the original plaintiffs, and John Rutherford and John Stephens, two of the original defendants, are alive; so that there is an existing suit as to those parties. All the rights of Myers Fisher accrued, on his death, to Samuel R. Fisher, as surviving partner, as well as by the operation of the deed of Jane Waldie to them as joint tenants, and the deed from the executors of Myers Fisher, who had power under his will to make the conveyance. No replication having been filed to the original bill, the cause is not at issue, and is open to amendments. An original bill may be amended by adding new matter which existed at the time of filing it, or bringing in new parties; the amendments, if allowed, are a part of the original bill, and the whole is one record. Hind. Pr. 21. After a bill is revived, amendments may be made as if the original party

[1] [Reported by Henry Baldwin, Esq.]

had been alive, if the matter had existed in his lifetime. Mitf. Eq. Pl. 62. Here the important amendment is, the averment of the citizenship of the defendants to have been in New Jersey at the time of filing the bill. That they were so is admitted, but it is contended that for the want of this averment the court have no jurisdiction of the cause, the amendment is therefore indispensable to enable the court to proceed in the cause; but though the averment is not in the record, the cause is not coram non judice, a judgment rendered on it would not be a nullity. [Kempe's Lessee v. Kennedy] 5 Cranch [9 U. S.] 173. The court has jurisdiction of the case, and whenever the objection is made, it is the common practice to direct the averment to be inserted. [Connolly v. Taylor] 2 Pet. [27 U. S.] 565. So as to an averment of the value of the matter in controversy, though necessary to enable the court to render a judgment, it is but matter of form and may be added after judgment has been arrested. Lanning v. Dolph [Case No. 8,073]. This is the only amendment to the original bill which is asked for. The amendments proposed to the supplemental bill are only as to introducing other parties, and such as are necessary to conform it to the bill as amended. The court will not look to the effect of the amendments any further than to be satisfied that they are allowable according to the rules of the court, and will lead to no injustice to the defendants. Whether there are such parties before the court as are necessary for a final decree, is not a material question in the present stage of the cause, it is always open to this objection, which will not be affected by allowing the amendment.

Mr. Vanarsdale and Mr. Wood, for defendants.

This is a stale demand, brought thirty-one years after the right of Jane Waldie, under whom plaintiffs' claim had accrued, and they are entitled to no indulgence. The suit was abated, and until it is revived, the bill cannot be amended (1 Harr. Ch. 126); the order of revival must precede the application to amend (Mitf. Eq. Pl. 62); the bill of revivor must show good cause for reviving, and that a decree can be rendered against the new parties (Coop. Eq. Pl. 70). But as the court have no jurisdiction for the want of an averment of citizenship, they can make no order in it, but may order it to be stricken from the docket, as was done in [Hylton v. U. S.] 3 Dall. [3 U. S.] 183; S. P., Dodge v. Perkins [Case No. 3,954]; [Capron v. Van Noorden] 2 Cranch [6 U. S.] 127; Wright v. Wells [Case No. 18,101]. The plaintiff has no reason to complain, after the suit abated he had his election to revive or bring a new suit; if he is allowed to amend now, he will bring in parties to answer whose ancestors would not be bound to answer if alive. He will revive the suit after it has been abated as to some of the parties twenty-two years, when his only excuse for the delay is, not having complied with the rule for security for costs. This is a hardship on those now sought to be made parties, as they could not move to hasten the cause, while the suit remained abated. They had a right to presume the suit abandoned, when no replication was filed for more than twenty years after the answer put in. There has been such gross laches, that the court will not sustain a bill of revivor, or a supplemental bill, otherwise all the evils against which the statute of limitation was intended to guard will be let in, and we may show that the statute is a bar to the bill of revivor, though it would not be to the original bill (Hollingshead's Case, 1 P. Wms. 744; Mitf. Eq. Pl. 235); and this after a decree to account. A bill of revivor must be brought within six years after the suit abates, if an account is prayed for, as courts of equity will not sustain a bill in any case where there has been laches in prosecuting the claim; if not accounted for, the lapse of time is good ground for dismissing the bill. 3 Johns. Ch. 586. A mortgage cannot be redeemed after twenty years' possession by the mortgagee (2 Sch. & L. 636); the party seeking relief must do it promptly (1 Ves. & B. 246); stale demands will not be enforced (Jeremy, 548; 18 Ves. 196, 286, 180; 2 Vern. 276; Willard v. Dorr [Case No. 17,680]; 2 Ves. Sr. 400; 2 Eden, 169); nor an amendment be allowed after great delay (4 Price, 325; 3 Anstr. 807; S. P. [Elmendorf v. Taylor], 10 Wheat. [23 U. S.] 168). This is not only a stale, but a hard, ungracious claim, on which a court of equity will act on the same principle as courts of law, in refusing amendments in penal or hard actions, where there has been delay (6 Durn. & E. [6 Term R.] 171; 8 Durn. & E. [8 Term R.] 30); or in qui tam actions (2 Durn. & E. [2 Term R.] 707; 4 Durn. & E. [4 Term R.] 228). There can be no decree in this case for the want of proper parties; the personal representatives of the mortgagee, and the assignees of the mortgage must be parties. 2 Freem. 59, pl. 66, 180, 245; 2 Atk. 235; Randall v. Phillips [Case No. 11,555]; [Caldwell v. Taggart], 4 Pet. [29 U. S.] 202. The heir also must be a party; Coop. Eq. Pl. 146, 246. If one tenant in common dies, his heirs must be made parties. 11 Ves. 312. The want of proper parties is an objection to the jurisdiction of the court, which must be met whenever the question occurs. [Ketland v. The Cassius] 2 Dall. [2 U. S.] 368. Jurisdiction depends on the residence of the parties when the suit is brought. [Mollan v. Torrance] 9 Wheat. [22 U. S.] 539; [Connolly v. Taylor] 2 Pet. [27 U. S.] 556, 565. In this case there were parties in interest residing in New York, who are necessary parties ([Strawbridge v. Curtiss] 3 Cranch [7 U. S.] 267; [Sullivan v. Fulton Steamboat Co.] 6 Wheat. [19 U. S.] 450; 5 Johns. Ch. 303), but cannot be brought within the jurisdic-

tion of the court; the consequence of which is, that the bill cannot be sustained, though it is amended according to the plaintiff's motion. This is a fatal objection to the bill, existing when it was filed, which cannot be cured. 1 Ves. Sr. 446. This court cannot proceed against a citizen of New York in any way, as he cannot be brought in by publication or notice. Vide [Mandeville v. Riggs] 2 Pet. [27 U. S.] 482. If the case cannot be completely decided between the litigant parties, on account of a person whom the process of the court cannot reach, being a party in interest the court cannot make a decree. [Elmendorf v. Taylor] 10 Wheat. [23 U. S.] 167, 168. So if there is a joint interest in such party, and a party to the suit, the court have no jurisdiction. [Cameron v. M'Roberts] 3 Wheat. [16 U. S.] 593, 594; S. P. [Russell v. Clark], 7 Cranch (11 U. S.) 69, 98. The record shows this to be the situation of the defendants to the original bill; the court therefore cannot act upon the case.

BY THE COURT. It has been made a ground of objection to the motion to amend the original bill, that the suit has abated, and must be revived before the bill can be amended, but this objection is not sustained in point of fact. One of the original plaintiffs is alive, in whom the rights of both unite, as well by survivorship as by a conveyance from the executors of the deceased party. Two of the original defendants are also alive. There is therefore a cause in court between original parties, pending and open on the pleadings without an issue, so that the object of the bill of revivor is not to make a new suit, but to add other parties to one which has never abated. The demurrer to the bill of revivor and supplemental bill, pointed to a fatal objection to the jurisdiction of the court over the cause, inasmuch as there was no averment of the citizenship of the defendants in the original bill. As this is an objection always open, and conclusive against any action of the court after it is made, the cause will be coram non judice, unless it can be made to appear on the record that the defendants are citizens of New Jersey. The consequence therefore of sustaining this objection must be, that if there can be no amendment without revival, there can be no revival without amendment, as there will be no proceeding over which the court can exercise jurisdiction. The judgment on the demurrer is not final; had it been in favour of the plaintiff, the defendant would have been ordered to answer over, or plead to the bills, and after a judgment against him, the plaintiff may amend at any time. Where judgment was arrested for the want of jurisdiction in not averring the value of the property in controversy, the plaintiff was permitted to amend by adding the averment. Lanning v. Dolph [Case No. 8,073]. It is the common practice to amend by inserting the averment of citizenship of parties, wherever the want of it is suggested. Connolly v. Taylor, 2 Pet. [27 U. S.] 565. The averment of value and citizenship are both indispensable to the jurisdiction of the court, yet are mere matters of form, as regards the merits of the case, and will be added, if true, in point of fact. Though the averment is not in the record, and the judgment would be reversed on error, yet it would not be a nullity to be avoided collaterally. Kemp v. Kennedy, 5 Cranch [9 U. S.] 173. It is too late to object to the jurisdiction after an affirmance in the supreme court and a mandate for execution. Skillern v. May, 6 Cranch [10 U. S.] 267. So if all parties are aliens, the court may sustain jurisdiction, if no objection is made. Mason v. The Blaireau, 2 Cranch [6 U. S.] 264. In this case, there is jurisdiction in fact, as the defendants are citizens of New Jersey, the amendment is no surprise to them, and is in fact mere form, so considered by all parties who, with knowledge of the defect, and the decisions of the supreme court, have suffered the cause to remain in its original form from 1795 till 1826, without suggesting any want of jurisdiction.

It has been objected that the act of limitations has barred the plaintiff of all remedy, so as to prevent the court from affording him any aid in the prosecution of this suit, but so far as respects the matter in the original bill, the judgment of the court on the plea of the statute heretofore filed by the defendants, is conclusive on the parties who pleaded it and their privies. They cannot again set up the same matter as a bar, though it may be done by new parties (not privies to the parties who made the plea) to the original, the supplemental, or bill of revival; as to them the case will be open to all objections arising from any statutory limitation, any rule of equity adopted by analogy, or the staleness of the demand. But in the present stage of the case, we cannot yield to either objection, when made on a collateral question of amendment; they apply to the merits of the cause on a final hearing, or on plea or demurrer, not to a motion to so amend the record as to give the court jurisdiction to hear and determine the merits in some way.

By allowing the amendments, nothing is decided against the defendants; the original bill is not revived or new parties added, all questions as to the right of the plaintiff to revive, or whether there are proper parties to the suit, remain open; parties may be added after the reversal of a final decree, and the cause remanded to the circuit court. Russell v. Clark, 7 Cranch [11 U. S.] 99; Caldwell v. Taggart, 4 Pet. [29 U. S.] 190. It is therefore premature, to now decide upon any matter affecting the right to revive, or as to proper parties, till the court shall have the power to decide these questions on a proper record. A refusal to amend, is fatal to the plaintiff's case without the right of appeal;

the supreme court cannot review a motion to amend which rests in the discretion of this court, whereas an appeal would lie on our final decree against him, upon any of the grounds of objection now made to the proposed amendments. It would be hard to place him in this predicament, that he would be debarred of any appeal by our decision on any of the collateral questions which have been made in the argument, while all would be open to the defendant after a final decree. The staleness of the demand has been much insisted on, as a reason for refusing the amendments, but we cannot permit it to prevail. If the lapse of time brings the case, in our opinion, within the act of limitation, we cannot reverse the former judgment of this court; if it does not, then the staleness of the demand cannot be so palpable at the first blush, as to authorize us to throw the plaintiff out of court for this cause on a motion to amend. The judgment on the plea of the statute, is yet open to revision by the supreme court after our decree on the merits, and if we differed from our predecessors on that point, it would be but a decent respect to their memories to leave the question open.

There is, however, one question arising from the lapse of time, on which it is proper to give an opinion, that is, whether the motion to amend was not too late in 1827. This objection would have been a good one, if the plaintiff had delayed making the motion to amend an unreasonable time after the want of jurisdiction had been pleaded or suggested. It escaped the attention of all parties for more than thirty years after the commencement of the suit, when the defendant assigned it as one of the causes of demurrer; the present motion was made immediately after the judgment of the court, and was in due time. We are therefore of opinion, that the plaintiffs have a right to make the proposed amendments, according to the established principles of courts both of common law and equity, and that we are bound to allow them by the provisions of the thirty-second section of the judiciary act "in order to enable us to proceed and give judgment according to the right of the case."

Amendment allowed.

Case No. 4,824.

FISHER et al. v. The SYBIL.

[Brunner, Col. Cas. 274;[1] 5 Hughes, 61; 6 Hall. Law J. 509.]

Circuit Court, D. South Carolina. June, 1816.[2]

SALVAGE—AMOUNT OF.

Liberal compensation must always be made in case of salvage, not only with a view to the value and danger of the thing saved, but for the general interest in promoting exertions in such cases.

[See note at end of case.]

[Appeal from the district court of the United States for the district of South Carolina.]

In admiralty.

JOHNSON, Circuit Justice. If ever there was a case in which the claimants on a libel for salvage were thrown upon the protection of a court, this is one. There is not a witness to anything that occurred on the ocean, who is not interested in increasing the compensation. Even Dangerfield, the master, to extricate himself from damages and censure, finds his interests coincide with those of the libellant, in making out a justification for abandoning the vessel. However the witnesses may differ in representing the merits of each other, they all, with the exception of one (I mean the Indian seaman, Francis,) concur in making this out a case of great distress, and complete abandonment. The practice of this court permits the individual in such a case, to exhibit his own merits on his own oath, and it is but too evident that most of the salvors have attached much importance to the idea that this is a case of derelict, and that the salvage in such a case must necessarily consist of a large proportion of the goods saved. It is only in the contest for the distribution of this proportion that they disagree, and each one showing too strong a disposition to present himself as the hero of the adventure. Their advocates have ably and ingeniously argued that cases of derelict are cases in which the salvors are peculiarly entitled to a liberal reward; that the courts have manifested the most striking liberality in such cases, generally giving one half, sometimes as far as three fifths, never less than one third. The property libelled being of considerable amount, nearly one hundred thousand dollars in value, it becomes very material to the salvors to maintain this doctrine. But whoever looks into the history of the law of salvage, will find it to be as now acknowledged, in admiralty courts, comparatively of modern origin. Even the meaning of the term "derelict" is now materially varied from what it was originally, and the idea that the salvor is entitled to anything like a de jure compensation, has long since been exploded. In the language both of the civil and common law, "derelict," as applied to chattels, meant a thing voluntarily abandoned, so that the first finder became the lawful possessor, if he reduced it into possession. Such were the bona vacantia of the civil law; in which, in a state of nature, it is evident, whether the thing be found on sea or land, that the individual would acquire an absolute and exclusive interest; but in a state of society, whether he should take it wholly to himself or to the use of his sovereign: or what portion of it he should retain, and with whom divide the residue, must necessarily depend upon the provision of posi-

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[2] [Affirmed in 4 Wheat. (17 U. S.) 98.]

tive law. The barbarous notions in which originated the droit de bris of France, and the royal privilege of wreck in England, have long since, (among the rulers, if not among the people of those countries) given way to the progress of moral, intellectual, and commercial improvement. But there is reason to think that wreck and derelict were anciently confounded. It is perfectly natural for the inhabitant of a sea coast, whose subsistence perhaps from his earliest recollection has been drawn from the ocean, to consider whatever is thrown up by the sea as a bounty from Providence to the first finder. But the possessor of the soil would also put in his claim, and either exclude the casual trespasser, or insist that the bounty was sent to himself, and confer on the finder a portion or compensation as a gratuity. Such at this day is the law of England, with regard to the property of a pirate or enemy cast away on the coast. It is not so easy to find a satisfactory reason for the idea which too certainly has prevailed, that a shipwrecked mariner may be treated as a shipwrecked enemy. Yet in the history of navigation, we may find an apology, if not a justification for this barbarous notion.

The first nautical expeditions were certainly equipped for the purposes of war or plunder. The coasts of France and Great Britain were long infested and devastated by the cruisers of Norway and Denmark. If then every vessel that appeared threatened plunder, slavery and bloodshed, it was natural to consider every vessel that was wrecked as an enemy on whom heaven had executed vengeance. The benign spirit which religion has breathed into modern ethics would assign to an enemy in misfortune the treatment of a friend, but death, plunder and slavery may have been sanctioned by retaliation, and was certainly the law of the victor in that day. I can scarcely admit the disgraceful supposition that afterwards, as commerce extended, and the eyes of men became opened to the necessary distinction between wreck and derelict, the cruel purpose of removing a claimant or a witness could have operated to expose the lives of shipwrecked persons, but there is too much reason to infer from the laws which have been passed for their protection, that some protection was necessary. In the Laws of Oleron, art. 31, it is asserted that this often happened; and as late as the year 1798, in a case which occurred before Sir William Scott,—The Aquila [1 C. Rob. Adm. 37],—we find a magistrate alleging on oath, that the plundering of a wreck is customary on that part of the coast of England where he resided.

For the modern acceptation of the word "derelict" we may very safely take the definition of Sir Leoline Jenkins, as given us by Sir W. Scott: "Boats or other vessels (or, he may have added, any goods washed overboard at sea, or floated away from land) forsaken, or found on the seas, without any person in them, of these the admiralty has but the custody, and the owner may recover them in a year and a day." And such the form of the libel usually filed in such cases, declares it to be, to wit: "found floating to and fro on the high and open seas." Such goods are in the first instance pronounced "derelict" in the restricted sense of the word, to wit: abandoned from fear or necessity. But after the year and day they are considered as pure derelict, as having been absolutely and voluntarily abandoned, so that the sum or portion reserved in the registry of the court becomes a droit of the admiralty. If there is anything in the law of salvage which distinguishes the case of a salvor or "derelict," in the modern acceptation of the term, from any other salvor, I have never been able to discover it. Whether we refer to the reason of the thing, or to adjudged cases, the court appears to possess an equal latitude of discretion in all cases of salvage, and rewards either by adjudging a compensation in ratio or in number, as it thinks reasonable. One general rule, and that alone appears to run through all the cases, and that is "the compensation must be liberal, and that too not only with a view to the value and endangered state of the thing saved, the risk incurred, the skill and labor bestowed, but with a view to the general interests of commerce in promoting exertions in such cases, and to the interests of mankind in rewarding and promoting generous and magnanimous actions. The court undertakes to direct not only the justice but the generosity of the claimant. However the ancient idea that wreck and derelict was the property of the crown may have been exploded in modern times, it is very certain that something like that idea has been preserved in the adjudication, between salvors and claimants, as to the quantum which each shall retain of the thing saved. Such unlimited discretion has always been assumed, as looks very much like acting under the principle that "cujus est dare cujus est disponere." That it is not a mere case of quantum meruit is universally allowed; and why the court should prescribe a rule to the generosity of the claimant under any other idea, is difficult to discover. For the same reason it is that a compensation has been awarded to an apprentice boy instead of his master, and hence perhaps also such liberties are taken with the reasonable rules of evidence as suffer parties to make out their case upon their own affidavits, as they do in some measure in prize cases, which are certainly boons of the government. If the case of "derelict," according to the modern acceptation of the term, be considered, with a view to the reason of the thing, there will be found to be in it no ground necessarily attaching to it a superior claim to all other compensation. It is very easy to conceive a case which cannot come within the definition of derelict, which would rally all the best feeling of the heart around it in support of a

reference. Take the case of a vessel whose crew is sick or exhausted, or devouring each other for food; or take the case of a vessel without boat, on fire, or stranded, with her whole crew on board, and in danger every moment of going to pieces, where not only the vessel, but the lives of the crew are saved. In a case of pure derelict, as of a pirate, where the court knows at the time of adjudication, that the residue must be adjudged a droit, and where, of course, it is a mere bounty to the government as well as to the individual, it may very well be conceived that the court would be very liberal in awarding salvage; but when the party himself, the original owner, puts in his claim, and sets up the plea of misfortune, the case is widely different; and traces of this distinction will be found to exist in the ancient sea laws of Europe. Sir. W. Scott, in the case of The Aquila, in considering the question whether a moiety could be claimed de jure by a salvor, has said, that he could find no trace of such a right in the Consolato del Mare. As applicable to the case of derelict, according to the modern meaning, this eminent judge is unquestionably right; but the modern meaning was not probably attached to the word when those laws were compiled, for they are of great and no ascertained antiquity. But in the case of pure derelict, where the other moiety is to be given to the lord and the poor, the one moiety is by the Consolato del Mare given to the salvor (chapter 252,) and hence probably originated the English rule which appears to have existed in a remote period, that the thing saved should be divided by moieties between the salvor and the king. But by the Laws of Oleron, which are of the highest authority in this court of any of the ancient systems, all persons were required to aid and assist in saving shipwrecked goods, "and that without any embezzlement or taking any part thereof from the right owners; but, however, there may be a remuneration or consideration for salvage to such as take pains therein according to right, reason, or good conscience, and as justice shall appoint." Article 29. This article probably laid the foundation of the jurisdiction which this court is now exercising. In the 45th article of the second fragment of the Law of Rhodes it is enacted "that if a ship be surprised at sea with whirlwinds, or be shipwrecked, any person saving anything of the wreck, shall have one-fifth of what he saves." Although this article does not say what is to be done with the residue, yet it evidently relates to a case of restoration, as appears by the next or 46th article, according to which "if any one find a boat, which has broken loose from a ship and drifted to sea, and preserves it safe, he shall restore everything as he found it, and receive one fifth as a reward." Although the counsel in The Aquila argued that one half was the usual and favorite salvage in case of derelict, yet unless they meant to confine themselves to voluntary or to total abandonment, it would rather seem that (in ancient times at least) one fifth was the favorite proportion in cases like the present, or even stronger cases. For shipwrecked effects found on the high sea or "fished up out of the bottom of it," the Ordinance of Louis XIV. allowed a third to the salvor, the remainder to be restored to the owners. Section 45, art. 1, s. 27. If then we compare the ancient sea laws with modern decisions, we find that, except in case of pure derelict, they were hardly as liberal as the courts of admiralty are at the present day; and modern liberality has, I fear, been too much exerted, from a want of attention to the distinction between cases where the residue becomes a droit, and those in which it is restored to the original owner. I cannot think the argument a sound one that salvage in fact falls upon the underwriter who has been paid for the risk; for the spes recuperandi is one of the perquisites of the insurer, and which combines with others to enable him to underwrite at a less premium. Nor can I admit that the compensation to the salvor must be in a certain ratio to the thing saved, or that that ratio is not to be diminished from relation to the amount.

The question to be decided by the court is always one to which no fixed rule can be assigned. How shall the salvor be compensated? is this inquiry. And how is it possible to produce uniformity in the decisions of courts, where the judges are to act on circumstances endless in their variety and combinations, and of which any two men may take different views? Or how is it possible to detach the mind from considering the amount saved both with a view to increasing the compensation as to the claimant on the one hand, and diminishing it as to the salvor on the other? As to the question whether it shall be in proportion or in numero; if the judge, knowing the value of the thing saved, is unrestricted in fixing the compensation, it is immaterial to bind him down to the fixing of it by way of ratio, since it is so easy to bring it to numerical precision. It is true, that it has been most usual for courts to adjudge in proportion: but the reason of that is evident. Courts of justice, perhaps more than any other constituted bodies, will receive a tone in their proceedings from the mores majorum. At a time when commerce was carried on by actual merchandise, it would have been the most simple and natural mode of compensation to make an actual division of the thing saved, if susceptible of division. But at the present day, money, the medium of commerce, expresses the value and all subdivisions of property with a more convenient precision, as it is the standard by which the mind is accustomed to compare the value of things. That such a practice should have prevailed is easily accounted for from this cause. It is evident, that whenever a legislative power undertakes to affix a com-

pensation by way of salvage, it can only do so by assigning a proportion to the salvor. This is done in all the ancient systems of sea laws: and this very naturally led to the practice of assigning a proportion for salvage in the adjudications of the admiralty courts. But under the practice of modern times and the Laws of Oleron, I hold an admiralty court to be at large to decree compensation either numerically or by ratio, as it deems proper. But could I be induced to attach any importance to the idea of derelict abstractly considered I should not adjudge this to be a case of derelict even in the modern acceptation of the term. The vessel was not found derelict upon the ocean, and when she was deserted by her crew, all the witnesses prove an express abandonment of her to Mr. Fisher, or the ship's company of the Margaret. "There she is, make what you can of her." Her actual state of distress then, and the merits and compensation of the respective salvors shall govern my decision, without attaching any technical importance to the epithet by which her state may most correctly be designated. And here while the practice of the courts permits each claimant to make the most of his merits on his own affidavit, it is impossible for the mind to detach itself from the conviction, that the testimony of any man is to be received with due caution, where he swears in his own behalf. And we are naturally led to the consideration of these facts, concerning which there can be no dispute, and these parts of the testimony of each witness which have no immediate bearing upon his own interests, as furnishing the best grounds to form an opinion upon. As to the state of the vessel, the case furnishes satisfactory evidence on all points except two leaks. The main and mizzen masts were gone, with all their rigging, and most of their spars, and in going overboard they had carried with them a part of the bulwark. The long-boat, at the time of the abandonment, though leaky, was fit for use. Afterwards it appears to have been materially injured. Water and provisions she had in abundance, and a ship's company consisting of sixteen persons, all of whom, except one or two (perhaps three) were fit for duty. Her foremast and bowsprit, with all their rigging were perfect; and the hull of the vessel new, stanch, and strong, so much so, that a ship-carpenter of great skill and experience says, "the men ought to be hanged who would have deserted her." Her nautical instruments were in sufficient preservation, her reckoning accurate, and they were at the time of meeting not above three hundred miles from our coast, not above four hundred miles from Norfolk, where the vessel was owned, and about the same distance from Philadelphia and New York, where her cargo was owned. The wind was tolerably fair for the first port, and there was little difficulty in making any port in the whole extent of the American Atlantic coast. On the state of her leaks, the evidence is various and contradictory. When they took possession of her, Fisher says, she had four feet of water in her hold: Jones makes it only thirty or forty inches. Fisher says she made eighteen inches per hour, whereas in port she did not make above seven; but on this point there are three facts in which all concur: 1st, that four hands pumped her dry before 12 at night; 2nd, that only seventy-three bales of her cargo were damaged, and those so little as to sell for above twenty cents per pound; 3d, that the leaks did not cause the abandonment, for they were known when the ship first hailed the Margaret, at which time the captain of the Sybil expressed no idea of abandoning her. Some of the witnesses, indeed, say, that on hailing a second time, Dangerfield declared they had sprung a fresh leak. But Dangerfield in his protest says nothing of the kind, and he would not then have omitted it had it been true. I therefore conclude that the leaks did not very greatly endanger her safety.

We now come to the very material cause of the abandonment, to wit, the state of the rudder; and this indeed was the only cause, —for the protest and the evidence show that before this discovery, the captain was so far from intending to abandon her, that he only requested a supply of cordage and sails from the brig, and upon being informed that they could not spare any, he made sail away on his course. On this point the evidence is also various and contradictory. Dangerfield in his protest alleges that it hung together only by a few splinters; but this is a gross exaggeration. The rudder must have been injured in the gale, and the vessel had been nearly two days working with it in that condition, when she fell in with the Margaret. Besides, the ship-carpenters who have examined it in port agree that it required but little skill, labor, or risk to mend it. Captain Todd thinks that any gentleman then in the court room could have mended it; and several other witnesses agree that it was a very poor apology for abandoning the ship. To this we may add, what is very well known; that the loss of a rudder is by no means fatal, as a ship may be steered by her sails or by a cable, or by both in co-operation.

I now come to the most disagreeable part of this case, to examine the respective merits of the salvors—and first, of Fisher. This gentleman claims salvage on account of personal services; on account of being the owner of the Margaret, and on account of the freight of her cargo, and the sum awarded him by the district court would amount to more than twenty thousand dollars. I have pondered long upon the merits of Mr. Fisher, not uninfluenced by a reluctance at differing very widely from the opinion of the district court, or of underrating the services of any man, especially one of such high pretensions. But really no effort can bring my mind to

place this salvor on a pre-eminent footing of merit. I look in vain throughout his conduct to discover one trace of magnanimity or disinterestedness. Nothing appears in it but selfishness. He first claims a very high salvage from the owners, and then in the spirit of monoply finds some pretext or other for excluding his fellow adventurers from sharing the golden harvest. I am far from cherishing the Utopian notion, that pure disinterestedness is to be expected from man. But salvage is not a compensation for what we do for ourselves, but what we do for others. And the man who in the prosecution of selfish views can forget what is due from man to man—I will not add from a brother sailor in a state of distress—comes with a bad grace into this court to lay claim to that liberality which is the acknowledged meed of gallantry and generous sentiments. The compensation of such an one should be limited to mere quantum meruit. I am led to apply these remarks to Fisher from the fol lowing considerations, drawn from his own testimony. 1. It is in evidence that Fisher was bred a shipwright, and his skill, dexterity, and exertions as such, form a chief ground of his claims to compensation. It is also in evidence that when the Sybil approached the Margaret the second time, Fisher came on board, and he and Dangerfield went into the cabin and examined the state of the rudder through the windows. Upon being then consulted expressly with regard to the rudder he told the captain—to use his own words—"that it was in an extremely bad state." Now the contrary of this has been expressly proved, and he himself proved it by repairing it the next day. That he was ignorant of its actual state, and of the means and facility of repairing it, cannot be supposed, whether we consider his skill as a shipwright, or his readiness to go on board immediately and take charge of her with only four men. Then what did moral duty point out to him as the conduct to be pursued on that occasion? Not surely to increase the alarm of the captain by magnifying his danger, but to point out the means by which it could be repaired, and tender his assistance in repairing it. Doing otherwise looks too much like a premeditated design to take advantage of the fears, ignorance and imbecility of the captain, to get possession of the ship. But after getting possession of her and putting her in the partial refitment with which she reached this port, if he had in his subsequent conduct shown that he was at all influenced by considerations drawn from a view to the interest of the owner, this would have operated to remove the unfavorable impression which his conduct respecting the rudder was calculated to produce. Instead of which we find, that when he was but three hundred miles from the American coast, he bore away for Jamaica, distant at least one thousand miles, at a time when those seas are much more exposed to the danger of tempestuous weather than the north coast of the United States. I do not deny that he was justifiable in doing this, for after being in possession of the vessel, they had a right to judge for themselves how far keeping company with the Margaret outweighed all other considerations; but if in their decision, as to their course, the interest of the owners gave way to personal considerations, this certainly lessens their right to demand compensation from those owners. And as the vessel was sufficient to have made the voyage to the United States alone, no one can doubt that the interest of the owners was pretermitted in the attempt to go to Jamaica. I consider Mr. Fisher for these reasons, as a salvor who had nobody's interest in view but his own, and as entitled to compensation in proportion to the incidental advantages resulting to the owners. And here may it not be asked, had the owners any cause to rejoice that the Sybil fell in with the Margaret? Would it not have been for their interest that the ship had not encountered her or any other vessel at sea? She was competent to make the voyage to the United States in all human prob ability, and they might then have repaired her, earned her freight, and escaped the payment of salvage. Certainly no service was rendered them by taking out the crew. And had not the crew been taken out, possessing as they did the competent means of saving their lives, in the effort to do so they would have saved the property. In one view, therefore, Mr. Fisher may be considered as the innocent cause of doing the owners material injury. But it will not do to act upon that view of the case, for the cause of humanity forbids that the captain of the Margaret should have refused on any ground to take the crew of the Sybil on board if requested. It is therefore a case of salvage, but not a case of the highest order. And as no one could have left the Margaret without Fisher's permission, I certainly consider him as the dux facti, and as such ranked above all the salvors. But he cannot lay claim to the credit of having either navigated or commanded the Sybil, or having even discharged the duties of a mate on board of her.

As to the individual merits of the salvors, it is not necessary to remark very particularly on the evidence respecting them. Jones evidently was master and navigator on board the Sybil. However Fisher may have been his superior on board the Margaret, he certainly ranked his former owner on board the Sybil. The whole crew received and acknowledged him as captain. Rice appeared to have acted as next in command, and to have enjoyed an acknowledged superiority. Beech the landsman, a character always sneered at on board ship, did his best, and deserved much credit for having volunteered among the first: not a little in my opinion from a consideration of the doubts and fears which may be reasonably expected to attend

a landsman in such an undertaking. With regard to the six colored seamen who belonged to the original crew of the Sybil, some questions of considerable nicety and difficulty arise. 1st. Whether they are to be regarded as salvors, or referred to their original contract with the ship. 2d. Whether if considered as salvors, they shall themselves receive their compensation, or it shall be adjudged to Fisher, or if not to him, to the whole ship's company of salvors. Fisher claims the whole, under an agreement which he sets up as having been entered into by these men to navigate the Sybil for twenty-five dollars per month. It appears that the day after they took possession of the Sybil they hailed the Margaret and inquired if any of the Sybil's crew who were then on board the Margaret "would volunteer" (that was the expression) on board the Sybil. These six men then came on board the Sybil; no agreement was made while yet in the Margaret, but after they are on board the Sybil they make this agreement which is set up by Fisher. I omit here, as I have omitted all along, to make any reference to the evidence of Francis, as I could wish, if possible, to avoid giving weight to any man's testimony except where it makes against himself, or his interests are unaffected by the consequences. But I confess I feel a strong moral repugnance at admitting the claim of Fisher, so far as it is founded upon the services of these men. That he who claims twenty thousand dollars compensation, and who without the aid of these men could never have earned a cent of it, should be enriched, whilst they who never, according to Rice's testimony, voluntarily quitted the ship, and who returned to it expressly as volunteers, should be put off with scarcely enough to buy them a suit of clothes, carries with it something very inconsistent with moral propriety, and I acknowledge that it is with pleasure I lay hold on any ground to get rid of the necessity of making such a decree. The case affords two sufficient grounds. 1st. It is acknowledged that they were called upon to enter as volunteers, and under that idea they came on board the Sybil. No agreement was made for wages on board the Margaret, and whether a parol agreement was made before the written agreement or not, still it was not made till they were in a situation in which every seaman feels that he is not a free agent. The confirmatory agreement made after their arrival in port, is liable to the same objection, and I here explicitly acknowledge that I am not satisfied with the fairness of the one or the other. But there is another ground of objection. Whatever may have been Fisher's situation on board the Margaret, when they entered on board the Sybil, associated with four others, their migration was complete, and they assumed new relations, although they could not have quitted the Margaret without Fisher's consent, yet neither could he, without their consent, have forced them to quit her. When therefore they entered on board the Sybil, they had their rights as well as Fisher, and he could no more lessen their compensation as salvors for his own benefit, than they could his. The agreement, therefore, with the black seamen, if it operated to deprive them of their claim as salvors, enured to the benefit of the company of salvors; but they set up no claim under it, and acknowledge that it was not explained to these seamen that they were to forfeit their claim to salvage.

But here another question arises—are these seamen, as relates to the owners, to be at liberty to depart from their original relation, and assume the new one of salvors? One thing only, can sanction such a departure, and that is, they have not been in default. Their captain, against their will, as Rice testifies, obliged them to quit the Sybil, and he could not afterwards control them to prevent their assuming this new relation. They were freed from their original contract, and at liberty to act for themselves; I shall therefore adjudge them entitled to a compensation by way of salvage. But what is to be done with regard to Perry? He is clearly proved to be an absconded slave, and his owner has lost his services for several years. To this I reply, that whatever may have been my decision, had he been at the time hired out for the benefit of his master, since he was in fact a runaway, his master must receive his compensation and not himself.

One more question remains to be disposed of. The ship had proceeded six hundred miles on her way to Jamaica, when Jones and the crew, without the consent and against the will of Fisher, altered their course in the night and made for this port. Fisher contends that this was an act of mutiny, which worked a forfeiture of the rights of all concerned in it. But it appears to me that this deviation was the first act, unquestionably correct, done by the company of the salvors. Jones was unexceptionably the master, and even if we view Fisher as the owner, which is the highest grade to which he can pretend, his station at sea is inferior to that of the master. There could not be a mutiny then where the master headed the opposition. The ship's company had a right to alter the ship's course for the good of all concerned, and more especially to make an alteration so materially beneficial to the owners of the vessel and cargo. It was the first instance in which Fisher's interest had given way to those of the owners, and this was violently opposed by him. Besides, if this forfeiture had occurred, it would not have been to the benefit of Fisher, but of the owners, and it would be absurd to adjudge that a cause of forfeiture which clearly tended to their benefit.

In the course of the argument, the case of Mason v. The Blaireau [2 Cranch (6 U.

S.) 240] was often cited; and that case was very justly considered as the best standard for governing our decision in this. I readily receive it as such; and think, that when compared with that, the merits of this case are strikingly inferior. 1st. The amount saved was only about two-thirds the present amount. 2nd. The attempt to save the Blaireau was universally acknowledged to to be attended with great danger, almost desperate, such was her leaky and shattered state; here the danger is universally allowed to have been but inconsiderable, as the loss of the masts in fact, in some measure diminished it. The distance navigated there, is stated to have been three thousand miles; true or false, is immaterial, if the court were under the influence of that impression. If the owner's interest had been considered, it need not have been navigated above twelve hundred. Whether the Blaireau was derelict or not, I have before declared, technically immaterial, but I should think it unavailing to contend that Tooles' being on board, could diminish the merit of the salvors. To the merit of saving the property was added the more important consideration of saving human life. Finally, it has been contended, that the owners of the ship in this case ought to be allowed their freight and general average, principally on the ground of their having precipitated a sale of vessel and cargo, so as to deprive the owners of an opportunity of tendering salvage, and proceeding on their voyage. If precipitating sale is any ground of complaint, it is obvious that it can only be made against the district court, and not against the salvor. I am fully aware, that great and unnecessary loss to owners may be produced in such cases, as salvage can be as well ascertained by appraisement as by sale. But if a court has unadvisedly been led to order a sale in such a case, it is as against the salvors, damnum absque injuria. Freight and average can with no propriety be charged upon salvors, as both the freight and the average are equally the result of the efforts in saving the ship and goods. That claim, therefore, must be wholly rejected.

Upon the whole, I shall decree to the salvors the one fourth of the net proceeds of the vessel and cargo, and hesitate while I do so, under an apprehension that I have given too much. This will amount to more than twenty-one thousand dollars; of this sum let four hundred be paid to the pilot boat Opposition, and in the distribution of the balance, I adjudge one third to the Margaret, her freight cargo and crew. The remaining two thirds to be divided into twenty-four parts, and distributed as follows: to Fisher, eight parts; to Beach, one part; to the five free seaman, and the owner of Perry the slave each one part. In distributing the one third assigned to the Margaret, let the sum be also divided into twenty-four parts, sixteen of which are to be divided amongst the owners of the vessel, cargo, and freight, according to their relative value; in which distribution, let the vessel be valued at three thousand dollars, the freight at four thousand, and the cargo at the rate which Fisher himself fixes the value in his testimony, valuing those articles to which he does not testify at the advance proved by him on others. The reason for adopting this mode of fixing the value of the cargo is this: the result is unfavorable to Fisher, but he cannot murmur at it, as it is founded on his own testimony, and Johnson, the owner, being on board, and having consented to the undertaking, is certainly entitled to salvage. In distributing the remaining eight shares of the Margaret's third, it is right that Darrell, the second mate of the Sybil, should participate. He was entered mate to the Margaret, and, what I attach more importance to, he appears to have been desirous of remaining by his own ship. Kennedy is also entitled to some distinction in this division. Let Wilson then have three parts, Darrell one part and a half, Kennedy one part, and the balance be equally distributed among the remainder of the Margaret's crew. The balance of the proceeds must be distributed among the claimants according as they shall prove interest. The claims of freight and average, even as between vessel and cargo, I wholly reject, as the abandonment put an end to the contract, and I consider the salvage paid by the freighters as a substitute for both freight and average. The decree of the district court (that decree awarded fifty per cent. salvage [case unreported]) is thus revised, and anulled so far as it is inconsistent with this decree, and the register will report to this court such evidence relative to interest, as will enable it to make a final order of distribution after paying all costs, which are to be charged upon the entire amount of the sales.

As to the specie, which it appears was taken from the Sybil and saved in the Margaret, I think it not necessary to make any observations respecting it, as it does not appear to me to be at all subject to our jurisdiction. Had any thing improper been done respecting it, we should have enforced such terms upon the salvors as would have been consistent with equity and good conscience; but nothing with this view appears to require the interference of this court.

[NOTE. On appeal, this decree of the circuit court was affirmed by the supreme court, Mr. Chief Justice Marshall delivering the opinion. It was held that under the peculiar circumstances of this case the amount of salvage to be allowed is within the discretion of the court, and that appeals in such cases should be discouraged; but the learned justice remarked that in this case the court was satisfied both with the amount of salvage allowed and the mode of distribution. The Sybil, 4 Wheat. (17 U. S.) 98.]

FISHER (UNITED STATES v.). See Cases Nos. 15,100–15,103.

FISHER (WILSON v.). See Case No. 17,803.

FISHING INS. CO. (HANCOX v.). See Case No. 6,013.

Case No. 4,825.

FISHLEY v. FISHLEY.

[Nowhere reported, opinion not now accessible.]

Case No. 4,826.

FISK et al. v. CHURCH.

[5 Fish. Pat. Cas. 540;[1] 1 O. G. 634.]

Circuit Court, S. D. New York. May 28, 1872.

PATENTS — VALIDITY — INFRINGEMENT — PRIOR KNOWLEDGE AND USE—BURDEN OF PROOF.

1. The questions involved in the defense of prior knowledge and use are wholly questions of fact, in respect of which the burden rests upon the defendant to make good the defense by satisfactory proof.

2. The letters patent for a "composite felt suspender-end, composed of felt, combined with a strengthening material," granted to Thomas J. Flagg, September 14, 1869, are valid.

[A suit in equity, brought against Hepsabeth C. Church, administratrix of the estate of Samuel B. Church, deceased, by Henry G. Fisk, Thomas R. Clark, and Thomas J. Flagg, for the alleged infringement of letters patent [No. 94,881] for an improved buckle, granted to complainants as assignees of Augustus Pototsky, July 14, 1868, and of two several letters patent for improved suspender-ends, granted to the complainants as assignees of Thomas J. Flagg, and bearing date, respectively, April 27, 1869, and September 14, 1869.

[On the hearing complainants' counsel asked a decree on the last-named patent only.][2]

W. A. Coursen and George Gifford, for complainant.

Stephen D. Law, for defendant.

BLATCHFORD, District Judge. This suit is brought on letters patent granted to the plaintiffs, as assignees of Thomas J. Flagg, the inventor, September 14, 1869, for "an improvement in suspender-ends." The specification says: "My invention consists of a suspender-end, faced with felt, and combined with buckskin, chamois leather, kid, goat-skin, or other strengthening material. In manufacturing my improved article, I prefer to employ a strong, hard felt, such as is used for the manufacture of bonnets, or such as is used in the manufacture of piano-forte hammers. I paste a sheet of strengthening material to a sheet of such felt by means of wheat-flour paste. I press the composite sheet and permit it to dry. I then cut out the suspender-ends from the composite sheet by means of a cutting-die, whose edge corresponds with the outline of the suspender-ends. I also cut a button-hole in one end of the article by means of a cutting-die of the required form. The article is then sewed with lines of stitching by means of a sewing-machine, the effect of which is to improve the appearance of the article and to combine its members securely. * * * In some cases, I manufacture the articles of two thicknesses of felt, with a layer of goat-skin or kid between them; and, in some cases, a single thickness of felt and a single thickness of chamois leather, with a layer of goat-skin or other strengthening material between the two. In either case, I prefer to conduct the manufacture by first producing a composite sheet by pasting the material together. The faces of the articles may be made of any desired color by using felt dyed of that color. I prefer to employ for my manufacture felt produced without spinning and weaving; but felt produced in part by spinning and weaving will answer the purpose, provided the felting process has been effected so thoroughly that the edges of the articles, when cut, do not ravel. * * * Composite felt suspender-ends, made as above described, have the ornamental appearance and freedom from raveling at the edges of a suspender-end composed wholly of felt, and also the advantage that they do not tend to stain the clothing with which the felt face is in contact, even though the suspender-end be wet with perspiration. They possess, in addition, the advantage incident to the strength of the strengthening material with which the felt is combined. * * * I am aware that suspender-ends have been made of two or more thicknesses of various materials, and therefore I do not claim broadly a suspender-end composed of two materials of every description."

The claim is: "The composite felt suspender-end, hereinbefore described, composed of felt combined with a strengthening material, the same being a new article of manufacture."

The answer substantially admits the infringement by the defendant, by the sale by him, as agent of the American Suspender Company, of suspender-ends composed of felt and leather, constructed as described in the patent. Such infringement is also otherwise proved.

The answer sets up prior knowledge and use of the invention by various persons at the city of New York, particularly one Augustus Pototsky, and others connected with him there, and various persons at Waterbury, Connecticut, particularly one John W. Dayton, and others connected with him there. It also sets up that all the knowledge which Flagg had of the invention was obtained by him from Pototsky, and that Flagg was neither an original nor the first inventor of such invention.

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

[2] [From 1 O. G. 634.]

The questions involved in such defenses are wholly questions of fact on the evidence, in respect to which the burden rests on the defendant to make good the defenses by satisfactory proof. This he has failed to do as to all the points involved. It is satisfactorily shown that Flagg made the invention himself, and without any comunication of it to him by Pototsky, and that he made it as early as the forepart of October, 1868. This was prior to any invention by Dayton at Waterbury. The defendant has not established that Pototsky knew of the invention before it was made by Flagg, or that Pototsky ever made the invention, or that Pototsky did not first learn of it from or through Flagg. It is enough to state these conclusions. The evidence is voluminous, and no good purpose would be served by a discussion of it in detail.

There must be a decree for the plaintiffs for a perpetual injunction and an account, with costs.

[NOTE. For another case involving this patent, see Fisk v. West, Bradley & Cary Manuf'g Co., Case No. 4,830a.]

FISK (McKENNA v.). See Case No. 8,852.

Case No. 4,827.

FISK v. UNION PAC. R. CO. et al.

[6 Blatchf. 362.] [1]

Circuit Court, S. D. New York. April 6, 1869.

REMOVAL OF CAUSES—CITIZENSHIP—SUBJECT-MATTER — CONSTITUTIONALITY OF ACT OF JULY 27, 1868—REMOVAL OF PART OF SUIT—INDEPENDENT OF ACTION OF STATE COURT — MANDAMUS—FILING OF PETITION AND ACTION OF STATE COURT —FEDERAL QUESTION — PROCEEDINGS IN STATE COURT SUBSEQUENT TO REMOVAL.

1. Where a court of the United States has no jurisdiction of a case, it has no power to make any order in it except to dismiss it for want of jurisdiction.

2. The 12th section of the judiciary act of September 24, 1789 (1 Stat. 79), and the act of July 27, 1866 (14 Stat. 306), and the act of March 2, 1867 (Id. 558), are statutes where the right to remove a case from a state court into a court of the United States is made to depend upon citizenship or alienage.

3. The act of March 2, 1833 (4 Stat. 632, 633), and the act of March 3, 1863 (12 Stat. 755, 756), and the act of July 27, 1868 (15 Stat. 226, 227), are statutes where the right so to remove a case is made to depend upon subject-matter.

[Cited in Jones v. Oceanic S. Nav. Co., Case No. 7,485; Tennessee v. Davis, 100 U. S. 294.]

4. The act of July 27, 1868, is constitutional.

5. Under the act of March 2, 1833, and the act of March 3, 1863, and the act of July 27, 1868, the entire suit is removed if any part of it is removed.

[Cited in Whelan v. New York, L. E. & W. R. Co., 35 Fed. 864.]

6. The 2d section of the act of July 27, 1868, construed, as to what suits are removable under it, and at whose instance, and what is the mode of removal.

7. The right to remove a cause, under all the acts of congress providing for removals, is a right conferred directly by the act of congress, and is not dependent upon the volition, or action, or non-action, of a state court.

[Cited in Brigham v. C. C. Thompson Lumber Co., 55 Fed. 884.]

[See Hughes v. Northern Pac. Ry. Co., 18 Fed. 106.]

8. No mandamus from a court of the United States to a state court is necessary, to enforce affirmative action by a state court, to allow a cause to be removed, in an ordinary case of the removal of a cause before judgment; and, therefore, a court of the United States has no jurisdiction to issue such mandamus.

9. Under the act of July 27, 1868, a petition for removal must be regarded as being filed in the state court when it is presented to that court with the proper surety; and, when the proper petition is so presented, with the proper surety, so that that court acts upon the matter judicially, in any way whatever, whether that court accepts the surety or not, unless it puts its refusal upon some valid defect in the petition, or some insufficiency in the surety, it loses jurisdiction of the cause eo instanti.

[Cited in Woolridge v. M'Kenna, 8 Fed. 664; Pelzer Manuf'g Co. v. St. Paul F. & M. Ins. Co., 40 Fed. 186.]

[Cited in Lange v. Benedict, 73 N. Y. 36.]

10. Where, in a petition for removal under the act of July 27, 1868, the defendants petitioning comply with the act, by setting out that they have a defence in the suit, arising under the constitution of the United States and the laws of the United States, that averment must, in the court of the United States, be accepted as true, until it is disposed of on the trial of the case.

11. Where a suit is removed into this court, under the act of July 27, 1868, as respects all the parties to it, and all the subject-matter involved in it, all further proceedings in it in the state court are void: and, although the state court may be proceeding further in it at the instance of a party to it, it is not necessary to the exercise of the jurisdiction of this court, that it should make an order staying all proceedings in the suit, by such party, in the state court, and, therefore, such order will not be made.

12. This court will not stay proceedings in a state court which are null and void; and it is forbidden by the 5th section of the act of March 2, 1793 (1 Stat. 334, 335), to stay valid proceedings in a state court.

[Followed in Penrose v. Penrose, Case No. 10,958. Cited in Milligan v. Lalance & G. Manuf'g Co., 17 Fed. 466; Yick Wo v. Crowley, 26 Fed. 208; Dillon v. Kansas City S. B. R Co., 43 Fed. 111.]

[Cited in Mix v. Andes Ins. Co., 74 N. Y. 57; Johnson v. Brewers' Fire Ins. Co., 51 Wis. 589, 8 N. W. 297, and 9 N. W. 657.]

[See Fisk v. Union Pac. R. Co., Case No. 4,830.]

This case came before the court on a motion, on the part of the defendants, to stay all proceedings on the part of the plaintiff [James Fisk, Jr.], as against any and all of the defendants, in the supreme court of the state of New York.

Edwin W. Stoughton and David Dudley Field, for plaintiff.

Samuel J. Tilden, Charles Tracy, and Clarence A. Seward, for defendants.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

BLATCHFORD, District Judge. This suit was originally instituted in the supreme court of the state of New York, by the plaintiff, Fisk, against the Union Pacific Railroad Company, a corporation organized under a law of the United States, and not a banking corporation, and twenty-three other defendants. It is alleged that four other defendants have since been brought in, by proceedings in the state court. The motion now made is founded on the idea that the suit is one now pending in this court, in which the plaintiff who commenced the suit in the state court is plaintiff, and all the defendants who have been made defendants in it, in the state court, are defendants. The suit was not commenced in this court by the service of process of any kind; but jurisdiction over it, if acquired at all by this court, has been acquired by a process of removal, exercised under an act of congress, passed on the 27th of July, 1868 (15 Stat. 226, 227). So far as I am aware, this is the first case which has been brought up in any court of the United States, or in any state court, under this statute. In some respects, this statute differs from all other statutes on the subject of the removal of cases into the courts of the United States, and in some respects it is similar to them.

The first question that arises for consideration upon the motion is, whether this case is in this court—whether this court has jurisdiction of the case. This question necessarily arises, and must be decided at the outset; because, if this court has no jurisdiction of the case, it has no power to entertain the motion that is made, no power to make any order either granting or denying the motion, and no power to make any order whatever in the case, except to dismiss it for want of jurisdiction. Mayor v. Cooper, 6 Wall. [73 U. S.] 247, 250. The order that is now asked for is not an order outside of the case, but an order in the case. I proceed, therefore, to consider whether this court has jurisdiction of the case. The question of jurisdiction was argued very fully, on the motion, by the counsel for the respective parties. The grounds urged by the counsel for the plaintiff, against the jurisdiction of the court, were: (1) That the whole suit is not in this court; (2) that no part of the suit is in this court; (3) that, under the act of 1868, a suit cannot be removed into this court, except on the petition of all of the defendants in it; (4) that the suit, to be removable, under the act of 1868, must be brought for a liability of the Union Pacific Railroad Company, and also for a liability of all the other defendants, as members of such company; (5) that the petition for removal presented to the state court was not properly verified by oath, by any defendant; (6) that the suit was not brought in the state court for any liability, or alleged liability, of said company.

As was well observed by one of the counsel for the defendants, the cases of removal of suits from the state courts to the courts of the United States, provided for by acts of congress since the institution of the government, arrange themselves naturally, and according to the provisions of the statutes, into two classes. One class is, where the right of removal is given by reason of the condition of citizenship or alienage in a party; and the other class is, where the right is conferred by rea son of a subject-matter involved in the suit. The 12th section of the judiciary act of September 24, 1789 (1 Stat. 79), and the act of July 27, 1866 (14 Stat. 306), and the act of March 2, 1867 (Id. 558), are statutes where the right of removal is made to depend upon citizenship or alienage. The act of March 2, 1833 (4 Stat. 632, 633), for the removal of suits or prosecutions brought on account of acts done, or authority claimed, under the revenue laws of the United States, and the act of March 3, 1863 (12 Stat. 755, 756), passed during the late Rebellion, for the removal of suits or prosecutions for acts done, or omitted to be done, during the Rebellion, by virtue of authority derived from the president of the United States, or any act of congress, and the act now in question, passed July 27, 1868, are statutes where the right of removal is made to depend upon subject-matter. The authority conferred upon congress to pass such statutes as these three of 1833, 1863, and 1868, for the removal of causes where the jurisdiction depends upon the subject-matter, is conferred by the second section of the third article of the constitution of the United States, which provides, that the judicial power of the United States "shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." That provision has been expounded by the supreme court of the United States, in some memorable cases, and rests upon a solid and secure foundation, with well-defined and well-understood boundaries, making it perfectly clear and distinct how far the authority of congress to confer this jurisdiction upon the proper courts of the United States extends. In view of those decisions, there can be no doubt whatever, that it was within the constitutional power of congress to pass this act of the 27th of July, 1868. It in no respect differs, in principle or character, in its scope, object and purpose, or in the basis on which it rests, from the act of 1833 and the act of 1863 (Mayor v. Cooper, 6 Wall. [73 U. S.] 247, 254); and, for the purpose of expressing distinctly the views that this court entertains on this subject, I shall proceed to state those views at some considerable length.

The case which settles the principle to which I have referred, authoritatively and distinctly, is the case of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738. In that case, the act of congress, incorporating the bank of the United States, conferred upon it the

capacity to sue in any circuit court of the United States; and the question arose for decision, whether the clause which authorized the bank to sue in the federal courts was constitutional, under the provision of the constitution to which I have referred. The bank had come into the federal court in Ohio, by virtue of that clause in its act of incorporation, and brought a suit in equity against certain individuals, praying relief. The relief was granted, and the defendants appealed to the supreme court. The opinion of that court was delivered by Chief Justice Marshall. The question, as stated by him (page 819), was whether the suit was a case arising under a law of the United States. The objection made against the jurisdiction of the federal court was, that several questions might arise in the case which depended on the general principles of law, and not on any act of congress. In regard to this, the chief justice says: "If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn, and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any way released his claims, are questions some or all of which may occur in almost every case; and, if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing." He also says (page 821): "We perceive, then, no ground on which the proposition can be maintained, that congress is incapable of giving the circuit courts original jurisdiction in any case to which the appellate jurisdiction extends." And here I may remark, that whether this power of removing cases from the state courts into the courts of the United States is to be referred to appellate jurisdiction or to original jurisdiction, is of no consequence whatever, on this branch of the case. Such power of removal has sometimes been referred (Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 304, 349, 350) to the appellate jurisdiction, on the ground that, as the suit is not instituted in the federal court by original process, the jurisdiction of that court must be appellate, because it cannot be original. In a case, however, in this court, before Mr. Justice Nelson, decided in July, 1866, of a removal under the act of 1833,—the case of Dennistoun v. Draper [Case No. 3,804]—he speaks of the jurisdiction of this court over a case removed into it from the state court, as "original jurisdiction, acquired indirectly by a removal from the state court." But the name given to the jurisdiction, whether it be called original, or quasi original by way of removal, or whether it be called appellate, is of no consequence. That the jurisdiction exists, to be exercised by way of removal of the case to the federal court, there can be no doubt. The chief justice proceeds (page 821): "We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States, others on principles unconnected with that law." He also says (page 822): "The judicial power of the Union extends effectively and beneficially to that most important class of cases, which depends on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases, only, which present the particular question involving the construction of the constitution or the law. We say, it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause, and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will." This view applies equally to a jurisdiction acquired by removal, because the jurisdiction intended by the constitution, and, as I think, purposely carried out by congress, in the acts of 1833, 1863, and 1868, is a jurisdiction not restricted to the single question which arises under the constitution, laws, or treaties of the United States, but is a jurisdiction under which the cause is transferred to a court of the United States where such question exists as an ingredient in the cause. The chief justice proceeds, (page 823): "We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." This view is confirmed by the

opinion of the supreme court, in the case of Mayor v. Cooper, 6 Wall. [73 U. S.] 247, 252. A jurisdiction of that character and extent can, as a matter of course, be given as well by the process of removal as by the original institution of the suit in the federal court, or as by an appeal or a writ of error. Mayor v. Cooper, ut supra. If this were not so, it is perfectly obvious that a plaintiff would always have it in his power, by introducing into his suit, as causes of action, questions of fact or law that did not of themselves arise under the constitution or laws of the United States, and by coupling them with other causes of action arising under the constitution or laws, to deprive the courts of the United States of all jurisdiction of the suit. That result would ensue, if the jurisdiction be restricted to the question which arises under the constitution or laws, unless the incongruity were admitted, or transferring a part of a cause into one court, and leaving the rest of it in another court.

The chief justice then proceeds to say—and I cite these observations of his, because they are quite applicable to the present cause, in many of its aspects: "The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions, and all its rights, are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?" He then proceeds to argue that proposition and demonstrate it very fully. The conclusion arrived at was, that the clause in the act incorporating the bank, enabling it to sue in the courts of the United States, was consistent with the constitution, and was to be obeyed in all courts.

The conclusion at which the supreme court arrived in that case, was cited and applied in this court, by Mr. Justice Nelson, in the case of Murray v. Patrie [Case No. 9,967], decided in July, 1866. In his opinion in that case he says: "The question of the removal of causes from the state courts to the circuit courts of the United States, was discussed very much in Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 346-350, and no doubt was entertained that it might take place after as well as before judgment. It was again commented upon in the case of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 821-828, and especially by Mr. Justice Johnson, in his dissenting opinion (pages 884-889). Mr. Justice Johnson was inclined to the conclusion, that congress could not confer original jurisdiction upon the circuit courts of the United States, either directly, or by removal from state courts, in cases arising under the constitution, the laws of the United States, and treaties, &c., inasmuch as the federal court must assume the jurisdiction upon the simple hypothesis that such question had arisen, and that, until such question had actually arisen, and was presented for decision, the case was exclusively cognizable in the state court. This view led the learned justice to maintain, that the question could be brought properly before the federal court, only under the 25th section of the judiciary act, as it could not be ascertained whether the case had actually arisen, till it was heard and decided. The chief justice, who delivered the opinion of the court, held, that jurisdiction could be entertained, when the question assumed such a form that the judicial power was capable of acting on it; that it then became a case; and that the judicial power extended to all cases arising under the constitution, &c." I cite these remarks, to show the view entertained by Mr. Justice Nelson, as to the proper construction of the decision in the case of Osborn v. Bank of U. S. [supra], and as to the constitutionality of the exercise of the power of removal, and as to the circumstances under which a case arises, so as to be capable of removal.

The same principle was held by Mr. Justice Washington, in the case of Bank of U. S. v. Northumberland Bank [Case No. 931], in which a suit was brought by the Bank of the United States, a corporation created by a law of the United States, under the power, conferred by its charter, to bring a suit in the circuit court of the United States. Mr. Justice Washington held, that the power to bring the suit existed. He uses this language: "That this is a case arising under a law or laws of the United States, is unquestionable. It never could have arisen, if the legislature, in the exercise of its constitutional authority, had not incorporated the Bank of the United States." This view, taken by him in 1821, is the same view which was taken by the supreme court, in the case of Osborn v. Bank of U. S., supra.

I have referred to the three statutes of 1833, 1863, and 1868, as being statutes very much in pari materia upon the subject of removing causes from the state courts, where the jurisdiction depends on the subject-matter, and arises under the clause of the constitution which I have cited. A more particular reference to these statutes will be useful. The third section of the act of March 2, 1833, was, as is well known, passed in consequence of the attitude of nullification assumed by the state of South Carolina at that time. It was passed during the administration of President Jackson. There is one feature about the third section of this act, in which it differs from all the other acts, providing for the removal of causes, that have

ever been passed by congress. In all other acts, the party desiring the removal is sent, by express enactment of congress, to take the initiative for the purpose in the state court, by filing a petition in the state court and offering surety there, and, until he has done those acts in the state court, he has no right to enter this court. But, by this act of 1833, in consequence of the hostile attitude assumed by South Carolina, the action toward a removal is entirely confined to action in the federal court; and the act of congress addresses the state court solely by inhibition. It does not send the defendant to the state court to present any petition, or offer any surety, but it acts on the state court only by inhibition, and by a writ of certiorari, or a writ of habeas corpus cum causa, issued by the federal court. It provides that, "in any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person, under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States in and for the district in which the defendant shall have been served with process, setting forth the nature of such suit or prosecution, and verifying the said petition by affidavit, together with a certificate signed by an attorney or counsellor at law of some court of record of the state in which such suit shall have been commenced, or of the United States, setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and has carefully inquired into all the matters set forth in the petition, and that he believes the same to be true; which petition, affidavit and certificate shall be presented to the said circuit court, if in session, and if not, to the clerk thereof at his office, and shall be filed in said office, and the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court; and it shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of certiorari to the state court, requiring said court to send to the said circuit court the record and proceedings in said cause; or, if it were commenced by capias, he shall issue a writ of habeas corpus cum causa, a duplicate of which said writ shall be delivered to the clerk of the state court, or left at his office by the marshal of the district, or his deputy, or some person duly authorized thereto; and, thereupon, it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit or prosecution, upon delivery of such process, or leaving the same, as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein, in the state court, shall be wholly null and void." It is thus put in the power of the federal court to acquire and maintain its jurisdiction completely and entirely by action within itself. The issuing of the writ of certiorari, requiring the state court to send to the circuit court the record and proceedings, seems to be merely a mode of notifying the state court; because, by the fourth section of the same act, provision is made for supplying to the federal court, by affidavit, the absence of certified copies from the state court of the record and proceedings therein. Abranches v. Schell [Case No. 21]. When the process is delivered to or left at the office of the clerk of the state court, the case is thereby ipso facto removed to the circuit court. No return to the writ is necessary; but, when the writ is thus served on the state court, it becomes the duty of the state court to stay all further proceedings in the cause, and any further proceedings therein, in the state court, becomes wholly null and void.

It is quite apparent, that the jurisdiction which congress intended to give, under this act of 1833, where a suit or prosecution is commenced against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, is to be such a jurisdiction, that a plaintiff in a state court shall not be able to deprive such officer or other person, who is sued on account of an act done under the revenue laws, of the right to remove the suit into a court of the United States, under this statute, by joining with him in the same suit other defendants who are not sued on account of acts done under the revenue laws. Thus to deprive the federal court of jurisdiction of the case, would be to deprive the officer or person justifying under the revenue laws, of the power to have his rights adjudicated from the commencement by the federal court, and to compel him to follow the case through the state courts in all of its stages, and finally take it, under the 25th section of the judiciary act, to the supreme court of the United States. No such construction of this law has been admitted, so far as I am aware. The manifest intent of this statute, in saying that "it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit, or prosecution, upon delivery of such process, or leaving the same, as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the state court, shall be wholly null and void," is to remove the suit. The suit goes into the federal court, with all the parties to the suit. Every party to the suit

is brought into the federal court when the suit is brought there, and the court, in obtaining jurisdiction of the suit, obtains jurisdiction over all the parties to it. It is plain that this must be the construction of the act of 1833, or it would be mere waste paper. Otherwise, a plaintiff would have it in his power to deprive an officer of the United States, who justified his acts under the revenue laws, from ever removing the cause into the federal court, by joining with such officer, as a defendant, some other person, on other causes of action, no matter how incongruous or irrelevant.

The same principle applies to the act of March 3, 1863. The 5th section of that act provides: "If any suit or prosecution, civil or criminal, has been or shall be commenced in any state court, against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present Rebellion, by virtue or under color of any authority derived from, or exercised by, or under, the president of the United States, or any act of congress, and the defendant shall, at the time of entering his appearance in such court, or, if such appearance shall have been entered before the passage of this act, then at the next session of the court in which such suit or prosecution is pending, file a petition stating the facts, and verified by affidavit, for the removal of the cause for trial at the next circuit court of the United States to be holden in the district where the suit is pending, and offer good and sufficient surety for his filing in such court, on the first day of its session, copies of such process and other proceedings against him, and also for his appearing in such court and entering special bail in the cause, if special bail was originally required therein, it shall then be the duty of the state court to accept the surety and proceed no further in the cause or prosecution, and the bail that shall have been originally taken shall be discharged; and, such copies being filed, as aforesaid, in such court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said court by original process." The section then provides for removing the case by appeal, after final judgment, during the session or term of the court at which judgment was rendered. It provides also for removing the case, within six months after judgment, by writ of error. That was what was done by the process which was issued in the case of Murray v. Patrie [supra], to which I have referred. That was a writ of error issued under this section, within six months after the judgment was rendered in the state court. The section then goes on to say: "and the said circuit court shall thereupon proceed to try and determine the facts and the law in such action." This act thus provides for removing the whole suit, no matter who the parties are, and no matter what relief is sought to be obtained in the suit, provided there is found in the suit, as an ingredient therein, a claim against an officer, or any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the Rebellion, under color of any authority derived from, or exercised by, or under, the president of the United States, or any act of congress. If such ingredient is found in the suit, the whole suit goes into the federal court. If this were not so, then, as in the case of the act of 1833, a plaintiff could deprive a party of all remedy under this statute.

We come now to the act of 1868, under which the proceedings for removal in this suit were instituted. This is an act in which the jurisdiction is founded on subject-matter. The second section of the act provides, that "any corporation or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced, in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof, as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating they have a defence arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety for entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as are required to be done by the act entitled, 'An act for the removal of causes in certain cases from state courts,' approved July twenty-seventh, eighteen hundred and sixty-six; and it shall be thereupon the duty of the court to accept the surety, and proceed no further in the suit; and, the said copies being entered as aforesaid, in such court of the United States, the suit shall then proceed in the same manner as if brought there by original process." Under this act of 1868, as well as under the acts of 1833 and 1863, if the suit comes into this court at all, as to any person, it must come as an entirety. There can be nothing of it here, unless the whole of it is here; and, if any of it is here, there can be nothing of it left in the state court. This is necessary, and must have been intended by congress, in the act of 1868, because of the subject-matter, which is the foundation of the jurisdiction of this court, and because, otherwise, it would be in the power, as already suggested, of any plaintiff to deprive a corporation, organized under a law of the United States, which has a de-

fence arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, of the power to remove the suit to this court, by simply joining with the claim for relief against such corporation, because of an alleged liability of such corporation, some other right of action against some other defendant in the suit.

The act of July 27, 1866, introduces a new principle, which did not exist under the act of September 24, 1789, in regard to the removal of suits in cases where the right of removal is given because of the condition of alienage or citizenship in a defendant. This act of 1866 provides for the removal, in certain cases, into the proper federal court, of a cause, as against an alien or defendant who is a citizen of a state other than that in which the suit is brought, who petitions for such removal; and it expressly enacts, that such removal, as against such petitioning defendant, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the state court, as against the other defendants, if he shall desire to do so. The power of removal under this act of 1866 is limited, however, to cases where the suit, so far as relates to the alien defendant, or to the defendant who is the citizen of a state other than that in which the suit is brought, is instituted for the purpose of restraining or enjoining him, or is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause. It is quite manifest, that the principle introduced by this act of 1866, of proceeding with the suit in the federal court as against the removing defendant, and proceeding at the same time with the suit in the state court as against the non-removing defendants, has no application to the acts of 1833, and 1863, and 1868. Under those acts, if any part of the suit remains in the state court, the whole of it remains there; and, if any part of it goes to the federal court, the whole of it goes there.

The question that now arises for consideration, is as to the proper construction of the second section of this act of 1868. That section provides, that any corporation, or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced, in any court other than a circuit court or a district court of the United States, for any liability, or alleged liability, of such corporation, may have such suit removed from the court in which it may be pending, to the proper circuit court or district court of the United States, upon taking certain proceedings. Under this provision, and in analogy to the provisions of the acts of 1833 and 1863, it is only necessary that a suit, at law or in equity, shall be commenced in a court other than a circuit court or a district court of the United States, against a corporation other than a banking corporation, organized under a law of the United States, for a liability, or alleged liability, of such corporation. That is all that is necessary, in the first place, to authorize the suit to be removed; and the proper construction of the provision is, that where such a suit is commenced, for such a liability, or alleged liability, if the corporation designated is brought within the act, in other respects, it cannot be deprived of the right to remove the suit, because there are joined in the suit with such cause of action against the corporation, other and additional causes of action against the corporation, which are not for a liability, or alleged liability, of the corporation, or causes of action against other defendants, which do not involve a liability, or alleged liability, of the corporation, or of some member thereof, as such member. Of course, the main point upon which the jurisdiction by removal is made by this statute to depend, is the averment, to be made in the petition, provided for afterward, that the corporation, or the member thereof, as such member, has a defence, arising under or by virtue of the constitution of the United States, or some treaty or law of the United States. But, so far as the cause of action which is spoken of in the section is concerned, it is to be a cause of action for a liability, or alleged liability, of the corporation, or of a member thereof, as such member. If such a cause of action against the corporation appears by the papers in the suit, the case is one within the statute, even though other causes of action are joined, which are not for a liability, or alleged liability, of the corporation. Otherwise, the statute might be nullified, at the will of the plaintiff, by joining all kinds of causes of action, no matter how incongruous.

Such being the character of the suit, the next question is, as to who can institute proceedings for the removal of the suit. This may be done by the corporation, or by any member of it. Where the member petitions for the removal, he must be a member who was a member when the suit was commenced in the state court. The ownership of stock in a corporation is necessary to membership, within the meaning of this statute. Subject to these constructions, the initiative to remove the suit may be taken by the corporation, or by any member of it.

The mode of removal prescribed by the act is, that the petition is to be made by the corporation, or by a member thereof, and is to be verified by oath, and is to be presented to the court in which the suit is commenced, and is to be so presented, either before or after issue is joined, and is to be filed in such court, and is to state the existence of a defence, arising under or by virtue of the constitution of the United States, or a treaty or law of the United States; and the petitioner must offer to such court good and sufficient surety for entering in the federal court, on the first

day of its session, copies of all the proceedings in the suit, and doing such other appropriate acts as are required to be done by the act of July 27, 1866, such as, appearing in the federal court, and, if necessary, entering special bail in such court in the cause. The act of 1868 then says: "And it shall be, thereupon, the duty of the court to accept the surety, and proceed no further in the suit; and the said copies being entered, as aforesaid, in such court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process."

In regard to all the acts for the removal of causes, the acts of 1789, 1833, 1863, 1866, 1867, and 1868, the same principle applies, in this particular—that the right to remove is a right which is conferred upon the party directly by the act of congress, and depends in no manner upon the volition, or action, or non-action, of the state court. If this were not so, the statutes would be mere waste paper. Under these acts, where surety is required to be given, the party is required to offer to the state court good and sufficient surety, and the state court is required, if the surety is good and sufficient, to accept it, and to proceed no further in the suit. The state court cannot defeat the right of removal, by refusing to act upon the question at all, or by refusing to accept the surety, unless it puts the refusal to allow the case to be removed, on the ground that the surety is insufficient. Undoubtedly, there is a discretion, a legal discretion, to be exercised by the state court, in respect to the sufficiency of the surety. But it was held by the supreme court, in the case of Kanouse v. Martin, 15 How. [56 U. S.] 198, as a definitive disposition of the question, that the right of removal is conferred on a party by the act of congress, and that, although he is required to take certain proceedings, by filing a petition in the state court and offering proper surety, yet, when he has done so, if the state court thereafter proceeds with the case, the case is coram non judice in the state court, and all its proceedings are utterly void. This is, unquestionably, the proper interpretation of the acts of congress, all of which are alike, so far as any action is to be had in the state court to secure a removal. The intention is to secure a removal on a compliance with the statute, without the exercise of the pleasure or will of the state court, in any manner whatever. While the state court cannot, by refusing an order of removal, prevent a party from effecting the removal, it adds nothing whatever to the right of removal, or to the jurisdiction of this court, to procure an order from the state court, allowing the removal, provided, always, that the provisions of the act of congress are complied with. An order refusing a removal cannot prevent a removal, nor can an order granting a removal promote a removal. Neither order can effect the jurisdiction of this court in any manner whatever. The act of 1833, as before remarked, has special provisions, providing for coming into the federal court, and doing every thing there. But, in all the other acts, from that of 1789 down, the principle is plainly written on the face of all the statutes, that, when the petition is filed, verified by oath, stating the things which the statute requires—be it alienage, or citizenship, or a defence arising under the constitution of the United States, or a treaty or law of the United States, or a trespass committed under authority derived from the president of the United States during the late Rebellion, or inability, from prejudice or local influence, to obtain justice in the state court—and when good and sufficient surety is offered for doing what the statute requires to be done, the right of removal is perfected. From that time, the state court can do nothing further in the suit, but accept the surety. The act of 1868 says: "And it shall be, thereupon, the duty of the court to accept the surety, and proceed no further in the suit." It then adds: "And, the said copies being entered, as aforesaid, in such court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process." Now, where a defendant, who has a clear case for removal, files his petition in the state court, and offers proper surety, and obtains from that court an order to remove the cause, it becomes thereupon the duty of the state court to proceed no further in the suit. The case is out of the jurisdiction of the state court, but, at the same time, this court cannot proceed in it, until copies of the proceedings in the state court are entered here. But the plaintiff, in such a case, is not at the mercy of the defendant; because, if the case is a proper one for removal, the plaintiff himself can enter the papers in this court, and the case will proceed here. At a certain stage, the case may be considered as being in neither court, because it is on its transit from the one to the other. The state court is inhibited, by the statute, from proceeding in it, while, at the same time, the federal court cannot proceed in it, because the papers are not yet entered there. Therefore, no difficulty can arise from the failure of the defendant to enter the papers in this court. The sole object of requiring the surety is, that good faith may be observed, and that no defendant shall be allowed to avail himself of the privilege of removal, who is not able to furnish good and sufficient surety for coming into the federal court, at the earliest possible day, and submitting himself to the jurisdiction which he has invoked.

Such is my view of this act of 1868. I have referred to the other statutes, on the subject of removal, because the system is one which has been in operation since the

year 1789, and has been acted upon throughout, by congress, on one principle, namely, that the jurisdiction of the federal courts, in cases of removal, shall in no manner depend on what a state court may do, or omit to do.

In the case of Murray v. Patrie, before referred to, a writ of error was issued by this court, under the act of 1863, in pursuance of the provision of that act, that "it shall be competent for either party, within six months after the rendition of a judgment in any such case, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered." The words, "writ of error," were used by congress, in that act, in their common law sense; and, when an act of congress says, that it shall be lawful for a party to remove a judgment by writ of error, the expression necessarily implies that the usual course in regard to a writ of error is to be observed. The judgment is to be removed by the writ of error, but it is not removed by the mere issuing of the writ of error. As in the case of all writs of error, there must be a return to the writ of error. In the case referred to, a writ of error was issued by this court, and served upon the clerk of the state court, which was the supreme court of the state of New York. He refused to make a return to the writ, and desired to bring before this court, for decision, the question whether the case was one in which this court had jurisdiction to issue the writ of error, and whether the act of congress was constitutional. For that purpose, an order was made, in the first instance, requiring the clerk of the supreme court of the state of New York, for the county of Greene, in the third judicial district, to show cause why he should not make a return to the writ. The matter was thoroughly argued, and it was on that hearing that Mr. Justice Nelson gave the opinion to which I have referred. As the result of it, he directed that an order should be issued, requiring the clerk of the supreme court of New York to make a return to this court, on the writ of error. The clerk still refused to make the return, and then the question came up, before Mr. Justice Nelson, as to what should be done. On the view that it was necessary that this court should have a return to the writ of error, in order to exercise its jurisdiction in the case, he issued, sitting in this court, a writ of alternative mandamus to the supreme court of the state of New York. I have before me the original writ of alternative mandamus, the allowance of which is signed by him, and bears date on the 16th of October, 1866. That writ was served on the clerk of the supreme court, for the county of Greene, on the 18th of October, 1866. It is addressed to the justices of the supreme court of the state of New York, for the third judicial district, and for the county of Greene, and to the clerk of the county of Greene, and of the supreme court therein, and recites the recovery of the judgment in the supreme court of New York, and that a writ of error has been allowed by this court on the judgment, with a citation and a proper bond, for the removal of the action into this court, to the end that this court may proceed to try and determine the facts and the law therein. It recites, also, that it has been represented to this court, that, after the rendition of the judgment, the state court refused to allow the action to be removed into this court. It then proceeds: "Whereupon, the said circuit court being willing that justice shall be done, you are hereby commanded, that you make due and legal return to said writ, as required by law, and that you do allow said action to be removed and transferred into the said circuit court of the United States for the southern district of New York, and that you do proceed no further in said case, or, in default thereof, that you and each of you make known" to this court, on a day therein named, "why you and each of you have not done the same." The writ is signed by the clerk of this court, and has upon it the impress of the seal of the court, and its allowance by the court, as before mentioned. To that alternative mandamus the return and answer of the justices of the supreme court was made. The return states, that it is made by way of showing cause why a peremptory mandamus should not issue. It recites all the proceedings in the state court, and sets out all the facts of the case which were deemed necessary to raise the legal questions involved, and then concludes as follows: "Wherefore, the said justices and clerk of said supreme court say, that the said circuit court of the United States has not acquired jurisdiction of the said suit, in favor of said Patrie against said Murray and Buckley, and cannot compel a removal of the same by said writ of error, and a new trial of the same in the said circuit court of the United States." To that return there was a demurrer, and a joinder in demurrer, and then this court gave judgment by a judgment record, which sets out the alternative writ, the return, the demurrer, and the joinder in demurrer, and then proceeds as follows: "Whereupon, all and singular the premises being seen by the court now here, and fully understood, and mature deliberation being thereupon had, for that it appears to the said court, now here, that the said answer and return of the said justices and clerk, and the matters therein contained, are not sufficient in law to quash the said alternative writ of mandamus of the said United States and the said relators, whereupon, the said United States and relators pray judgment, and also a writ of peremptory mandamus, to be directed to the said justices and clerk, commanding them as in said alternative writ is specified: Wherefore it is con-

sidered, that a writ of peremptory mandamus do forthwith issue, directed to the said justices and clerk, commanding them, upon pain and peril that shall fall thereon, to remove and transfer into the circuit court of the United States for the southern district of New York, a certain judgment, and the record thereof, now remaining on file in the office of the said clerk, 'describing the judgment particularly,' according to the command of the said former writ of alternative mandamus, and that they do proceed no further in said cause." This judgment record is signed by Mr. Justice Nelson, and also by the clerk of this court, and bears date on the 20th of November. 1866.

The object of that proceeding by mandamus was, to secure a return to the writ of error, on the idea that the jurisdiction of this court, under the act of 1863, on a writ of error, could not be exercised, unless a return was made to the writ of error. The proceeding by mandamus was, therefore, regarded by this court as necessary to the exercise of its jurisdiction. So far as the judgment of this court awards a peremptory mandamus directing the state court to remove and transfer the judgment of the state court, and the record thereof, into the circuit court of the United States, it awards a mandamus to remove the suit by a return to the writ of error. That is the point on which the jurisdiction of this court to issue the writ of mandamus in that case depended; and it by no means follows, because the writ of mandamus was a proper remedy in the case of Murray v. Patrie, that it is at all a necessary or proper remedy in an ordinary case of the removal of a suit before judgment, under the statutes to which I have referred. Under those statutes, a writ of mandamus is not a necessary remedy. The case comes here without any writ of mandamus. A writ of mandamus would be a pure matter of supererogation, in any case of the kind, because the fact that the case comes here without any affirmative action by the state court, and that no affirmative action of the state court is necessary, shows that no mandamus from this court is necessary to enforce any such affirmative action of the state court. The inhibition of the act of congress, that the state court shall proceed no further in the cause, is addressed directly to the state court by the act of congress. As the jurisdiction of this court, under the 14th section of the judiciary act of September 24, 1789 (1 Stat. 81, 82), to issue writs of mandamus, is, as has been determined in numerous cases, by the supreme court of the United States, confined to cases where such writs are necessary to the exercise of the jurisdiction of the court, it follows, that it is not necessary, in any case of the removal of a cause from a state court into this court, except, perhaps, the case of a writ of error under the act of 1863, that this court should issue a mandamus to the state court to remove the case, a mandamus not being necessary to the exercise, by this court, of its jurisdiction over the cause.

I have referred, at some length, to this subject of a mandamus, because there are several cases, in the courts of the United States, which seem to regard a writ of mandamus as an appropriate remedy in a case like the present one. But, in my view, it is never an appropriate remedy for a circuit court of the United States, unless it is a necessary remedy; and it is not a necessary remedy, unless it is necessary to uphold the exercise of the jurisdiction of the court. Although what I have said on this subject is, in one sense, not strictly involved in the question now before the court, yet the general subject of the remedy by mandamus, in a case like the present one, is so connected with the order that is asked for on this motion, that I have found it impossible to come to a satisfactory conclusion without considering the entire question.

The opinion delivered by Mr. Justice Barnard, in the state court, on his refusal to allow this suit to be removed to this court, states clearly the grounds of the refusal. He says: "A liability, or alleged liability, of such corporation, or any member thereof," referred to in the 2d section of the act of 1868, "must, I think, be construed as sole liability, or sole alleged liability. It is very manifest, that congress intended to transfer to the federal courts jurisdiction in cases where a corporation, or a member thereof, created by federal laws, is sought to be made liable by reason of its corporate acts, or by reason of acts of members thereof charged as corporate acts. If this action were of that character, the right to removal could not be well disputed. If the sole object of this action was to compel the company to issue to the plaintiff the certain shares of the company, referred to in the complaint, the company would be entitled to a removal of the same. But an examination of the complaint shows that, in addition to this object, the plaintiff seeks to have set aside, and have declared illegal, certain transactions between the company and the Credit Mobilier of America, as frauds upon the stockholders of the company. Certainly, in this aspect of the case, it is not brought to enforce the liability of the company, but to set aside and annul certain transactions of the company, as ultra vires." He then proceeds to put his refusal to remove the case upon the ground that the action was brought to enforce a joint liability on the part of the company and of other defendants. In other words, he places his refusal on the ground, that there are coupled with a claim made by the plaintiff against the Union Pacific Railroad Company, for an account and payment to him, as a shareholder in the company, of his share in the profits and property of the company, other causes of action, against other parties, which are not for

a liability of the corporation. He then says, in respect to the verification of the petition for removal, by the treasurer of the company, on its behalf, and by the petitioners Macy and Cisco, for themselves: "The petition and verification thereof as to the Union Pacific Railroad Company are regular. The same may be said as to the defendants Macy and Cisco." Nothing is said, in the opinion, upon the question of surety. The surety is not criticised in any way, as being insufficient. The whole case is put upon the construction of the statute. As to that, as I have already stated, I cannot concur with Mr. Justice Barnard. One other fundamental idea, I perceive, runs through his opinion, which is, that if the case comes into this court as to the company, and as to Macy, and as to Cisco, the case, as to the remainder of the defendants, will be left in the state court, which is, nevertheless, commanded, by the act, to proceed no further in the suit. As to that point, also, as I have already stated, I do not concur in the opinion of Mr. Justice Barnard.

It appears by the papers entered in this court, in the cause, by the defendants, that the petition for removal was originally presented to Mr. Justice Cardozo, of the supreme court, on the 31st of July, 1868. The verifications of the petition by the company, and by Cisco and Macy, bear date on the 30th of July. The petition, in all respects, fully complies with the requirements of the act of 1868, so far as the company and Macy and Cisco are concerned, and states, in the body of it, that the petitioners "hereby offer good and sufficient surety, for entering in said circuit court of the United States for the southern district of New York, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit," &c. Appended to the petition, as entered in this court, is a bond to the plaintiff, in the penalty of $10,000, reciting the suit and the petition for removal, and conditioned as required by the act of 1868. There are two sureties to it, each of whom justifies in the amount of its penalty, and it is acknowledged by the sureties. The bond, affidavits, and acknowledgment bear date on the 31st of July, 1868. On that day, Mr. Justice Cardozo, on the summons and complaint in the state court, and the petition, made an order requiring the plaintiff to show cause, on the first Monday of August following, why the petition should not then be filed and the prayer thereof be granted, the prayer being, that the suit be removed to this court, and that the said surety be accepted by the state court, and that the state court proceed no further in the suit. The petition for removal must have been presented to the state court on or before the 6th of August, 1868, because, among the papers entered in this court, in the cause, is an order, entitled in the suit, made by the supreme court, at a special term held on that day by Mr. Justice Barnard, reciting, that a motion had been made in this action, on due notice, based on the petition of the company for the removal of the cause to this court, under and by virtue of the provisions of the acts of congress in such case made and provided, and that time to file papers in opposition to the motion had been given to the plaintiff, on his application, until the third Monday of August. Some time seems to have been occupied in taking testimony before a referee, to be used on the motion to remove the cause, and it does not appear at what time the motion was finally submitted to the judgment of the court. An affidavit made for, and used on, the motion, states, that the petitioning defendants presented the petition to the state court on the 3d day of August, 1868, "and then and thereupon offered in and to said supreme court good and sufficient surety, in pursuance of said acts of congress." The opinion of Mr. Justice Barnard, deciding the motion for removal, was filed on the 4th of March, 1869. The formal order of the state court on the decision, is dated March 10th, 1869. It makes no reference whatever to the fact that any surety had been offered to the state court. It refers merely to the summons, the complaint, the petition for removal, and sundry affidavits used on the motion for removal, and orders that the prayer of the petition be denied. The copy of the petition and the copy of the bond, which are entered in this court, each of them bears an endorsement that it was filed March 13th, 1869. No other conclusion can be drawn from these facts, than that the bond, as surety, was offered to the state court while the petition was pending before it; and no point is made, in the opinion of Mr. Justice Barnard, as to that fact, or as to the sufficiency of the surety. The petition being, as to its contents, in strict accordance with the act of congress, and being under the seal of the company, with an affidavit of its secretary that such seal is its seal, and was set thereto by him by its authority, and being signed by the treasurer of the company, and being, as Mr. Justice Barnard states in his opinion, verified as to the company, in the form authorized by the state practice, and the allegation in it being, as Mr. Justice Barnard also states, positive and not upon information and belief, a proper case for removal was made out. Under the act of 1868, the petition for removal may be made by the company, or by any one member thereof. The petition in this case was made by the company, and it was also made by Cisco, a member thereof, and by Macy, a member thereof. It shows a suit pending against the corporation, for an alleged liability, within the statute; and it is of no consequence that other causes of action are joined with that

cause of action. The complaint in the state court sets forth, that the plaintiff is the owner and holder of six shares of the capital stock of the defendants, the Union Pacific Railroad Company; that the same stand in his name on the books of the company; that he claims to be entitled, as against the company, by subscription, to twenty thousand other shares of its capital stock; and that the directors of the company deny his right thereto, and refuse to give him certificates therefor. He demands judgment, that he may be declared to be a stockholder of the company, in respect to the twenty thousand shares, and to be entitled to an account of all the rights, property, and franchises of the company, at the time he subscribed for the twenty thousand shares, and to be allowed his just proportion thereof; and that, until his rights are fully admitted, and the said accounting be had, and payment be made to him of all to which he may be entitled, the company be restrained, by injunction, from declaring, making, or paying, any dividend or division of any money or property among its stockholders, or any of them. In addition to this claim for a liability of the company, and this prayer for relief against the company, the complaint makes sundry allegations of fact, in reference to other defendants, on which it prays that those of the defendants who are directors, officers, and stockholders of the company, and have participated in the profits of the defendants the Credit Mobilier of America, be declared to be trustees thereof for the company and its stockholders, and held to account for the same; that the company be enjoined from delivering to the Credit Mobilier, and the Credit Mobilier from receiving, any bonds of the United States, or any grants of lands from the United States, or any bonds of the company issued under certain acts of congress; that all contracts made between the company and the Credit Mobilier, and between the company and the defendant Oakes Ames, be declared fraudulent, and be set aside; that the Credit Mobilier return to the company all property, or the proceeds thereof, received at any time by the Credit Mobilier from the company, or under any contract or transfer made by the company; and that the Credit Mobilier be enjoined from dividing any profits, money, or property among its stockholders, until the liabilities of its directors and stockholders to the company and its stockholders shall be, in such action, determined. The petition for removal avers, that the petitioners, who are the company, Cisco, Macy, and three others of the defendants, "have a defence in said suit arising under and by virtue of the constitution of the United States, and the laws of the United States."

I am of opinion, therefore, that a case was made out for removal; that the state court, ipso facto, lost jurisdiction of the case; and that, on the entering of the papers in this court, it can proceed with the suit and with the whole suit. If all the proper papers have not as yet been filed here, the defect can be supplied; but, as far as I am advised, they all have been filed here. The petition for removal must be considered as having been filed in the state court, within the meaning of the act of 1868, when it was presented to the state court with the bond, irrespective of the formal endorsements made on those papers, that they were filed on the 13th of March, 1869; for, otherwise, it would be in the power of the state court to defeat a removal, by making a rule that a petition for removal should never be filed therein, when the state court should refuse to grant its prayer. The act of congress cannot be evaded in that way. It is substantially what South Carolina did, under circumstances which caused the passage of the act of 1833; and New York might do the same. When the proper petition is presented to the state court, with the surety, so that that court acts upon the matter judicially, in any way whatever—and, in this case, such presentation and action took place, as before shown, as early as the 6th of August, 1868—whether the state court accepts the surety or not, unless it puts its refusal upon some valid defect in the petition, or some insufficiency in the surety, it loses jurisdiction of the cause eo instanti.

It was urged, on the motion, that there is, in fact, no defence in this case, arising under, or by virtue of, the constitution of the United States, or any law of the United States, that the defendants themselves have so declared, and that the papers show the fact. There is a decision of this court on that point, made by Mr. Justice Nelson, in the case of Dennistoun v. Draper [Case No. 3,804], to which I have already referred. It was a case of a suit removed from a state court into this court, under the act of 1833. That act requires that, in the petition to this court, the nature of the suit shall be set forth. A motion was made to this court to remand the suit back to the state court. The defendant, in his petition for removal, set forth that he was an officer, acting under the revenue laws of the United States, namely, a cotton agent at the city of New York, appointed by the secretary of the treasury, in pursuance of law, and that he was in possession of the cotton involved in the suit, and which was a replevin suit for the cotton, and held it as captured and abandoned property, under certain statutes of the United States. The motion to remand was founded on the ground that the defendant did not hold the cotton, at the time the replevin suit sought to be removed was brought, as an officer of the revenue laws, or as a person authorized to hold the cotton under such laws, but held it wrongfully, and in violation of the rights of the plaintiffs in it, and was simply a tortfeasor. Upon that point, Mr. Justice Nelson says: "If

the petition and affidavit, with the certificate of counsel, failed to bring the cause within the act of congress providing for the removal, it would be the duty of the court, on motion, to remand it; and such order has, also, not unfrequently been entered in cases where it appeared clearly, by the admission of the parties or otherwise, that they were not within the act of removal. But, in cases where the proceedings are in conformity with the act, the removal is imperative, both upon the state and the circuit court; and, if the facts are seriously contested, it must be done in a formal manner, by pleadings and proofs, in the latter court. The question of jurisdiction belongs to the federal courts, and must be heard and determined there. The statute is peremptory, that 'the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court,' and 'shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the state court, shall be wholly null and void.' It is true, that the plaintiff, after the removal of the cause into the circuit court, has no means, according to the course of proceeding in that court, to raise the question of jurisdiction upon the pleadings; and such disability, doubtless, furnishes some plausibility of reason for the hearing of the question upon motion. But this mode of presenting it, which must be upon affidavits, oftentimes conflicting and irreconcilable, is most unsatisfactory, and should not be entertained unless from unavoidable necessity, with a view to ascertain the appropriate tribunal to hear and determine the cause. I am of opinion that no such necessity exists." He then proceeds to show that the plaintiff can avail himself of the objection to the jurisdiction at any stage of the trial, and that if, when the evidence is closed, it shall appear that the cause is such as not to come within the cognizance of the court, under the act, it will be its duty to instruct the jury that the court has no jurisdiction of the case, and to remand it back to the state court. He further says: "The cause, therefore, in question, was properly instituted in the state court, leaving the only question for consideration, on this motion, as to the legal effect of the removal; and, as to that, I am of opinion, inasmuch as the act of congress has been fully complied with, it is not proper, if it be competent, for this court to determine, upon motion, the disputed jurisdictional facts, involving the right or legality of the removal; and that, inasmuch as the question of jurisdiction involving them cannot be raised upon the pleadings, the proper place to hear and determine them is on the trial, where the plaintiffs will be at liberty to take advantage of the objection." The same view was taken by the supreme court in Mayor v. Cooper, 6 Wall. [73 U. S.] 247, 254. As the defendants, the company, Cisco and Macy, have complied strictly with the act of 1868, by setting out, in their petition, that they have a defence in the suit, arising under the constitution of the United States and the laws of the United States, that averment must be accepted as true, until it is disposed of on the trial of the case. It cannot be inquired into on the present motion, or even on a motion to remand the cause to the state court.

My conclusion, therefore, is, that the whole of this cause is in this court, as respects all the parties to it and all the subject matter involved in it; and that no part of it is now in the state court. Any proceedings which are going on in the suit in the state court are void. Whether, as is alleged in an affidavit used on this motion, such proceedings are going on, or whether, as is claimed on the part of the plaintiff, whatever proceedings, connected with the suit, are now going on in the state court, are not proceedings in the suit, are not questions now presented.

As this court has jurisdiction of this suit, the next question is, whether the relief asked for by this motion shall be granted. The propriety of the action of this court, either directly upon a state court, or upon a party to a suit pending in this court, has been discussed in various cases arising under the laws of the United States, in the courts of the United States. Under the 14th section of the judiciary act, before referred to, which provides that the courts of the United States shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and in view of the general principles of jurisprudence, this court undoubtedly has power, with a view to the efficient exercise of its jurisdiction in this case, to resort to all means that are proper to enforce its jurisdiction. I refer, on this subject, to the case of Board of Com'rs of Knox Co. v. Aspinwall, 24 How. [65 U. S.] 376, and to the case of Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166. In the case last cited, a state court in Iowa has issued an injunction to restrain the levying of a tax to pay a judgment recovered by one Riggs, in the circuit court of the United States for Iowa, against Johnson county, in Iowa, on certain bonds issued by that county. After the injunction had been issued, Riggs, by petition, applied to the said circuit court for a mandamus to the parties enjoined, who were officers of the state, to compel the levying of a tax sufficient to pay the amount of the judgment. In opposition to the application, the issuing of the injunction by the state court was set up. Riggs demurred to such answer, assigning, as cause of demurrer, in substance, that, after the rendering of the judgment by the circuit court, the state court had no jurisdiction to prevent him from using the process of the circuit court, by writ

of mandamus, to collect his judgment. The circuit court overruled the demurrer and Riggs carried the case, by writ of error, to the supreme court. That court reversed the judgment and sustained the demurrer. It held, that the issuing of the mandamus by the circuit court, was to be regarded as a proceeding necessary to the exercise of the jurisdiction of the circuit court; that a circuit court of the United States can issue a writ of mandamus, in all cases where it may be necessary, agreeably to the principles and usages of law, to the exercise of its jurisdiction; and that it can issue such a writ to an officer of a state. To the same effect are the cases of U. S. v. Council of Keokuk, 6 Wall. [73 U. S.] 514, 518. The principle of those cases is, that this court has power to issue a writ of mandamus, and to do any other act of a kindred character, when necessary to the exercise of its jurisdiction. These cases are all based upon the early case of McIntire v. Wood, 7 Cranch [11 U. S.] 504, which holds that the power of the circuit courts of the United States to issue the writ of mandamus, while it exists in cases where the issuing of the writ is necessary to the exercise of its jurisdiction, is confined exclusively to such cases. In the opinion of the court in that case, delivered by Mr. Justice Johnson, the following language is used: "We are of opinion, that the power of the circuit courts to issue the writ of mandamus, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Had the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right, arising under laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the supreme court, and this provision the legislature has thought sufficient at present for all the political purposes intended to be answered by the clause of the constitution which relates to the subject." The case just cited is the one upon which, under the 14th section of the judiciary act of 1789, it has been regarded as settled, that the remedy by a writ of mandamus from a circuit court of the United States, is to be invoked only where it is necessary to the exercise of the jurisdiction of the court. Upon this subject, the remarks of Mr. Justice Woodbury, a very discreet and experienced judge, long in public life, in the case of Ladd v. Tudor [Case No. 7,975], are exceedingly apposite. An application was made to the circuit court of the United States for the district of Massachusetts, to issue a mandamus to a state court, to remove a cause therefrom, under the act of 1789, where the plaintiff was a citizen of Massachusetts and the defendant was a citizen of New Hampshire, and where the state court had refused to remove the cause. Mr. Justice Woodbury, in his opinion, says: "It may not be improper to add a few remarks more as to the use of this particular remedy in a case like this. Some doubt might exist, whether a mandamus to a state court from this tribunal, organized under another government, was the proper remedy." He then cites the case, which has been referred to on this motion, of Spraggins v. County Court of Humphries, Cooke, 260, and says that that case seems to countenance the application before him. He also cites the case of Brown v. Crippin, 4 Hen. & M. 173, and says, that, "although the marginal note of that case says that a mandamus would lie from the circuit court, no such opinion was there given; that it is only suggested whether a writ of certiorari might not lie from the circuit court; and that the counsel strenuously contended that no mandamus would lie from the circuit court, and that the latter had no jurisdiction over the case till it actually came there." He then refers to the case of McIntire v. Wood, 7 Cranch [11 U. S.] 504, and says, that, although that case speaks generally of the power of the circuit court to issue a mandamus, in order to sustain its jurisdiction, and although the decision in the case in Cooke rests on the power of superior courts to enforce their jurisdiction over inferior ones by mandamus, yet it is very questionable whether a case like the one then before him ought to be considered within that principle. He adds: "It is a correct principle between inferior and superior courts of the same government, but difficult to be upheld between courts established by separate governments. If necessary to decide on this, it might require more grave consideration, before sustaining it in cases like this, because, being a mode of redress very likely to lead to jealousies and collisions between the states and general government, of a character any thing but desirable."

It is apparent, therefore, that this one idea runs through all the cases—that the remedy by mandamus will not be exercised by the courts of the United States, except where it is necessary to their jurisdiction. On this principle, in a case of removal like the present, no mandamus is necessary to the exercise of the jurisdiction of this court. This principle, embodied in the 14th section of the judiciary act of 1789, is carried, in spirit, into the 5th section of the act of March 2, 1793 (1 Stat. 334, 335), which provides that no writ of injunction shall be granted by a court of the United States, "to stay pro

ceedings in any court of a state." This provision was intended by congress to prevent conflicts between the state courts and the federal courts, in cases where such conflicts were not absolutely necessary. Where a case goes up to the supreme court, from a state court, under the 25th section of the judiciary act of 1789, and it is necessary to the exercise of the jurisdiction of the supreme court, that it should issue any particular process, of course it will issue it; and so this court, where it is necessary to issue any process, will do so. It issued a mandamus in the case of Murray v. Patrie [Case No. 9,967], because the issue of the writ was regarded as necessary to the exercise of the jurisdiction of this court, with a view to secure a return to the writ of error.

In analogy to this principle, I do not regard it as proper to grant the order asked for in this case. Such an order is not necessary to the exercise of the jurisdiction of this court. On the general principles of comity, irrespective of the act of 1793, if this case is a case which the state court regards as still remaining in that court, and this court shall issue an order restraining the plaintiff, under pains and penalties, from proceeding in the suit in the state court, the state court may grant an order to restrain the defendants, under pains and penalties, from proceeding in the suit in this court. While the issuing of no process appropriate to a suit and necessary to properly maintain the jurisdiction of this court, will ever be intermitted by this court, this court will always sedulously abstain from inviting any of those conflicts which have a tendency to arise, under our mixed system of government, between the federal and the state courts. We have proceeded for eighty years with very few of such judicial conflicts, and, with discretion, they may generally be avoided. Entirely irrespective, therefore, of the act of 1793, my judgment is against the propriety of granting the order asked for.

But there is a further ground which seems to me conclusive against the motion. If this cause is, in fact, in the state court, this court is absolutely prohibited, by the act of 1793, from staying the proceedings in the state court. If this cause is not in the state court, every thing that is going on there, in the way of proceedings in the suit, is an utter nullity and it is, certainly, not becoming for this court to stay proceedings which this court declares to be null and void. It would hesitate long before it would stay void proceedings in a state court. The state court, it is to be assumed, regards the proceedings now going on in this court, in this suit, as null and void; but it is not to be assumed that the state court would undertake to restrain the defendants from carrying on such null and void proceedings. It has not done any thing of the kind as yet, and it would, doubtless, regard such a proceeding as outside of its proper province. So far as appears to this court, the action of the state court, in this matter, has been entirely unexceptionable, as respects this court, or any action of this court. The point upon which Mr. Justice Barnard placed his decision in the state court, in this case, is one upon which I am clearly of opinion that he was wrong; but it is a question as to the construction of a statute, on which judges and courts often differ in opinion.

Irrespective of the views already presented, if this suit is an existing proceeding in the state court, this court is inhibited, by the 5th section of the act of March 2, 1793, from granting an injunction to stay such proceeding. The statute uses, indeed, the words, "a writ of injunction;" but the spirit of it is, that this court shall not in any manner stay a proceeding in a court of a state. It is not an inhibition merely against issuing an injunction in the shape of a writ injunction, mandamus, or prohibition, directed to the state court itself, but it has been construed always as an inhibition against staying a party from conducting such proceedings in a state court. Such was the view of this court in the case of City Bank of New York v. Skelton [Case No. 2,739], where this court was asked to stay a defendant from taking further proceedings in a suit which he had brought in a state court. This court says: "There is an impediment to the enforcement of that principle by this court in the case now before it. One of the suits pending, against which the plaintiffs ask relief, is prosecuted in the state court of chancery, and this court is clothed with no power to restrain or interfere with a suit so situated. A court of the United States, in executing a jurisdiction vested in it, may undoubtedly act upon parties who are suitors in a state court in relation to the same subject-matter, so far, at least, as to compel their submission to such judgment as the United States court may render in a case of which it has cognizance. But, even then, it cannot interdict their prosecuting their suit in a state court, much less control any action pending in such court. It is understood that the state courts uniformly adopt the same doctrine in respect to courts of the United States." In the order made in that case, this court declared, that the proceedings in the state court were not within the cognizance of this court, or subject to its control, and, therefore, it issued an injunction merely restraining the defendant from further prosecuting suits brought by him in this court, until the suit in the state court should be decided.

It results, from these views, that, although this suit has been properly removed to this court, and is now pending here, it is not a proper exercise of the judicial power of this court to grant the order asked for. The motion is, therefore, denied.

[NOTE. For subsequent litigation between these parties, see Cases Nos. 4,828–4,839.]

Case No. 4,828.

FISK v. UNION PAC. R. CO. et al.

[8 Blatchf. 243; 13 Int. Rev. Rec. 77; 3 Alb. Law J. 156; 5 Am. Law Rev. 566.][1]

Circuit Court, S. D. New York. Feb. 13, 1871.

REMOVAL OF CAUSES—AVERMENT OF CAUSE SPECIFIED IN ACT OF JULY 27, 1868—TRIAL ON AFFIDAVIT ON MOTION TO REMAND—SEPARATE PETITIONS—OPPOSITION—SUBSEQUENT PROCEEDINGS IN STATE COURT—OTHER THAN FEDERAL QUESTIONS—PARTIES.

1. Where a petition for the removal of a suit into this court, under the act of July 27, 1868 (15 Stat. 226), avers that the suit has been brought for a cause of action specified in the act, the question whether it has been brought for such a cause of action, cannot be tried on affidavit, on a motion to remand the cause. Per Nelson, Circuit Justice.

2. Under that act, all the parties who claim the right of removal need not join in one petition; but they may petition for the removal, as they are served with process, or otherwise brought into court. Per Nelson, Circuit Justice.

[Cited in Pond v. Sibley, 7 Fed. 137.]

3. The application to the state court, on the petition, is ex-parte, no notice of presenting it to the state court need not be given, and no affidavits can be read before the state court, in opposition. Per Nelson, Circuit Justice.

[Cited in Stevens v. Richardson, 9 Fed. 194; Whelan v. New York, L. E. & W. R. Co., 35 Fed. 865; Strasburger v. Beecher, 44 Fed. 213.]

4. When the removal has been initiated, by the presentation of a petition by one or more of the defendants, and a compliance with the act, it is not competent for the state court to take any proceedings in the suit, other than to perfect the removal, as other defendants may appear and present their petitions. Per Nelson, Circuit Justice.

[Cited in Johnson v. Brewers' Fire Ins. Co., 51 Wis. 589, 8 N. W. 297, and 9 N. W. 657; Sharp v. Gutcher, 74 Ind. 364.]

5. The fact, that questions may arise, in the course of the litigation, besides those under the acts of congress, and which depend upon general principles of law, cannot withdraw the cause from the jurisdiction of the federal courts. Per Nelson, Circuit Justice.

[Cited in Tennessee v. Davis, 100 U. S. 294; Mackaye v. Mallory, 6 Fed. 751.]

6. Nor can the suit be withdrawn from such jurisdiction, by joining defendants who are not within the limitation prescribed by the statute with those who are within such limitation. Per Nelson, Circuit Justice.

In equity. This case came before the court on a motion by the plaintiff [James Fisk, Jr.] to remand the case to the state court, and on a motion by the defendants to dissolve an injunction which had been granted in the suit, by the state court, on the 17th of July, 1868, before any proceedings had been taken for the removal of the suit. For the prior proceedings in the suit, see Fisk v. Union Pac. R. Co. [Case No. 4,827]. The injunction was one restraining the defendants from removing, or allowing to be removed, from the state of New York, any of the books, papers, money or other property of the Union Pacific Railroad Company, or of the Credit Mobilier of America, until the further order of the court.

Edwin W. Stoughton and David Dudley Field, for plaintiff.

Samuel J. Tilden, James Emott and Clarence A. Seward, for defendants.

Before NELSON, Circuit Justice, and BLATCHFORD, District Judge.

NELSON, Circuit Justice. A bill was filed in this case, in the supreme court of the state, by the plaintiff, against the Union Pacific Railroad Company, the Credit Mobilier of America, a corporation of Pennsylvania, and twenty-two other persons. It was filed in the forepart of July, 1868. The precise date is not given, nor is the time when it was served upon the respective defendants. On 3d of August following, six of the defendants, the Union Pacific Railroad Company, John J. Cisco, William H. Macy, Charles A. Lambard, Sidney Dillon and Thomas C. Durant presented a petition to the court to remove the cause to the circuit court of the United States for the southern district of New York, under an act of congress passed July 27, 1868 (15 Stat. 226). The act provides, that any corporation, or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof, as such member, may have such suit removed from the court in which it may be pending to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating that they have a defence arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety for entering in such court, on the first day of its session, copies of all process, pleadings, &c., and doing such other appropriate acts as are required to be done by an act of congress passed July 27, 1866 [14 Stat. 306]; and that it shall be thereupon the duty of the court to accept the surety and proceed no further in the suit: and that, the said copies being entered as aforesaid in such court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process.

The petition presented to the supreme court of the state conformed in all respects, substantially, to the provisions of the act. Some question is made on the part of the learned counsel for the plaintiff, whether the suit is brought against the defendants for a liability, or an alleged liability, of the Union Pacific Railroad Company, or of any of its

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 5 Am. Law Rev. 566, contains only a partial report.]

members as such; and it is claimed, that a critical examination of the bill of complaint will show this not to be the fact. My examination of it has led to a different conclusion. If it had been otherwise, however, I am of opinion it would not have deprived the defendants of the benefit of the act; that is, if it had not appeared affirmatively on the face of the bill that the suit was against them for such liability. The defendants have averred, in their petition, that the suit has been brought against them for such cause of action; and, if a question is to be made upon the allegation, it must be settled at the trial, and not on affidavits.

The 3d section of the act of March 2, 1833 (4 Stat. 633), provides, that, in any case where a suit is brought, in a state court, against an officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, it shall be lawful for the defendant, at any time before trial, upon a petition to the circuit court of the United States, setting forth the nature of the suit, and verifying the petition, &c., to remove the suit to that court, and that the cause shall be entered on the docket of that court. This act, like the one before us, has a limitation upon the privilege of removal. The suit must be against a person for or on account of an act done under the revenue laws of the government, or under color thereof. It cannot be doubted, however, that, if no such fact appeared in the declaration, and it was simply for an assault and battery, he could remove the cause, by setting forth in his petition that the suit was for the cause stated in the act; otherwise, the statute could always be evaded by the pleader. I had occasion to examine this third section at large in Dennistoun v. Draper [Case No. 3,804], and refer to the case for my views in respect to its provisions.

The only question in this case arising out of the act of July 27, 1868, that involves any difficulty, is that in respect to the parties claiming the right to a removal. Are all of them obliged to join in the petition, or may they not apply for it as they are served with process, or otherwise brought into court? In my judgment, they need not all join at the time of presenting the petition, but each, or as many as may see fit, may, without waiting, present the petition, and otherwise comply with the requirements of the act. I perceive no well grounded objection to this practice, but, on the contrary, it may be attended with convenience, and can work no prejudice to either party.

The learned counsel for the plaintiff seem to suppose that the solicitor is entitled to notice of the time and place of the presenting of the petition. But this is an error. The act prescribes no such practice, and it is otherwise under all the previous statutes providing for removals. No affidavits can be read before the state court, in opposition. The application on the petition is ex parte, and depends upon the papers upon which it is founded, and, if they are regular and conform to the requirements of the statute, the court has no discretion—the act is peremptory.

I am, also, of opinion, that, when one or more of the defendants have presented a petition and conformed in all respects to the act, and thus initiated the removal, it is not competent for the state court to take any proceedings in the cause, other than to perfect the removal as other defendants may appear and present their petitions. There may, as in the present case, be numerous defendants, and considerable intervals of time between the service of the process, and where it would be expedient that each should be at liberty to take the necessary steps to remove the cause so far as he is concerned and, in the meantime, it would be unfit, and might be a useless waste of time and expense, to all parties concerned, to proceed in the lititgation until the question of jurisdiction was determined.

I agree with the views of the counsel for the defendants, that the fact, that questions may arise, in the course of the litigation, besides those under the acts of congress, and which depend upon general principles of law, cannot withdraw the cause from the jurisdiction of the federal courts. This principle was settled in Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, and has been recognized as the settled law of the court ever since. Nothing can be added to the conclusiveness of the reasoning of Chief Justice Marshall upon the point, in that case. He observes: "If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn, and a clause in this constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States."

For the same reasons, I am of opinion, that the joining of defendants in a suit, not within the limitation, as prescribed by the act, with those who are, cannot be permitted to withdraw the cause from the jurisdiction of the federal courts. If this were admitted, the privilege extended to the parties setting up a right under the constitution and laws of the United States, would, in most, if not in every instance, be defeated. Indeed, if any such principle could be admitted, most of these acts of removal, depending principally upon the subject matter, and intended to secure the interpretation of the constitution and laws of the United States, at the original hearing, to its own judiciary, would be futile and worthless.

The act of 1833, which provides for the removal of suits against an officer of the United States, or other person, for acts done un-

der the revenue laws, could be readily evaded, by joining one or more persons with him not acting in that capacity. If these outside parties are deemed material, or are really material, to a complete remedy in behalf of the plaintiff, they must be regarded as subordinate and incidental to the principal litigation in respect to which the act of congress has interposed the remedy of removal. In this way, the right of the parties to have their defence under the constitution or laws of the United States, tried in the federal courts, is secured, and, at the same time, the remedy of the plaintiff is unimpaired.

It appears, from the papers before me, that a second petition was presented to the state court by all the defendants not included in the first, on the 27th of March, 1869, and the proper order entered for the removal. There appears to have been a full compliance with the terms of the act. It is objected, that the judge before whom the petition was presented, was not sitting in court but at chambers, when the papers were presented and the order of removal made. But, the affidavits before me show that the proceedings took place before the supreme court. It also appears, that the order, duly certified by the clerk of the court, which had been served on the opposite attorneys, was produced before Judge Blatchford, on the return to the alternative mandamus, by the counsel for the defendants in that proceeding, who suggested that the motion for the peremptory writ was inconsistent with that order, and that, if the order was inoperative, the peremptory writ was unnecessary.

The clerk will enter an order in conformity with this opinion, if Judge BLATCHFORD concurs in the result, and will also enter an order, on the motion of the defendants, to dissolve the injunction of July 17th, 1868, granted by the state court.

BLATCHFORD, District Judge. I concur in the result, that the motion of the plaintiff to remand the cause to the state court must be denied, and the injunction of July 17th, 1868, be dissolved.

[NOTE. For subsequent proceedings, see Cases Nos. 4,829 and 4,830.]

Case No. 4,829.

FISK v. UNION PAC. R. CO. et al.

[8 Blatchf. 299.][1]

Circuit Court, S. D. New York. March 24, 1871.

REMOVAL OF CAUSES—BRINGING IN NEW PARTIES AFTER REMOVAL—FAILURE TO DECLARE AGAINST ALL DEFENDANTS—ELECTION AS TO PROCEEDING AT LAW OR IN EQUITY.

1. A suit was commenced in a state court, and removed into this court under the provisions of the act of July 27, 1868 (15 Stat. 226). The plaintiff then filed a bill in this court in the suit, naming as a party defendant a person who was not a party to the suit as brought in the state court. The defendants moved, for that reason, to take the bill from the files: *Held*, that the motion must be granted.

2. The plaintiff also filed a declaration against some, but not all, of the persons named as defendants in the suit as brought in the state court, containing allegations found in the complaint in the suit as so brought, and asking relief thereon which it would have been proper for the state court to grant in the suit thereon, against the defendants liable thereon, such relief being relief properly grantable in this court only in a suit at law. The defendants moved to take the declaration from the files: *Held*, that the motion must be denied.

[Cited in Railway v. Stringer, 32 Ohio St. 485.]

3. *Held*, also, that the plaintiff could not be compelled to elect whether to proceed at law or in equity in this court, but that, in addition to proceeding with his suit at law by such declaration, he could at the same time proceed by bill in equity for equitable relief, founded on allegations in substance the same as allegations contained in the original complaint in the state court.

[Cited in La Mothe Manuf'g Co. v. National Tube-Works Co., Case No. 8,033; Thorne v. Towanda Tanning Co., 15 Fed. 291; Schneider v. Foote, 27 Fed. 585.]

This is the suit which was before the court in Fisk v. Union Pac. R. Co. [Case No. 4,827], and again, Id. [Case No. 4,828]. The plaintiff [James Fisk, Jr.], after the denial of his motion to remand the cause to the state court, filed in this court a bill in equity against the persons named as defendants in the suit as brought in the state court, and one other person, and, also, a declaration against some, but not all, of the persons named as defendants in the suit as brought in the state court. Thereupon, the defendants made the motions referred to in the opinion of the court.

Edwin W. Stoughton and David Dudley Field, for plaintiff.

James Emott, for defendants.

BLATCHFORD, District Judge. (1.) As to the motion to take from the files the bill in equity, "because one Davis is named as a party defendant therein who is not a party to the action commenced in the state court and removed to this court." This motion must be granted, in any aspect of the case. If the entire suit, as to all the defendants named as such in the original summons in the state court, was removed into this court, in August, 1868, it was not so removed as to Davis, because he was not named as a defendant in such original summons, nor does his name appear as that of a defendant in the suit, in any of the papers, until the 23d of March, 1869. If the suit is not removed as to any defendant until such defendant petitions the state court for the removal of the cause, then this suit is not removed as to Davis, for the reason that he never has petitioned for such removal.

(2.) As to the motion to take the declaration from the files, "on the ground that it

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

does not include or name as defendants to the action which it purports to commence all the persons who are defendants to the original action, and because it does not conform to the form of the action in the state court." This motion is denied. The allegations contained in the declaration are, in substance, contained in the original complaint in the state court, and the relief asked in the declaration, on such allegations, is relief which it would have been proper for the state court to grant in the suit on such allegations, against such of the defendants as should have been found to be liable thereon. Only such defendants as are sought to be made liable on such allegations are made defendants in such declaration. On the allegations in the declaration the plaintiff asks for such relief as is properly grantable in this court only in a suit at law.

(3.) As to the motion "that the plaintiff be ordered to elect whether he will proceed at law or in equity, by declaration or bill, to discontinue all other proceedings than those which he shall elect, and to continue one suit or action only against the defendants originally sued by him in the state court." This motion is denied. In addition to proceeding with his suit at law in this court by such declaration, he may proceed in this court at the same time by bill in equity, for what is properly equitable relief, founded on allegations to be contained in such bill, in substance the same as allegations contained in the original complaint in the state court.

(4.) As to the motion "that the order to answer said bill and rule to plead to said declaration be vacated." The motion that the order to answer the bill be vacated is granted. The motion that the rule to plead to the declaration be vacated is denied, and the defendants are granted thirty days from the service of a copy of the order to be entered hereon to plead or demur to said declaration.

An order will be entered in conformity with the foregoing decisions.

[NOTE. In March, 1873, an injunction was issued against the Credit Mobilier of America, one of the defendants in this suit, to stay certain proceedings in the state court. See Case No. 4,830.]

Case No. 4,830.

FISK v. UNION PAC. R. CO. et al.

[10 Blatchf. 518.][1]

Circuit Court, S. D. New York. March 8, 1873.

INJUNCTION—RESTRAINING PROCEEDINGS IN STATE COURT—ACT OF MARCH 2, 1793—EFFORTS OF CORPORATION—DEFENDANT TO SECURE ITS DISSOLUTION.

1. A corporation, defendant in a suit in equity, and which might be held liable to respond pecuniarily to the plaintiff, in the suit, and which had made one attempt to procure its own dissolution, was enjoined from taking any proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution thereof among its stockholders, or any other persons, and from making any distribution or transfer of any of its effects.

[Distinguished in Kessler v. Continental C. & I. Co., 42 Fed. 259.]

2. The provision of section 5 of the act of March 2, 1793 (1 Stat. 334, 335), that a writ of injunction shall not be granted to stay proceedings in any court of a state, has application only to proceedings commenced in a court of a state before the proceedings are commenced in the federal court.

[Cited in State Lottery Co. v. Fitzpatrick, Case No. 8,541; Hamilton v. Walsh, 23 Fed. 420; Wagner v. Drake, 31 Fed. 851; Sharon v. Terry, 36 Fed. 365; Frishman v. Insurance Co., 41 Fed. 449; Texas & P. Ry. Co. v. Kuteman, 54 Fed. 551; Abeel v. Culberson, 56 Fed. 333; President of Bowdoin College v. Merritt, 59 Fed. 7.]

3. Under the power given to the federal courts, by section 14 of the act of September 24, 1789 (1 Stat. 81, 82), to issue all writs which may be necessary for the exercise of their respective jurisdictions, it may properly be considered as necessary for the continued exercise of the jurisdiction of a federal court over a corporation, that the corporation should be restrained from taking steps, in a state court, to put itself out of existence.

[Cited in State Lottery Co. v. Fitzpatrick, Case No. 8,541.]

[This was a bill in equity by Lucy D. Fisk, as executrix, etc., of James Fisk, Jr., the original plaintiff in this suit (see Cases Nos. 4,827–4,829), against the Union Pacific Railroad Company, the Credit Mobilier of America, and others. It was shown that the Credit Mobilier of America had commenced proceedings in the state court for the purpose of effecting its dissolution. The plaintiff prays for an injunction to restrain said corporation from any further attempts to evade the jurisdiction of the court.]

David Dudley Field, for plaintiff.

James Emott and Albert Stickney, for defendants.

BLATCHFORD, District Judge. It appears from the papers that the profits growing out of one of the contracts must have reached those who received them through the medium of the Credit Mobilier of America, as assignee and owner of such contract, so as to make that corporation, as such, liable to respond in this suit to the plaintiff, and to those on whose behalf the suit is brought, and to the Union Pacific Railroad Company, as creditors of such corporation, for such profits, if any defendant is liable so to respond. It also satisfactorily appears, that the Credit Mobilier of America has some property, and that it has made one attempt to procure its dissolution. The property of corporations is held in trust for creditors, and may be pursued by them into whosesoever hands it may come, as well after as before the dissolution of the corpora-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

tion, unless it may have come to the hands of bona fide purchasers. Hence, the capital stock of a corporation is deemed a trust fund for all the debts of the corporation, and no stockholder can entitle himself to any dividend or share of such capital stock, until all the debts are paid. If the capital stock should be divided, leaving any debts unpaid, every stockholder, receiving his share of the capital stock, would, through a remedy in equity, be held liable pro rata to contribute to the discharge of such debts out of the fund in his hands. Upon the principle, that the property of a corporation is held by its officers in trust, to be applied to the discharge of the legal debts of such corporation, courts of equity interfere to restrain such officers from applying such property to any illegal purpose, and to compel restitution when any illegal application has been made. 2 Story, Eq. Jur. §§ 1252, 1252a. The pursuit of the stockholders may make it necessary to retain jurisdiction over the corporation. It cannot be permitted, that, after jurisdiction, in this suit, over this corporation has been acquired by this court, the corporation should be suffered to take steps to evade such jurisdiction by procuring its own dissolution.

The provision of section 5 of the act of March 2, 1793 (1 Stat. 334, 335), that a writ of injunction shall not be granted to stay proceedings in any court of a state, has never been held to have, and cannot properly be construed to have, any application except to proceedings commenced in a court of a state before the proceedings are commenced in the federal court. Otherwise, after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat, in many ways, the effective jurisdiction and action of the federal court, after it had obtained full jurisdiction of person and subject-matter. Moreover, the provision of the act of 1793 must be construed in connection with the provision of section 14 of the act of September 24, 1789 (1 Stat. 81, 82), that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions. It may properly be considered as necessary for the continued exercise of the jurisdiction of this court over the corporation in question, that it should be restrained from taking steps, in a state court, to put itself out of existence.

The injunction asked for is proper, to restrain the corporation from taking any proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution thereof among its stockholders, or any other persons, and from making any distribution or transfer of any of its effects. If this injunction shall at any time interfere with the doing by the corporation of anything which it ought properly to be allowed to do, application may be made to modify it.

FISK (UNITED STATES v.). See Case No. 15,104.

Case No. 4,830a.

FISK et al. v. WEST BRADLEY & CARY MANUF'G CO.

[19 O. G. 545.]

Circuit Court, S. D. New York. April 29, 1880.

PATENTS—BILL TAKEN PRO CONFESSO—PROOF OF DAMAGE—NOMINAL DAMAGES—COSTS.

1. Where a bill is taken pro confesso and the case referred to a master to ascertain the complainants' damages and the defendants' profits arising from infringement of a patent, and the complainants fail to make satisfactory proof thereof before the master, he can report only nominal damages against the defendants.

2. In such case, if the complainants except to the master's report, and their exceptions are overruled by the court, they will be allowed costs to and including the interlocutory decree; but the defendants will be allowed costs thereafter, the one to be set off against the other to the extent of its amount, and the excess to be recovered of the party against whom it exists.

Master's report: This case does not come to the master after a final hearing upon pleadings and proofs, but upon a decree entered under an order taking the bill pro confesso. The decree therefore does not inform the master precisely in what the infringement consists or what particular suspender-ends made and sold by the defendant come within the reference to ascertain the damages sustained by the plaintiffs or the profits made by the defendant. The plaintiffs have produced before the master three several exhibits, marked, respectively, "C," "F," and "Y," alleged to have been purchased from the defendant, and which they claim infringe the patents upon which this suit is brought, and for the manufacture and sale of which and others like them damages are claimed. The infringement is denied by the defendant. Experts have been examined before the master upon this point, and, as is usual in such cases, differ in opinion. It is not deemed necessary by the master to determine this question of difference, for in the view of the case taken by him it is immaterial. The complainants have been unable to show satisfactorily what number of suspender-ends like Exhibits C, Y, and F the defendant has made and sold, and hence no information is furnished upon which any estimate can be made either of the profits, if any, made by the defendant or of any damages sustained by the complainants. The master is compelled, therefore, to report that the complainants are entitled to recover but the nominal damages of six cents.

W. A. Coursen, for plaintiffs.

M. B. Andrus, for defendant.

BLATCHFORD, Circuit Judge. I see no sufficient grounds for interfering with the report of the master in this case, and the plaintiffs' exceptions to the report are over-

ruled. The plaintiffs are entitled to the costs of the cause to and including the interlocutory decree, and the defendant is entitled to recover its costs from and after such decree, the one bill to be set off against the other and the difference to be recovered by the party against whom it exists.

FISKE (BOSTON MANUF'G CO. v.). See Case No. 1,681.

Case No. 4,831.

FISKE v. HUNT.

[2 Story, 582.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1843.

BANKRUPTCY—RESTRAINING PROCEEDINGS IN STATE COURT—COLLECTION OF JUDGMENT—DISCRETION OF THE COURT.

1. A. sued B., and trustees, in October, 1843, in assumpsit, and as no defence existed, B. was, with his consent, defaulted. The cause was then continued for two successive terms, in order to ascertain whether the trustees had any effects, when, no application having been made to take off the default, or to stay the proceedings, a final judgment was rendered against B. on May 26th, 1843, and execution issued on June 22d, 1843, and was levied on the real estate attached. On January 25th, 1843, B. petitioned for the benefit of the bankrupt act, and was declared a bankrupt on March 14th, 1843. C. was appointed his assignee on April 7th, 1843, and obtained from the district judge a writ of injunction to restrain B. from proceeding in his suit, which was dissolved on the application of B. on April 28th, 1843. This bill was then brought, praying the court to set aside the judgment, and to order the moneys levied upon to be paid over to the assignee, and for other relief. It was *held*, that, as the default was entered before the bankruptcy of B., and was entered without surprise, mistake, or fraud, but with the consent of B., and as no application had ever been made to take it off, that there was no good ground to set aside the judgment.

[Cited in Coggeshall v. Potter, Case No. 2,955; Crapo v. Kelly, 16 Wall. (83 U. S.) 638.]

2. It was also *held*, that, as the suit brought in the district court was not identical with the bill in the present case, the decision therein could not be pleaded as a flat bar; but since the relief asked of this court was a matter in its sound discretion, and not of right, that the decision operated strongly to influence it in refusing to interfere in the matter.

3. The doctrine in Ex parte Foster [Case No. 4,960] affirmed.

[Cited in Hubbard v. Hamilton Bank, 7 Metc. (Mass.) 344.]

Bill in equity [by Augustus H. Fiske, assignee, against Lyman Hunt]. The material facts set forth in the bill and admitted in the answer, sufficiently appear in the opinion of the court. A general replication to the answer was put in; but no evidence was taken by either side, and the cause was, therefore, argued upon the bill and answer.

Rand, for assignee.

B. R. Curtis, for defendant.

[1] [Reported by William W. Story, Esq.]

STORY, Circuit Justice. The statement of the material facts in the present case may be thus briefly given. The creditor, Hunt, sued the bankrupt, Healey, in assumpsit, on a writ of attachment, on which real estate was attached, and the trustees were summoned, in the state court of common pleas for Suffolk county, returnable to the October term, 1842; and no defence then existing, the defendant Healey was, with his own consent, defaulted. The cause was then continued to the next January term of the same court, 1843, in order to ascertain, whether the trustees, or some of them, had any effects; and it was again continued, for the same purpose, to the April term of the same court. At the April term, no application having been made to the court of common pleas to take off the default, a final judgment was rendered against the defendant Healey, on the 26th day of May, 1843. In the intermediate time, to wit, on the 25th day of January, 1843, Healey petitioned the district court for the benefit of the bankrupt act, and on the 14th day of March, 1843, he was accordingly declared a bankrupt; and upon the 20th day of the same month, Fiske (the plaintiff) was appointed the assignee of his estate. On the 7th of April, before the judgment was taken, the assignee made an application to the district judge for a writ of injunction against the defendant, Hunt, that he might be restrained from further prosecuting his said suit, which was granted upon a hearing ex parte on the same day. Hunt afterwards made an application to the court to dissolve the injunction, so granted; and upon the hearing of the case, on the 28th of April, 1843, the injunction was dissolved by the district court; and on the 26th of May, 1843, the judgment was entered in the suit in the court of common pleas. No application was made to the court of common pleas, at any time before the judgment, to take off the default, or to stay the proceedings or judgment. An execution was issued on the judgment on the 22d of June, 1843, and by levies thereon the execution was satisfied for about $4463.98. The bill seeks to set aside the judgment as a fraud upon the bankrupt, and to have the moneys and property levied and received upon the execution paid over and reconveyed to the assignee, and for other relief.

The case, then, for the purposes of the argument, stands for consideration upon the following points: (1.) Whether the assignee is entitled to any relief, in a case where, before the bankruptcy, the judgment debtor has voluntarily consented to be defaulted; and of course, where, in a legal sense, he is out of court, and has no day either for appearance or pleading in the court. (2.) Whether it will make any difference in the case, that the judgment has been rendered after the bankruptcy, with a full knowledge thereof. (3.) Whether it will make any difference, that the assignee has full knowledge of the pro-

ceedings in the court, where the suit is pending, before the judgment is rendered, and makes no application to take off the default, or suspend the judgment. (4.) Whether the final hearing upon the matter of the injunction before the district court is conclusive upon the point, that the creditor, Hunt, was lawfully entitled to take judgment, and that the assignee, having elected his remedy before the district court, can entitle himself in the circuit court to maintain the present bill.

In respect to the three first points (which may be conveniently considered together,) it is material to be borne in mind, that, in cases unaffected with fraud, the assignee generally, although perhaps not universally, succeeds to those rights, and those rights only, which belong to the bankrupt. His remedy may be more extensive, growing out of the bankruptcy; but his rights are not enlarged. In the present case, there is no pretence to say, that the default, or the judgment was a fraudulent contrivance, between the bankrupt and the creditor (Hunt,) to give the latter a preference, in contemplation of bankruptcy. Such a contemplation, if it had existed, would have been sufficient to have vitiated all the proceedings. Now, is there any ground to suggest, that the creditor (Hunt) proceeded to take his judgment suddenly after the bankruptcy, before the assignee was appointed, or had an opportunity to apply to the court of common pleas to take off the default, or to stay proceedings? That might have presented a very different case. Here the case is one, where no application was ever made to take off the default, or stay proceedings so as to let the party into any defence arising under the bankruptcy, in case the bankrupt should obtain his discharge. The bankrupt and the assignee must, therefore, be deemed to have submitted voluntarily to the judgment, either upon the ground, that they would not be successful in any such application, or that it would not furnish, if allowed, any just ground of defence, under all the circumstances. Now, I must say, that, looking to these special considerations, and to the fact, that the default was by the express consent of the debtor (Healey), it does not strike me, that there is laid in the bill any just ground of relief upon the default and judgment. The assignee and the bankrupt have both voluntarily withdrawn from the court, where the suit was pending, and suffered the judgment to go without opposition. In these respects, it must resemble the case Ex parte Vose [unreported], decided in this court a few days ago, although distinguishable from that in some other particulars.

But I should be unwilling to rest the present case upon this narrow ground, because it seems to me, that the court is called upon, by the frequency of the occurences of this sort, to lay down a rule more comprehensive upon the subject. And it strikes me, that, after the term has passed, at which the default has been entered before the bankruptcy, not by surprise, or mistake, or fraud, but by the voluntary consent, or wilful non-appearance of the party, then, and under such circumstances, as the matter of taking off the default is and must be a matter of sound discretion in the court, where the suit is pending, and not of absolute right in the party, this court ought to be very slow in interfering with that discretion; and unless under extraordinary circumstances, raising some equity, it ought to leave the case to the court where it is pending, to act ex aequo et bono, at it deems suited to the merits of the application. But, at all events, I am prepared to say that where a default has been so entered, and an assignee has been appointed before judgment, and has not, with knowledge of the fact, chosen to apply to the court to take off the default, or to stay the proceedings, that, of itself, ought to be deemed an abandonment of any defence in such suit, and conclusive upon all the creditors whom he represents. Further than this it is not necessary to go, in order to decide the present case; and, therefore, I leave the naked question, whether after a default, which has never been taken off, or has been refused to be taken off by the court, and the judgment has been rendered thereon (without any prohibitory injunction,) any redress ought to be given, either in this court or in the district court in bankruptcy, to be decided, when it shall directly arise in judgment.

Upon the other remaining point, as to the effect of the dissolution of injunction by the district court, there may perhaps be more difficulty. The suit in the district court, and the bill in this court, are not, indeed, throughout, identical in their matter, or their claim for relief. The petition for an injunction, under the circumstances, could go no farther than to ask for an interlocutory degree for an injunction, until it should be ascertained whether there should be any discharge granted to the bankrupt, which could be pleaded in bar of the suit. It was, of course, temporary; and the granting it was not decisive of the merits of the application. But when the court dissolved the injunction, which I am to take, from the statement in the case, to have been a decree upon the merits of the application, and not upon any ground of irregularity, there, by implication, the court must have decided that there was no ground to prevent the creditor from proceeding to judgment in his suit upon the default. Now the present bill asks for relief against that very judgment, and to have it set aside, and to have the moneys and lands levied upon under the execution, to be restored to the assignee. This is certainly far broader relief than was claimed, or could, under the circumstances of the case, have been asked or given upon the petition for the injunction. But then the question still arises, whether in a case, like the present, the relief sought is a matter of right, or in the sound

discretion of the court. And if it be the latter only, then whether this court ought to set aside the judgment, and grant the other relief prayed by the bill, after the district court has impliedly sanctioned that judgment by allowing it to be entered. In my judgment, the interposition of the court in a case of this sort is a matter of sound discretion, and not a matter of right in the party. Before the court grants the relief, it should be entirely satisfied that the judgment ought to be set aside, as improperly, or, at least, improvidently obtained; and that the creditor (Hunt) is entitled to no lien or equity in the premises, which should be protected and sustained by the court against the claims of the other creditors. Now, I must say, that I am not able to perceive any solid ground, upon which this incipient claim, or right of priority or lien (call it which you please), created by the attachment, has been displaced, or ought to be displaced. The creditor has but followed out his legal rights to their natural and ordinary consummation. He has obeyed the injunction of the district court, and taken judgment only, when, by the decree of that court, he was definitively informed, that he was at liberty to do so, and that there was not in the judgment of the court, sitting in bankruptcy, any ground to dispute, or to displace, or postpone his legal rights. Now, this was a matter clearly within the jurisdiction of the district court, sitting as a court of equity in bankruptcy, under the 6th section of the bankrupt act of 1841, c. 9 [5 Stat. 440]. If that decision, coming incidentally under consideration, under the view of this court, in a bill in equity for more general purposes is not, and cannot be pleaded as a flat bar to a bill, as I incline to think that it cannot, still it addresses itself strongly to the discretion of the court, as a matter fit to operate upon its own judgment, in refusing to interfere, where the judgment is founded upon a just claim, and the district court has justified the creditor in entering it.

The cases, which have been cited at the bar in support of the bill, are, in my judgment, distinguishable from the present in leading circumstances. I adhere to the doctrine laid down in Ex parte Foster [Case No. 4,960]; and, indeed, after much reflection upon it since it was delivered, I maintain, notwithstanding some doubts, which have been attempted to be thrown over it by those who have certainly misunderstood its true bearing, or have dissented from it, without condescending to answer its reasoning, that it is founded in the true interpretation of the bankrupt act of 1841, c. 9 [supra], and upon authorities of the highest consideration and value. But in that case there was not only no default, but the cause was but just commenced, and no pleadings were had, and, indeed, the writ itself was not returnable until April after the petition was filed. Parker v. Muggridge [Case No. 10,743], was a cause of default, and a continuance for judgment under a special agreement, and it was held, that the creditors had a right, under the agreement, to proceed to judgment, and had an equitable lien on the property attached. In Ex parte Cook [Id. 3,152], the judgment itself was obtained before the petition in bankruptcy was filed; and it was held to be a clear case of lien within the protection of the bankrupt act of 1841, c. 9 [supra]. Ex parte Vose has been already referred to, and, as has been said, approaches very near to the present. So far as it does go, it is against the plaintiff.

The cases, which have been cited from the English courts, to establish the doctrine, that the courts of common law will, after an interlocutory judgment upon default, set it aside in order to allow the bankrupt to plead his discharge, are, it seems to me, founded in good sense and reason. Evans v. Gill, 11 Bos. & P. 52; Duff v. Campbell, 3 Barn. & Ald. 577. See, also, Ex parte Sawtell, 6 Pick. 110; Shearer v. Jewett, 14 Pick. 232; Lovell v. Eastaff, 3 Term R. 554. But they are addressed to the discretion of the court of common law, where the suit is pending, and might have furnished a good ground to that court to take off the default, or to stay the proceedings. But no application was made to the court of common pleas in the present case to take off the default, and final judgment was regularly rendered in the case. There is then no equity, addressed to this court, from the circumstances, upon which it can act upon the judgment. It may be observed too, that the cases cited were to set aside interlocutory judgments; and that, by the late bankrupt act (6 Geo. IV. c. 16, § 108), a special provision has been made to meet cases, where final judgments are rendered, and to take from the judgment creditor any more than his rateable proportion of the bankrupt's assets. But the judgment itself is not interfered with. 2 Tidd, Pr. (9th Ed. 1828) p. 570.

The main stress of the argument of the plaintiff is this, that the lien was a conditional one, and not absolute, dependent upon future contingencies at the time when the bankruptcy took place. To that I agree; but then the judgment has been obtained upon that conditional lien, and perfected and made absolute thereby in a regular manner, without any fraud or impropriety on the part of the creditor, and without any surprise or asserted mistake on the part of the bankrupt, or of his assignee. The latter have had full opportunity to apply for relief and to suspend the proceedings in the court of common pleas before judgment, if they, or either of them, had applied to the court for the purpose. Instead of adopting that course, they have silently acquiesced in the judgment, without interposition or objection. The assignee did apply to the district court for an injunction to stay the proceed-

ings and judgment; but the application failed of final success. The circuit court, therefore, is called upon to say, that a judgment, regularly obtained in the proper court, by which the lien became absolute and was perfected, ought now to be set aside, and the execution thereof avoided, not because the judgment is not a just one, but because, if the assignee had interfered in the proper court, the judgment might have been stayed; and, therefore, the circuit court ought not to do for the assignee what he might have done for himself in another court, if he had thought proper to act in the premises. It appears to me, that the present case falls directly within the reasoning of the case Ex parte Vose. The assignee has not interfered at the proper time, or in the proper court, to stay the judgment or to take off the default, and, therefore, he may, in a just sense, be said voluntarily to have withdrawn himself from the suit.

Upon the whole, in every view, in which I can contemplate this case, it is not one in which the assignee is entitled to relief in this court. Bill dismissed without costs.

Case No. 4,832.

FISKE v. MASSACHUSETTS NAT. BANK.

[See Case No. 9,857.]

FISKE (MOODY v.). See Case No. 9,745.

FISKE (PALMER v.). See Case No. 10,691.

FISKE (RISCH v.). See Case No. 11,855.

Case No. 4,833.

FISKE et al. v. SMYTHE.

[15 Int. Rev. Rec. 115.]

Circuit Court, S. D. New York. April 8, 1872.[1]

CUSTOMS DUTIES—CLASSIFICATION—SILK NECKTIES.

[Silk neckties imported in 1868 are dutiable at 35 per cent. as "wearing apparel," under the acts of 1861 and 1862 (12 Stat. 186, 555), and not at 60 per cent., as scarfs by similitude, under the act of August 30, 1842, § 20 (5 Stat. 565).]

[Distinguished in Cohen v. Phelps, Case No. 2,964.]

[See note at end of case.]

This was an action to recover duties claimed to be illegally exacted upon an importation of silk neckties made in October, 1868, upon which the defendant [Henry A. Smythe], then collector of the port of New York, had assessed and collected duty at the rate of 60 per cent., under the act of March 3, 1865 [15 Stat. 493], as upon "ready-made clothing of silk." On appeal to the secretary of the treasury, the rate charged was affirmed, but the goods were classified as scarfs by similitude under section 20, act of August 30, 1842. Plaintiffs [Henry G. Fiske and others] contended that the articles were provided for as "wearing apparel and articles worn by men, women, or children," at 35 per cent., under the tariff acts of 1861 and 1862. Evidence was introduced for the plaintiffs, showing that the article "neckties" was known in trade and commerce as gentlemen's furnishing goods, and not as ready-made clothing; that they were not scarfs, which were made in a different way and of different patterns.

Edward Hartley and B. L. Ludington, for plaintiffs.

Noah Davis, Dist. Atty., for defendant.

After argument THE COURT charged the jury that the goods were not under the evidence, and in view of the cases cited, "ready-made clothing," nor could they be liable to duty by similitude, under the act of 1842, because that law affected only non-enumerated articles, and these were enumerated under the title of wearing apparel; hence they were not dutiable as scarfs, and directed a verdict for the plaintiff.

[NOTE. The defendant Smythe sued out a writ of error on which this judgment was reversed by the supreme court, Mr. Justice Swayne delivering the opinion. It was held that the silk neckties were dutiable at 50 per cent. ad valorem under the provisions of the act of July 30, 1864 (13 Stat. 202), which act imposes a duty of 60 per cent. "on all dress and piece silks," etc., and on all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, 50 per cent. ad valorem. It was held that the neckties were dutiable under this last clause as a manufacture of silk not otherwise provided for. Smythe v. Fiske, 23 Wall. (90 U. S.) 374.]

FISLER (UNITED STATES v.). See Case No. 15,105.

Case No. 4,834.

FITCH v. CORNELL et al.

[1 Sawy. 156.][1]

Circuit Court, D. Oregon. May 10, 1870.

EJECTMENT—WHEN LANDLORD MAY BE MADE DEFENDANT — ANSWER SHOULD STATE FACTS, NOT EVIDENCE—EXHIBIT NO PART OF A PLEADING—DIVORCE — DISPOSITION OF PROPERTY OF THE PARTIES—MINOR DEFENDANTS—HOW JURISDICTION OF ACQUIRED—JUDGMENT IN EJECTMENT—WHEN NO BAR TO ANOTHER ACTION — MESNE PROFITS—SET-OFF.

1. A landlord has no right to apply to be made defendant in an action of ejectment in place of the tenant until the latter files his answer, stating "that he is in possession only as the tenant of another, naming him and his place of residence." Code Or. 226.

2. A defendant in ejectment should state in his answer the nature and duration of the estate he claims in the premises, if any, but not the evidence of it. Code Or. 226, 227.

[1] [Reversed in 23 Wall. (90 U. S.) 374.]

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

3. An exhibit is no part of a pleading in an action at law; a record or instrument should be stated in a pleading either according to its tenor or legal effect.

4. The Oregon act of January 17, 1854, relating to marriage and divorce, which gave the court granting a divorce power to "make such a disposition of the property of the parties" as might appear "just and equitable" under the circumstances of the case, and to "make such disposition of and provision for the children as shall appear most expedient," did not authorize such court to give the property of either parent to the children, except during their minority, and as a means of providing for their nurture and education during such minority.

5. A general guardian cannot voluntarily appear for minor defendants, but they must be served with process, and a guardian ad litem appointed for them, when brought into court.

6. If a verdict for the defendant in an action of ejectment, only states that the defendant is entitled to the possession of the premises, a judgment therein is not necessarily a bar to another action between the same parties for the same property. Code Or. 227.

7. A plea of set-off for permanent improvements made upon the premises in an action for mesne profits, is not sufficient, unless it allege that such improvements were made by the defendant, or those under whom he claims while holding under color of title, adversely to the claim of the plaintiff and in good faith. Code Or. 227.

[This was an action at law by J. B. Fitch against William Cornell, A. R. Tunstall, Jonathan Moore, and Jacob Kline, Jr., to recover the possession of certain real property.]

Joseph N. Dolph and Walter W. Thayer, for plaintiff.

Erasmus D. Shattuck, for defendants.

DEADY, District Judge. This action was commenced April 16, 1869, to recover the possession of lots 3, 4, 5 and 6, in block 111, in the city of Portland, against George W. Durand, then in the actual possession of the premises. The complaint alleges that the plaintiff is a citizen of the state of California, and said Durand is a citizen and resident of Oregon; that plaintiff is the owner in fee-simple of the property sued for, and entitled to the immediate possession thereof; and that the defendant Durand is wrongfully in possession of the same and withholds such possession, to the damage of plaintiff $1,000.

Among the papers in the case is one purporting to be the answer of Durand, and signed by his attorneys, and verified by him on April 27, 1869. The paper is attached to the separate applications of William Cornell and others to be made defendants in place of Durand, the outer one of which is marked "Filed May 3, 1869." I presume it was assumed by the attorney, that this answer being attached to these applications, it became a part of them, and was filed with them. But this is a mistake. It has no connection with them, and ought not to have been attached to them. It comes from another source, and should have been filed before the applications were entitled to be heard. A landlord has no right to apply to be substituted as defendant in place of the party who is in actual possession and sued, until the latter by his answer made and filed in court, declares "that he is in possession only as the tenant of another, naming him, and his place of residence." Code Or. 226. Such slovenly and irregular practices touching matters of this kind are often in after times the cause of innocent parties being involved in unnecessary and expensive litigation, and therefore ought not to be tolerated by the courts. For this reason I call attention to it in this instance. Having done so, I will assume for the purposes of this case, that it was in fact filed, although not so endorsed, by being lodged in the clerk's office, and placed by the clerk among the papers of the case, and that therefore Cornell and others had a legal right to be made defendants in place of Durand, the party in possession.

The answer of Durand admits that he is in possession of the premises, but alleges that he holds such possession as the tenant of William Cornell, S. M. Tunstall and Mary Jane, his wife, Jonathan Moore and Jacob Cline, residents of Multnomah county, in the district aforesaid.

On May 5, 1869, William Cornell, in pursuance of the order of the court making himself and the others aforesaid defendants, in place of Durand, filed an answer to the complaint, which contains the following pleas or defenses:

1. A specific denial of each material allegation of the complaint, except the citizenship of the parties and the possession of the defendants.

2. That the defendant is the owner in fee of an undivided one fourth of the premises, for which he defends. This plea, instead of stopping here, proceeds at length to state the evidence which the defendant claims proves the fact that he is the owner of such undivided interest in the premises. This part of the plea will be omitted here and stated in the evidence.

3. That the plaintiff ought not to have and maintain this action, because in an action heretofore brought by one Jacob Cline to recover the possession of the same premises against John Hulery, in the circuit court for the county of Multnomah, and state of Oregon, in which one Mary Cline, guardian for her minor children Antha, Isabella, Mary Jane and Jacob Cline, was admitted by the order of said court as a defendant in place of said Hulery, as guardian aforesaid, it was on December 5, 1863, by the judgment of said court determined that said Mary Cline, as guardian aforesaid, was entitled to the possession of said premises, and that Jacob Cline take nothing by his said action; and that afterwards the said Jacob Cline appealed from the judgment of the said circuit court to the supreme court of the state aforesaid, and said supreme court, on hearing and consideration of said appeal gave judgment

on September ——, 1864, affirming the judgment of the said circuit court, which still remains in full force and effect; and that said judgments of said circuit and supreme courts are conclusive as to the estate in said premises, and to the right to the possession thereof upon said Cline and all persons claiming under him since the commencement of said action, and that the only right or title held by the plaintiff herein, is derived from Cline since said action was commenced.

4. That the defendant and those under whom he claims since November 26, 1862, have made permanent improvements upon the premises, of the value of $1,000, which sum he offers to set-off against any sum that the plaintiff herein may be found entitled to as damages on account of the defendant's occupation of the premises.

The other three defendants filed separate and similar answers, Mary Cline appearing and answering for her ward, Jacob Cline aforesaid. On May 6, the plaintiff filed separate replications to the answers of the defendants. These do not contain, as they should, separate replies to the separate defenses in said answers, of title in the defendants, and a former adjudication of the right to the possession of the premises. As to the plea of title, they deny that the defendants are each the owners of an undivided fourth of the premises, or of any estate or interest therein, and then proceed to reply to the evidence of defendants' alleged title, as set forth in the plea of title in the answer —either denying the facts stated, or the legal conclusions sought to be drawn therefrom. The proper reply to this part of these pleas would have been a motion to strike out for redundancy. As to the pleas of former adjudication, the replications admit that an action was brought in the circuit court aforesaid, by Jacob Cline against John Hulery, to recover possession of the premises in the complaint mentioned, as stated in said pleas, but deny that it was adjudged therein that said Cline take nothing by said action, or that the same was brought for the identical causes as this, or that "all the matters involved in this action were adjudged or finally determined" therein; "and alleges that a true copy of the judgment in said action is hereto attached and marked 'A';" and denies that said judgment of the circuit and supreme court aforesaid, are conclusive as to the estate in said property, or as to the right to the possession thereof upon said Jacob Cline, or those claiming under him as alleged in said pleas.

As to the so-called "Exhibit A," attached to the replications, it cannot be regarded as a part of them. There is no such thing as an exhibit in pleadings, in an action at law. A record or instrument must be stated in a pleading according to its legal effect, or according to the tenor thereof, and its legal operations referred to the court. Gould, Pl. 156–160. The plaintiff by his replication, denies that the action mentioned in this record or so-called "Exhibit A," was brought for the same causes of action as this, and also denies the legal effect claimed for such record by the defendants in their answers. This is sufficient, so far as the pleadings are concerned. The burden of proof is upon the defendants, to show the existence of such a record, and that they have correctly stated its legal effect.

From the evidence it appears:

I. That in 1836, in the state of Illinois, Jacob Cline and Mary Cline were intermarried, and that they continued to live together as husband and wife, until 1862, and that since 1844, they have resided in Multnomah county, Oregon.

II. That on September 26, 1862, Mary Cline commenced a suit against Jacob Cline, her husband, for a divorce from the bonds of matrimony, on account of adultery and harsh and cruel treatment, and for the custody and guardianship of four minor children of said marriage, and for a division of Jacob's property, and an allotment of so much thereof to said Mary, as might be just and equitable under the circumstances; and that Mary was the owner in her own right of one half of the donation claim of 640 acres of said Jacob and Mary, of the value of $2,500; and that said Jacob was the owner of the other half of said donation claim, together with other real property situate in the city of Portland, of the value of $18,000, and of personal property of the value of $5,000, all of which has been acquired since the marriage aforesaid, except $1,500 which Jacob possessed at that time; and that there were then living seven children, the issue of said marriage, four of whom were minors, between the ages of nineteen and seven years.

III. That on November 26, 1862, said circuit court by its decree then given, in said suit for divorce, etc., adjudged and provided, that the parties thereto be divorced from the bonds of matrimony; and that said Mary "have the custody and guardianship of the four minor children of the parties mentioned in the complaint, to wit: Antha, Isabella, Mary Jane and Jacob, and the care and control of their estate during their minority respectively;" and that the defendant's half of the donation claim aforesaid, and lots five and six in block seven, in the city of Portland, then owned by Jacob, be given to and "vested in said Mary, to have and to hold to her own use during her natural life," which real property, according to the statements of said parties in their respective pleadings, was then of about the value of $5,200; and also that certain furniture owned by said Jacob, of the value, according to the statements aforesaid, of about $500, "be given to, and transferred to said Mary, to have and to hold the same to her own use;" and that said Jacob pay to said Mary the sum of $1,500 in money out of the

remainder of said property in two payments within the period of six months thereafter; and also "all the right, title and interest of said Jacob in and to lots three, four, five and six, in block 111 in the city of Portland, be and the same is divested out of the said Jacob, and the same is hereby vested in the four minor children of the parties, to wit: Antha, Isabella, Mary Jane and Jacob, as tenants in common, to have and to hold the same with the appurtenances to them and their heirs forever, and the same Jacob is hereby ordered and required to deliver over to the said minors or their guardian, the possession of said property, and said guardian is hereby required to use and apply the issues, rents, and profits of said estate, to the maintenance and education of said minors respectively, according to their interest during their minority, which last mentioned property is the same for the possession of which this action is brought, and which at the date of said decree, according to the statements of the parties aforesaid, was of the value of about $3,600; and further, that the remaining property and pecuniary rights of Jacob not disposed of by said decree, remain to him as if the same had not been made."

IV. That Jacob paid said sum of $1,500 to said Mary, and also the costs of said suit; and that on November 25, 1863, Jacob gave notice of an appeal from the decree aforesaid to the supreme court of the state of Oregon, and that on September 21, 1864, said supreme court, on motion of respondent, dismissed said appeal, without hearing the cause upon its merits, because so far as appears, no transcript thereof was filed by appellant in said court.

V. That on October 8, 1863, said Jacob Cline brought an action in the circuit court aforesaid against John Hulery, to recover possession of the lot in controversy, alleging in his complaint therein, that he was the owner in fee and entitled to the possession of the premises, and that the said Hulery was wrongfully in the possession thereof. On the same day Hulery was duly served with process requiring him to appear and answer the complaint by November 9, which he failed to do. On November 14, Cline moved for a judgment against Hulery; and on the same day Mary Cline moved for leave to appear and answer as the landlord of Hulery. Accompanying this latter motion, was the affidavit of Mary to the effect that the property in question belonged to her children, and as their guardian, she was entitled to the possession of the same; and that she had rented it to Hulery, and had no notice of the pendency of the action until the day before, whereupon said circuit court denied the motion of Jacob and allowed the motion of Mary. On November 16, Mary filed an answer to the complaint of Jacob, wherein she denies that he is the owner of the premises and entitled to the possession thereof, and pleads, according to the tenor thereof, so much of the decree in the suit of divorce above mentioned, as relates to the premises in controversy, and that as guardian of the minor children aforesaid, she had rented said property to Hulery, who was then in the possession of the same as her tenant; and that she was applying the rents and profits of said property to the support of said children, in pursuance of said decree.

VI. That the action aforesaid was tried by the said circuit court, without the intervention of a jury, and on December 4, the said court found, as a conclusion of fact, that "Mary Cline is the guardian of the minor children named in the answer, and as such, was at the time of the commencement of this suit, and is by her tenant, the defendant Hulery, in possession of the premises described in the complaint;" and "that the decree, an extract of which is set out in the answer, remains unreversed, and at the date of the answer not appealed;" and that said court also found "as a conclusion of law from these facts, that the defendant Mary Cline, as guardian, etc., and the defendant John Hulery as her tenant, are entitled to the possession of said premises." And afterwards, on December 5, the court aforesaid gave judgment in said action and upon said findings, as follows:

"This cause being submitted to the court upon the pleadings and an agreed statement of facts, the court finds that the defendant Mary Cline, as guardian, and the defendant Hulery as her tenant, are entitled to the possession of the premises described in the complaint, and it is ordered and adjudged by the court that the defendant Mary Cline, as guardian, and defendant John Hulery as her tenant, do have and hold the possession of said premises, and that they recover of and from the plaintiff their costs and disbursements, to be taxed." And that afterwards Jacob Cline took an appeal from said judgment of said circuit court to the supreme court of the state of Oregon, upon the hearing and consideration of which, it was determined by said supreme court, on September 27, 1864, that there was no error in the record of the proceedings in the court below, and that its judgment "be in all things affirmed."

VII. That in the month of August, 1862, Jacob Cline became and was the owner in fee simple of the premises, and that soon after the decree of divorce aforesaid, Mary Cline, with the knowledge of Jacob, received the rent from the tenant in possession of the same, and after said tenant left the premises she rented them to Hulery aforesaid, and that the use and occupation of the same since November, 1862, has been worth not less than $45 per month, or $520 per annum; and that on December 9, 1868, Jacob Cline and Sarah Ellen, his wife, executed a conveyance of

the premises to the plaintiff herein; and that Isabella aforesaid intermarried with one James Campbell in the month of December, 1867, and that afterwards and before December, 1868, she and her said husband duly executed a conveyance of an undivided one fourth in the premises to the defendant Moore; and that Antha aforesaid intermarried with one Peter Cline prior to December, 1868, and afterwards and prior to the last mentioned date, she and her said husband duly executed a conveyance of an undivided one fourth interest in the premises to the defendant, Cornell; and that Mary Jane aforesaid, after the decree of divorce aforesaid, and before the commencement of this action, intermarried with one S. M. Tunstall, one of the defendants herein; and that said Antha, Isabella and Mary Jane had each arrived at the age of majority before the commencement of the action, and that Jacob Cline, Junior, is now aged fifteen years and six months.

Upon this statement of the case, two principal questions arise, and were argued by counsel.

1. Had the circuit court of Multnomah county jurisdiction and power in the suit for divorce between Mary and Jacob Cline, to take the property of the latter and vest it in his children, or any of them? and,

2. Is the plaintiff barred from maintaining this action to recover the possession of the premises by reason of the judgment of said circuit court, in the action of Jacob Cline against Hulery aforesaid.

The answer to the first question depends upon the construction to be given to the statute then in force, entitled—"An act relating to marriage and divorce," passed Jan. 17, 1854, and which took effect on the first of May following. The second and last chapter of the act is entitled—"Divorce and Alimony." After declaring the causes for which a divorce might be granted, and in what court the proceedings should be had, and the mode of them, the act provides as follows:

"Sec. 7. The court in granting a divorce, shall make such disposition of, and provision for the children, as shall appear most expedient under all the circumstances, and most for the present comfort and future well being of such children. * * *

"Sec. 8. In granting a divorce, the court shall also make such a disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and the burdens imposed upon it, for the benefit of children. * * *

"Sec. 10. When the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be entitled to her dower in his lands in the same maner as if he were dead; but she shall not be entitled to dower in any other case of divorce." St. Or. 1855, p. 540.

This act remained in force until June 1, 1863, when it was superseded by title 7, of chapter 5, of the Civil Code, passed October 11, 1862. Code Or. 269. If the act has received a settled construction in the courts of Oregon, it is the duty of this court to follow such construction. But I do not think it can be said to have received such a construction. It contained no provision for an appeal from the inferior courts in which the original jurisdiction was vested, to the supreme court, and therefore its provisions never came before the latter court, and were never directly considered or expounded by it. During the existence of the act, the decisions of the district courts, until the state organization went into operation in 1859, and thereafter the circuit courts, were final in each case. The defendants have produced five decrees of these courts in support of the position that the act authorized the court to give the real property of the parties, or either of them, to the children.

In Horner v. Horner, on September 5, 1855, there was a decree of divorce on the complaint of the wife. The parties were in possession of a donation claim of 640 acres, under the act of congress, each being entitled to one half thereof in his or her own right. The court (Olney, Judge) gave the wife her half of the land, and gave the husband's half to two minor children of the parties. In Shively v. Shively, on June 15, 1857, there was a divorce granted on the complaint of the wife. The parties were in possession of a donation claim, and the court (Olney, Judge) gave the husband his half of the land, and gave the wife's half to the minor children of the marriage. In Fozette v. Fozette, on August 15, 1859, there was a divorce granted on the complaint of the wife, and the parties appear to have been in possession of a donation claim of 640 acres. The court (Wait, Judge) divided the wife's half of the claim between herself and two minor children, but made no disposition of the husband's half. In Soverns v. Soverns, on November 29, 1860, there was a divorce granted on complaint of the wife. The court (Wait, Judge) divided the land of the husband (160 acres) between the wife and one minor child of the marriage. In Stone v. Stone, on August 6, 1859, a divorce was granted on the complaint of the wife. The parties were in possession of a donation claim of 640 acres. The court (Wait, Judge) gave the husband his half of the claim, and divided the wife's half between herself and one infant child of the marriage.

No other instances of the exercise of this power have been shown, and these are confined to one judicial district of the state, the same in which Cline v. Cline [3 Or. 355] was decided. In the other judicial districts, no such construction appears ever to have been

given to the act, and only in these comparatively few instances in a period of nine years, in that one. If this state of things is any evidence of a settled construction of the statute by the courts of Oregon, it is against the one claimed by the defendant. I conclude, then, that the question is unsettled, and that this court must construe the act for itself.

The primary object of the statute was to authorize and provide for the dissolution of the marriage relation in certain cases when, on account of the neglect, misconduct or unfitness of one of the parties to it, the other, in the judgment of the legislative assembly, ought no longer to be bound by it. But when a divorce is granted, the parties are not restored to their original condition, and it becomes necessary to provide for and adjust the rights of the parties in and to the property of each other, and to make disposition of and provide for the future custody and maintenance of the minor children of the marriage. This power is merely incidental to that of granting the divorce, and therefore ought not to be extended or applied farther than is necessary and convenient to provide for the altered circumstances of the parties directly consequent upon their judicial separation. Unless a divorce is granted, the court has no power over the property or children of the parties. The power to dispose of the property of the parties is not an unqualified one. Certainly it would not be contended that the legislature intended to give the court power in its discretion to dispose of the property by giving it to the parents of the parties, or to their cousins or strangers, or to charitable uses; nor, it seems to me, could the rights of creditors be prejudiced or excluded by such disposition. In making this disposition, the court is required by the act to have "regard to the respective merits of the parties;" that is, the parties whose property is to be disposed of, are the parties whose "respective merits" are to be regarded by the court in making such disposition. Now, the necessary inference from this clause is, that in disposing of the property the court is confined to the parties whose "merits" it is required to consider in making it. These parties are the parties to the suit—the husband and wife—and not other persons, whether strangers or relations, lineal or collateral. Again, the court in disposing of the property of the parties, is to have regard "to the condition in which they"—the parties to the suit—"will be left by such divorce;" and also "to the party"—one of the parties to the suit—"through whom the property was acquired," and "to the burdens imposed upon it"—the property divided between the parties—"for the benefit of children."

From these considerations I conclude, that section 8, which authorizes the court granting a divorce "to make such disposition of the property of the parties, as shall appear just and equitable," cannot and ought not to be construed as giving power to such court to dispose of such property by giving it to third persons—even if they were the children of such parties. The only disposition of the property which this section authorizes the court to make, is one between the parties to the suit. Whether its power in this respect is absolute or not, is a serious question, but for the purposes of this action it may be admitted to be unlimited.

But it is claimed that, under the clause already quoted from section 7 of the act, the circuit court had power to give the premises in controversy to the minor children of Cline. This clause provides that, "the court in granting a divorce, shall make such disposition and provision for the children as shall appear expedient under the circumstances, and most for the present comfort and future well-being of such children." This power to dispose of and make provision for children, is given to the court by the statute only as an incident to the power to grant a divorce. Therefore, as has been said of the power to dispose of the property of the parties, it ought not to be extended or applied farther than is necessary and convenient for the altered circumstances of the parties directly consequent upon their judicial separation.

During the marriage, the custody of the children belongs to the parents jointly, subject to the ultimate authority of the father as the head of the family, but upon a divorce being granted, it is or may be impossible that this joint custody can be continued. To meet this emergency, the court is authorized to dispose of the children. But it would not be authorized to dispose of them by giving them to a third person, whom it regarded as better qualified than either of the parents. The act was not made to enable the circuit court to interfere with the relation of parent and child only as an incident of the power of granting a divorce, and then only as far as might become necessary on that account. The joint custody of the parents being determined or rendered impracticable by the divorce, the only power of the court in the premises is to provide for the emergency by giving the children to one or the other of them.

This word "children" must be construed to mean minor children. If the children of the parents are of age when the divorce is granted, the court has no power to dispose of them or provide for them. The reason is, they are no longer in the custody or under the control of their parents, nor are the latter bound to maintain them, except under peculiar circumstances arising from poverty and sickness. So with the power to make "provisions for the children" of divorced parties, it must be exercised in subordination to the proposition that the court is only authorized to make provision for their maintenance, so far as the condition and circumstances of their parents warrant and require, and their

divorce renders it necessary. Of course under no circumstances, would it be authorized to make provision out of the property of the parties or either of them, for the maintenance of children who are of age, and whom the parents are therefore not bound to support.

Whether, under the authority to make provision for the minor children of Jacob Cline, the court had authority to take the premises in controversy, and give them to such children outright, during their minority, or to their mother in trust for them, may be a question. The act, in some particulars, seems rather to contemplate that the provision shall be made in the usual way, by giving the parent to whom the children are confided, a larger portion of property, to enable him or her to meet the burden of their maintenance, or by imposing upon the property of the other a charge sufficient for that purpose. But the act, so far as it gives the court jurisdiction, does so unqualifiedly. There is no limit or restraint as to the choice of means by which the court shall make this provision, and I am inclined to the opinion that the court, if it appeared "expedient under all the circumstances," had authority to vest the property in the children or their mother, for their use, for that purpose. But as Jacob Cline was not bound to support his children after they became of age, the court had no authority to make any provision out of his property for their maintenance, to extend beyond the time when they would become obliged to support themselves. The circuit court, although authorized to divorce Mary from Jacob, and as between themselves to make a just and equitable disposition or division of their property, and to dispose of and provide for the maintenance of their minor children, had no power to anticipate Jacob's demise, and to make a will for him devising this property to these children—"to have and to hold the same with the appurtenances to them and their heirs forever."

Upon this point it seems to me there is no room for difference of opinion. The decision of the circuit court given in the suit for divorce, so far as it provides that the premises in controversy should be held by, or for the use of the minor children of Jacob, beyond the time when they should become of age respectively, is simply void. Upon any construction that I am able to give the act, the legislative assembly did not intend that a father's property should be arbitrarily taken from him and given to his adult child, or what amounts to the same thing, to his minor child to hold and possess after he becomes of age, because forsooth, in a civil suit for divorce, he was adjudged to have broken his marriage vows, or neglected the duties which they imposed upon him. The two things have no necessary connection; and if the act expressly provided for its being done, it would be so far void. Such a disposition of property amounts to a forfeiture without due process of law, and is beyond the power of the legislative assembly to authorize.

The consequence of vesting the arbitrary discretion in any court to take a parent's land and give it to his or her child, because in the judgment of the court it is expedient or best for the child, is singularly illustrated in the above cited case of Stone v. Stone. There the divorce was granted upon the complaint of the wife for the fault of the husband: The parties owned 320 acres of land apiece, each in their own right. The court, in legal effect, divested each of any right to or interest in the land of the other. As the mother was the innocent party, and the only issue of the marriage was an infant female child, the court very properly gave it to the custody of the mother, but instead of giving the mother a portion of the father's land, to assist her in bringing up the child, or charging it with the payment of some sum of money for that purpose, the court arbitrarily took one half of the mother's land, and gave it to the child forever.

I next proceed to consider the second question as to whether the plaintiff is barred from maintaining this action on account of the previous adjudication in the case of Cline v. Hulery [Case No. 2,897]. The plaintiff Fitch claims under Jacob Cline, and of course is bound by that adjudication as far as Cline, his grantor, is. They are privies in estate. But the judgment in Cline v. Hulery cannot operate as an estoppel against Cline or his grantee in this action, unless it also binds the defendants. Estoppels, to be binding upon either party, must be mutual. Deery v. Cray, 5 Wall. [72 U. S.] 803. In this case there is no such mutuality. The defendants now before the court were neither parties nor privies to the judgment in the action of Cline v. Hulery. The minor children of Jacob and Mary Cline were not served with process in that action, and the court never acquired jurisdiction of them. Consent will not give jurisdiction as to minors, but the proceeding must be in invitum. No guardian can voluntarily appear for a minor, but he must be served with process and thereby brought into court, and a guardian ad litem then and there appointed for him. Code Or. 146, 151. It seems that Mary Cline assumed that she was the landlord of Hulery, the person in possession, when in fact, upon her own showing, the minor children were such landlords, and she was in some sort their guardian or trustee. It is not even clear there was any person properly before the court in that action as defendant, except Hulery. True, Mary Cline was admitted to defend the action as the landlord of Hulery, in opposition to the motion of plaintiff for judgment against H. for want of an answer. But it is not perceived on what ground the court made this order, as the law authorizing the landlord to be made defendant in the place of the tenant, in an action of ejectment, does

so only upon the condition or contingency that the tenant against whom the action is brought shall first answer and plead, "that he is in possession only as the tenant of another, naming him and his place of residence." "Thereupon, the landlord, if he apply therefor, shall be made defendant in place of the tenant, and the action shall proceed in all respects as if originally commenced against him." But Hulery made no answer, of any kind, and the court allowed Mary Cline to volunteer to become a defendant, upon her statement, instead of Hulery's answer, that she was his landlord.

But, for the purposes of this action, it may be admitted that the court had the power to admit Mary Cline to become a defendant, as it did, or that the plaintiff in the action accepted her as such defendant, by proceeding thereafter with the action against her, and still the judgment therein would not have been given between the parties to this action, or those under whom they claim, and therefore the plaintiff Fitch is not estopped by it. The minor children of Cline or their grantees, defendants in this action, do not claim under Mary but under Jacob Cline, and therefore they are not estopped by a judgment in an action between Mary and Jacob; and if they are not estopped, then neither is Jacob or his subsequent grantee.

Again, it may be assumed for the time being that in Cline v. Hulery [supra] the minor children aforesaid became parties to the action by reason of their mother's being admitted as their guardian to become defendant as landlord, and in place of Hulery, and therefore that the judgment given therein is mutually binding upon said children and Cline, and estops either of them or those claiming under them, from asserting or claiming anything to the contrary, and still the plaintiff is not estopped by such judgment from maintaining that he is the owner of the premises in controversy and entitled to the possession thereof.

The action of Cline v. Hulery was brought under section 13 of the Civil Code, which provides, that: "Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law." And also, that the action must be brought against the person in actual possession, or if no one be in such possession, then against the person acting as owner thereof. Code Or. 226.

At common law ejectment was only a possessory action, and a judgment therein did not determine the estate or interest of the parties in the property, and owing to the special fictions which were a part of the action, such judgment, in effect, did not conclusively determine even the right to the possession. But in most of the United States it has long since been provided, that a judgment in an action of ejectment, as between the parties, shall be conclusive as to all the questions actually and necessarily included therein or necessary to such determination. Still the defendant was permitted to plead the general denial or "Not guilty," and the jury to find a general verdict for the plaintiff or defendant. Under such a practice the record would not disclose what estate or interest, if any, the defendant claimed in the premises, and if judgment was given for him, it would not appear whether the jury passed upon his claim or not. The question may have arisen upon the evidence and been passed upon by the jury in favor of the defendant, or the controversy may have been confined to the title of the plaintiff, and the jury may have based their verdict upon the insufficiency of the evidence to support it. Now, if the judgment on the verdict was afterwards pleaded as an estoppel, it would become necessary to ascertain by parol evidence what was proven to the jury and what was or may have been passed upon by them in making up their verdict.

The action given by the Code is simply the common law action of ejectment pruned of its fictions; but the Code goes farther and, by way of remedying the evil above suggested, it provides that "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof; unless the same be pleaded in his answer," with "the certainty and particularity required in a complaint." The complaint must set forth the nature of the plaintiff's "estate in the property, whether it be in fee, for life or for a term of years, and for whose life or the duration of such term."

The jury by their verdict, if it be for the defendant, must find "the estate in the property or part thereof or license or right in the possession * * * established on the trial by the defendant, if any; in effect as the same is required to be pleaded." Code Or. 226, 227.

It also provides that a judgment in ejectment "shall be conclusive as to the estate in the property and the right to the possession thereof, so far as the same is hereby determined upon the party against whom the same is given" and all persons claiming under him, except in certain cases when judgment is given for want of an answer.

As to what is to be considered as having been determined by the judgment of the circuit court in Cline v. Hulery, the Code prescribes the rule as follows: "Sec. 727. That only is deemed to have been determined by a former judgment, decree or order, which appears upon its face to have been so determined or which was actually and necessarily included therein or necessary thereunto." Code Or. 329.

Now it is manifest that nothing appears to have been determined by this judgment, except that Mary Cline as guardian, was then entitled to the possession of the premises. The court sitting as a jury in its

verdict or conclusions of fact, only found that Mary Cline was the guardian of the minor children aforesaid, and as such guardian was in possession of the premises, and that the decree in the divorce suit was unreversed.

On the appeal to the supreme court, the judgment of the circuit court was simply affirmed. For aught that appears in these judgments, both the circuit and supreme court may have been of the opinion that the decree in the divorce suit, so far as it provided that this property should be vested in the minor children after they become of age, was simply void. The most that can be said to have been determined by the judgment, is that the minor children were entitled to the use of the property according to their respective interests until they became of age respectively, and that in the meantime Mary, as their guardian or trustee, was entitled to the possession thereof and to take and receive the rent and profits for the purpose of their nurture and education.

By the act of October 11, 1864, which took effect January 20, 1865 (Code Or. 644), the age of majority for males in this state was fixed at 21 years, and that of females at 18 years. Before the commencement of this action all these minor children, except Jacob, Jr., had become of age. As to these adults, Jacob, Sen., was no longer bound to support them, and the power of the circuit court did not enable it to subject his land thereafter to their support, by the intervention of a trustee, guardian or otherwise. As to Jacob, Jr., his term in an undivided fourth of the premises does not expire until he becomes of age or is deceased.

The plaintiff is the owner in fee and in possession of three undivided fourths of the premises, and in reversion of the other undivided fourth, and has a present right to the possession of the whole in common with the tenant for years of the last mentioned undivided fourth.

The plaintiff is also entitled to recover from the defendants Cornell, Moore and of S. M. Tunstall, each, one fourth of the value of the use and occupation of the premises during the time they have been in possession respectively, and in the case of Tunstall, since his wife Mary Jane became eighteen years of age.

The answers of the defendants also contain a plea of set off for the value of permanent improvements made upon the property by the defendants, or those under whom they claim. But the plea is altogether insufficient, as it does not state that such improvements were made while the parties were holding under color of title, adversely to the claim of the plaintiff, in good faith, but only that they are permanent and valuable. The plaintiff has not replied to the plea, but treated it as an immaterial allegation. On the trial, however, the defendants, without objection from the plaintiff, examined witnesses upon the subject, but I do not think the proof sufficient to warrant the conclusion that the improvements, if any, are either permanent or valuable.

The defendants appear to have paid the ordinary taxes levied upon the property during their occupation, and also some assessments for the improvement of adjoining streets. Although not set up in the pleadings, the parties have stipulated that the amount of these taxes may be deducted from the sum found due the plaintiff for mesne profits.

FITCH (GEAR v.). See Case No. 5,290.

Case No. 4,835.

FITCH et al. v. McGIE.

Ex parte SANGER.

[2 Biss. 163;[1] 2 N. B. R. 531 (Quarto, 164); 2 Am. Law T. Rep. Bankr. 80.]

District Court, E. D. Wisconsin. July Term, 1869.

BANKRUPTCY—FRAUDULENT PREFERENCES—JUDGMENT BY DEFAULT—SATISFACTION FROM FUNDS IN HANDS OF ASSIGNEE.

1. A judgment by default, and execution upon a note given when the creditor had cause to believe the debtor insolvent, are preferences under the act, and do not give a valid lien upon the property of the debtor, or its proceeds.

[Cited in Beattie v. Gardner, Case No. 1,195; Haskell v. Ingalls, Id. 6,193.]

2. The debtor suffers his property to be taken under legal process, by not defending; he should file his petition in bankruptcy.

3. The court will not order such a judgment to be satisfied from funds in the hands of the assignee.

[This suit was originally brought by William H. Fitch and others, praying that George B. McGie be declared a bankrupt.]

This was a motion by Wm. H. Sanger, execution creditor of the bankrupt, to have his judgment satisfied from the proceeds of sales of property of the bankrupt, taken in execution, and turned over to the assignee in bankruptcy.

Hopkins & Sanborn, for motion.
H. W. & D. K. Tenney, contra.

MILLER, District Judge. In the month of April, 1868, McGie being largely indebted to Wm. H. Sanger, a merchant of New York, upon notes due and payable and some soon to become payable, gave a promissory note payable one day after date, with warrant to confess judgment. Before making the note it was a subject of discussion whether the security should not be a chattel mortgage on McGie's stock of goods; which was advised against by the attorney. Sanger was a business friend of McGie, and

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

would not allow his notes to be protested for non payment. At the date of note McGie complained of dull times and inability to pay other debts, of which Sanger had notice. A summons was issued to recover the amount of the note given in April, and a judgment was rendered in the United States circuit court in November last. By virtue of a fieri facias issued on the judgment, the marshal levied on McGie's stock of goods. Fitch and other creditors then proceeded against McGie in bankruptcy, and in January last he was declared a bankrupt. The marshal, under an order of the court in bankruptcy, delivered over the stock of goods to an assignee. Sanger now applies to the court to be paid the avails of the sale of the goods made by the assignee, claiming a preference by reason of the execution and levy. Prior to the suit Sanger instructed that the goods should be taken possession of, under the impression, no doubt, that execution might be or had been issued in satisfaction of his judgment note, which was payable one day after date.

It is contended that the judgment was obtained in due course of legal proceedings, and that McGie did not "procure or suffer his property to be taken on legal process." An insolvent debtor commits an act of bankruptcy when he "gives any warrant to confess judgment, or procures or suffers his property to be taken on legal process." The warrant to confess judgment was an act of bankruptcy committed by McGie to prefer his friend and accommodating creditor, who knew at the time of McGie's inability to pay his notes to other creditors. And the result shows conclusively that McGie was at the time insolvent to a large amount.

There was no necessity for the suit on the note. Judgment could have been entered without a summons. The warrant to confess judgment cut off defense to the action, and McGie suffered judgment to be taken by default. By the warrant to confess judgment, McGie consented that his property should be levied on, under an execution, and by his default he suffered it to be done. If McGie did not directly procure his property to be taken on legal process, he suffered it to be done. There is a distinction between procuring and suffering property to be taken on a legal process. Either is an act of bankruptcy. The bankrupt act prohibits preferences to be obtained by a creditor, when his debtor is insolvent, or in contemplation of his insolvency, or bankruptcy, by the taking of the debtor's property on legal process, whether the taking be by an act of procurement, or by an act of sufferance on the part of the debtor, where there is an intent on the part of the debtor to give such preference, and the creditor has reasonable cause to believe that the debtor is insolvent. McGie should have prevented the preference to Sanger by means of the levy, by an application for the benefit of the bankrupt act [of 1867 (14 Stat. 517)]. Knowing himself to be insolvent, he should have pursued the course of equity to all his creditors required by the act. Sanger and McGie both knew that the probable consequence of the judgment note, if pursued, was to give a preference. The object and intent of the bankrupt act is, to require a debtor, in failing circumstances, to subject his property to an equal distribution among his creditors, in proportion to their respective debts. The proceeding in the case falls within the prohibition of this act. There is no essential difference in this case, from a seizure and sale by virtue of a chattel mortgage, or on execution, issued in a judgment by confession. McGie permitted what he should have prevented, and he thereby suffered his goods to be taken on legal process in favor of a friendly creditor, who had at least reasonable cause to believe that his debtor was insolvent.

The application of Sanger for the avails of the sale of McGie's goods is denied.

NOTE. The preference upon a judgment note is not obtained when the warrant of attorney is given, but when the judgment upon it is entered. Golson v. Neihoff [Case No. 5,524]. The sufficiency of the judgment depends upon the knowledge or information the creditor had at the time he made his warrant operative. Id. A creditor who knows that his debtor cannot pay all his debts in the ordinary course of business, has reasonable cause to believe him insolvent, and will not be allowed to secure, by confession of judgment and levy of execution, any preference over other creditors. Wilson v. Brinkman [Case No. 17,794]. Judgments obtained against a debtor at the time insolvent, by creditors who had not reasonable cause to believe him so, are good against the assets. In re Wright [Id. 18,071]. Where bankrupt while solvent gives warrant of attorney to confess judgment, and creditor takes judgment thereupon with notice of subsequent bankruptcy such judgment is good against the assets. Id.

FITCH (MIDDLETOWN TOOL CO. v.). See Case No. 9,535.

Case No. 4,836.

FITCH v. REMER.

[1 Flip. 15;[1] 1 Biss. 337; 8 Am. Law Reg. 654; 5 Quart. Law J. 266.]

Circuit Court, D. Michigan. July Term, 1860.

LEX LOCI CONTRACTUS — MORTGAGE OF PROPERTY IN ONE STATE—MONEY PAYABLE IN ANOTHER—THE LAW THAT GOVERNS.

1. Where a mortgage is executed on land in one state for money loaned in another, but which provides that the money shall be paid at the mortgagee's residence in that other state, with a rate of interest that would be void in the state of the mortgagee but not in that of the mortgagor: *Held*, that the plaintiff might elect to proceed under the laws of the state

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

where the mortgage was recorded and where the whole contract was vaild.

[Cited in Thompson v. Edwards, 85 Ind. 422.]

2. Doctrine of lex loci contractus and lex fori fully discussed.

In equity.

Mr. Duffield, for complainant.
Mr. Lathrop, for defendants.

McLEAN, Circuit Justice. This bill was filed to foreclose a mortgage. When the mortgage was executed, Fitch resided in New York, the defendants in the state of Michigan. On the first of January, 1850, the complainant loaned to the defendants two thousand dollars, to secure which the defendants executed a bond and mortgage on land in Michigan. The sum loaned was to be paid in January, 1856, to the complainant, at his residence in the state of New York, with interest at ten per cent. per annum, payable semi-annually.

In New York the legal interest is seven per cent. per annum, and any per cent. above that sum is usurious, and the instrument is declared to be void. In Michigan there is no penalty for usury, the excess over the legal rate, only, being recoverable.

It is agreed that this proceeding to enforce these securities must be under the laws of New York or the laws of Michigan, whichever shall be held to be the law of the contract. This is the only question in the case, there being no dispute about the facts.

The general rule is, that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed. Kent, Comm. 459; Story, Confl. Laws, § 242. In Van Reimsdyk v. Kane [Case No. 16,871], Judge Story says the rule is well settled, "that the law of the place where a contract is made is to govern as to the nature, validity and construction of such contract," unless it shall appear from the tenor of such contract, it was entered into with a view to the laws of some other state; as where a negotiable note was indorsed in a state different from that in which it was made. Slacum v. Pomery, 6 Cranch [10 U. S.] 221. Lord Mansfield, in Robinson v. Bland, 2 Burrows, 1077, says, "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country." And Kent, C. J., in 1 Johns. 92, said, "The force and effect of the contract must be determined from the contract itself, and not by proof aliunde."

Huberus, in his De Conflictu Legum (volume 2, bk. 1, tit. 3), says, "The general rule is, that contracts are to be interpreted according to the laws of the country where they are made; but if, from the terms or nature of the contract, it appears it was to be executed in a foreign country, or that the parties had respect to the laws of another country, then the place of making the contract becomes immaterial, and the obligation must be tested by the laws of the country where the duty was to be performed." In Champant v. Ranelagh, Finch, Prec. 128, it was decided that a bond executed in England, and made payable in Ireland, carries Irish interest, where no interest was mentioned. Fanning v. Consequa, 17 Johns. 511. In Robinson v. Bland, 2 Burrows, 1077, a bill of exchange drawn in France for money lent there, and made payable in England, was deemed a contract subject to the laws of England, and to bear English interest. In Thompson v. Ketcham, 4 Johns. 285, a note was drawn in Jamaica, made payable in New York, and the supreme court of New York followed the same rule. In Smith v. Smith, 2 Johns. 235, Ruggles v. Keeler, 3 Johns. 263, and Van Schaick v. Edwards, 2 Johns. Cas. 355, the same doctrine was carried out.

A contract is to be construed by the law under which it was made, but if entered into to be performed in another state or place, it is to be treated, generally, as to its force and effect, by the laws of the latter place; and it will be good or bad according to the laws of such place. To this there is an exception in regard to official bonds, taken in pursuance of an act of congress, which are not subject to the local law, but are assumed to have been executed at the seat of the federal government. Cox v. U. S., 6 Pet. [31 U. S.] 173; Andrews v. Pond, 13 Pet. [38 U. S.] 77; Bell v. Bruen, 1 How. [42 U. S.] 169; Brabston v. Gibson, 9 How. [50 U. S.] 263; Fanning v. Consequa, 17 Johns. 511; Ruggles v. Keeler, 3 Johns. 263; Thompson v. Ketcham, 4 Johns. 285; Barney v. Newcomb, 9 Cush. 46; Story, Confl. Laws, § 280; Story, Bills, § 147; Robinson v. Bland, 2 Burrows, 1077.

Under the principles laid down in the above authorities, it is insisted that the instrument before us is a New York contract, and that the agreement to pay more than seven per cent. interest is usurious and void; and as the contract binds the defendant to pay the complainant, in New York, interest at the rate of ten per cent. per annum, semi-annually, and the loan at the end of six years, the argument is presented with great force against the legal rights of the complainant; and this contract, it is urged, is to be governed by the law of the place of performance, and whatever shall be a good defense there shall be good everywhere. This doctrine is laid down in Story on Conflict of Laws, §§ 331, 305, and Story on Bills of Exchange, § 161. And it is admitted, that where a contract is made in one place, payable in another, without fixing the rate of interest, such rate is determined generally by the laws of the latter place. Scofield v. Day, 20 Johns. 102; De Wolf v. Johnson, 10 Wheat. [23 U. S.] 367; Healy v. Gorman, 3 J. S. Green [15 N. J. Law] 328.

And it is admitted by the highest authority,

that any interest may be lawfully stipulated for, not exceeding the law of the place where the instrument is payable. Andrews v. Pond, 13 Pet. [38 U. S.] 77; Thompson v. Ketcham, 4 Johns. 285; Robb v. Halsey, 11 Smedes & M. 140.

These concentrated authorities seem to cover the whole ground of controversy, leaving but little for doubt or speculation. Principles are sometimes evolved from the exigencies of society, and grow into favor from their adaptation to the fitness of things. No one can say that both the common and civil law have not been ameliorated and improved by such means. But we are to look to established principles and not to theories in considering the case before us.

The debt is founded upon a bond and mortgage for the payment of two thousand dollars, executed on land in Michigan, by the defendant to the complainant, a citizen of New York, payable in six years at the rate of ten per cent. per annum semi-annually, on the first days of July and January, to the complainant, at his residence in New York.

In 2 Kent, Comm. 460, it is said: "If, however, the rate of interest be specified in the contract, and it be according to the law of the place where the contract was made, though that rate be higher than is lawful by the law of the place where payment was to be made, the specified rate of interest at the place of the contract has been allowed by the courts of justice in that place; for that is part of the substance of the contract. The general doctrine is, that the law of the place where the contract is made is to determine the rate of interest when the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on lands in another state, unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case, the rate of interest of the place of payment is to govern." De Wolf v. Johnson, 10 Wheat. [23 U. S.] 367; Quince v. Callender, 1 Desaus. Eq. 160.

"With respect to the question of usury, in order to hold the contract to be usurious it must appear that the contract was made here, and that the consideration for it was to be paid here. It should appear, at least, that the payment was not to be made abroad; for if it was to be made abroad, it would not be usurious." Thompson v. Powles, 2 Sim. 211.

In reference to the above cited case, Chancellor Kent says (volume 2 of his Commentaries, 461): "According to the case of Thompson v. Powles [2 Sim. 194], it is now the received doctrine at Westminster Hall, that the rate of interest on loans is to be governed by the law of the place where the money was to be used or paid, or to which the loan has reference; and that a contract made in London to pay in America, at a rate of interest exceeding the lawful interest in England, was not a usurious contract, for the stipulated interest was parcel of the contract." This appears to be a liberal relaxation of the rigor of the former rule in the English courts, and it is comformable to the American cases. Story, Confl. Laws, § 305.

In the somewhat noted case of Depau v. Humphreys, 8 Mart. (N. S.) 1, the note was given in New Orleans, payable in New York, for a large sum of money, bearing an interest of ten per cent., being the legal interest in Louisiana, the New York legal interest being seven per cent. only. The question was whether the note was tainted with usury, as it would be, if made in New York. The supreme court of Louisiana decided that it was not usurious; and that although the note was made payable at New York, yet the interest might be stipulated for, either according to the law of Louisiana or according to that of New York. To the same import are the cases of Peck v. Mayo, 14 Vt. 33; and Chapman v. Robertson, 6 Paige, 627. In Pratt v. Adams, 7 Paige, 615, the court says, "If the contract was not illegal by the laws of the country where it was made, and where the money was loaned, the fact that the drafts were payable in New York would not render them void under our usury laws, except in a case where the loan of the money out of this state was a mere device to evade the operation of the law of this state which was intended as a cover for usury." The doctrine is well established, if a mortgage be executed in Michigan, which is the domicil of the mortgagor, at the legal rate of interest, full effect will be given to the security without reference to the usury laws of any other state, which neither party intended to violate. In Andrews v. Pond, 13 Pet. [38 U. S.] 78, the court says, "The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

By the statute of Michigan, ten per cent. was the legal rate of interest, and this was the amount stipulated to be paid, and constituted a part of the contract; the court cannot presume, therefore, against the fact, that usury under the New York statute was intended.

In Ohio Ins. Co. v. Edmondson, 5 La. 295, 299, 300, the court says, "By the comity of nations a practice has been adopted, by which courts of justice examine into, and enforce contracts made in other states, and carry them into effect according to the laws of the place where the transaction took its rise. This practice has become so general in modern times, that it may be almost stat-

ed to be now a rule of international law, and it is subject only to the exception, that the contract to which aid is required, should not, either in itself or in the means used to give it effect, work an injury to the inhabitants of the country where it is attempted to be enforced." Story, Confl. Laws, § 244.

In Chapman v. Robertson, 6 Paige, 633, the court said, "I have arrived at the conclusion, that this mortgage, executed here, and upon property in this state (New York), being valid by the lex situs, which is also the law of the domicil of the mortgagor, it is the duty of this court to give full effect to the security."

If no place of payment is prescribed, the contract takes effect as a contract of the place where it is made; and being payable generally, it is payable everywhere. and after a demand and refusal of payment, interest will be allowed according to the law of the place of the contract. But if the place of payment or of performance is different from that of the contract, then the interest may be validly contracted for at any rate not exceeding that which is allowed in the place of payment or performance.

"Whether a contract is usurious or not, depends, not upon the rate of interest allowed, but upon the validity of that interest in the country where the contract is made, and is to be executed. A contract made in England for advances to be made at Gibraltar, at a rate of interest beyond that of England, would nevertheless, be valid in England; and so a contract to allow interest upon credits given in Gibraltar at such higher rate would be valid in favor of the English creditor." Story, Confl. Laws, § 292.

In his Conflict of Laws (section 488), Mr. Justice Story says, "Boullenois has no where to my knowledge, directly and positively treated the question, whether the interest may be stipulated for according to the place of the contract, when payment is to be made in another place where it would be illegal." In section 304a, he says, "If the transaction is bona fide and not with intent to evade the law against usury, and the law of the place of performance allows a higher rate of interest than that permitted at the place of the contract, the parties may lawfully stipulate for the higher rate of interest." No one ever doubted this. The daily experience of every business man shows that a note is legal, if given for a rate of interest fixed by law in any state where it is payable. In Michigan, ten per cent. is the legal rate of interest, and may be recovered.

Mr. Justice Story objects to the principle here laid down, and there is no jurist in America or in England, of higher authority. He admits in section 299, that the phrase "lex loci contractus" may have a double meaning or aspect; and that it may indifferently indicate where the contract is actually made, or where it is virtually made, according to the intent of the parties, that is, the place of payment or performance. And he says, "We have seen that the rule of the civil law clearly indicates this."

No one can suppose that a contract can be distributed into parts, and so made good for the whole, but that the clear intention of the parties may be understood and applied; as where the legal rate of interest stipulated to be paid is higher where the contract is entered into than at the place of payment, the higher rate may be presumed to be within the intention of the parties.

If the transaction is bona fide and not with intent to evade the law against usury, and the law of the place of performance allows a higher rate of interest than that permitted at the place of the contract, the parties may lawfully stipulate for the higher interest. But then the transaction must be bona fide, and not intended as a mere cover for usury. Andrews v. Pond, 13 Pet. [38 U. S.] 65. Mr. Chancellor Kent has correctly laid down the modern doctrine; and he is fully borne out by the authorities. "The law of the place," says he, "where the contract is made, is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on land in another state, unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case, the rate of interest of the place of payment is to govern." 2 Kent, Comm. 460; De Wolf v. Johnson, 10 Wheat. [23 U. S.] 367; Scofield v. Day, 20 Johns. 102; Thompson v. Powles, 2 Sim. 194.

It is agreed that the above loan was made in this manner: "An agent of the complainant, Mr. Loomis, residing in St. Clair county, drew a draft on the complainant, caused the same to be cashed at a bank in the city of Detroit, and paid the proceeds over to said Remer, at said St. Clair; the bond and mortgage were executed at St. Clair, on real estate in said county of St. Clair, and delivered to said Loomis at that place, as the agent of complainant."

It is also agreed, that by the laws of the state of New York, in force at the time of making said loan, and ever since in force, the taking more than seven per centum per annum upon any loan of money was prohibited, and any contract or security made or taken in violation thereof, was by such laws void.

Now, that this was a perfectly fair transaction, understood by the parties, no one can question. The contract was valid under the laws of Michigan, unaffected by any taint of usury. No deception was practiced. The contract can be legally enforced in Michigan; and this suit is now brought to enforce it. There is not a circumstance to show that the parties had in view any other rate of interest than that which was

stipulated in the contract. And if that rate of interest cannot be recovered under the laws of New York, no one doubts that it may be recovered in the state of Michigan, where the contract was made. In Andrews v. Pond, 13 Pet. [38 U. S.] 78, the supreme court says: "If the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." And the court says, taking eight per cent. in Alabama is no violation of the New York law.

The bond and mortgage are valid under the Michigan law, and the complainant elects, as he has a right to do, that he will proceed under the Michigan statute. And it is difficult to perceive on what ground the defendant can complain that his rights are affected by the usury law of New York. The ten per cent. interest which the defendant agreed to pay, was a part of the contract authorized by the laws of Michigan, and this contract is not supposed to be impaired by an agreement to pay the same rate of interest in New York. The mortgagee claims the ten per cent. interest, under the Michigan law, and this he is entitled to.

NOTE [from original report in 1 Flip. 15]. See, as to law of place governing contracts, limitations or the rule, and how it is applied in cases of usury, the following cases: 2 Johns. 235; 3 Johns. 263; 16 Johns. 233; 3 N. Y. 266; 7 N. Y. 500; 9 N. Y. 53; 13 N. Y. 31; 32 N. Y. 21; 33 N. Y. 615; 59 N. Y. 587; 1 Cow. 103; 32 Barb. 522; 34 Barb. 33; 62 Barb. 326; 65 Barb. 265; 4 Denio, 305; 6 Paige, 627; 13 N. Y. 290; 40 N. Y. 496; 45 N. Y. 113; 12 N. Y. 495; 15 N. Y. 9; 30 N. Y. 259; 11 Humph. 194; 4 Heisk. 385; Peck [Tenn.] 1; 6 Cold. 499; 2 Swan. 573; [Cary v. Curtis] 3 How. [44 U. S.] 262; 2 Lea, 676; 5 Sneed. 328; [Cook v. Moffat] 5 How. [46 U. S.] 295; and 1 Pars. Notes & B. 327.

FITTLER, The E. H. See Case No. 4,311.

FITTON (UNITED STATES v.). See Case No. 15,106.

Case No. 4,837.

Ex parte FITZ.

In re RAWSON et al.

[2 Lowell, 519.][1]

District Court, D. Massachusetts. Nov., 1876.

PLEDGE—BILL OF SALE IN MASSACHUSETTS—REGISTRATION—DELIVERY TO PLEDGEE—POSSESSION.

1. By the law of Massachusetts, a bill of sale intended for security operates as a pledge and not as a mortgage, and does not require, or admit of, registration.

2. Delivery to the pledgee may be either actual or constructive.

3. Possession may be kept by an agent, and that agent may be the pledgor.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

In bankruptcy.

R. D. Smith, for petitioner.
T. F. Nutter, for assignee.

LOWELL, District Judge. The petitioner lent money to Rawson & Hittinger, and took from them at the same time the notes of Jacob Hittinger, not a member of the firm, and bills of sale of certain locomotive engines, then in their machine-shop in Cambridgeport, as additional security. Rawson & Hittinger have become bankrupt, and Jacob Hittinger has paid the debt; and the petitioner, acting as trustee for him, asks that the engines or their proceeds be now applied to pay the debt. Jacob Hittinger has become a party to the petition, and submits his rights to the determination of the court.

It was argued in behalf of the petitioner that the bills of sale were mortgages, and that the failure to record them would not, under the circumstances of the case, be fatal to the title of the mortgagee. I take it, however, to be clear, that, by the law of Massachusetts, as of the other states, the bill of sale, intended for security, operated as a pledge and not as a mortgage, and neither required nor admitted of registration: Walker v. Staples, 5 Allen, 34; Kimball v. Hildreth, 8 Allen, 167; and, incidentally, Newton v. Fay, 10 Allen, 505; Drake v. White, 117 Mass. 10. As a general rule, the pledgee must take and keep possession of the chattels, or his title will not be valid against the assignee in bankruptcy. My decision, that a mortgagee had a better title than the assignee in some cases, though he neither took possession nor recorded his mortgage, does not apply to pledges, but turned on the words of a statute, construed with the aid of the rule of the common law of Massachusetts, that the possession of a mortgagor is consistent with the title of the mortgagee. Still, on the question of what is a sufficient taking and keeping, the cases arising under mortgages are in point.

I understand the law to be that there must be a delivery before the pledgee's lien will attach; but the delivery may be either actual or constructive: Meyerstein v. Barber, L. R. 2 C. P. 38; Id. 661; 4 H. L. 317; Young v. Lambert, L. R. 3 P. C. 142. Then, as to keeping possession, it may be kept by an agent, and that agent may be the pledgor. If the circumstances make out a good reason for giving the custody and apparent control to the pledgor, there may not even be evidence of fraud; but, at most, his possession will only be evidence either that the pledge has been abandoned, or that the transaction is covinous. See Sumner v. Hamlet, 12 Pick. 76; Macomber v. Parker, 14 Pick. 497; Hays v. Riddle, 1 Sandf. 248; Way v. Davidson, 12 Gray, 465; Cooper v. Ray, 47 Ill. 53; Martin v. Reid, 11 C. B. (N. S.) 730; Thayer v. Dwight, 104 Mass. 254; Thorn-

dike v. Bath, 114 Mass, 116; Weld v. Cutler, 2 Gray, 195.

On the question of fact, whether possession was taken and kept, there is, unfortunately, a direct contradiction between the only two witnesses to the acts done. The petitioner testifies that, soon after the bills of sale were given, he went to the shop of the pledgors, and in presence of one of them, Michael Hittinger, took possession of every one of the engines, put his hand upon each, and told Michael Hittinger to hold them as his agent, and that if any of them were sold he would give an order for the delivery. Michael Hittinger says that the petitioner came over to the shop, and one engine was pointed out to him, but he did nothing about taking possession, and gave no orders. Supposing, as I do, that the witnesses are equally veracious, I feel bound to give greater credit to the evidence of the petitioner; because he cannot be mistaken, and Mr. Hittinger may have forgotten the circumstances. The petitioner went to the factory, according to his story, with a definite purpose, and must recollect what it was, and what he did in pursuance of it. Both stand before the court unimpeached, and with no serious bias, because the debt has been paid to Mr. Fitz, and he is proceeding for the benefit of a surety; and Mr. Hittinger, on his part, has assigned all his title by his petition and the proceedings in bankruptcy. I can only regret that the parties did not see fit to submit the decision of this question to a jury.

Taking it, as I feel bound to do, that Mr. Fitz's recollection is the more accurate, it seems to me, as matter of law, that his possession was sufficient. I do not consider that a pledgee is bound to remove locomotive engines, and put them into his house or into a warehouse. He might well leave them with the pledgor, to be finished, or even to be sold. There is somewhat more danger of fraud if the pledgor himself is intrusted with the possession, than if a third person was employed; but there is no difference in principle between the appointment of Hittinger and of one of his clerks. It comes back to a question of fraud or good faith. Of course, it is well understood that an assignee in bankruptcy is not a purchaser without notice.

It is argued that there was no sufficient designation of the particular engines pledged. I do not understand the evidence to be undisputed on this point. Mr. Fitz said that the engines mentioned in his bill of sale could be easily picked out from the others; and Mr. Hittinger again differed from him on this point. But this matter is set at rest by the evidence, which I have accepted as accurate, that each engine was in fact designated and pointed out when Mr. Fitz went over to the shop and took possession, which was long before the bankruptcy.

Petition granted.

Case No. 4,838.

FITZ v. The AMELIE.

[2 Cliff. 440.][1]

Circuit Court, D. Massachusetts. May Term, 1865.[2]

SALE OF VESSEL BY MASTER—DISABLED BY PERILS OF THE SEA—LIENS TRANSFERRED TO PROCEEDS.

1. The master is justified in selling the ship as the best thing that can be done for the interest of all concerned, under the following circumstances: When the ship is disabled by perils of the sea, and the master has no means of getting the repairs done in the place where the injury occurred; or, if being in a place where the repairs might be made, he has no funds in his possession, and cannot, on account of the distance or other sufficient cause, communicate with the owner, and is not able to raise the necessary means by bottomry, or otherwise, to execute the repairs; also, if the injuries to the ship are so great that the cost of repairing her would be greater than her value after the repairs were completed; also, if the ship is disabled so that she cannot proceed, and the cost of repairs will amount to more than one half her value, reckoning one third new for old, and the master has no funds, and can neither procure any nor communicate with the owner, and the whole circumstances are such that a prudent owner would decide to break up the voyage.

[See note at end of case.]

2. The circumstances, which create a moral necessity for the sale of the vessel by the master, have the effect to constitute the master the agent of all concerned, and therefore the title of the purchaser becomes complete and absolute.

3. When a ship is thus lawfully sold, any lien upon her is transferred to the proceeds of the sale, which, by operation of law, become the substitute of the ship, in the sense of the admiralty law.

[Cited in Wilson v. Bell, 20 Wall. (87 U. S.) 221.]

This was an admiralty appeal in a cause of contract civil and maritime. [The libellant, Charles Fitz, filed his libel in the district court against the galliot Amelie (B. Riviere and others, claimants) for a lien and damages for the nondelivery of a cargo. The district court dismissed the libel (case unreported), and libellant appealed.] The complaint of the libellant was, that on the 13th of March, 1862, he shipped on board the Amelie, then called the Plata, and lying in the port of Paramaribo, certain merchandise to be transported to Boston, and there to be delivered to the libellant. It was alleged that the vessel subsequently departed on the voyage and arrived at the port of destination, but that the master neglected to deliver a large part of the cargo, and failed to render any satisfactory account of the same. The defence of the claimants was, that the vessel arrived at Port au Prince, unseaworthy, and utterly unfit and unable to proceed on her voyage, or any voyage to sea; that very extensive and

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 6 Wall. (73 U. S.) 18.]

costly repairs were necessary, before she could be rendered seaworthy; that neither the master nor the owners had any funds or any credit at that port, wherewith to procure the repairs to be made; and consequently, that the master, not being able to procure the funds by bottomry bond or otherwise, to execute the repairs, on the 12th of June following sold the vessel at auction, and that he, the claimant, then and there became the lawful purchaser of the vessel.

The case came before the court upon an agreed statement of certain facts, in substance the following:—

The cargo was received on board the vessel at Surinam, to be transported and delivered as alleged in the libel. The invoice value of the cargo was $8,306.67, and the master signed bills of lading for the same in the usual form. The vessel suffered damage by perils of the sea. The cargo consisted of two hundred and forty-two hogsheads and sixteen barrels of molasses, fifty hogsheads and nine barrels of sugar, and sixteen pieces of old copper. Some of the cargo was also damaged by the perils of the sea, and thirty hogsheads of the molasses were jettisoned for the common safety, and thirty more were intentionally stove in the hold and their contents lost.

It appeared that the vessel put into Port au Prince for repairs, and that she was there twice surveyed and ordered to be repaired. Repairs under those orders were made, to the the extent of $1,000, when it was ascertained that more extensive repairs were required than was at first deemed necessary, whereupon a third survey was called, which resulted in a more thorough examination of the vessel. A sale of the vessel was made, under the recommendation of the third report. The libellant denied the validity of the sale; and the question whether it was rightfully made, under the circumstances, was the first and principal question in the case.

Other questions were discussed at bar, but, under the view of the case taken by the court, it will not be necessary to advert to them in this report.

F. C. Loring, for libellant.
C. W. Loring, for claimants.

CLIFFORD, Circuit Justice. The authority of a master to sell his ship under any circumstances was denied by some of the continental writers upon maritime law, and by some of the early decisions in the courts of the parent country. The reason given for the prohibition was, that such authority, if allowed, would tend to encourage fraud. Tremenhere v. Tresillian, 1 Sid. 452; Johnson v. Shippen. 2 Ld. Raym. 984; Reid v. Darby, 10 East, 143; Abb. Shipp. (5th Ed.) 9; Ekins v. East India Co., 1 P. Wms. 395.

A careful scrutiny of those cases, however, will show that the circumstances in most of them were not such as to justify a sale in any view of the law; and the decision in some of them was placed upon that ground. Subsequent cases have clearly established the doctrine even in that country, that the master in a case of extreme necessity may sell the ship for the benefit of the owners or of all concerned. Hayman v. Molton, 5 Esp. 65; The Fanny & Elmira, Edw. Adm. 117; Milles v. Fletcher, 1 Doug. 231; Idle v. Royal Exchange Assur. Co., 8 Taunt. 755; Freeman v. East India Co., 5 Barn. & Ald. 617; Cannan v. Meaburn, 1 Bing. 243; Read v. Bonham, 3 Brod. & B. 147; Underwood v. Robertson, 4 Camp. 138. Abbott, in his work on Shipping, says the master possesses every power necessary for the employment and navigation of the ship; and he admits that, in a case of extreme necessity, he may sell the ship, but insists that he is bound, before exercising that authority, to try every other expedient to raise money. Abb. Shipp. 9. But the rule is much better stated by Parke Baron, in Hunter v. Parker, 7 Mees. & W. 342, to which special reference is made. He says that the master has by virtue of his employment, not merely those powers which are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of the ship for their benefit.

The libellant admits that it is well settled in this country that the master, in a case of necessity, may sell his ship, and the admission is a very proper one in this court, as the point has been at least three times authoritatively decided by the supreme court of the United States. Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 620; New England Ins. Co. v. The Sarah Ann, 13 Pet. [38 U. S.] 400; Post v. Jones, 19 How. [60 U. S.] 157. Speaking of the authority of the master to sell his ship, Mr. Justice Thompson said in the first case cited, that there can be no doubt that the injury to the vessel may be so great and the necessity so urgent, as to justify a sale. There must be, says the court, this implied authority in the master, from the nature of the case. He, from necessity, becomes the agent of both parties, and is bound in good faith to act for the benefit of all concerned; and the underwriter must answer for the consequences, because it is within his contract of indemnity. All the circumstances must be submitted to the jury, and they must find both the necessity and the good faith of the master in order to justify the sale. The opinion of the court in the second case was delivered by Mr. Justice Wayne, who does not stop to argue the question of authority, as that had been decided in the preceding case, but proceeds at once to the statement of the conditions under which it must be exercised, in order that the sale may be held valid. Those

conditions as there stated are, that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that the sale can only be made upon the compulsion of a necessity, to be determined in each case by the actual and impending peril to which the vessel is exposed, from which it is probable, in the opinion of persons competent to judge, that the vessel cannot be saved. He admits, however, that the necessity for a sale cannot be denied, when the peril, in the opinion of those capable of forming a judgment, makes a loss probable, although the vessel may in a short time afterwards be got off and put afloat. Mr. Justice Grier delivered the opinion in the third case cited; and he affirms that it cannot be doubted that a master in certain cases of absolute necessity has power to sell both vessel and cargo. Such a necessity may be held to exist, say the court in that case, where the vessel is disabled, stranded, or sunk, if it appear that the master had no means, and could raise no funds to repair, so as to prosecute his voyage. Unless the vessel is so disabled that it is rendered unsafe for her to proceed on her voyage, the question as to the necessity of selling her cannot arise. Nothing short of proof of that fact will authorize the conclusion that the authority of the master was so enlarged that he became the agent of all concerned, and that he was clothed with power to determine in their behalf what should be done for their common interest. Prince v. Ocean Ins. Co., 40 Me. 493. When the vessel is so disabled that she cannot proceed on her voyage, and the master has no funds to make the necessary repairs to enable her to proceed, and cannot raise any for that purpose, by bottomry or otherwise, he must determine, in the absence of the owner, what the interest of all concerned requires him to do. His authority in the premises under those circumstances, is not derived from the owner, but is devolved upon him by law, and consequently it is his duty to act according to his best judgment. Sale of the ship is a necessity within the meaning of the commercial law, when under the circumstances indicated, nothing better can be done for the benefit of the owner or those concerned in the adventure. If the voyage be broken up in the course of it, by ungovernable circumstances, the master, says Chancellor Kent, may sell the ship, provided he do so in good faith, for the good of all concerned, and in a case of supreme necessity, which sweeps all ordinary rules before it. 3 Kent, Comm. 173. Neither necessity nor good faith is alone sufficient to make such a sale valid, but both must concur, and must be affirmatively shown by the party setting up the sale. The Henry [Case No. 6,372].

My judgment is, said Judge Story, upon the most careful survey of the authorities, as well as upon the general principles of law, that the master has a right to sell the ship in cases of urgent necessity; and I adopt the argument at the bar, that it must be proved that there was a pressing necessity to justify the sale. The Tilton [Case No. 14,054]. Other courts of the highest respectability have employed the same or similar expressions; but the explanations of Tindal, Ch. J., in Somes v. Sugrue, 4 Car. & P. 282, show to a demonstration that there cannot be in such a case either a legal or physical necessity, and consequently that it is only a moral necessity which is required to be shown, in order that the sale may be held to have been justified. Two decisions of Judge Story in this circuit are also to the same effect. Pope v. Nickerson [Case No. 11,274]; Robinson v. Commonwealth Ins. Co. [Id. 11,949]. Whether the necessity actually exists or not depends upon the circumstances, and so when carefully examined are all the well-considered cases. Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. 249; The Sarah Ann [Case No. 12,342]; Hall v. Franklin Ins. Co., 9 Pick. 476; American Ins. Co. v. Center, 4 Wend. 51; Peirce v. Ocean Ins. Co., 18 Pick. 83.

Different forms of expression are employed by different courts and jurists in describing the degree or intensity of the necessity which is required to justify the sale. Doubts are entertained whether any of the epithets, so employed, express very fully or definitely the precise idea intended to be conveyed. Perhaps it is not possible to devise any rule which will apply to all cases, but it is believed that some approximation may be made in that direction.

When the ship is disabled by perils of the sea, and the master has no means of getting the repairs done in the place where the injury occurred, or, if being in a place where the repairs might be made, he has no funds in his possession and cannot, on account of the distance or other sufficient cause, communicate with the owner, and is not able to raise the necessary means by bottomry or otherwise to execute the repairs, or if the injuries to the ship are so great that the cost of repairing her would be greater than her value after the repairs were made, or if the ship is disabled so that she cannot proceed, and the cost of repairs will amount to more than half her value, reckoning one third new for old, and the master has no funds, and can neither procure any nor communicate with the owner, and the whole circumstances are such that a prudent owner would decide to break up the voyage, then the master is justified in selling the ship as the best thing that can be done for the interest of all concerned. Such a state of circumstances creates the moral necessity, the urgent necessity, the extreme necessity, the imperious, uncontrollable necessity, described in the decided cases, and authorizes the master to sell the ship, if in his judgment, honestly exercised, the sale will best promote the interest of all concerned. When those condi-

tions, or any class of them, concur, it becomes the duty of the master to decide the question; and if he finds that the disaster will be most alleviated, and the interests of all will be best served by a sale, then it is his duty to act in the premises; and if he makes the sale bona fide as the agent of all concerned, it is valid, and all are bound by his acts. Reference is made by the libellant to certain recent decisions in the admiralty court of the parent country, in which it is supposed that a more stringent rule is laid down, but a careful examination of the cases will show that they do not warrant any such conclusion. Cases referred to are the following: The Eliza Cornish, 1 Spinks, 46; The Glasgow, 1 Swab. 146; The Margaret Mitchell, Id. 386; The Australia, Id. 484; The Bonita & Charlotte, 1 Lush. 252, 261.

The general rule is, says Dr. Lushington, in the case first cited, that the master has no authority to sell the ship, but he adds that, "whatever opinion may have been doubtfully expressed on the subject, it appears to me clear, upon reason and authority, looking at what the law now is, that in case of necessity he must be invested with that power." Borrowing the language of the opinion in the case of Robertson v. Clarke, 1 Bing. 445, he says: "I agree that it is not sufficient to show that the sale was bona fide and for the benefit of all concerned, unless it be also shown that there was an urgent necessity for its being resorted to." The same rule is laid down in the second case, but the same judge says that "the necessity is to be judged by all the circumstances: 1. The state and condition of the vessel. 2. The consequences of not proceeding to sell. 3. The facility of communicating with the owner. 4. The resources of the master, or the total absence of all resources. 5. The power and means of the owner to avert a sale." The third case asserts that it is clear from the authorities that, though in early times the validity of a sale by a master in a foreign port was doubted, yet now it is decided that he has an implied authority in cases of extreme necessity, and in those only. Judgment was also pronounced in the fourth case by the same learned judge, and in that he states that the necessity which the law contemplates is not an absolute impossibility of getting the vessel repaired, but if the ship cannot be sent upon her voyage without repairs, and if the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, that constitutes a case of necessity; and he states the rule in the fifth case in the same language as in the first, and borrows it from the same source. Taken as a whole, these cases, I think, confirm the rule as before explained. Applying that rule to the present case, it is quite clear what the result must be. The record shows that the vessel sailed for Boston on the 16th of March, 1862, and that she was stanch and in good repair. Full proof is exhibited that she encountered severe storms, was struck by a heavy sea, and was so badly crippled, injured, and broken that it was with difficulty that she arrived at Port au Prince. Due protest was made by the master, and she was three times surveyed. The first two surveys recommended temporary repairs to enable her to proceed to her port of destination. The surveyors' reports describe in detail the apparent injuries to the vessel, and specify the temporary repairs required to enable the vessel to proceed. They show, when taken in connection with the statements of the protest and the parol testimony, that the vessel as examined upon the outside and with the cargo on board, was very badly stove and crippled, and that she was emphatically disabled from proceeding on the voyage. The second report states that the surveyors recommend that "the vessel be repaired here sufficiently for her to proceed on her voyage to Boston. It being well understood that total and adequate repairs to the damage which the vessel has suffered are impossible in this port." Temporary repairs were accordingly made at the cost of $1,000; but the third report shows that upon taking off the side planking to replace the same by new, as was ordered in the second report, the injuries to the vessel were found to be very much greater than was supposed or could have been known when the prior surveys were made. On the last survey were three competent masters of vessels, Lloyd's agent, and the agent of the New York and Philadelphia underwriters. They all agreed that it was not possible to make the necessary repairs in that port in a proper manner; that even if the necessary materials could be obtained, it would cost, in addition to the $1,000 which had been expended, not less than $3,500 Spanish, and that it would take four months to make the repairs; and they also found that the whole cost of repairs would be more than the vessel would be worth after the repairs were made. Their report I think is sustained by the evidence in the case.

Sale of the vessel was accordingly made on 12th of June, 1862, for the benefit of all concerned, and the claimant became the purchaser for the sum of $407 in gold. Claimant repaired her at a cost of $1,695.31 in gold, and despatched her to Boston. She was libelled here shortly after her arrival, and was sold under the order of the district court. The proceeds of sale amounting to the sum of $2,138.64 remain in the registry of the court. Libellant claims a lien on the vessel for so much of the cargo as was sacrificed for the common benefit, and also for so much of the cargo as has not been delivered. He resists the sale as unauthorized; but I am of the opinion that it was clearly justified within the principles already explained.

The second proposition of the libellant is

that the sale, even if necessary and valid, operated only to pass the title of the owner, and that the purchaser took his title, subject to the lien of the libellant; but I am of the opinion that the circumstances which create the moral necessity for the sale of the ship in a case like the present, have the effect to constitute the master the agent for all concerned, and consequently that the title of the purchaser became complete and absolute. The Tilton [supra]; Milles v. Fletcher, 1 Doug. 232; Idle v. Royal Exchange Assur. Co., 8 Taunt. 755.

On this point I adopt the views of the respondents, that the lien when the ship was lawfully sold, was transferred to the proceeds which became by operation of law the substitute for the ship in the sense of the admiralty law. Brown v. Lull [Case No. 2,018]; Sheppard v. Taylor, 5 Pet. [30 U. S.] 675. Bear in mind that the sale in this case was a sale from necessity; and I am of the opinion, notwithstanding the doubt expressed in the case of The Catherine, 1 Eng. Law & Eq. 681, that the purchaser took a full title free of the lien set up by the libellant. Unless such be the law, then the authority conferred to sell in a case of necessity is a mockery, as no prudent man would ever purchase such a title.

Having come to these conclusions, it is unnecessary to decide the other questions discussed at the bar. Decree affirmed. Libel dismissed with costs.

[NOTE. On libellant's appeal the decree of the circuit court was duly affirmed, Mr. Justice Davis delivering the opinion of the supreme court, in the course of which it was held that the sale of a ship becomes a necessity, within the meaning of the commercial law, when nothing better can be done for the owner or those concerned in the adventure. If the master, on his part, has an honest purpose to serve those who are interested in the ship and cargo, and can clearly prove that the condition of his vessel required him to sell, then he is justified. The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a legal necessity to do it. If this can be shown, the master is justified; otherwise, not. It was held that the facts of this case bring it within these well-settled principles of maritime law, inasmuch as they show that the several surveys of the vessel were made in the harbor of Port au Prince by captains of vessels temporarily detained in port and agents of the American and English underwriters, and that their report established that the cost of repairs necessary would exceed the value of the vessel, and hence they advised that the voyage be broken up, the vessel sold, and the cargo reshipped to Boston. In the face of this, if the master had proceeded to repair his vessel he would have been culpable, being in a distant port with a disabled vessel, seeking a solution of the difficulties surrounding him at a great distance from his owners, with no direct means of communicating with them, and having good reason to believe the copper of his vessel was displaced, and that worms would work her destruction. The Amelie, 6 Wall. (73 U. S.) 18.]

FITZGERALD (ECKLE v.). See Case No. 4,267.

Case No. 4,839.

FITZGERALD v. The H. A. RICHMOND.

[10 Chi. Leg. News, 216.]

District Court, E. D. Michigan. March 11, 1878.

LIBEL FOR MATERIALS — RIGHTS OF MORTGAGEE — BONA FIDE PURCHASER—LIENS—STALE CLAIM.

1. It is too well settled to need the citation of authorities that the lien of a material man is not waived by taking the negotiable paper of the owner or master of the vessel.

[Cited in The Illinois, Case No. 7,005.]

2. The court considers how far a mortgagee is to be regarded as a bona fide purchaser without notice.

3. That it is well settled, a mortgagee for a present valuable consideration, is a bona fide purchaser to the extent of his mortgage interest, but even if no money be advanced at the time the mortgage is made, if upon the faith of the security the mortgagee afterwards advances money, or becomes liable as indorser to that extent, he becomes a bona fide purchaser.

4. Under the circumstances in this case, the claimant should be regarded as a bona fide purchaser, the libel not having been filed until two years after his claim accrued, and one year after the mortgage was given and the advances made.

In admiralty. On the 19th day of August, 1875, libellant [Edmond Fitzgerald], who is the proprietor of a shipyard at Port Huron, furnished a mast to the schooner "H. A. Richmond," for which Scott & Brown, her owners, agreed to pay $225, in two installments of $112.50 each, evidenced by two drafts, one on the captain of the vessel, which was paid, and one upon themselves, which was accepted but not paid. This draft matured September 21st. Subsequently during the same season, the schooner took on two cargoes at Port Huron, and continued passing and re-passing the rivers until the close of navigation. In May, 1876, she was again put upon the lake and river trade, chiefly between points on Lake Huron and Lake Erie. She passed Port Huron and Detroit several times, and continued to make frequent trips, within the jurisdiction of this court, during that season, and in November, 1876, was actually seized by the marshal upon another claim, but was released upon bond. The libel was not filed until September 28, 1877. On September 13th, 1876, James Dewey, the claimant, took a mortgage from Scott & Brown upon the schooner, conditioned to pay all negotiable paper upon which he might then be or might become liable as indorser, and to indemnify him against all loss by reason of such indorsements. This was 13 months after libellant's bill was contracted, and just one year from the time the draft on Scott & Brown matured. Prior to the giving of the mortgage, Dewey had indorsed for Scott & Brown to a considerable amount. And after the mortgage was given he indorsed three notes in the aggregate sum of three thousand four hundred and twenty dollars, all of which he

was obliged to take up. On the 28th of April, 1877, the schooner, then being at Hamilton, Ontario, claimant having previously taken possession of her, bought her in upon his mortgage sale, and from that time assumed sole possession and control of her. In May she left Hamilton and was put in trade between the Bruce mines on the river St. Mary, and Detroit. Dewey swears that he received no notice of the claim until July 24th, 1877, when he received a letter from Capt. Fitzgerald, requesting payment. It seems that at the time he took the mortgage, Dewey made every effort possible to ascertain the claims outstanding against the vessel, and Scott testifies that some time in November of that year, he did notify him of libellant's claim, but informed him he had supposed it was settled by his note.

Atkinson & Atkinson, for libellant.
Burt & Burritt, for claimant.

BROWN, District Judge. Defendants' claim that the bill was settled and paid by the acceptance of Scott & Brown, the owners, cannot be maintained. It is too well settled to need even the citation of authorities, that the lien of a material man is not waived by taking the negotiable paper of the owner or master of the vessel. Captain Scott's testimony that these drafts were given in payment for the mast; that he supposed it was paid, and therefore did not constitute a lien upon the boat, is nothing more than his own opinion upon the subject. There was no conversation proven to have taken place at the time the draft was given, indicating any intention on the one to give it, or of the other to receive it, in payment of the bill.

The second defense, that the claim has become stale as against the mortgagee, is better supported by the testimony. How far a mortgagee is to be regarded as a bona fide purchaser without notice, depends much upon the character of the transaction. A bona fide purchaser is one who at the time of his purchase advances a new consideration, surrenders some security or does some other act, which if his purchase were set aside, would leave him in a worse condition than his original position: Johnson v. Graves, 27 Ark. 558. Had Dewey taken this mortgage simply as security for the debt already existing, and made no further advances upon the strength of it, it would be a serious question whether he could be protected as against this lien. Though the question does not seem to have been passed upon directly in any admiralty suit, it has been discussed with great learning and elaboration in several cases where a vendor has sought to enforce his lien upon land, which has been conveyed to trustees for the benefit of creditors or to assignees in bankruptcy, or mortgaged for a prior indebtedness. The decided weight of authority seems to be that in such cases the mortgagee cannot assert his claim as against the vendor's lien: Brown v. Vanlier, 7 Humph. 249; Eubank v. Poston, 5 T. B. Mon. 286; Shanks v. McWhorter, 26 Ga. 315; Shurley v. Sugar Refinery, 2 Edw. ch. 505; Repp v. Repp, 12 Gill & J. 341; Harris v. Horner, 1 Dev. & B. 455; 1 Hill. Mortg. 52; 2 Story, Eq. Pl. 1225–1230.

Were it not for the case of Bayley v. Greenleaf, 7 Wheat. [20 U. S.] 46, I should feel no hesitation in holding that the claimant, by the mere taking of this mortgage, did not stand in a position to test this claim as a bona fide purchaser. That case, however, held directly that the vendor cannot enforce his lien for unpaid purchase money as against trustees for the creditors of the vendee to whom the land has been conveyed, without notice of the lien. The opinion of Chief Justice Marshall in this case has been criticised with great ability by the courts in several of the cases above cited, and were the question to come before the supreme court again, it is at least doubtful whether it would adhere to this opinion; or at least whether it would be adopted so far as to sustain the claim of a mortgagee against the lien of a material man. I see nothing to distinguish his possession from that of an assignee in bankruptcy, against whom it is well settled the lien of the material man will prevail. It is well settled, however, that a mortgagee for a present valuable consideration, is a bona fide purchaser, to the extent of his mortgage interest: The Nevada [Case No. 5,839]; The Key City, 14 Wall. [81 U. S.] 653; The Columbia [Case No. 3,036]; The Dubuque [Id. 4,110]. But even though no money be advanced at the time the mortgage is made, if upon the faith of the security, the mortgagee afterwards advances money, or becomes liable as indorser, to that extent, he becomes a bona fide purchaser. Ladue v. Detroit & M. R. Co., 13 Mich. 380. That is the position of the claimant in this case. Upon the day the mortgage was executed, he indorsed for Scott & Brown a note to the amount of $1,200; soon thereafter he indorsed two other notes in the aggregate sum of $2,220, all of which he was obliged to take up at maturity. Under these circumstances, I deem it quite clear that he should be considered as a bona fide purchaser. The libel not having been filed until two years after his claim accrued and one year after the mortgage was given, and the advances made, I think libellant's claim must be adjudged to be stale.

The view which I have taken of the case renders it unnecessary to consider whether Dewey gained any additional rights by the purchase made April 28th, 1877, upon the foreclosure of his mortgage. The libel will be dismissed.

FITZGERALD (LAKE v.). See Case No. 7,993.

FITZGERALD (LEADVILLE CO. v.). See Case No. 8,158.

FITZGERALD (UNITED STATES v.). See Case No. 15,107.

FITZHUGH (ASHTON v.). See Case No. 583.

Case No. 4,840.

FITZHUGH v. BLAKE.

[2 Cranch, C. C. 37.][1]

Circuit Court, District of Columbia. Dec. Term, 1811.

SCIRE FACIAS TO REVIVE JUDGMENT — JUDGMENT FOR PENALTY—EXECUTION.

1. A scire facias to revive a judgment is not a new action; and if the original judgment was rendered in Maryland before the 27th of February, 1801, an execution, after the revival of the judgment by scire facias in Maryland, may be issued upon it by the clerk of this court, under the act of congress of that date, section 13 [2 Stat. 104], upon the filing of an exemplification of the record; but the exemplification must be of the whole record in the suit; not of the proceedings upon the scire facias only.

2. When the judgment is for a penalty to be released on the payment of a smaller sum, that sum must be ascertained before the execution can be issued.

Mr. Law, for the defendant, moved to quash an execution issued by this court upon an exemplification of a judgment upon a scire facias in Maryland, under the act of congress of the 27th of February, 1801, § 13 (2 Stat. 107), because the scire facias was issued subsequent to that date. The original judgment was in 1799; the judgment on the scire facias was in 1804, in Maryland.

THE COURT (FITZHUGH, Circuit Judge, absent) was of opinion that the scire facias was not a new suit; and that the judgment upon it was such a judgment in a suit pending in a court in Maryland on the 27th of February, 1801, as would justify the clerk of this court to issue an execution upon the original judgment thus revived, under the 13th section of the act of 27th February, 1801.

Mr. Law then contended, that if the scire facias was not a new suit commenced after the date of that act, the exemplification should have been of the whole record, including the original judgment and the proceedings which led to it, and not of the proceedings upon the scire facias alone.

Mr. Law also objected that the execution does not pursue the original judgment. It is for a certain sum to be released on the payment of such sum as Leonard Mackall, for whose use the execution is docketed, shall say is due; which is no part of the original judgment.

THE COURT (FITZHUGH, Circuit Judge, absent) quashed the execution, on the ground that the exemplification of the original judgment was not filed before issuing the execution; and because the release was uncertain.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 4,841.

FITZHUGH v. The COMMERCE.

[38 Hunt, Mer. Mag. 193.]

Circuit Court, D. New York.[1] Sept., 1857.

COLLISION—STEAMBOAT AND TOWS ON HUDSON RIVER—NEGLIGENCE OF PILOT.

[A steamboat descending the Hudson river at night, and passing in a narrow place an ascending steamboat having ten boats in tow on hawsers, *held* in fault for failure of her pilot to observe the tows, and for neglect to slow down or take any of the measures usual, under such circumstances, to prevent collision.]

[Appeal from the district court of the United States for the district of New York.]

In admiralty.

NELSON, Circuit Justice. The libel in this case was filed by the owners of the barge Isabella against the Commerce for a collision on the North river, near Castleton, some ten miles below Albany. The steamboat Indiana was ascending the river on the east side with a tow of ten boats. The Isabella, the one in question, with barge Cleveland, were the last tier, and were connected by a hawser to the tug. There was an intermediate tier of four canal boats, also connected by a hawser, some two hundred feet in advance of the two last. The Indiana had passed Mull Island, and had straightened up on the east side of the river, as near as it was safe for her to go, and had advanced so far that the last tow was opposite or just above the head of the island. The Commerce had left Albany that evening, and was descending the river on the west side, the Oregon following her at a distance of a few hundred yards. The night was not very dark. The Commerce, after passing the Indiana west from seventy to one hundred feet, when about opposite the second tier of tows took a sheer to the east, and thus changing her course, struck the Isabella, which was lashed to the larboard side of the Cleveland, and, of course, nearest the Commerce, sinking vessel and cargo.

The court below was of opinion, upon the proofs, that the Isabella was wholly in fault, being out of place at the time, and far in towards the west shore, and in the track of the Commerce, and dismissed the libel. [Case unreported.] The conflict and obscurity of the proofs on this point have been very much cleared up by the evidence of the pilot of the Oregon, who had charge of that vessel, which has been taken in this court since the appeal. The evidence of the master of the Indiana, and of six of the tows, is very full and explicit, that, at the time of the sheer of the Commerce, the two last tows, the Isabella and Cleveland, were on a line, or nearly in a line, with the tug, which confessedly was as far to the east shore as was safe; and the master of the Cleveland, to which vessel the Isabella was lashed, states that his vessel was about as

[1] [District not given.]

near the shore as was prudent for him to go. And further, they all agree that there was room enough for the Commerce to have passed west of the tow, and that the sheer was unnecessary, and the direct cause of the collision. These witnesses all saw the sheer, which, indeed, is admitted by the witnesses for the Commerce: and, apprehending a collision in consequence, watched the course of the vessel until it happened. They speak, therefore, with confidence as to the transaction; and, indeed, cannot well be mistaken; and they are fully confirmed by the testimony of the pilot of the Oregon, who also apprehended the collision when he saw the sheer, and kept his eye on the Commerce. The evidence of this pilot, who was first pilot of the Oregon, very much shakes the testimony of Wilson, the second pilot, who was examined on behalf of the respondents in the court below.

The defense set up to justify the sheer is placed on two grounds: (1) That there was a light on the Isabella, and that the pilot of the Commerce supposed, and had a right to suppose, she was a vessel at anchor; and that, being well out in the channel of the river, he made the sheer to pass her on the east side; and (2) that she was so far out in the channel there was not room to pass her on the west side. As we have already said, the testimony of the captain of the tug, and of six of the tows, is very strong to show that the pilot was mistaken as to the room in the channel west of the Isabella. But in addition to this, is the evidence in this case of the pilot of the Oregon, who was looking on, and who passed over the tract just at or near the moment of the collision. And as it respects the light on the Isabella, it was in the hand of the master, who was moving about on the boat at the time, and, under the circumstances, we cannot but be of opinion that if proper attention had been given to the navigation of the Commerce, it would have aided in admonishing the pilot of her position as one of the tows of the Indiana instead of confusing or embarrassing him. The pilot of the Oregon, who had charge of that vessel and who was several hundred feet behind the Commerce, had no difficulty at the time in regarding this vessel with the light as the tow of the Indiana, and apprehended a collision from the moment of the sheer of the Commerce. The channel of the river was only from three to four or five or six hundred feet wide at the place of the collision in which were the Indiana with her ten tows ascending slowly the river—the Commerce and Oregon descending, and in respect to which navigation some embarrassment existed, and yet, the weight of the proof is, that the speed of the Commerce was not checked till the moment of the collision, nor any of the usual precautions taken under such circumstances. The Oregon immediately checked her speed, and took measures to prevent any accident.

FITZHUGH (SCHOLFIELD v.). See Case No. 12,474.

Case No. 4,842.

FITZPATRICK v. DUBOIS et al.

[2 Sawy. 434.][1]

Circuit Court, D. Oregon. May 26, 1873.

"SETTLEMENT" UNDER DONATION ACT — GRANT— CONDITIONS SUBSEQUENT AND PRECEDENT THERETO — DIVORCE AFTER SETTLEMENT, BUT PRIOR TO NOTIFICATION.

1. A "settlement" under the donation act (9 Stat. 497) consisted of the selection and occupation of a particular tract of the public lands with intent to acquire the same, and due notice thereof to the surveyor-general or other proper officer; but when such notice was given, it related back to the commencement of such occupation, unless the same was prior to the passage of the act.

2. The donation act was a present grant to the settler thereunder, but the completion of "a settlement" upon the tract claimed was a condition precedent to the vesting of any estate or interest in the land, in such settler.

3. From June, 1845, until March, 1851, Dubois and wife occupied a land claim; in June, 1852, Dubois obtained a divorce from his wife, and in September of the same year notified and proved up on such land claim, and subsequently obtained a patent for three hundred and twenty acres thereof: *Held*, that no right or interest in said land had vested in Dubois or his wife at the date of the divorce, and that thereafter Dubois was only entitled to claim and take a donation as a single man, and that his former wife was not entitled to any share or part thereof.

[This was a bill in equity by Richard Fitzpatrick against Andrew Dubois and others.]

John H. Woodward, for complainant.

Reuben P. Boise, for defendants.

DEADY, District Judge. This suit was commenced on May 30, 1872, and is brought to "declare and establish" the rights of the parties thereto, in and to a certain tract of land, described in the bill as claim 98, containing 321.80 acres, and situated in Marion county, and to procure a partition thereof. The defendants answered the bill, except Dubois, who made default.

On February 17, 1873, the cause was heard and submitted on the bill, answers, replications and proofs. A large portion of the evidence taken in the cause is irrelevant and incompetent, but the material facts are not seriously disputed. They appear to be as follows:

In 1840 the defendant, Andrew Dubois, and Margaret, his wife, were settled upon a land claim of six hundred and forty acres, which included the premises in controversy. In 1843 said Margaret died, and in 1845 said Andrew married one Josette ——, now Josette Jeffries, and thenceforth they two resided on said land claim until March, 1851, when said Josette left the bed and board of said Andrew. On June 9, 1852, said Andrew

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

duly obtained a divorce from said Josette, who in June, 1853, was married to Edward Jeffries, with whom she still lives.

In September, 1852, said Andrew notified as a married settler upon said land claim under section four of the donation act of September 27, 1850, and made proof of the required residence and cultivation thereon, and of his marriage with his first wife, Margaret. On October 31, 1864, the register and receiver issued a certificate for the claim to said Andrew and Margaret. Upon examination of the matter in the general land office, it appearing that said Margaret had died before the donation act, and therefore was not entitled to land under it, the register and receiver, under the direction of said office, issued a corrected certificate in favor of said Andrew as a single man for three hundred and twenty acres, upon which, on June 16, 1868, a patent was issued to him for the premises in controversy.

Subsequently Josette made a claim in the local land office to the one half of said claim, upon the ground that she was the lawful wife of said Andrew from January, 1845, to March, 1852. Thereupon said patent was withheld from delivery, and a hearing of the parties had before the register and receiver, who decided in favor of Josette. This decision was reversed in the general land office upon the ground that, although Josette had an undoubted "right to one half of the claim in her own right, which she could have disposed of in any manner she thought fit," yet she had lost it by abandonment and "disclaimer of any right therein."

The defendants—Hall, Smith and Brown—are American citizens, and in possession of the premises, and claim title thereto as sole tenants in fee, by virtue of sales and conveyances thereof by defendant Dubois in the years 1855 and 1856, as follows: Hall of one hundred acres; Smith of one hundred and seventy acres, and Brown of fifty acres. On May 6, 1872, the said Edward and Josette Jeffries executed a conveyance of the premises to the complainant, who is a subject of Great Britain.

Upon this state of facts, counsel for the complainant maintains that Dubois and Josette, being husband and wife at the passage of the donation act of September 27, 1850 (9 Stat. 497), and then settled upon the land in question, the title thereto vested in them immediately, as tenants in common, subject to the performance of the subsequent conditions of notification and proof of residence and cultivation; and that it being the duty of the husband to notify the surveyor-general of the precise tract claimed under the law, and otherwise comply with the provisions of the act, so as to entitle himself and wife to a patent for the donation, the failure to obtain a patent to the whole six hundred and forty acres settled upon is the fault of the former and not the latter, and the consequent loss must at least be borne by the husband equally with the wife, and therefore she is entitled to an undivided half of the three hundred and twenty acres described in the patent.

On the other hand, counsel for the defendants insists that the performance of all the duties imposed upon the settler by the donation act are conditions precedent to the vesting of title in him, and therefore no estate vests in the settler or his wife until the making of the notification and completion of the four years residence and cultivation required by the act, and that Dubois being a single man when he made his notification, was not entitled to take or claim a donation for his late wife Josette, or any one but himself.

The provisions of the donation act [9 Stat. 497] bearing upon the question are as follows: Section 4 enacts: "That there shall be and hereby is granted to every white settler or occupant of the public lands * * * now residing in said territory, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section, or three hundred and twenty acres of land, if a single man, and if a married man, * * * the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right; and the surveyor-general shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office."

Section 6 requires: "That within three months after the survey has been made, or where the survey has been commenced, then within three months from the commencement of such settlement, each of said settlers shall notify the surveyor-general to be appointed under this act of the precise tract or tracts claimed by them respectively under this law."

Section 7 requires: "That within twelve months from the survey or the settlement, when the latter is the second in point of time, the settler must make proof before the proper officer 'that the settlement and cultivation required by this act had been commenced; and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section of this act;' and upon such proof being made, such officer shall issue a certificate 'setting forth the facts in the case, and specifying the land to which the parties are entitled.'"

In Chapman v. School Dist. [Case No. 2,607]. this court held that section 4 of the donation act "is a grant in the present and gives the fee simple to every settler who avails himself of its provisions from the date of his settlement; but until the completion of the subsequent conditions of residence and

cultivation and proof thereof, it is an estate upon condition—what is known at common law as a base or conditional fee—subject to be defeated or lost by a failure to perform the conditions upon which it is held. But it is an estate in fee, nevertheless, and upon the completion of the residence and cultivation or other conditions, it becomes absolute and unqualified."

Thus far this ruling has been followed, and is, therefore, in this court, the law of this case. According to it the title—the estate in fee in the lands—vests in the settler from the date of his settlement, and the conditions of residence and cultivation are subsequent and not precedent.

But the case does not decide what constitutes a settlement, or whether the notification of "the precise tract claimed" is a condition precedent or subsequent to the taking effect of the grant. Precedent conditions are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or nonperformance of which an estate already vested may be defeated. 2 Bl. Comm. 154.

The case turns upon the determination of this question. For if the settlement, in contemplation of the act, was commenced while Josette was the wife of Andrew, then the right to the donation in equal parts was vested in the settler and his wife, and the subsequent divorce in no way affected it. The act imposed no duty upon the wife in connection with the land. The right to make the location and settlement is given to the husband, and the corresponding duty of performing the conditions is imposed upon him, and if he chose to complete the residence and cultivation and make proof thereof, notwithstanding the divorce, the effect of such compliance with the act enures to the benefit of the wife as well as himself.

In Fields v. Squires [Case No. 4,776] it was held that: "The settlement of a married man is intended for the benefit of his wife as well as himself, to enable her to obtain her equal share of the bounty of the grantor. A married man may occupy less land than the law permits. He may have good reasons for so doing. A particular half section may be deemed of more value than any whole one, open to settlement. In this respect the act commits the interest of the wife to the judgment and thrift of the husband. But he cannot change the law, and elect to take as a single man to the exclusion of the wife. The exclusive power of the husband is confined to the selection and location of the land. In any event, the land embraced in the settlement, whether a whole section or less, is granted to the husband and wife in equal parts."

Mere indefinite occupancy of the public lands did not constitute any one "a settler" nor make a "settlement" thereon under the donation act. Such occupation must be upon a particular tract, having the form or boundaries required by the act, and with the intent to acquire the same.

Neither did residence and cultivation, however commenced or prolonged, bring a party within the purview of the act, so as to vest in him any estate or interest in the land. Notice to the surveyor-general of "the precise tract claimed," was the first act which brought the occupant within the operation of the law. By this means he signified his intention to avail himself of the benefits of the act, and his acceptance of the proffered grant. Thereafter, but not before, the grant was located and confined to the land described in his notification, unless, as was the practice, the settler had leave to withdraw his notification and abandon that location.

This notification by the occupant was what constituted him "a settler," and his occupation thereby became "a settlement" under the act, as well as in fact. Doubtless it should be held to relate back to the beginning of his occupation, or to the passage of the act, when the occupation commenced prior thereto. But without this notification the occupant could never acquire any legal relation to the land, or the government be deprived of its ownership thereof.

In this respect the donation act is unlike the grants in the cases cited by counsel for complainants—namely, Rutherford v. Green's Heirs, 2 Wheat. [15 U. S.] 196; Fremont Case, 17 How. [58 U. S.] 557; Hornsby v. U. S., 10 Wall. [77 U. S.] 235. In all these cases there was a grant of a specific quantity of land within certain exterior limits to a particular person. The courts held that such grants passed a present interest to the grantee, as against the government, subject to the right of the latter to locate the grant within the exterior limits according to the terms thereof, and the general law upon the subject. In the language of the cases the general gift then became a particular one.

But here the grantee is not named, otherwise than as one included within a description of a class of persons who may take, and the selection and notice to the grantor of the precise tract claimed depended upon the former, and involved in fact his acceptance of the proffered grant.

It follows from these premises that the act of notification is a condition precedent to the vesting in the occupant of any estate or interest in the land.

Apply this conclusion to the case at bar. On June 9, 1852, when Andrew was divorced from Josette, he was a mere occupant of the public lands. Whether he should become "a settler" thereon, and a donee under the act, of the land occupied by him, depended upon his election to notify thereon within the time limited by the act. Josette could not compel him to notify, nor while she was his wife could she receive a donation otherwise than through her husband's acceptance of the proposed grant. But be-

fore he notified he had ceased to be a married man, and she was no longer his wife. He was only entitled thereafter to take as a single man. His former wife was now a femme sole, and entitled to become a settler in her own right. Silver v. Ladd, 7 Wall. [74 U. S.] 226. Although as a matter of fact Dubois did notify as a married man upon the whole section, he had no right to do so, and was finally held by the land department to be a single man, and allowed a donation accordingly.

It is a proposition too plain for argument, that Josette could not, after the divorce, acquire any right or interest in this land as the wife of Andrew. That relation then came to an end, and she could acquire nothing in that character thereafter. Neither did she acquire any such right before the divorce unless Andrew did. But as has been shown, the notification being a condition precedent to the vesting of any estate in the premises in Andrew, he acquired none until September, 1852, some months after the divorce. Josette, never having acquired any interest in the premises, because no estate therein was vested in either her or Andrew prior to their divorce, her vendee, the complainant, has none, and his bill, being therefore without equity, is dismissed.

Case No. 4,843.

FITZPATRICK et al. v. EIGHT HUNDRED BALES OF COTTON.

[3 Ben. 42.][1]

District Court, S. D. New York. Dec., 1868.[2]

VOLUNTARY STRANDING—SEAWORTHINESS—MASTER.

1. Where a three-masted schooner encountered a severe storm from the eastward, off Fire Island, in the course of which the mizzen sail was so torn as to make it useless, and it was found impossible to repair it, and the effect of its loss was that the vessel could not be kept up to the wind, but fell off into the trough of the sea, and, about ten o'clock at night, the master ordered the mainsail to be taken in to check her speed, and kept her off before the wind towards the New Jersey shore, hoping that, before he reached it, some change might take place, but the wind and sea increased, and, about one o'clock the next morning, on consultation, it was determined that, inasmuch as an attempt to bring the vessel's head to the wind would cause her to fall into the trough of the sea, and be thrown on her beam ends, when her decks would be swept, and all on board be lost, it was safer to run the risk of beaching her, and, accordingly, she was kept on, and ran ashore about an hour after, and proved a total loss, her cargo being almost all saved: *Held*, that this was a case of voluntary stranding, and that the owners of the vessel were entitled to contribution from the cargo.

2. A vessel equipped in a manner which renders her competent to encounter the ordinary perils of a voyage is seaworthy.

3. The fact that the mizzen sail of the vessel gave out in the extraordinary storm, and that she had no spare mizzen sail, does not show that she was unseaworthy when she sailed.

4. The master of the vessel acted with due deliberation and discretion, with no unreasonable timidity, with an honest intent to do his duty, and with a fair exercise of skill.

This was a libel [by Philip Fitzpatrick and others against eight hundred bales of cotton and two hundred and eighty eight barrels of molasses] to recover contribution, in general average, for the damage sustained by the libellants by the loss of the schooner George W. Hynson, owned by them, and of the freight on her cargo. Such loss was claimed to have occurred by the voluntary stranding of the vessel by her master. The libel was filed against the cargo, which was saved, and was being transported on the vessel as freight. The vessel was a three-masted schooner. She took on her cargo at New Orleans, and left there for Providence, Rhode Island, on the 28th of December, 1866. On the 21st of January, 1867, at about five o'clock p. m., when she was about fifteen miles south from Fire Island, on the shore of Long Island, she encountered a severe storm from the eastward, and was headed off on a south southwest course. As the wind and the sea increased, an attempt was made to take in sail, and, in taking in the mizzen sail, it was so torn by the wind as to require to be repaired before it could be further used. The other sails were taken in, so that the vessel ran under a two-reefed mainsail, and a jib with the bonnet off. The night was so dark, the weather so cold, the wind so violent, and the sea so high, that, after an attempt by all disposable hands to mend the sail, the effort had to be abandoned about nine o'clock p. m. The effect of the loss of the use of the mizzen sail was, that the head of the vessel could not be kept to the wind and she fell off into the trough of the sea, and was in danger of being thrown on her beam ends. The wind and the sea continued to increase, and life lines were stretched for the safety of the crew, as the sea frequently broke over the deck. About ten o'clock p. m., the master, after consultation with the mate, ordered the mainsail to be lowered, to thus check the speed of the vessel, and kept her off before the wind and the sea to the westward, towards the New Jersey shore. At that time he supposed himself to be from twenty-five to thirty miles distant from that shore, and he had no then present intention of running the vessel on shore there, but hoped that before reaching there, the wind would either go down or shift from the eastward, and allow him to change his course from one towards the shore. Directed by her rudder, proper hands being kept at her wheel, she was kept away from the wind, and out of the trough of the sea, and on a westward course. The wind did not abate or shift, and the sea increased. It was storming, with rain, snow, and hail, and

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 4,319.]

very dark, and, about one o'clock a. m., the master had another consultation with the mate. The occasion of that consultation was, that the vessel had been running before the wind for three hours, and was approaching the New Jersey coast. The result of the consultation was, that, in the then state of the wind and the sea, it was thought to be impossible to do anything else but keep the vessel running to the westward, before the wind and the sea, until she should run upon the beach, for the reason that any attempt to bring her head to the wind would cause her to fall into the trough of the sea and be thrown on her beam ends, when her decks would be swept, and all on board would be lost. It was known to the master that the shore was a sandy beach. Two men were kept at the wheel, and guided the course of the vessel directly before the wind, and towards the beach, until the last moment, so as to prevent her falling into the trough of the sea before reaching the shore, so as to ensure her reaching the shore, and so as to ensure her reaching it bow on, and not broadside on, in which latter event the breakers might have swamped her. The rest of the crew were sent into the rigging. About two o'clock a. m., the vessel neared the breakers, bow on. The men at the wheel left it and jumped into the rigging just as a heavy swell came which lifted the vessel over the outer bar and carried her high up upon the beach, which, when daylight came, was found to be Squam beach. The vessel was secured by an anchor from listing to starboard towards the sea. She ran up so high that, at low water, it was bare ground in shore of the vessel. An arrangement was soon made with the Coast Wrecking Company to save the vessel and cargo for seven per cent. of their value, they to be delivered to the master in New York. After work was commenced under this arrangement, an agent, sent by the owners of and underwriters on the cargo, arrived at the wreck, and sanctioned the arrangement, and concurred in the discharging of the whole of the cargo, and remained there until nearly all of it was discharged. The cargo was all saved, mostly in good order, except thirteen barrels of molasses. The vessel broke up and was lost, despite all proper efforts to save her. After being stripped she was sold, as she lay, for $316. Her value before was about $20,000. The freight and primage on the cargo, if delivered in Providence, would have been $3,902. The agent of the owners and underwriters of the cargo told the master of the vessel, at the wreck, that he was prepared and authorized to sign average bonds for the owners and underwriters of the cargo, and that the freight would be payable, less the cost of transportation from New York to Providence. Without the knowledge of the master or of the agents of the vessel, the agent in New York of the consignees of the cargo received there and forwarded to Providence all of the cargo except 276 bales of cotton, which were seized under the process in this suit. The consignees of the cargo paid the salvage expenses and charges on it. The answer set up, in defence, that the vessel was not seaworthy, or competently manned or commanded for her voyage; that no proper effort was made to pursue her voyage, or to prevent her and her cargo from being wrecked, or to take her into a place of safety; and that the disaster was due to the fault or neglect of the master or the poor condition of the vessel and her equipment. The liability of the cargo to contribute in general average for the loss of the vessel, or of her freight, was denied. The libellants insisted that the case was one of voluntary stranding, constituting a general average loss of the vessel and freight, and entitling the libellants to recover contribution therefor from the cargo saved; and that the vessel was seaworthy, and was properly navigated. On the part of the claimants it was insisted, that the stranding, if excusable, was not voluntary but compulsory, and that the vessel was not properly equipped or competently navigated.

E. H. Owen, for libellants.
C. A. Hand, for claimants.

BLATCHFORD, District Judge. It is the law of this court, as settled by the supreme court of the United States (Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 331), that the voluntary running on shore of a vessel in a case of such imminent peril that there is no other possible means of preserving the crew, the vessel and the cargo, the stranding being done to preserve the crew, the vessel, and the cargo, followed by a total loss of the vessel and the saving of the cargo, constitutes, on behalf of the vessel, a general average loss, to which the cargo saved is bound to contribute. In the case of Barnard v. Adams, 10 How. [51 U. S.] 270, 303, the same court state the rule to be, that, where there is a danger in which vessel, cargo, and crew participate, and such danger is imminent and apparently inevitable, except by voluntarily incurring the loss of a portion of the whole to save the remainder, and there is a voluntary jettison of some portion of the whole, for the purpose of avoiding such imminent peril, and the attempt to avoid such imminent common peril is successful, the case is one for a general average contribution. It was urged, in the present case, on the part of the claimants, that, to constitute a voluntary stranding, the vessel must be subjected intentionally to an increased peril, and that, where she flees from instant and sure destruction, the election to strand her is a secondary result forced by unavoidable com-

pulsion, and is not voluntary. This is a mistaken view of the law of the federal courts on the subject. In Columbian Ins. Co. v. Ashby [supra], it is held, that where, in the stranding, there is an intention to place the vessel and cargo, if practicable, in less peril, by an act which, though hazardous, is done to escape from a more pressing danger, and for the common safety, and the salvation of the cargo is accomplished thereby, while the vessel is lost, the case is one of voluntary stranding, in which the cargo must contribute, in general average, for the loss of the vessel. So, too, in Barnard v. Adams [supra], it is held, that where there is imminent peril that the vessel will be driven on shore under such circumstances as to be inevitably wrecked, with loss of vessel, cargo, and crew, and such immediate peril is avoided by voluntarily stranding the vessel at a less dangerous place, and cargo and crew are saved uninjured, but the vessel is lost, the case is one of voluntary stranding, and one for contribution, in general average, by the cargo saved, to the loss of the vessel. In that case, it was urged, that if the common peril was of such a nature that the thing cast away to save the rest would have perished inevitably, even if it had not been selected to suffer in place of the whole, there could be no contribution. But the court overruled this view, and held that there could be no foundation for a voluntary stranding, except the compulsion of necessity to save vessel and cargo or one of them from an imminent peril which threatened their common destruction; that the compulsory choice between the loss of the whole and the loss of a part must exist, to justify the sacrifice of a part for the whole; and that, if the jactus were not indispensable in order to escape the common peril, the master would himself be liable for the consequent loss. In the case of Rea v. Cutler [Case No. 11,599], the doctrine of the case of Columbian Ins. Co. v. Ashby was applied, and it was held that, where the master adopted a course which seemed to him least perilous, and most conducive to the common benefit, the loss by shipwreck being inevitable, but being capable of being met in more than one way, and with different degrees of peril to life or property, and in so acting the vessel was wrecked, the loss was a ground for general average.

Applying these principles to the facts of the present case, the stranding of the vessel was less perilous than an effort to keep her head to the wind, and to keep her away from the shore. Such an effort, on the evidence, would have caused her to go around no farther than into the trough of the sea, and there was in such a position imminent and apparently inevitable danger that her crew would have been swept away and lost, entailing a loss of vessel and cargo. Under these circumstances, the master adopted the course which was least perilous. He knew that the New Jersey shore was sandy, and afforded a probability of safety, and, after due and proper consultation, he directed the course of his vessel so as to give her and her cargo the benefit of the lesser peril and the chance of avoiding the greater one. There was, of course, a chance that, in not running before the wind, and in keeping off shore, the vessel might in some way have escaped the apparent danger from lying in the trough of the sea, but that chance the master threw away and elected not to take; and in doing so he exercised volition. There was a manifest intention on the part of the master, especially after the second consultation, to place the vessel and cargo in less peril by running the vessel on shore. That act, though hazardous, was done to escape from the more pressing danger, and was for the common safety. It is true that, when the master first began to run before the wind, the New Jersey shore was so far distant that his hope that the wind would die away or change before he should reach the shore was greater than his fear of being cast upon the shore. But, at the time of the second consultation, there was an honest belief that the vessel and cargo and crew would be lost in the trough of the sea, if the vessel were not run on shore, and that there was less peril in running her on shore. Under this state of facts, the will of the master was exercised in avoiding the greater peril of lying in the trough of the sea, and in discarding whatever chance of safety existed in doing so, and in carefully guiding the course of the vessel so as to accomplish the result attained. The case, therefore, was one of voluntary stranding, calling for contribution, in general average, on the part of the cargo saved.

The defence that the vessel was not seaworthy when she left New Orleans is not made out. She was equipped in a manner which rendered her competent to encounter the ordinary perils of the voyage. Dupont v. Vance, 19 How. [60 U. S.] 162, 167; 2 Pars. Mar. Law, bk. 2, c. 3, § 2, p. 132. The fact that the mizzen sail gave out in the extraordinary storm the vessel encountered, and that she had no spare mizzen sail, is not enough to make out unseaworthiness at the commencement of the voyage. I see no evidence of any deficiency in her equipment in other respects, or of any want of care or skill in her navigation. The master appears to have been a competent man, and to have acted in the emergency with due deliberation and discretion, with no unreasonable timidity, with an honest intent to do his duty, and with a fair exercise of skill. Lawrence v. Minturn, 17 How. [58 U. S.] 100, 110. The freight, if lost, is to be regarded as a part of the loss to be contributed for. Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 331, 344.

There must be a decree for the libellants

in accordance with this decision, with a reference to a commissioner, as an auditor, to adjust, and state, and report the average contribution due from the cargo saved. All other questions are reserved until the coming in of the report.

[NOTE. An appeal was taken to the circuit court (Case No. 4,319), where the decree of the district court was affirmed.]

FITZPATRICK (LOUISIANA STATE LOTTERY CO. v.). See Case No. 8,541.

Case No. 4,844.

FITZPATRICK et al. v. TROY INS. CO.

[5 Biss. 48.][1]

Circuit Court, D. Wisconsin. Oct., 1857.

INSURANCE STOCK NOTES.

An insurance company has no right to divide its risks and capital into classes, and restrict the liability upon stock notes to the class in which they are placed. The insured has the right to call upon the whole capital of the company and require an assessment upon all the stock notes.

[This was a bill in equity by Alexis Fitzpatrick and others against the Troy Insurance Company.]

MILLER, District Judge. The plaintiffs recovered a judgment against the defendant upon a policy against fire on a store of goods. Upon the return of an execution unsatisfied, a creditor's bill was filed, with a rule for an injunction and for the appointment of a receiver. By the consent of the parties a receiver was appointed, who has filed his bond with sureties and has entered upon the discharge of the duties of his appointment. The receiver returned into court a schedule and inventory of the premium notes and assets of the company; and he has petitioned the court, setting forth that the company was organized with two departments, the farmers' department and the merchants', and that by the charter and by-laws the accounts and policies in each department were to be entirely separate and distinct from each other; and praying instructions as to the manner of making assessments upon the notes in each department for the liquidation of the debts of the company. Section 4 of article 2 of the by-laws is, "That the accounts of each department shall be kept entirely separate and distinct, and no premium note shall be assessed for the payment of any loss except in the class to which it belongs;" and in pursuance of article 9 of the charter, these by-laws are annexed to the policy and are made by reference a part of the contract in form.

These plaintiffs paid a cash premium without giving a note, and did not, therefore, insure on the mutual principle. They have a right to claim of the company the amount of their judgment. They have not, by a note or in any other manner, classed their policy under either department as specified in the by-laws.

The charter was granted and the company was organized under and by virtue of an act entitled "An act to provide for the incorporation of insurance companies," passed by the legislature of Wisconsin, and approved February 9, 1850. I do not find in that act any authority for the division of the company into two departments, or its business into classes. The fifth section requires agreements or notes for insurance before the organization of the company, which the corporators certified to under oath, upon submitting their application for the charter. That certificate does not classify the premium notes so received. These notes are required as capital of the company. They are "payable when called for, according to the charter and by-laws of the company, to pay losses and expenses." But this provision does not authorize a classification of the notes. It is not contemplated by the act that there should be the classification as made by the charter and by-laws of this company. One charter, or the incorporation of one company upon each application, was intended. This charter and the by-laws virtually make two companies of separate and distinct interests and liabilities. The law of this state appears to be the same as that of the state of New York. The only decision in that state referred to is the case of Thomas v. Achilles, 16 Barb. 491, in which the court ruled that "a mutual insurance company, organized under the general insurance act, has no right to divide its risks into two classes according to the degree of hazard, and to assess the premium notes only for the payment of losses happening in the class to which such notes belong. The assured has a right to look to the entire capital of the company—that is, the whole amount of premium notes taken—for his indemnity, in case of loss, instead of being limited to the capital of that class of risks in which his policy has been placed. And in case an assessment is made, he has a right to claim that all the premium notes held by the company should be embraced therein."

I adopt this decision as ruling the case and shall instruct the receiver accordingly.

Consult, also, 1 Phil. Ins. § 510, and cases cited in note 3; People's Eq. Mut. Fire Ins. Co. v. Arthur, 7 Gray, 267.

FITZSIMMONS (AZCARATI v.). See Case No. 690.

FITZSIMMONS (HICKS v.). See Case No. 6,460.

FIVE BARRELS OF WHISKEY (UNITED STATES v.). See Case No. 15,108.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

FIVE CASES OF CIGARS (UNITED STATES v.). See Case No. 15,109.

FIVE CASES OF CLOTH (UNITED STATES v.). See Case No. 15,110.

FIVE CASES OF LINEN TABLE CLOTHS (UNITED STATES v.). See Case No. 15,111.

FIVE CASKS OF FILES (UNITED STATES v.). See Case No. 15,112.

FIVE HUNDRED AND EIGHT BARRELS DISTILLED SPIRITS (UNITED STATES v.). See Case No. 15,113.

FIVE HUNDRED AND EIGHT BARRELS OF SPIRITS (UNITED STATES v.). See Case No. 15,114.

FIVE HUNDRED AND ELEVEN TONS OF NITRATE OF SODA. See Case No. 4,540.

Case No. 4,845.

FIVE HUNDRED AND TWENTY-EIGHT PIECES OF MAHOGANY.

[2 Lowell, 323.][1]

District Court, D. Massachusetts. March, 1874.

ADMIRALTY—JURISDICTION — ACTION IN REM TO RECOVER POSSESSION OF PROPERTY.

1. Where the possession of movable property has been changed, against the right of the true owner, by a maritime tort, or by the breach of a maritime contract, to which the property was subject, the owner may vindicate his title in a court of admiralty by a proceeding in rem.

[Distinguished in Wenberg v. A Cargo of Mineral Phosphate, 15 Fed. 287. Cited in The Director, 26 Fed. 712.]

2. A party who would be the defendant in ordinary cases may often assume the character of libellant in a court of admiralty, in order to bring his case before the court, if the opposite party is in possession of the res, or of a fund in which the libellant has a right to share.

The libel alleged that certain mahogany, of which the five hundred and twenty-eight pieces were a part, was shipped at St. Domingo, in August, 1874, on the American brig Surprise, F. L. Norton, master, to be carried to Genoa, and there delivered, in accordance with the terms of two certain bills of lading, to the libellant, who was the owner thereof; that the master put into Yarmouth, Nova Scotia, and there, without right, sold the cargo, and became himself the purchaser; that said Norton had shipped several parts of said cargo to different ports for sale, and among others to Boston, and was about to ship the same hence to London; that the libellant believes said Norton is about to convert the cargo to his own use; that the libellant is willing to pay the freight and other charges, if any, due said Norton, but denies that any thing is due under the circumstances. The prayer was for a restoration of said cargo, upon payment of whatever may be due thereon.

The question of jurisdiction was submitted to the court, without formal pleadings, and was argued by H. C. Hutchins and H. H. Currier, for the libellant, and C. S. Lincolns, for the claimant of the cargo, who was said to be not the master himself, but a purchaser from him.

LOWELL, District Judge. The libellant's case has been excepted to in the outset in a somewhat informal way, by consent of parties, in order to test the jurisdiction of the court. Few decisions have been found by counsel or by me in which a restitution has been ordered by the admiralty of goods found separated from a vessel in circumstances like those set forth in this libel. Undoubtedly, such titles are usually tried in the state courts, excepting when they concern ships, which in this country have been held to be within the cognizance of the admiralty, and which have lately been put on the same footing in England. At the hearing I was much disposed to doubt whether the admiralty replevin, so to-call it, extended fully to cargoes, or what had lately been cargoes, as well as to ships; but, upon further reflection, I am of opinion that the suit may be maintained.

The admiralty has authority to seize and restore to the true owner all goods, or their proceeds, wrongly taken at sea, whether by simple robbery, or under color of a capture as prize of war, whenever and wherever and in whosesoever possession such goods or their proceeds may be found within the territorial jurisdiction of the admiralty court whose power is invoked in the premises: The Amiable Nancy, 3 Wheat. [16 U. S.] 546; Rex v. Broom, 12 Mod. 135; The Hercules, 2 Dod. 353; 1 Kent, Comm. 379. So, in salvage, the owner of the goods upon which there is a lien for salvage may reclaim them in the admiralty, submitting to the court the question of salvage, and offering to pay the amount. In Post v. Jones, 19 How. [60 U. S.] 150, the master of a whaleship wrecked in the Arctic ocean had sold her catchings to the claimants; and the owners of a part of the cargo proceeded in rem against the oil and whalebone, praying to have possession delivered to them of the oil, &c., or its proceeds, if sold, subject to salvage and freight. The supreme court sustained the libel, and ordered the circuit court to divide the proceeds according to the mode pointed out in the opinion.

In the two classes of cases that I have mentioned, the courts of admiralty have a peculiar, and in many respects exclusive, authority. A court of common law cannot deal directly with questions of prize, and probably not with salvage, as I have had occasion to show in another case. Studley v. Baker [Case No. 13,559]. But, upon the whole, I do not see that this consideration

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

will serve to distinguish all those cases from the present. Over some of them the other courts would have had a concurrent jurisdiction; as, for example, the title to a ship or cargo, not involving a point of prize or salvage, but of simple spoliation; and possibly of salvage, if a sufficient tender had been made.

The case of Post v. Jones, ubi supra, bears a strong analogy to this. There, as here, the owners of cargo alleged that the master had sold it in his own wrong, and they reclaimed it; and though some salvage was admitted to be due, yet it hardly seems that, if the case had involved only freight, the jurisdiction would have been lost, since the court has the same jurisdiction of affreightment that it has of salvage, though it is not so nearly exclusive.

A manuscript report of a case before Judge Benedict has been handed me, in which the owner of a cargo which had been put on board a ship for conveyance to South America, and afterwards unladen again in port in consequence of damage by fire, brought a libel, and alleged facts to prove that the libellant was not bound to permit the ship to carry forward the cargo under the circumstances. The learned judge so found, and ordered the cargo to be restored. No question was raised about the jurisdiction.

Judge Betts has expressed the opinion that a person deprived of his property on the high seas, whether with the connivance of the master or agent having charge of it, or not, and without regard to any marine tort having been committed, was entitled to a remedy in the admiralty, because the transaction is of a maritime character: American Ins. Co. v. Johnson [Case No. 303]. If this opinion is sound, it must follow that the jurisdiction would not be ousted by the fact that the cargo had been converted on shore rather than at sea, because, in matters of contract or of title, the place where an act was done is immaterial to the jurisdiction.

It is one of the equitable features of admiralty practice, that the party who would usually be the defendant may often bring the matter before the courts, as in Post v. Jones, where the persons, who would have been respondents in an ordinary salvage suit, were permitted to assume the character of libellants. In short, I am unable to see that Post v. Jones, and other like cases, can rest on any less broad foundation than this, that where the possession of movable property has been changed, against the right of the true owner, either by a maritime tort or by the breach of a maritime contract, to which the property was subject, the owner may vindicate his title in a court of admiralty, not only in personam, which is not doubted, but also in rem.

The reasons for the adoption of the practice may have been that such cases almost always involve maritime questions, and that the remedy in admiralty is more convenient and more adequate, its powers and proceedings being largely equitable. If the owner of the oil in Post v. Jones had been obliged to recover his property, by a proceeding at common law, one party or the other would have run great risk of losing what the supreme court found to be his equitable right. If the sale had been pronounced void, the owner might, perhaps, have recovered judgment on the strength of his legal title, without payment of freight or salvage; or, if the court found that freight or salvage were due and had not been tendered, or insufficiently tendered, they might have been obliged to find against the general owner, notwithstanding his title, on the ground of an undischarged lien in the defendant.

Finding this case to be of a maritime character, and considering the analogies presented by the cases cited, I am of opinion that the jurisdiction is successfully maintained in rem.

Jurisdiction sustained. Case to stand for answer.

FIVE HUNDRED BARRELS OF WHISKEY (UNITED STATES v.). See Case No. 15,115.

FIVE HUNDRED BOXES OF PIPES (UNITED STATES v.). See Case No. 15,116.

FIVE JUGS OF BRANDY (UNITED STATES v.). See Cases Nos. 15,117 and 15,118.

FIVE NEGROES (BASS v.). See Case No. 1,093.

Case No. 4,846.

FIVE SEAMEN v. The FAIR AMERICAN.

[Bee, 134.][1]

District Court, D. South Carolina. Jan., 1799.

SEAMEN ABSENT FROM VESSEL.

Seamen absent from a ship without any fault of their own, are nevertheless entitled to full wages.

[Cited in Highland v. The Harriet C. Kerlin, 41 Fed. 224.]

[See Antone v. Hicks, Case No. 493.]

[This was a libel for wages by five seamen of the Fair American against the ship Fair American and her captain.] It appeared in evidence that these seamen shipped on board this vessel on the 3d of September last, in the port of Philadelphia, to go from thence to the Havanna and back. They all received a month's wages in advance. On the 8th of October, they were captured by a French privateer: these men were taken on board, and the captain and two other of the crew left in the prize. The latter, after some time, recovered possession of the Fair American, and brought her into Charleston. [See

[1] [Reported by Hon. Thomas Bee, District Judge.]

Case No. 1,847.] The five seamen were put on board an American vessel, and arrived here in December last. They immediately went to their ship, and have been there ever since, in the regular performance of their duty, as part of the original crew. The voyage having been defeated by the capture, the cargo has been landed here, and the vessel is taking in freight for another voyage.

The question is whether these men are entitled to wages for the time they were absent from the vessel. It is contended that as this vessel was taken before she arrived at her first port of delivery, the seamen lose their wages. Lex Merc. 100. On the other hand the same book has been quoted to shew that, if a ship be taken, retaken, restored, and afterwards proceed on her voyage, the contract is not determined, and the entire freight becomes due: that wages follow freight, and are also due. This is the first case of the kind which I have been called upon to decide, and I have considered it fully. It will not be contended that these seamen are to blame. They were taken from their ship by superior force, returned to it as soon as they could, and have discharged their duty faithfully since. Molloy says (page 246) "that, if a vessel perishes, or is prevented by an enemy from returning, wages are lost; but if she unlades, they are due." No such loss has occurred here. The marine laws of the Hanse Towns declare that if a mariner fall sick and be left on shore, he shall receive his wages as if he had served out the entire voyage: and this appears just, for he was not in fault. Yet in such a case, additional expense is generally incurred by the hire of a substitute. Here, there was none, for all the duty was done by that part of the original crew that was left on board. In Mahoon v. The Glocester [Case No. 8,970] it is decided that seamen of an armed vessel, who were on shore by the captain's order, should, nevertheless, receive a full share of prize-money, though they were on shore when the prize was made; because they were not in fault. The case was fully argued, and the decision confirmed on appeal. That decision seems to conclude the case before me. I am of opinion, however, that as the first voyage was defeated, these seamen are bound to continue with the vessel till the one now in contemplation be ended; and at the same rate of wages. Let them, therefore, receive two thirds of what is due to them; and let the remainder be paid at the next port of delivery.

[NOTE. See Crammer v. The Fair American, Case No. 3,347.]

FIVE THOUSAND ONE HUNDRED DOLLARS IN SPECIE (UNITED STATES v.). See Case No. 15,119.

FLAGG (GOODYEAR DENTAL VULCANITE CO. v.). See Case No. 5,590.

Case No. 4,847.

FLAGG v. MANN et al.

[2 Sumn. 486.][1]

Circuit Court, D. Massachusetts. May, 1837.

WITNESS—INTEREST IN SUIT — REAL PROPERTY — COMPLAINANT MUST SHOW BETTER TITLE THAN ONE IN POSSESSION — ESTOPPEL — EQUITABLE MORTGAGE — EQUITY OF REDEMPTION — PAROL AGREEMENT TO PURCHASE ON JOINT ACCOUNT—STATUTE OF FRAUDS—ALLEGATIONS IN ANSWER—DEED—DELIVERY—JOINT POSSESSION BY TORTIOUS TITLE—RELEASE TO ONE — TRUST BY PAROL—SECURITY—MORTGAGE—DEFEASANCE—PURCHASE WITH NOTICE.

1. On or about June 13th, 1823, Samuel Frye, as guardian of his minor children, under a license of court, conveyed certain premises in Lowell, called the Paddy Camp Lands, to Luther Richardson, in fee. On the 14th of May, 1825, Luther Richardson conveyed these premises, being already subject to incumbrances, to his brother, Prentiss Richardson, by a deed of quitclaim, and upon a secret parol trust for the benefit of Luther. On the 6th of May, 1826, Luther Richardson and his wife, and Prentiss Richardson, executed a deed of quitclaim of the premises to Walker and Fisher, for the consideration of $2000 (as stated in the deed), and on the same day, Walker and Fisher executed a bond for $10,000 to Luther Richardson alone, which recites, that "the above-named Luther Richardson has, by a deed of quitclaim, bearing even date herewith, conveyed to the above-bounden Walker and Fisher, all his right and title, &c.," and then provides, that the obligees shall reconvey the premises to Luther Richardson whenever, within five years from date, he shall repay them such sums of money as they shall expend in discharging incumbrances, and making improvements on the land. At the same time, Walker and Fisher executed to Luther Richardson a lease of a part of the premises for five years, upon the annual rent of one cent during the term, unless the premises should be previously redeemed, according to the provisions of the bond. On or before the 13th of May, 1831, a claim was set up to these premises by the heirs of Samuel Frye, grounded on a supposed invalidity of the guardianship sale thereof at a former period. Shortly after, a parol agreement was entered into between the plaintiff and the defendant Mann, to purchase at their mutual expense and benefit, the title of Luther Richardson, and to extinguish the claims of Walker and Fisher, and of the Frye heirs in the premises, on their equal and joint account. This agreement was never abandoned by the parties thereto. And on the 13th of May, 1831, Flagg and Mann, in pursuance thereof, received a conveyance of the premises by deed of quitclaim from Luther Richardson, and also an assignment of the bond of Walker and Fisher. On the 27th of July, 1831, Walker and Fisher conveyed their title in the premises to Mann alone, by a quitclaim deed. Subsequently, the Frye heirs, by deeds of quitclaim, conveyed all their title in the premises to the defendant, Adams. On the 6th of August, 1831, the defendants, Mann and Adams, severally conveyed to each other, by quitclaim deeds, one moiety of the premises and of their respective interests therein. On the 8th of August, 1831, Mann conveyed, by a quitclaim deed, his moiety of the premises to the defendant Fuller, for $40,000, and Fuller, on the same day, executed a mortgage deed of the same moiety to Mann, as security for the payment of four notes, each for $10,000, given for the purchase-money. A bill in equity was now brought, by Flagg, to set aside the deeds of Mann to Adams, and of Adams to Fuller, as made in fraud of the rights of the plaintiff,

[1] [Reported by Charles Sumner, Esq.]

and for a reconveyance of one moiety of the premises to the plaintiff, upon payment by him of a moiety of the moneys paid in perfecting the title, and for other relief. *Held*, that Luther Richardson has no interest in this suit, to render him an incompetent witness.

2. The defect in Luther Richardson's original title, on account of the alleged invalidity of the guardianship sale, if such really existed, can be taken advantage of only by the Frye heirs, and others deriving title under them; and that, until the avoidance thereof by them, Luther Richardson must be deemed the lawful owner of the premises.

[Cited in Greely v. Smith, Case No. 5,750.]

3. The defendant, Mann, deriving his title, together with Flagg, from the purchase of Richardson, cannot set up the outstanding adverse title of the Frye heirs, to defeat the equitable rights of Flagg under the purchase on joint account, if Richardson at the time had any title in the premises.

4. The agreement between Flagg and Mann being made for the purpose of protecting themselves against the claim of the Frye heirs, a court of equity will not allow Mann to violate that agreement by interposing the above claim to defeat the rights of Flagg, although the relation would not cause an estoppel at law.

[Cited in Lawrence v. Dana, Case No. 8,136.]

5. The execution of the deed to Walker and Fisher, and the giving of the bond by them to Luther alone, with the assent of Prentiss, amounted to an execution of the secret trust between Luther and Pretiss, and is the same in effect as if Prentiss had first conveyed the premises to Luther, and the latter had then conveyed to Walker and Fisher, taking from them the bond.

[Cited in Hunter v. Marlboro, Case No. 6,908.]

6. Walker and Fisher, and all persons claiming under them, are estopped, at least in equity, by the terms of the bond of Walker and Fisher to Luther Richardson, as above recited, from denying, that all which they took under the deed of Luther and his wife and Prentiss was the right and title of Luther alone.

7. The deed to Walker and Fisher, and the bond by them to Luther Richardson are to be treated as part of one and the same transaction, and to have the same effect as if embodied in one instrument; and that this deed and bond, being merely an attempt to evade the strict rules of law with regard to mortgages, constitute an equitable mortgage to Walker and Fisher for their advances, and not a conditional purchase by them of the premises.

[Cited in Shapley v. Rangeley, Case No. 12,707; Bentley v. Phelps, Id. 1,331; Jewett v. Cunard, Id. 7,310.]

8. Luther Richardson had a clear equity of redemption in the premises at the time of his conveyance to Flagg and Mann, sufficient, at least in the view of a court of equity, to make them tenants in common, and to create between them a privity of title and estate.

9. The parol agreement between Flagg and Mann, for the purchase on joint account of the premises in question, as above recited, coupled with the deed of Richardson to Flagg and Mann, and the assignment to them of Walker and Fisher's bond, created a fiduciary relation between these parties, grounded on privity of title and estate, under which a purchase of an outstanding incumbrance or adverse title by one would be a trust for the benefit of both; and on this account, the agreement, though by parol, is extracted from the statute of frauds of Massachusetts.

[Cited in Barnes v. Boadman, 152 Mass. 393, 25 N. E. 623.]

10. Semble, that the agreement, though by parol, was executed by the passing of the deed, and assignment above-mentioned, even if no actual title passed from Richardson, so as to establish a fiduciary relation between the parties, grounded merely on privity of contract, which was sufficient to make the subsequent purchases of outstanding incumbrances in trust for the joint account, and to extract the case from the statute of frauds.

[Cited in Hunter v. Marlboro, Case No. 6,908.]

[Cited in Digby v. Jones, 67 Mo. 105.]

11. Mann was entitled to one moiety of the premises, which moiety was duly conveyed to Adams, without notice of the title of Flagg.

12. It was not of itself a wrongful act in Mann to take the title from Walker and Fisher, and from the Frye heirs in his own name, as it was his only security to compel Flagg either to abandon those purchases, or, if he insisted on his share, to repay the advances made.

13. The charges of notice of the plaintiff's title in the bill against Fuller are loose and indeterminate, amounting to a mere intimation or suspicion or belief, whereas there should have been an allegation of full notice of the very title and claim of the plaintiff asserted in the bill.

[See Wood v. Mann, Case No. 17,951.]

14. Fuller, at the time of his purchase of Mann, had no notice, actual or constructive, of the title of Flagg.

15. The deed from Mann to Fuller, although a mere quitclaim or release, must be treated as a bargain and sale, or other lawful conveyance, effectual to pass the whole estate, and entitling Fuller to protection as a bonâ fide purchaser without notice to the extent of the purchase-money already paid before notice of the plaintiff's title.

[Cited in Simmons Creek Coal Co. v. Doran, 142 U. S. 437, 12 Sup. Ct. 246.]

[Cited in Fletcher v. Jackson, 23 Vt. 588.]

[See Wood v. Mann, Case No. 17,951.]

16. Flagg is entitled to one moiety of the premises purchased of Richardson, Walker, and Fisher, and the Frye heirs, and, in default of this, on account of the conveyance to Fuller, to a moiety of the purchase-money, as a substituted fund, deducting therefrom the sums paid by Mann to Walker and Fisher and to the Frye heirs, and other expenses incurred in the premises.

17. For the payment of his moiety of the purchase-money, the plaintiff has a lien on the land conveyed to Fuller, to the extent of the purchase-money which remained unpaid at the time of notice to Fuller of the plaintiff's title.

[Cited in Dowell v. Applegate, 7 Fed. 887.]

[Cited in Fickett v. Durham, 109 Mass. 421.]

18. An allegation in an answer, which is not responsive to the bill, is not evidence; and the onus probandi is on the defendant to establish it.

19. If a deed is found in the possession of the grantee, there is a presumption of a due delivery thereof, because then, and not otherwise, it would be in the proper custody.

[Cited in The Panama, Case No. 10,703; Brown v. Brown, Id. 1,994.]

20. A deed can never be delivered as an escrow to the grantee himself.

21. A court of equity will not yield to technical rules of law, by which the intention of parties may be defeated.

22. When a witness has been cross-examined by a party, with a full knowledge of an objection to his competency a court of equity will not allow the party to raise the objection at the hearing.

23. Where two persons are in possession of lands by an imperfect or tortious title, as by disseisin, a release to one of them will enure to the benefit of both.

[Cited in Pierpont v. Fowle, Case No. 11,152; Myers v. Reed, 17 Fed. 406.]

24. If parties are interested together by mutual agreement, and a purchase is made agreeably thereto, neither party can exclude the other from what was intended to be for the common benefit; and any private benefit, touching the common right, which is secured by either party, will turn him into a trustee for the benefit of both.

25. A disseisor in possession has a lawful estate, which he may alien, and his alienee will have a good title as against all persons not having a paramount title.

26. A question of fact, which is essential to the decision of a case in equity, may be referred to a jury to be tried upon an issue framed for the purpose.

[Cited in Garsed v. Beall, 92 U. S. 694.]

27. A court of equity will often pronounce, that there is an equitable mortgage in cases, where a court of law would be compelled to say there was no mortgage.

[Cited in Bentley v. Phelps, Case No. 1,331; Almy v. Wilbur, Id. 256.]

28. A trust, created by a parol contract, will be enforced in equity against a party, who does not insist upon the defence of the statute of frauds.

29. Courts of equity do not regard the forms of instruments, but look to the intent, and give to the acts of parties that construction, which is consistent with the intent and with equity.

[Cited in Hall v. Speer, Case No. 5,947.]

30. To constitute a conditional purchase, there must be a sale for a valuable consideration between the parties, with a right of repurchase.

31. If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give to it, it is in equity a mortgage; and the parties cannot, by any covenant or agreement, limit the rights of the mortgagor, or cut off his equity of redemption after a limited period.

[Cited in Russell v. Southard, 12 How. (53 U. S.) 152; Gest v. Packwood, 39 Fed. 533.]

[Cited in Rogan v. Walker, 1 Wis. 565; Cotterell v. Long, 20 Ohio, 472; Davis v. Longstreet, 4 Ind. 105; Stinchfield v. Milliken, 71 Me. 570; Hurd v. Robinson, 11 Ohio St. 234; Pardee v. Treat, 82 N. Y. 391.]

32. The circumstance, that the grantee is not to be let into immediate possession of the estate, affords a presumption of its being a mortgage; so also does the circumstance, that the money paid by the grantee is not a fair price for the absolute purchase of the property conveyed to him.

33. It is not of the essence of a mortgage, that there should be a defeasance; and there may be a defeasance of a deed of conveyance, without constituting a mortgage. The question, whether a conveyance amounts to a mortgage, does not turn on this point.

[Cited in Bentley v. Phelps, Case No. 1,332; Tufts v. Tufts, Id. 14,233.]

[Cited in Horn v. Keteltas, 46 N. Y. 607.]

34. Quaere—If a bond given by a grantee to one of several grantors, in order to defeat and make void the conveyance, if executed at the same time with the conveyance, will amount to a technical defeasance.

[Cited in Tufts v. Tufts, Case No. 14,233.]

[Cited in Justice v. Uhl, 10 Ohio St. 176.]

35. The essence of a defeasance is to defeat the principal deed, and make it void ab initio, if the condition be performed.

36. Semble, that it is of the essence of the contract of sale, that there should be a fixed price for the purchase.

37. The courts of the United States are not concluded in a matter of general equity jurisdiction by a decision of the state court.

[Cited in McConologue's Case, 107 Mass. 159.]

38. A written agreement by two, to purchase lands on joint account, creates a fiduciary relation between the parties, which neither is at liberty to defeat by a purchase on his sole account, and such a purchase will be in trust for the joint account. Quaere—If this doctrine is applicable to parol agreements.

39. Where a rightful estate is claimed by each of two purchasers, whose titles in other respects are equal, the maxim prevails, "Qui prior est in tempore potior est in jure."

40. Vague reports and rumors from strangers, and suspicion of notice, though a strong suspicion, are not sufficient ground, on which to charge a purchaser with notice of title in a third person.

[Cited in The Lulie D., Case No. 8,602; Alexander v. Rodriquez, Id. 172; Empire State Nail Co. v. Faulkner, 55 Fed. 823.]

[Cited in Foust v. Moorman, 2 Ind. 19; Boling v. Howell, 93 Ind. 334.]

41. Semble. Possession by a tenant of an estate at the time of its purchase, is constructive notice to the purchaser of the tenant's title, though not of the title of the lessor, or of the party, under whom the tenant claims.

[Cited in Oakley v. Ballard, Case No. 10,393; Tufts v. Tufts, Id. 14,233; Hardy v. Harbin, Id. 6,059.]

[Cited in Burbank v. Fay, 65 N. Y. 62; Jeffersonville, M. & I. R. Co. v. Oyler, 82 Ind. 400; Ellis v. Horrman, 90 N. Y. 473.]

42. Courts of equity in the United States, where the registration of deeds is universally provided for, should not enlarge the doctrine of constructive notice, or follow all the English cases on the subject, without a due regard to the circumstances and laws of our country.

43. In a plea of a purchase for a valuable consideration without notice of the plaintiff's title, it is necessary to aver, that the person, who conveyed, was seised, or pretended to be seised, at the time when he executed the purchase deeds.

44. Semble. If a cestui que trust in fee conveys the estate to a purchaser, and the trustee afterwards confirms the sale, and releases to the cestui que trust, or to the purchaser, such a purchaser is entitled to protection against any antecedent secret trust, which was unknown to him at the time of the purchase and the confirmation, although, in a strict sense, the cestui que trust was not seised of the estate at the time of the conveyance.

[Cited in Hunter v. Marlboro, Case No. 6,908.]

[Cited in Baldwin v. Sager, 70 Ill. 507.]

Bill in equity, to set aside certain conveyances, alleged to have been made in fraud of the rights of the complainant, and for other relief. The bill was brought by Henry Flagg, of Barnstable, in the state of New Hampshire, against Samuel H. Mann, John R. Adams, and Elisha Fuller, of Lowell, in the state of Massachusetts. The following is an outline of the leading facts of the case:

In March, 1823, Samuel Frye, of Danville,

in the state of Vermont, being the guardian of his six children, all minors, by his late wife, Polly Frye, obtained a license from the supreme court of Massachusetts, in due form of law, to sell certain real estate belonging to and then in the seisin of the said minor children, situate in Lowell, in the same state. He sold the same estate at public auction, on the tenth of June of the same year, under the license, and on the thirteenth day of the same month executed a deed thereof to Luther Richardson, the purchaser at the sale, in due form of law. The validity of this sale constituted one of the questions in the cause, it being asserted on one side and denied on the other, that previous to the advertisement of the sale, he had not taken the oath prescribed by law, and indispensable to the validity of such a sale. Luther Richardson entered into possession of the premises, and had seisin thereof under and according to his deed; and on the 29th of September, 1824, mortgaged the same to Goodman, Saville & Kent, to secure the payment of $1,229.70; and subsequently, on the 13th of August, 1824, gave them a second mortgage thereof, to secure the payment of $2,850.30. Afterwards, the equity of redemption of Luther Richardson was attached, and subsequently, on the 18th of May, 1825, sold to John C. Proctor on an execution issued in favor of Mellen & Norcross against L. Richardson. While this attachment was pending, on the 14th of May, 1825, L. Richardson conveyed the premises by a deed of quitclaim, to his brother, Prentiss Richardson, for a consideration, stated in the deed to be $3,000. On the 21st of May, 1825, Proctor conveyed his title, acquired under the levy or execution in the equity of redemption of the premises, to Joshua Bennett. On the 6th of May, 1826, in pursuance of a previous negotiation, Luther Richardson and his wife, and Prentiss Richardson, executed a deed of quitclaim of the premises to William W. Walker, and Albigence W. Fisher, for the consideration (as stated in the deed) of $2,000; and on the same day, Walker and Fisher executed a bond for $10,000 to Luther Richardson alone, whereby, after reciting the quitclaim deed to themselves, the mortgages to Goodman, Saville & Kent, the sale of the equity of redemption to Proctor, and the conveyance by him to Bennett, the condition provides, that they shall reconvey the premises to Luther Richardson whenever, within five years from the date, he shall pay, or cause to be paid to them, all such sums of money as they shall pay in discharge of the incumbrances aforesaid, with legal interest, together with such sums as they may expend in betterments and improvements on the premises in that time by the mutual consent of the parties. At the same time, Walker and Fisher executed to Luther Richardson a lease of a part of the premises for five years, upon the annual rent of one cent during the term, unless the premises should be previously redeemed according to the provisions of the bond. On the 19th of September, 1826, Walker and Fisher took an assignment of their several mortgages from Goodman, Saville & Kent, paying them therefor $3,171.87; and subsequently, on the 14th of April, 1827, they took an assignment from the surviving partners, of the other mortgage to Goodman, Saville & Kent. On the 25th of May, 1826, Bennett conveyed to Walker and Fisher, by deed of quitclaim, for the sum of $1,200 (as stated in the deed,) all his right in the premises. So that, in virtue of all these conveyances, Walker and Fisher became the exclusive owners of the premises, subject only to the right of redemption of Luther Richardson under their bond to him, above referred to. Whether this right of redemption had been extinguished or not by the nonpayment of the moneys advanced by Walker and Fisher within the five years, according to the terms of the condition of the bond, was one of the matters in controversy between the parties.

On or before the 13th of May, 1831, it seems, that a claim was set up, by the minor children of Samuel Frye, to the premises, grounded, as has been already suggested, upon the supposed invalidity of the guardianship sale thereof in June, 1823. A negotiation then took place between Luther Richardson on one side, and Flagg (the plaintiff) and Mann (the defendant) on the other side, the object of which was (as the bill asserts) for Flagg and Mann jointly to purchase of L. Richardson his title (such as it was) in the premises (the five years being expired), and also to extinguish the claims of Walker and Fisher and of the Frye heirs in the premises on their equal and joint account. The bill asserts, that Flagg and Mann agreed with each other, that the purchase should be made at their mutual expense, and for their mutual benefit; and also agreed with Luther Richardson, upon his conveying his title in the premises to them, in case the title under the guardianship deed, and under the other conveyances, above referred to, should be found good, so that they might hold the same, to pay the sums due to Walker and Fisher, and also to pay him such part of the sum of $9,000, as should remain after discharging the debts so due to Walker and Fisher. The bill further asserts, that in pursuance of this agreement, Flagg and Mann, on the 13th of May, 1831, received a conveyance of the premises, by deed of quitclaim, from Luther Richardson, with a special warranty against himself and all persons claiming under him; and that they, Flagg and Mann, made a certain promissory note, payable to Luther Richardson, for the sum of $3,500, and which was delivered to one Seth Ames, the counsel of Richardson, to hold for his use in case Flagg and Mann should fail to comply with their agreement; and the better to secure the performance thereof. Though this quitclaim of L. Richardson to Flagg

and Mann is admitted to have been formally executed, yet it is denied, by the answer, that it ever became a consummated conveyance between the parties. On the contrary, it is insisted, that it was afterwards wholly abandoned upon facts subsequently ascertained. The agreement also, as stated in the bill, is denied, as to any purchase from the Frye heirs, and as to any engagement to pay the debt due to Walker and Fisher.

On the 27th of July, 1831, Walker and Fisher conveyed their title in the premises to Mann by a quitclaim deed, for the asserted sum of $10,000. The bill charges, that this deed ought to have been made in the names of Flagg and Mann, in pursuance of the agreement stated in the bill, and was fraudulently and secretly taken in the name of Mann alone. This is positively denied in the answer. On the 28th of July, 1831, Samuel F. Frye, and Aaron P. Frye (two of the Frye heirs) conveyed, by a quitclaim deed, all their title in the premises to the defendant Adams. On the 2d of August of the same year, Herman A. Frye and his wife, Mary Frye (she being one of the female heirs,) in like manner conveyed her title to Adams; and on the 4th of the same month, the remaining heirs, viz. Joseph Huse, and Harriot his wife (one of the female heirs,) and Caroline Frye and Adeline Frye, the other female heirs, in like manner conveyed their title to Adams; so that Adams thereby became possessed (so far as by law he might) of the title of all the Frye children in the premises. The bill charges, that these purchases were secretly made by a fraudulent agreement between Mann and Adams, the latter being fully acquainted with the agreement between the defendants Flagg and Mann for their mutual benefit, with an intent to defraud the plaintiff. The answer wholly denies the charge. On the 6th of August, in the same year (1831,) Adams conveyed, by a quitclaim deed, one moiety of the premises, and of all his right and title therein, to Mann; and Mann, on the same day, executed a counter conveyance of all his title to the other moiety to Adams. On the 8th of the same month, Mann conveyed, by a quitclaim deed, his moiety of the premises to the defendant, Fuller, for $40,000 (as stated in the deed,) and Fuller, on the same day, executed a mortgage deed of the same moiety to Mann, as security for the payment of four notes (each for $10,000,) given for the purchase money. The bill charges Fuller with a full knowledge of all the facts at the time of his purchase.

Such is a general outline of the most material facts, which are necessary to a true understanding of the nature and objects of the bill. The prayer of the bill is, that the deeds of Mann to Adams, and of Mann to Fuller, and all other the conveyances of Mann, may be declared void as made in fraud of the rights of the plaintiff; and that upon payment by the plaintiff of one moiety of the moneys paid to redeem the incumbrances on the property, and in extinguishing the claims of the Frye heirs, and perfecting the title to the premises, Mann, Adams, and Fuller may be decreed to convey one moiety of the premises to the plaintiff; or if that cannot be done by reason of any conveyance to bona fide purchasers without notice, that Mann and his confederates (Adams and Fuller) may be decreed to make full compensation for such moiety, or so much thereof as cannot be conveyed, to him; and that such parts of the purchase money as have not been paid, and all securities therefor, may be decreed to be paid and assigned to the plaintiff, until he is indemnified; and then follows a prayer for general relief. Answers were severally put in by Mann, Adams, and Fuller, to which the plaintiff made the general replication. The proofs, consisting of depositions and exhibits in the case, extended to great length. The foregoing outline, together with the summary of the statements and denials in the several pleadings, which is presented in the opinion of the court, will be sufficient for a clear understanding of the case.

A bill against the same parties, and founded on the foregoing facts, had been instituted before the supreme judicial court of Massachusetts, but finally dismissed for want of jurisdiction. 14 Pick. 467. The present bill was filed at the October term of this court, 1833. And the cause has been continued until the present term. The ample discussion, in the opinion of the court, of all the points raised at the bar, will render it superfluous, even if it could be done within reasonable space, to present a full view of the very learned and able arguments of counsel. The naked points, taken by the respective parties, were as follow:

For the plaintiff it was contended: 1st. That Luther Richardson, by virtue of the deeds executed by Samuel Frye as guardian of the minor children of his wife Polly Frye, of the lands in question, and his entry thereupon, became seised as owner thereof in fee. 2d. That the contract made between Luther Richardson and Walker and Fisher, and the deed from him and Prentiss Richardson to them, and their bond to him, constituted an equitable mortgage, which a court of equity will recognise and enforce; so that the sums of money advanced by them in procuring an assignment of the mortgages which he had made to Goodman, Saville & Kent, and the release or conveyance of the equity of redemption from Bennett, were in the nature of incumbrances from which Luther Richardson had a right to redeem the land as mortgagor, when he executed his deed to the complainant and the said Mann. And that, therefore, the said deed was a conveyance to them by him of a legal or equitable right of

redemption in these lands. 3d. That at the time of the execution of the deed of Luther Richardson to the complainant and the said Mann, the said Richardson had such an equitable or legal right, in the lands in question, as would, according to the principles upon which this court exercises its authority to compel specific performance, have enabled him to compel Walker and Fisher to reconvey to him the lands, upon tender of payment of their advances, interest, &c. And that this right passed to the complainant and Mann, under the said deed. 4th. That by the deed from Luther Richardson to the complainant and Mann under their contract with each other, to obtain the title to these lands for their mutual benefit, they jointly obtained such a title or color of title, as made any purchase by either of them, of any adverse claim or title, to enure to the benefit of both; upon the well-established principle of equity, that where two persons are in possession of an imperfect title, the purchaser of an adverse claim enures to their joint benefit. 5th. That the principle last stated, is an entire answer to any defence on the ground, that Luther Richardson had not acquired a good title under the guardian's deed, inasmuch as he had thereby color of title, and having entered, had actual seisin. 6th. That the deed from Luther Richardson to the complainant and Mann, was absolutely delivered. 7th. That if such delivery to the grantees, were or could have been conditional, nevertheless an inchoate title, or color of title, or imperfect right was thereby created in the complainant and Mann jointly, which neither could secretly abandon, and which would cause any subsequent acquisition of an adverse title by either, to enure for the benefit of both. 8th. That at the time of the purchase of the release, from Walker and Fisher to the said Mann, and of the releases of the minor heirs to the said Adams, and the other acts done by Mann and Adams to perfect the title to these lands; the said Mann fraudulently concealed these proceedings from the complainant, and deceived him into the belief, that he, the said Mann, was endeavoring to perfect the title for his and the complainant's mutual benefit. And, that the proceedings of the said Mann in the premises, were a fraud upon the complainant as a co-tenant with him of the right in equity to redeem, or as jointly interested with him in the right to compel a specific performance, or as having with him an inchoate or imperfect title, to be perfected for their mutual benefit, according to their contract. 9th. That the said John M. Adams and Elisha Fuller had actual and constructive notice of the contract between the complainant and the said Mann, and of the complainant's rights and interest in and to said lands, and to the benefit of any purchases made by the said Mann, or of any releases obtained by him of any adverse titles thereto; and therefore, they became parties to the fraud practised by said Mann, and cannot lawfully set up any claims or titles adverse to those asserted by the complainant. 10th. That the complainant is entitled to have a moiety of the said lands, or of such part thereof, as may not have been sold to bonâ fide purchasers without notice, released or conveyed to him and to have the securities received on any such sales or his proportional part thereof delivered over to him, and to be indemnified for any losses he may have sustained, by reason of being prevented by the acts of the defendants from the possession and employment of these lands; he having been at all times ready to pay his proportional part of the expenses of perfecting the title, and having required of the said Mann an account thereof, that he might seasonably make such payments.

Th defence of Mann and Adams was rested on the following grounds: 1st. That Luther Richardson never derived any valid title to the premises, by reason of the want of the proper oath having been taken by Samuel Frye, the guardian of the heirs of Polly Frye, before he fixed on the time and place of sale. 2d. That the deed from Prentiss and Luther Richardson, to Fisher and Walker, did not, together with their bond to Luther, constitute a mortgage legal or equitable, but that the bond was a mere personal obligation; so that after the expiration of the five years, Luther had no title or right to the land legal or equitable, which did or could pass to Flagg and Mann, by Luther's deed to them. 3d. That the deed from Luther to Flagg and Mann, never was delivered to them as his deed, nor accepted by them as such, but that the agreement of Flagg and Mann to purchase of Luther was conditional, dependent upon his having a good title, and one which should be satisfactory to them. 4th. That by reason of the matters stated in the last two points, Flagg and Mann never had any joint or common interest in the land, nor any such color of title thereto as would give Flagg any right to claim any benefit from Mann's subsequent purchase of Fisher and Walker, or the heirs of Polly Frye. 5th. That there was no agreement between Flagg and Mann, to perfect the title to the said lands, or to do anything further than to purchase Luther's title if he had any, and that it appearing that he had no title, that agreement was at an end before Mann's purchase of Walker and Fisher and of the Frye heirs. 6th. That both Flagg and Mann had abandoned the attempt and expectation of obtaining any title through Luther before Mann's purchase of Walker and Fisher or of the Fryes. 7th. That the attempt to obtain a title through Luther having failed and been abandoned, Mann had a perfect right to act for himself alone, in any new attempt to procure a title to said lands from any other persons. 8th. That Mann

never did pretend to Flagg, that he was acting for or with him in the premises, after the return of Goodhue from Vermont, nor was ever guilty of any fraudulent concealment or practice towards the plaintiff. 9th. That the plaintiff never paid any thing for Luther's deed, nor paid nor offered to pay any part of the money paid by Mann for the purchase of the title of the said Walker and Fisher, and the Frye heirs, though the amounts so paid by Mann were stated to him at his request. 10th. That Adams had no notice, actual or constructive, of any of the matters charged against Mann, until after he had taken a conveyance bonâ fide, and for a valuable consideration of half of the land. 11th. That the plaintiff is entitled to no relief; but that if he be, he can only have it upon payment to the party or parties against whom it shall be decreed, of one half of all the cost and expense of obtaining the said titles of Walker and Fisher and the Frye heirs and interest from the times of payment.

The defendant Fuller, adopted the grounds assumed by the defendants Mann and Adams, so far as they were applicable to his defence, and stated the following in addition: 1st. That Fuller is a bonâ fide purchaser of half of the lands, described in the plaintiff's bill, for a valuable consideration, without notice, positive or constructive, of any claim to, or interest therein on the part of the plaintiff, and, as such purchaser, is entitled to the protection and favor of this court. 2d. That the plaintiff is a volunteer, has paid no consideration, and is without right, as against Fuller, in law or in equity. 3d. That the bill on its face is not sufficient to entitle the plaintiff to a decree against Fuller. 4th. That Luther Richardson, at the date of his alleged deed to Mann, and the plaintiff, had no claim to, or interest in the lands in question; and if it were otherwise, Fuller had no notice thereof at the time of his purchase, nor can his title be prejudiced by any thing which has taken place since; nor can vague rumor or even common report, as to the claim of Luther Richardson or the plaintiff, affect Fuller's title, which is supported by the registered deed of Luther Richardson, in contradiction of such rumor and report. 5th. That the transactions alleged to have taken place between Fisher and Walker, and Luther Richardson and Prentiss Richardson, in relation to the conveyance of the lands in question to the said Walker and Fisher, did not give to Luther a right to redeem the said premises as a mortgagor, on the 13th of May, 1831, the date of his alleged deed to Mann and the plaintiff, according to the doctrine of the English court of chancery, much less had the said Luther any such right under the statutes of Massachusetts, or according to the adjudged cases in Massachusetts, and against the policy of the registry acts thereof. 6th. That if the plaintiff acquired any interest in the lands from the deed of Luther Richardson, Mann did not convey it to Fuller, he only conveyed to him such an interest as he had, nor does his deed purport to convey any more. 7th. That as the conveyances from Walker and Fisher and the Fryes were to Mann alone, he had authority to sell in his own name the interest which he thereby acquired, and Fuller is not responsible for the application of the proceeds; and if the plaintiff has any claim, it is not to the land, but to a share of the proceeds or profits, and against Mann, or Mann and Adams. 8th. That Fuller having derived all Mann's interest in the premises, prior to the time of the alleged tender of the money, the tender should have been made to him, if to any one, and not to Mann. 9th. That if the plaintiff had any equity against Mann and Adams or either of them, it was so doubtful, that even if Fuller had had notice thereof, which he positively denies, he was not bound to regard it. 10th. That notice of nothing alleged against Fuller but actual fraud on the part of Mann against the plaintiff, and actual co-operation therein on his, Fuller's part, can affect his title to the lands in question. 11th. That, upon the plaintiff's own account of the matter, and if there was any agreement between him and Mann, it appears to have been an agreement, that Mann should purchase lands at their joint expense, the plaintiff to furnish half the funds, and the land to be sold again, for profit; that the plaintiff advanced no money, and there was no evidence of the agreement, by means of which Mann could compel the plaintiff to execute it; that Mann, therefore, was justifiable in taking the title to himself, both for his own protection and to enable him to make sales; that being thus, at most, but a trustee with power to sell, Fuller's title derived from Mann is good, he is not bound to see to the application of the money, and the plaintiff's remedy, if any, is merely personal, and against Mann alone.

B. Rand and C. G. Loring, for complainant.

Mann & Adams, J. Mason, and F. Dexter, for defendants.

S. Greenleaf and W. R. P. Washburn, for defendant Fuller.

STORY, Circuit Justice. This is the case of a suit in equity, and has been argued with great ability and learning on the merits by the counsel on all sides, at the hearing at the present term. The facts are very complicated, the documents very voluminous, and the evidence in various parts in direct conflict. The questions of law, too, involved in the cause, are not a few, and some of them not without difficulty or novelty in their actual application to the circumstances of the cause. I have, therefore, taken time to consider and examine the record; and I shall now proceed to deliver my judgment.

It is obvious, that the whole right of the plaintiff (Flagg) to maintain the present bill rests essentially upon the truth of the allegations in the bill as to the agreement between Mann and himself on or before the 13th of May, 1831, to purchase the premises at their mutual expense and for their mutual benefit, and to perfect the title thereto, and to extinguish the claims (if any) of the Frye heirs, and also the claims of Walker and Fisher. If the agreement was never made, in substance, as it is alleged; or having been made, if it was never afterwards carried into effect by the parties, but was definitively abandoned; then the whole foundation of the plaintiff's case is gone, without mooting any other of the questions raised in the cause. If, on the other hand, that agreement is established, and is a subsisting agreement, then the other questions in the cause must necessarily be discussed and disposed of. In the natural order of the questions, it seems proper in the first place to ascertain, whether any such agreement was made, as is stated in the bill; and if so, whether it has been abandoned. The agreement between Flagg and Mann, as stated in the bill, consists of four distinct parts: (1) To purchase and procure for themselves for their mutual and equal benefit, and at their mutual and equal expense, a complete and perfect title to the premises. For this purpose, (2) to purchase of Luther Richardson his title to the premises, giving him therefor, if his title should be found to be good and sufficient to enable them to hold the same, the sum of $9,000, subject, however, to the deduction of the amount of the subsisting incumbrances thereon; (3) to extinguish the real or pretended title of the Frye heirs to the premises; and (4) to pay the sums due to Walker and Fisher, as subsisting incumbrances thereon. There is also a charge in the bill, that the deed was procured from Luther Richardson, in pursuance of the agreement.

The defendant, Mann, by his answer denies, that there ever was any agreement made between him and the plaintiff to procure for their common benefit a perfect title. But in reference thereto he says, that on the 13th of May, 1831, Flagg, and himself, understanding that Luther Richardson claimed an equity of redemption in the premises in virtue of the obligation of Walker and Fisher, notwithstanding the expiration of the five years, and believing the amount due to Walker and Fisher to be about $6,000 only, and knowing the claim of the Frye heirs, but not knowing or having heard, that Luther Richardson had, before the conveyance to Walker and Fisher, made a conveyance of the premises to Prentiss Richardson, and not knowing or ever having heard, that Samuel Frye, the guardian, had not, before fixing the time and place of sale, taken the oath prescribed by law; but supposing the claim of the Frye heirs to be founded on the want of the notifications of the said sale being duly posted, did verbally agree with each other to offer, and did offer to Luther Richardson, to purchase of him his right and title in the premises, and to give him for the same, when clear of incumbrances, if they should be satisfied with his title, the sum of $9,000, provided a good and clear title were made to them within three years from that time; which offer was accepted and agreed to by him (Luther Richardson). In pursuance of the offer and acceptance Luther Richardson made the quitclaim to them (Mann and Flagg), but did not deliver the same, nor was the same accepted by them as his deed, the said contract being still conditional and incomplete, and his (Luther Richardson's) wife, not having signed the deed, as it was agreed she should. But the deed was left at Mann's office to be afterwards completed and delivered, or withdrawn by Luther according to the election of Mann and Flagg. The deed was not recorded until the 15th of February, 1832, at which time it was procured to be recorded by Flagg, without the knowledge or assent of Mann. Mann by his answer further denies, that he and the plaintiff ever agreed with Luther Richardson to pay to Walker and Fisher any sum or sums of money whatever. But he admits that he and the plaintiff did make their note for $3,500, payable to Luther Richardson, and delivered the same to Ames, to remain in his hands, until they had examined the records of deeds and of probate, and had taken the advice of Samuel Hoar, Esq. respecting Luther Richardson's title to the premises. And if, after such execution, Mann and Flagg should elect to proceed with the negotiation, then the note was to be given up to them, and they were to give their obligation to Luther Richardson, to pay the sum of $9000, whenever he should within three months make to them a good title to the premises free from all incumbrances; otherwise the note and deed were to be given up and the negotiation to be wholly abandoned. Mann has annexed to his answer a copy of the form of the obligation, which, he says, was drafted by him, and approved by Luther Richardson, to be given in case Mann and Flagg elected to proceed with the negotiation. Mann further in his answer states, that he received Mr. Hoar's opinion, a copy of which is annexed to the answer, and is unfavorable to the title of Luther Richardson to redeem Walker and Fisher after the lapse of the five years. He showed it to the plaintiff; and he afterwards examined the records of deeds and of probate; and thereon the 17th of May, 1831, he first ascertained, that a conveyance had been made by Luther Richardson to Prentiss Richardson before the deed to Walker and Fisher; and also that it did not appear on the probate records, that Samuel Frye had, before fixing the time and place of sale, taken the oath prescribed by law in such cases; and that he and Flagg,

were, on the 18th of the same month, advised by Isaac Fiske, Esq. whom they consulted, that the want of such an oath was a fatal defect in the title. Upon the opinion of Mr. Hoar and Mr. Fiske so given, Flagg and Mann agreed to abandon the negotiation with Luther Richardson, and did wholly abandon the same; and a few days after he, Mann, gave notice thereof to Luther Richardson, and also notice to Ames, that the note was to be given up. Mann further denies by his answer, that after the 17th of May aforesaid he ever pretended or affected to co-operate, or gave Flagg to understand or believe, that he would co-operate with the plaintiff in measures to extinguish the claim of Walker and Fisher, or of the Frye heirs, or to perfect the title to the premises, as in the bill is alleged. He admits, however, that after the negotiation with Luther Richardson was so ended, he and Flagg and Thomas P. Goodhue, employed one Stephen Goodhue, as their agent, to go to Vermont, for their common benefit, to obtain conveyances of the claims of the Frye heirs; but he wholly failed to accomplish the object, and the attempt was abandoned; and with this, he insists, that all contract and agreement between himself and Flagg, respecting the premises, were at an end.

Such are the statements and denials of the answer in reference to the matter of the agreement between Flagg and Mann, charged in the bill; and so far as they are responsive to the matters charged in the bill, they are of course proper evidence in favor of Mann. The answer admits an agreement to purchase the title of Luther Richardson; but it insists, that it was a conditional purchase to be affected by future inquiries and events. In this respect it is not materially at variance with the allegations of the bill. The matters, which it controverts, are: 1. That there was any absolute delivery of the deed by Luther Richardson to Flagg and himself under the agreement. 2. That there was any stipulation in that agreement to pay Walker and Fisher's demands. 3. That there was any stipulation in that agreement to buy in and extinguish the claim of the Frye heirs for the common benefit of Mann and Flagg. 4. It sets up a positive abandonment of the agreement with Luther Richardson by the consent of Flagg; and as positive an abandonment of a subsequent agreement with Flagg for the purchase of the claims of the Frye heirs. Let us consider these points in their order.

1. The conditional delivery of the deed by Luther Richardson. The execution of the deed being admitted, and the deed found in the possession of Mann, and the allegation of a conditional delivery not being responsive to the charge in the bill, the answer is not evidence of it; but the onus probandi is on Mann to establish it. The suggestion is that the deed of Luther Richardson was imperfect; that it was to be executed by his wife, who was to release her dower; and that it was left in Mann's office as an imperfect instrument, until this was accomplished. Upon the face of the deed it was certainly contemplated, that it was to be signed by the wife. But this would not necessarily establish, that it was an essential ingredient, before it should have effect as to the husband, or that there was not a subsequent waiver of her signature. The case in support of the answer mainly rests on the testimony of John W. Coolidge, who was a student in Mann's office, and who states, that he was present on the 13th of May, 1831, and heard the agreement between Mann and Flagg, and Luther Richardson, who, with Ames, were all present in Mann's office. The papers, then produced and before the parties, were a deed from Luther Richardson, a bond from Walker and Fisher, with an assignment written thereon, to Flagg and Mann, and a note from them to Luther Richardson. The note was delivered to Ames, not to be delivered to Richardson, or to any other person, without the order of Flagg or Mann; and the deed, bond and assignment were left in the possession of Mann. He further states, that Mann and Flagg were to examine the records, and if they should conclude, after the examination and after consulting counsel, to retain the deed and assignment, they were to give a bond to Richardson, conditioned to pay him a certain sum, whenever his title should be adjudged good by the supreme court, and to take up their note lodged with Ames; and if, upon the examination, they concluded not to give their bond to Richardson, the deed and assignment were to be returned to the latter, and the note returned by Ames to them. He further states, that, a day or two after, a bond was partly prepared by Mann (the draft of which he verifies), in pursuance of the agreement, which Luther Richardson took away for examination. About the 22d of the same month of May he learned from Mann and Goodhue, that Mann had discovered the defect in the title of Luther Richardson, from the want of taking the oath at the proper time before the guardianship sale. In November, 1831, he heard Mann ask Luther Richardson, how long it was, after the note was made and left with Ames, when he gave him notice, that his (Luther Richardson's) title was good for nothing, and that they should do nothing more, and requested him to call and take his papers. Richardson answered, it was about a fortnight. The witness farther states, that he understood from the parties, that Luther Richardson's wife was to sign the deed of her husband. The draft of the bond referred to by the witness goes far to corroborate his testimony, as to some material facts. But it leaves the point now under consideration wholly untouched, for

the draft is imperfect. There is nothing in it, which leads in the slightest degree to the conclusion, that the deed of Luther Richardson had not been delivered, or that the delivery was conditional.

Without in the slightest degree impeaching the integrity of the witness, there are circumstances in the case, which lead one to suspect, that there may be some errors in his testimony on several points. Upon his cross-examination there is manifestly some hesitation and want of recollection as to circumstances connected with and included in his direct examination. But a more material circumstance, is that in his second deposition he qualifies his former deposition in several important particulars. His first deposition affirms and proceeds on the affirmation throughout, that he was not in the same room with the parties during all their negotiations and conversations; but that he was a part of the time in an adjoining room, and was called into the other room to witness the transactions. In his second deposition, taken about two years afterwards, he expresses a doubt, whether he was not in the same room with the parties during all the transactions. There are, however, other intrinsic circumstances in the case, as well as other positive testimony, which do materially weaken the force of the conclusions to be drawn from Coolidge's testimony. In the first place, it is admitted, that, after the deed was executed by Richardson, it was left in Mann's office with Mann, and the note of Flagg and Mann was delivered to Ames. It is difficult to reconcile these facts with the notion, that the transaction was not then treated as consummated between the parties; that the deed was not treated, as absolutely delivered by Richardson to Flagg and Mann, and the note delivered to Ames as an operative instrument, each of them being liable nevertheless to be rescinded by future events; that is, to speak technically, that both instruments were to be avoided by conditions subsequent, and were not dependent for their original validity upon conditions precedent not yet performed. Neither the deed, nor the note. has ever since been delivered up. The deed remains in Mann's possession and custody, and so far as this fact goes, it affords a strong presumption of an actual delivery in conformity to the terms of the deed. It is common learning, that when a deed of grant is found in the possession of the grantee, it affords a just presumption of a due delivery thereof, because it then, and not otherwise, would be in the proper custody. The answer in effect insists, that the instrument was never delivered as the deed of Richardson, but was a mere escrow. Now, there is a technical difficulty in this suggestion; for an instrument can never be delivered as an escrow to the grantee himself. Co. Litt. 36a, is direct to this point. And though a court of equity will not govern itself exclusively by technical principles of this sort, where the intentions of the parties would be thereby defeated; yet there must be the clearest evidence in such a case, what that intention is, and whether it will be so defeated; otherwise the rule of law must prevail.

The testimony of Luther Richardson, the grantor, is on this point most important. An objection is made to his testimony upon the ground of his being an incompetent witness by reason of his interest in the event of this suit. But I profess myself unable to perceive, what interest, legal or equitable, he has in this suit. He may have a feeling, and undoubtedly has, in favor of the plaintiff. But nothing decided in this suit can be given in evidence in support of any claim on his part; for it is res inter alios acta; and he has, therefore, nothing to gain or to lose by it. Besides; he has been cross-examined by the defendant with a full knowledge of the objection; and after that it is difficult to say, that in a court of equity he can be heard to make the objection. According to Richardson's testimony there was an absolute delivery of the deed and the assignment of Walker and Fisher's bond to Flagg and Mann; for, he says in direct terms, that he assigned the bond to them, and at the same time he gave them a quitclaim deed of the premises. His statement of the agreement between them and himself is as follows: "After various conversations and stating, that a suit was pending instituted by Frye's heirs respecting the title (a fact, which is admitted on all sides to be true), I agreed to sell my right to them for $3500, which was to be paid to me in case my title proved good against Frye's heirs; and a note for this sum was made by them, and deposited in the hands of Mr. Ames; and if the title of the Frye heirs prevailed and mine failed the note was to be given up." He adds, that by the terms of the agreement Flagg and Mann were not to pay any thing, unless the transaction with Walker and Fisher and their bond to him should prove to be a mortgage. He denies, that Flagg and Mann had a right to rescind the contract, until the title should be proved bad by a trial at law. He says, that the bond was not to be given in exchange for the note, but was to be a bond explanatory of the terms of the agreement; and that the note was to remain in Ames's possession, until his title should be settled at law. He annexes a copy of the imperfect bond drawn up by Mann, and handed to him, which contains a part only of the recitals of that referred to by Coolidge. He says, that in June or July, 1831, Mann stated to him that he doubted, whether the title was good for any thing; and about the 10th of August, 1831, Mann informed him, that he did not consider the title worth a quarter of a dollar, and he would have nothing more to do with it. About that time the witness called on Ames with Mann to exchange papers; but Flagg did not agree to

it; and no exchange was ever made. He farther adds; "In regard to my title to the said bond, Flagg and Mann were to perfect it at their own expense. There was no time fixed, within which I was to make a good title, because they were to see to that. But I was not to be paid the money until the decision of a court of law, establishing the title. There was nothing agreed upon relative to the term of three years." I observe, at present, that there is nothing in this deposition pointing to any agreement for the purchase of the claim by the Frye heirs between Flagg and Mann, and Richardson. But the only purchase apparently contemplated was the outstanding title in Walker and Fisher.

Ames's testimony as to the transaction is to this effect. That Mann stated, that he and Flagg had made a bargain with Luther Richardson, and were to buy his interest in that estate and were to allow him the price, named in the quitclaim deed ($9,000) from Richardson to them, deducting therefrom such sum as should be found due from Richardson to Walker and Fisher, provided the title should prove good. Richardson did not know the exact sum due to Walker and Fisher; but he stated a sum as being due, which the witness thinks was about $5,500. Mann expressed a confidence, that the transaction between Richardson and Walker and Fisher was a mortgage. Mann was to examine the records at Cambridge, and find out, how much was due to Walker and Fisher. A note for $3,500, being the supposed balance, which was coming to Richardson, was drawn (the witness thinks by himself), and signed by Flagg and Mann, and deposited, for the time, with the witness. It was stated by Mann as the bargain of the parties, that when the amount due to Walker and Fisher was ascertained, that the note should be taken up, and Flagg and Mann's bond should be given to Richardson, conditioned to pay him the balance of the price of the land, provided the title proved good. Richardson, after some doubts, and consulting the witness, finally signed the deed, and the assignment of the bond of Walker and Fisher. The note was not negotiable. The deed and assignment were left on the table (in Mann's office), or taken by Flagg and Richardson for the purpose of having the deed acknowledged by Richardson. It was acknowledged on the same day, as the witness thinks, but is not positive. But when he last saw the deed and assignment on that day (the 13th of May) they were on the table in Mann's office. The next time he saw the deed was in August or September, 1831, when it was handed to him by Flagg. About the time when the information came out, that Mann and Adams had purchased the lands in question of the Frye heirs, Mann and Richardson came to the witness's office to take up the note. Richardson made no objection; and Mann took it away, and returned it again to the witness on the same day, saying, he had concluded to return it, or words to that effect. It does not appear, that Flagg was, at the time, a party to these transactions. The witness adds, that in the latter part of the same month of May, Mann, under an injunction of secrecy, told him of a new and serious difficulty, the discovery, that the oath had not been properly taken by the guardian.

The testimony of Thomas P. Goodhue is, as far it goes, confirmatory of that of Ames and Richardson on this point; and its bearing on other points will hereafter be the subject of comment. He says, that Mann told him, that he thought the transaction of Richardson with Walker and Fisher operated as a mortgage. That on or about the 18th of May, 1831, he was informed by Mann and Flagg, that they were the owners of the Richardson title and interest in the premises, and that they were to pay $9,000, he thinks, in this way. They were to discharge the incumbrance of Walker and Fisher, and to pay the balance to Richardson. On the same day, he was also informed by them of the defect in Richardson's title from the omission of the guardian to take the oath at the prescribed time.

The testimony of another witness, Wood, is very cogent and positive. He says, that Mann told him, that he and Flagg had made the purchase of Richardson, and got their deed, and also an assignment of the bond or mortgage, and that they had agreed to give therefor $9,000. Mann took a paper from his drawer, and holding it up, said, this is our deed from Richardson, and we have given Richardson, for what is coming to him our security for the same, and the security is deposited or put into the hands of Seth Ames. At another time, Mann inquired of the witness, whether Richardson's wife had signed the deed to Walker and Fisher; and Mann said, if she had, it was as well, as if she had signed the deed of her husband to Flagg and himself.

Now, upon this posture of the direct evidence bearing on this point, I confess, that I am reluctantly driven to the conclusion, that it is not satisfactory to establish, that the delivery of Richardson's deed was not absolute, or that it was an imperfect inchoate transaction. Loose, and confidential, and inaccurate, as the whole proceedings were to attain the ends contemplated by the parties, I find no warrant in them to justify the court in saying, that the deed of Richardson was never delivered as a deed, but merely as an escrow. The indirect evidence of the Goodhues, and of Hunt, as well as of some others of the witnesses, does not fortify this part of the case in favor of Mann. But, if it weighs at all, it corroborates the view taken on the other side, that Mann treated the deed, as complete in its delivery, however it might be subject to conditions subsequent. It has also been remarked, and the criticism is correct, that Mann, in his answer to the bill in the state court, has not ventured positively

to deny, that the deed was delivered, but has only said, that the said deed and bond were both left in his possession, but as he "then believed and now believes, not delivered" to Flagg and Mann, or either of them, as a consummation of the said conveyance and assignment, &c.

In regard to the second point (2), whether there was any stipulation in the agreement, on the part of Flagg and Mann, to pay Walker and Fisher's demands, I have still more difficulty upon the evidence in withholding my assent, that there was such a stipulation. The extraordinary result would otherwise arise, that a contract, which could only be consummated by establishing a perfect title in Richardson, was wholly dependent for its completion upon the good will of Flagg and Mann. If they did not choose to redeem Walker and Fisher's mortgage (admitting it to be such), or to establish the title of Richardson by a suit against Walker and Fisher, it is plain, that Richardson could never entitle himself to the balance intended to be secured by the note. Richardson had not the means, neither had he, strictly speaking, any right to redeem the mortgage, or to sue Walker and Fisher thereon, after his assignment of their bond to Flagg and Mann. The testimony of Richardson and Ames are full to the purpose of establishing this point; and I cannot but think, that, under all the circumstances, they overcome the denials of the answer. That answer has, indeed, been assailed in many particulars, some of which may come under our notice hereafter.

The next point is (3) whether the agreement between Flagg and Mann contained any stipulation for the extinguishment of the title of the Frye heirs. The answer, as we have seen, denies it. It does, however, admit, that after the defects in Richardson's title, from the want of the guardian's taking the proper oath, and the prior conveyance to Prentiss Richardson, were known to him (Mann), which was about the 17th of the same month of May, Flagg and he, together with Thomas P. Goodhue, did, for their mutual benefit, and at their mutual expense, employ Stephen Goodhue (who was also to have an interest) to purchase up the title of the Frye heirs, and that he went, about the 25th of the same month, to Vermont for that purpose; but he failed in the attempt. It seems, that the object of the intervention of T. P. Goodhue was not to interfere with the rights of Richardson; but to procure a title to the other moiety of the land of the Frye heirs, which had been sold at the guardian's sale to another purchaser. But the answer insists, that, upon the failure of the Vermont expedition, the agreement ended between Mann and Flagg for any joint purchase of the claim of the Frye heirs. If there could be any doubt, as to the point of the intended purchase from the Frye heirs, it would be entirely removed by the concurrent testimony of the Goodhues. Whether that agreement was contemporaneous with the purchase from Richardson, or whether it took place after the discovery of the alleged defects in his title, is not, perhaps, important to the objects of the bill, if the purchase of Richardson was not, at that time, rescinded, and if the agreement to purchase, for mutual account, the claim of the Frye heirs, was not abandoned with the failure of the Vermont expedition.

And this leads me to the remaining point under this head; and that is (4) whether there has been any absolute abandonment, by the consent of all parties, of the purchase from Richardson, and of the intended purchase from the Frye heirs, or of either. Now, in respect to these points, the onus probandi is properly of the defendants, since they constitute matter set up in avoidance of the objects of the bill.

And first in regard to the abandonment of the purchase from Richardson. Unless I am greatly misled, there is no sufficient evidence in the case to establish the fact, that Flagg ever abandoned that purchase. On the contrary, it seems to me, that the current of the evidence, and the acts of the parties, with some few exceptions, show, that Flagg insisted upon the purchase and his rights under it. And, unless some clear and deliberate abandonment is shown, the purchase must, in contemplation of law, be deemed a continuing contract. Unless Flagg did abandon the purchase, it could not be rescinded or repudiated by Mann alone, or by Richardson and Mann together. Richardson wholly denies any abandonment to have been carried into effect; and Mann's return of the note to Ames, after he had received it, shows, that up to that period (which was in the latter part of July, or the beginning of August, 1831), there had been no definitive rescission of it. And none with the consent of Flagg was then accomplished, even if the other parties had been willing. Mann, by his answer, insists, however, that there was a definitive abandonment of the purchase on the 17th of May, 1831, in consequence of Mr. Hoar's opinion, and the other discoveries of the defects in Richardson's title, already alluded to. In this, he is, I will not say, certainly, but in all human probability, mistaken. In his answer to the supplemental bill, he admits, that when the expedition to Vermont was undertaken, the title of Richardson was relied on by himself and Flagg. He says, "Mr. Goodhue left Lowell for the purpose of going to Vermont, I think, on the 25th or 26th day of May, 1831. He went for the purpose of purchasing the title of the Frye heirs to the Paddy Camp lands (the premises in question), with the agreement, that if he did purchase it, it should be for the benefit of said Flagg and myself, so far as he could hold by Luther Richardson's title, and for his and his brother's interest, so far as they might be able to hold it by a quitclaim deed, which Wood had agreed to give them."

The testimony of both the Goodhues goes strongly to show, that there could not, at the time, have been such an abandonment. For, after the failure and return of Stephen Goodhue from the Vermont expedition, there having been in the meantime a discovery by Hildreth's testimony, that the oath had been properly taken before the guardian's sale, Mann told one of the Goodnues, that it was well, that they had not purchased the interest of the Frye heirs, as there was then no necessity for doing so. Indeed, after the discovery of Hildreth's testimony, and before the return of Stephen Goodhue from Vermont, Mann proposed to have a messenger sent to recall him; but it was not done, because they concluded, that he had already effected all he would be able to effect with the Frye heirs. Both of the Goodhues strenuously deny, that they ever had any knowledge, that the purchase from Richardson was abandoned by Flagg and Mann. On the contrary, their testimony leads to the conclusion, that they understood and believed, that the extinguishment of the claim of the Frye heirs was always contemplated to be in aid and not in exclusion of the title of Richardson. Even Coolidge does not pretend, that he ever knew of any actual abandonment of the purchase by Mann and Flagg, although certainly, as he was much in the confidence of the parties, and particularly of Mann, he would have been in a situation probably to have known it, if it had been definitely settled between them. I admit, that there is evidence in behalf of the defendants, which contains statements made in conversations with Mann, in which he (Mann) said, the purchase had been abandoned. But, certainly, his own statements are not either proper or satisfactory evidence in his favor for such a purpose. The testimony of Isaac Fiske seems to me to corroborate the view already taken upon this point; for it shows, that on the 18th of May, Mann, after a knowledge of the defects of Richardson's title, was taking steps to make that title good, and to protect it by an extinguishment of the claim of the Frye heirs.

The testimony of William Heard (the brother-in-law of Mann) is, indeed, in favor of the abandonment. He says, that about the first of June, 1831, he had a conversation with Flagg and Mann, and he asked them, how they came on in purchasing the Paddy Camp lands (the lands in question), to which Mann replied, "We have done with that;" no remark was made by Flagg on that point. Afterwards, in August of the same year, Mann, in his office, handed a bundle of papers to Flagg, and said the papers related to the transactions between him and Flagg and Luther Richardson, and that Flagg was to take up their note, and he called on the witness to take notice, that he had delivered up the papers. Flagg took up the papers, and made no reply. Walker also states, that Luther Richardson, in the latter part of May, 1831, told him, that Mann and Flagg had given up the bargain, as they thought the title was not good for any thing. Fisher says, that in May or July, he cannot tell which, Luther Richardson also told him, that Flagg and Mann had abandoned their purchase of him. But, at another time, he told him, that Flagg was not willing.

It is certainly difficult to reconcile all the testimony on this point of abandonment of the purchase from Richardson. If it is reconcilable at all, it seems to me, that it is so upon the supposition, that Mann's opinion as to the validity and value of the purchase varied at different times, from the different views, which he took, at those times, of the state of Richardson's title, and of the real or supposed defects in it. At some times he had great confidence in the title; at others, he appears to have thought it good for nothing; and he was ready to abandon the purchase. But his mind fluctuated from time to time; and it appears that there never was any final and conclusive abandonment of that title agreed to and acted on by all the parties in interest, Mann, Flagg and Richardson.

In regard to the abandonment of the joint agreement of Mann and Flagg for the purchase of the claim of the Frye heirs, there is still less evidence in favor of Mann's allegations in his answer. The Goodhues certainly did not understand, that there was any abandonment after the failure of the Vermont expedition; and the language of Mann to them, as detailed in their depositions, goes strongly to show, that he never gave up either the intention or the hope of purchasing out the Frye heirs, and that he encouraged them to believe, that a purchase might be effected. They had no notice from Mann, that Flagg had withdrawn from the object. It is plain that the subsequent negotiations of Mann with the Frye heirs were kept concealed from Flagg; and this fact sufficiently shows, that Mann contemplated excluding Flagg from the benefit of the future purchase. But how this can furnish any proof, that Flagg had abandoned his rights, real or supposed, under the agreement, I profess not to be able to comprehend. If the agreement was not abandoned, this conduct of Mann was a meditated fraud on Flagg. If it was abandoned the onus probandi to establish it is on Mann; and it should be by some proofs, clear, determinate, and full; and not by equivocal acts, or language, or intimations. The proofs in the case do not (I regret to say) enable me to give an unlimited confidence to the allegations of Mann in his answer. There are many circumstances, in which that answer is strongly assailed, if not completely overturned by the proofs. Some of these circumstances are to collateral points, on which, therefore, I do not dwell, though in summing up to a jury they might be very important as tests of credibility. After a careful survey of the evidence it seems to me,

that the original agreement between Flagg and Mann, as stated in the bill, is fairly made out; that it has never been abandoned by the consent of both parties; and that without such consent it was, under the circumstances, incapable of any abandonment by Mann, operative in point of law to destroy it. Assuming, however, that such an abandonment of it by Mann would have been operative in point of law, if openly, fully, and absolutely made; still I should be of opinion, that until it was so made, the acts of Mann to effect a purchase from the Frye heirs, secretly done, and thereby lulling Flagg into a false security, would, in a court of equity, be deemed a fraud upon Flagg, and would not be permitted to avail Mann as a ground to defeat his agreement.

We are next led to the consideration of another point in the defence, which is directly brought forward in the answer. It is, that the agreement, even if clearly made out in point of fact, is void in law, as a parol agreement respecting the purchase of lands, within the purview of the statute of frauds of Massachusetts of the 10th of March, 1784 (St. 1783, c. 37), which enacts, that no action shall be maintained upon any contract or sale of lands, or any interest in or concerning the same, unless the agreement is in writing. It seems not disputed at the bar, that the present agreement falls within the predicament of the statute, unless it is extracted from it by the fact, that some title was, at the time of the purchase from the Frye heirs, vested in Flagg and Mann under the deed from Richardson to them, or that that deed, connected with the agreement between Flagg and Mann, created per se a fiduciary relation, which would make the purchase by operation of law a purchase in trust for their joint benefit. It is a well known rule of the common law, that, where two persons are in possession of lands by an imperfect, and even by a tortious title, such as a title by disseisin, a release to one of them will enure for the benefit of both. The citations at the bar from Co. Litt. 194, 195, 275–277, are fully in point. But the doctrines entertained on this subject by courts of equity are far more broad and comprehensive. They proceed upon the maxim of general justice, so exquisitely enforced by Cicero: "In rebus minoribus socium failere, turpissimum est; neque injuria; propterea quod auxilium sibi se putat adjunxisse, qui cum altero rem communicavit. Ad cujus igitur fidem confugiet, cum per ejus fidem laeditur qui se commiserit?" Cicero, pro Roscio, Am. c. 40. That maxim is but an exposition of the doctrine, that if a purchase is made by the parties so interested by mutual agreement, neither party can rightfully exclude the other from what was intended to be for the common benefit; and that if one of the parties by private intrigue seeks to obtain without contract, but in violation of his good faith to his co-tenants or partners, a private benefit to himself in things touching the common right, it is a fraud, which shall turn him into a trustee for the benefit of all. Hence it is, that in cases of partnership, a contract made by one partner is deemed to be made for the benefit of all; for there is an implied obligation to act for the common benefit. In Featherstonhaugh v. Fenwick, 17 Ves. 298, where one partner had secretly for his own benefit obtained a renewal of a lease of the premises, where the joint trade was carried on, Sir William Grant decided, that the lease was a trust for the benefit of the partnership. "It is clear" (said he) "that one partner cannot treat privately and behind the backs of his copartners for a lease of the premises, where the joint trade is carried on for his individual benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the partnership." There is nothing new in this doctrine, for the same point was decided a century before in the case of Palmer v. Young, 1 Vern. 276, 1 Eq. Cas. Abr. 380. In Carter v. Horne, Id. 7, pl. 13, it was held by the court, that where two persons agree for the purchase of an estate in moieties, neither of the purchasers has a right to secure any private or personal benefit to himself; but whatever is obtained of advantage, in paying off incumbrances, is deemed in equity to be for their mutual benefit and on a mutual trust between them. See 2 Fonbl. Eq. 118. Fawcet v. Whitehouse, 1 Russ. & M. 132, was decided on the same principle, as was also Burton v. Wookey, 6 Madd. 367.

Mr. Chancellor Kent, in Van Horne v. Fonda, 5 Johns. Ch. 388, 407, applied it to a case in many circumstances resembling the present. His language on that occasion has his usual moral strength, and persuasive cogency of reasoning. "I will not say, however," (said he), "that one tenant in common may not in any case purchase an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title, derived from their common ancestor (the very case before him), there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claims and community of interest, that one of them should not affect the claim to the prejudice of the other, &c. It is not consistent with good faith, nor with the duty, which the connexion of the parties as the claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty; and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incum-

brance, or an adverse title, to disseise and expel his co-tenant. It cannot be tolerated, when applied to a common subject, in which the parties had equal concern, and which created a moral obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest." The present case requires the application of principles of far less stringency and comprehensiveness. In the present case the community of interest (if any) arose from direct contract between the parties; and from a direct agreement, not rescinded or abandoned, to purchase the original, as well as the outstanding, title upon joint account. In such a case there would seem to be no room for doubt, that if the parties stood in the relation of co-tenants, or joint owners, a court of equity ought to deem the purchase of an outstanding incumbrance or adverse title by one to be a trust for the benefit of both, if not ex contractu, at all events in foro conscientiae. The case of Featherstonhaugh v. Fenwick, 17 Ves. 310, 312, was decided upon this latter ground. And let me here remark, that the partnership in that case was dissoluble at pleasure. But still, as it was not actually dissolved, and as no notice was given of the intention to dissolve it, or to seek a renewal of the lease, to the other partner, it was held to be a renewal in trust for the partnership; for it was an attempt to secure clandestinely an undue advantage to the injury of that partner.

Pothier states the same doctrine in a still more general form, as having for its support a just foundation in the principles of natural equity. He denies, that one partner has a right to dissolve a partnership for his own peculiar advantage to the injury of the other partners. The renunciation (or abandonment) of the society (says he) must be made in good faith and at a reasonable time. "Debet esse facta bonâ fide et tempestivè." The renunciation is not made in good faith, when a partner renounces to appropriate to himself alone the profit which the partners had proposed to acquire in contracting that relation. And Pothier applies the doctrine to the case, not of general partners only, but to joint agreements to purchase property on speculation; putting the case of a joint agreement by two booksellers to purchase a library on joint account; where he holds, that one cannot renounce without the consent of the other, and purchase on his own sole account. Pothier, Traité de Société, art. 150. The civil law enforces the same enlightened morality. "At cum aliquis renunciaverit societati, (say the Institutes) solvitur societas. Sed plane, si quis callidè in hoc renunciaverit societati, ut obveniens aliquod lucrum solus habeat, cogitur hoc lucrum communicare." Inst. lib. 3, tit. 26. The same doctrine is fully established and illustrated in the Pandects, of which I will cite a single passage, peculiarly applicable to the very abandonment of the joint agreement for the purchase of the Paddy Camp lands, set up by Mann in the present case. "Item, si societatem ineamus ad aliquam rem emendam, deinde solus volueris eam emere; ideoque renunciaveris, societati ut solus emeres; teneberis, quanti interest meâ." Dig. lib. 17, tit. 2, l. 65, § 4. A wholesome and equitable principle, which by declaring the sole purchase to be for the joint benefit, takes away the temptation to commit a dishonest act, founded in the desire of obtaining a selfish gain to the injury of a co-contractor, and thus adds strength to wavering virtue, by making good faith an essential ingredient in the validity of the purchase. There is not, therefore, any novelty in the doctrine of Mr. Chancellor Kent, notwithstanding the suggestion at the bar to the contrary; and it stands approved equally by ancient and modern authority, by the positive rule of the Roman law, the general recognition of continental Europe, and the actual jurisprudence of England and America.

If then a fiduciary relation did exist between Flagg and Mann, at the time of the purchases from Walker and Fisher and from the Frye heirs, it is clear, and indeed was admitted at the argument, that the purchases by Mann alone must be deemed in equity to be for the joint benefit of both. But the argument is, that this fiduciary relation does not arise from a mere common hope or expectation under the contract of the parties, but from a common interest in the subject-matter of the purchase, then vested and subsisting in the parties. A mere honorary obligation is not sufficient; nor will a parol agreement without a vested interest in the property give a rightful existence to the fiduciary relation.

Passing, for the present, the question as to the fiduciary relation, arising from mere contract, let us proceed to the consideration, whether the deed and assignment of Richardson to Flagg and Mann did convey any equitable title or interest to the latter in the premises. First, it is said, that Richardson derived no title to the premises under the guardian's deed to him in June, 1823, for want of the proper oath having been taken by the guardian prior to his fixing the time and place of sale. It is admitted, that by the decisions in Massachusetts such a defect is fatal to the title. Williams v. Reed, 5 Pick. 480. But it by no means follows that, therefore, the title is utterly void, and that nothing passed by the deed. On the contrary, the deed did pass a title to the premises, defeasible and defective, indeed, as to the Frye heirs, but good, as against all the rest of the world. It was not a void but a voidable conveyance, operative between the parties; and the seisin acquired under it by Richardson gave him a lawful estate in fee, good against all persons, except the minors and those claiming under them. Even a disseisor in possession has a lawful estate, which he may aliene

and the alienee will be deemed in rightful possession thereof against all persons not having a paramount title. A fortiori, Richardson had a rightful estate, having entered, not merely under color of title, but under a bonâ fide purchase without notice of any defect of title. The defect could be taken advantage of only by the Frye heirs and others deriving title under them within the time prescribed by the statute of 1819 (chapter 190, § 12). There is nothing in the case of Williams v. Reed, 5 Pick. 480, which impugns this doctrine. On the contrary it is tacitly admitted by that case. Until, then, the title of Richardson under the guardianship deed was actually avoided by the Frye heirs, and his seisin in the premises was ousted under a recovery against him by these heirs, he must be deemed, as to all other persons, to be the lawful owner of the premises, and entitled as such to hold and convey the same by mortgage or otherwise. It seems to me wholly incompetent for Mann, deriving the title together with Flagg by purchase from Richardson, to set up the outstanding adverse title of the Frye heirs, in order to defeat the equitable rights of Flagg, accruing from the fiduciary relation created between them by that purchase, if Richardson had at the time any title in the premises.

The matter of fact, whether the oath was duly taken or not, is, however, in dispute; and upon the actual state of the evidence, if it were, as in my judgment it is not, a point essential to be decided in the present controversy, I should direct it to be tried by a jury upon an issue. I think, that it is not essential; because, in the first place, the actual title of Richardson, supposing it not to be parted with, and, putting out of sight the mortgages, and other incumbrances created by Richardson (which will presently be considered), would, upon his conveyance to Flagg and Mann, be sufficient to create a privity of title and a fiduciary relation between them, such as, upon the doctrine above stated, would raise a trust for their mutual benefit in the purchase from the Frye heirs, supposing the claim of the latter to be valid and unimpeachable. I think, farther, that, inasmuch as the agreement for the purchase from Richardson was made by Flagg and Mann, avowedly for the purpose of protecting themselves against the claim of the Frye heirs, and upon the necessary understanding, that it should be resisted by both, it is not now competent for Mann to violate that understanding, by interposing that claim to defeat the rights of Flagg under that agreement, if it be still a subsisting agreement. I do not here proceed upon any notion of an estoppel at the common law; but upon the principles of courts of equity in depriving a party of the advantages obtained by what they deem a constructive fraud.

But it is argued, that at the time of the conveyance of Richardson to Flagg and Mann, he had not a scintilla of title in the premises; but that he had parted with all his title, whatever it might be, to Walker and Fisher; so that at most his possession of the premises at the time was merely that of a tenant at sufferance. And this leads us directly to the consideration of the state of Richardson's title, with reference to the transactions with Walker and Fisher. The question is, whether the conveyance by the Richardsons to Walker and Fisher, connected with the other papers and circumstances, amounted to a mortgage or to a conditional sale of the premises. It seems admitted at the argument, that it must be one or the other; and therefore, if either be displaced, the other must prevail. This question is to be examined, not with the views, which a court of common law might be constrained to take of it, having reference solely to the jurisprudence, which it is bound to administer; but it must be examined with the enlarged views, which are embraced by courts of equity in recognizing what may be called equitable mortgages. A court of law may be compelled, in many cases, to say, that there is no mortgage, when a court of equity would not hesitate a moment in pronouncing, that there is an equitable mortgage. The case of Kelleran v. Brown, 4 Mass. 444, clearly recognized this distinction in Massachusetts; and, indeed, it pervades the system of equity jurisprudence on this subject. The state of the title of Luther Richardson in the premises, at the time of the transactions with Walker and Fisher, was as follows: It was subject to the two mortgages to Goodman, Saville & Kent. The equity of redemption had been attached, and sold on execution to Proctor, who had assigned it to Bennett. Subject to these incumbrances, the statute equity to redeem the premises against the sale on the execution had been vested in Prentiss Richardson, under the deed of release to him from his brother Luther. See Reed v. Bigelow, 5 Pick. 281. So that, in a legal point of view, all right of the latter thereto was extinguished. The only question, which could arise, would be, whether the conveyance of Luther to Prentiss Richardson was bonâ fide and absolute, or upon a secret trust in favor of Luther.

Now, upon a review of the evidence and circumstances of the case, it is clear to my mind, that the conveyance from Luther to Prentiss Richardson was not a bonâ fide and absolute sale, but was upon a secret trust for the benefit of Luther. It was made after the attachment and before the sale of the equity of redemption upon execution, and was probably designed to cover the equity under the sale from the reach of creditors. Both Luther and Prentiss Richardson, by their depositions, admit the fact, that the conveyance was not absolute. No actual consideration passed between them at the time; and both of them explicitly aver, that the con-

veyance was upon a secret trust for the benefit of Luther. Now, I admit, that this trust was, or at least might be, within the statute of frauds, and therefore not such as a court of equity would feel itself bound to enforce, if resisted by Prentiss Richardson. See Leman v. Whitley, 4 Russ. 427. But the trust was not utterly void between the parties; but it was, as a matter in conscience, obligatory between them. And if they chose voluntarily to act upon it, and to carry it into effect in the same manner, as if it had been in writing, and possessing a complete legal obligation, I know of no principle of law, which forbids the creation or the voluntary execution of such a parol trust by the parties, although a court of equity might not enforce the execution of it. Because a trust is created by parol contract, it does not necessarily follow, that it may not be enforced in equity. On the contrary, if it be afterwards admitted, and the party does not insist upon the defence of the statute of frauds, a court of equity will decree a specific performance. There are many cases to this effect. But I need not do more than refer to Barrell v. Joy, 16 Mass. 221; Cottington v. Fletcher, 2 Atk. 155; Croyston v. Banes, 1 Eq. Cas. Abr. 19; Forster v. Hale, 3 Ves. 696, 5 Ves. 308; Attorney General v. Sitwell, 1 Younge & C. Ex. 583, and 1 Fonbl. Eq. 29, bk. 1, c. 3, § 8, and note a; Hampton v. Spencer, 2 Vern. 288a. See, also, 2 Story, Eq. Jur. § 755, and cases there cited. And trusts, arising or resulting by the implication or construction of law, are, as we all know, expressly excepted from the operation of the statute of frauds. St. 1783, c. 37, § 3. Even if the original transaction between Luther and Prentiss Richardson was not upon a trust, yet it is manifest, that Prentiss, at the time of the conveyance by them to Walker and Fisher, held the title in trust for Luther, and claimed no interest whatsoever in the premises. He states the fact in his deposition, in the most explicit manner, that he then had no interest in the premises; that all his claim under the conveyance made to him by his brother was at that time satisfied; that the transaction with Walker and Fisher was for the sole benefit of his brother, and that he received no consideration whatsoever for signing the deed to them. Indeed, the bond to secure a reconveyance or a redemption of the premises within the five years, being given to Luther alone, demonstrates the truth of his statement in an entirely satisfactory manner. It appears to me, that, in the view of a court of equity (for I do not meddle with the question at law), the execution of the deed to Walker and Fisher, and the giving of the bond by them to Luther alone, with the assent of Prentiss, amounted to a complete execution of the trust between Luther and Prentiss, and is precisely the same in effect, as if Prentiss had first conveyed the premises to Luther, and the latter had then conveyed to Walker and Fisher, taking from them the bond. Courts of equity do not regard the forms of instruments; but they look to the intent, and give to the acts of the parties the construction, which that intent justifies and requires, as far as consistently with general principles it can be done. Here, then, is the case of an executed trust, which is wholly beyond the reach of the statute of frauds. It is plain, too, that Walker and Fisher understood, at the time, that Luther Richardson was the sole beneficial owner of the premises. Their bond recites the conveyance to them as being from Luther Richardson alone. The condition recites, "Whereas the above-named Luther Richardson has, by a deed of quitclaim, bearing even date herewith, conveyed to the above-bounden Walker and Fisher, all his right and title, &c. &c.;" and then the condition provides for a reconveyance to him. It seems to me, that Walker and Fisher, and all persons claiming under them, are estopped by the terms of this instrument from denying, at least in a court of equity, that all, which they took under the deed, was the right and title of Luther Richardson, Prentiss's formal title being extinguished by his joining in the deed; and that they were bound to reconvey all the right and title, which they so acquired. It would be unconscionable for them (and those claiming under them are in the same predicament) to set up the want of any legal title in Luther, in order to defeat the true operation of their bond, if otherwise it would make the conveyance to them a mortgage. If the objection had been stated at the time, it would (as we must all see) have been obviated by a separate conveyance from Prentiss to Luther, or by a recital in the deed, that Prentiss had the formal and Luther the beneficial interest in the premises. I am aware, that it has been said, that the reason for Luther Richardson's joining in the deed to Walker and Fisher was not to convey away his supposed title in the premises, but merely to give validity to his wife's relinquishment of dower in the premises. It appears to me, that the very form and purport of the deed contradict this argument. The deed purports to name Luther and Prentiss as grantors, and they both convey the premises. The name of the wife does not occur except in the common in testimonium clause. The bond, too, as we have seen, recognises the deed, as being a conveyance from Luther of his own right and title. The testimony of Walker and Fisher necessarily admits, that Luther Richardson claimed a right to the premises, as then subsisting in himself. The whole negotiation with them was avowedly on his own account and for his own benefit, and not for his brother Prentiss.

Did, then, the transaction between the Richardsons and Walker and Fisher create a mortgage in the premises? Some things

are, to my mind, exceedingly clear. In the first place, the deed to Walker and Fisher, and the bond by them to Luther Richardson, are to be treated as part of one and the same transaction. They were, in my judgment, executed at the same time; and if not, at all events they were intended to be contemporaneous in their object and operation. Neither was to be of any force or validity without the other. The bond must have the same precise effect and construction, as if it were inserted in the body of the deed. If, by being so inserted, a mortgage could be created, it was equally created by its being in a separate instrument. In the next place, no consideration whatsoever was paid by Walker and Fisher to Luther or Prentiss Richardson, on account of the deed, at the time of the execution of it, or has been at any time since. It is true, that there is the consideration of the thousand dollars stated in the deed; but it was purely nominal. No person pretends, that that sum, or any other sum was in fact paid, or intended to be paid. If this were the whole case, the deed would be merely voluntary; and the question of a conditional purchase could never arise; for to constitute a conditional purchase, there must be a sale for a valuable consideration between the parties, with a right of repurchase. A mere gift would not raise the question; and, indeed, there is no pretence in the present case to say, that any gift was intended.

What, then, was the real consideration between the parties? To me it appears plain, that there was an agreement by Walker and Fisher, at the request and for the benefit of Luther Richardson, to pay off forthwith the incumbrance of Bennett on the premises, and thereby to save the equity of redemption from being totally extinguished. On the part of Richardson, there was an agreement to convey the premises to Walker and Fisher, to secure the payment of this advance, and all other advances made by them towards the extinguishment of the antecedent mortgages and all expenditures in improvements, with a right reserved to Richardson of reconveyance upon his repayment thereof within five years. This was the basis of the papers actually executed; and the whole transaction would otherwise be without any just aim or object. Bennett's title to the premises would become in a few days absolute, unless he was redeemed. Richardson was, notoriously, unable to redeem from his own funds, and that inability constituted the ground of the application to Walker and Fisher. It would have been the idlest of forms, and the most useless of contrivances, to shift the title from Prentiss Richardson to Walker and Fisher, if it was the design of all parties, that it should perish in the space of twelve days, without any attempt of redemption. The very nature of the transaction demonstrates to my mind, that the redemption of Bennett by Walker and Fisher was the sine quâ non of the whole arrangement. If there could be the slightest doubt upon this head from reading the testimony of Walker and Fisher, it would be entirely removed by the other evidence, and by admitted facts. Bemis says, that about the time the papers were finishing, Bennett passed in the street, and was called in; and Walker and Fisher requested Bemis to ask Bennett to appoint a time, when they should meet him at Billerica, and pay him the money. He did so; and Bennett appointed the time. And on the day so appointed, Walker, and Fisher, and Richardson, and Bemis, met at Billerica, and the money was paid by Walker and Fisher, and the deed was accordingly executed to them by Bennett. This is as pregnant and conclusive a proof of the real nature of the transaction, as can be desired.

Upon this posture of the case, what ground is there to say, that there was a conditional sale of the premises to Walker and Fisher? They paid nothing to Luther Richardson for any transfer of his right to them. They simply paid, at his request, a subsisting debt due from him to Bennett, and took a transfer from Bennett of his interest in the premises. Beyond this they paid nothing; and upon the reimbursement of this and all other advances, on account of the premises, within five years, the premises were to be restored to Richardson. It was in truth but the transfer of a debt from one creditor to another, with the assent of the debtor, expanding the equity to redeem the estate pledged for it from a few days to five years. It has been said, that the true test, whether the conveyance in this case was a mortgage or not, is to ascertain, whether it was a security for the payment of any money or not. I agree to that; and indeed, in all cases the true test, whether a mortgage or not, is, to ascertain, whether the conveyance is a security for the performance or non-performance of any act or thing. If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage. If it be not a security then it may be a conditional or an absolute purchase. It is said, that here there was no loan made, or intended to be made, by Walker and Fisher to Richardson; and that they refused to make any loan. There is no magic in words. It is true, that they refused to make a loan to him in money. But they did not refuse to pay for him the amount due to Bennett, and to take the premises as their security for reimbursement within five years. It is said, that there is no covenant on the part of Richardson to repay the money paid, which should be paid by Walker and Fisher to discharge the incumbrances on the premises. But that is by no means necessary in order to constitute a mortgage, or to make the grantor liable for the money. The absence of such a covenant may, in some cases, where the transaction assumes the form of a con-

ditional sale, be important, to ascertain, whether the transaction be a mortgage or not; but of itself it is not decisive. The true question is, whether there is still a debt subsisting between the parties capable of being enforced in any way, in rem or in personam. The doctrine is entirely well settled; and for this purpose it is sufficient to refer to Floyer v. Lavington, 1 P. Wms. 270, 271; King v. King, 3 P. Wms. 360; Longuet v. Scawen, 1 Ves. Sr. 406; Mellor v. Lees, 2 Atk. 496; Goodman v. Grierson, 2 Ball & B. 278; and Conway's Ex'rs v. Alexander, 7 Cranch [11 U. S.] 237,—out of many cases. Now, it seems to me clear, upon admitted principles of law, that, upon the payment of the money due to Bennett by Walker and Fisher, Richardson became their debtor for that amount, as it was paid at his request, and for his benefit. It is a common principle, that if A, at the request of B, pays a debt due by him to C, A may recover the amount in assumpsit for money paid to his use, or for money lent and accommodated. In my judgment, that is the very case at bar. If it should be asked, why no personal obligation was given by Richardson, on this occasion, to pay the money, it might be answered, that the whole circumstances of the present case show an extreme looseness in the transaction of business between the parties; and considering, that much of it was done by the advice and with the assistance of counsel, it is not very creditable to the skill and diligence of the profession. The negotiations between Flagg and Mann and Richardson evince a most obstinate carelessness in the draft and execution of important instruments, leaving much to personal confidence, and the imperfect recollections of the parties, as well as that of the witnesses. And there is no ground for surprise in finding the same laxity pervade the arrangements of Richardson with Walker and Fisher. But the satisfactory answer is, that Richardson was poor and embarrassed, and Walker and Fisher relied on the premises for a full indemnity and satisfaction of all their advances, believing that Richardson would never be able to redeem. They were indifferent about the personal obligation, as they possessed an adequate fund in their own hands.

It is well known, that courts of equity lean against construing contracts of this sort to be conditional sales: and, therefore, unless the transaction be clearly made out to be of that nature, it is always construed to be a mortgage. So Lord Hardwicke laid down the doctrine in Longuet v. Scawen, 1 Ves. Sr. 406, and it has never been departed from. The onus probandi, then, is on the defendants to establish it to be a conditional sale. If it be doubtful, then it must be construed to be a mortgage. If we look to the condition of the bond, it is difficult to resist the impression, that it is precisely in its terms such, as would be appropriate, if the conveyance were a mere mortgage, to secure future advances to be made by Walker and Fisher, in discharge of the incumbrances referred to in the recital. The language of the accompanying lease points to the same conclusion. The dwelling house and garden (a valuable part of the premises) were let to Richardson for five years at a nominal rent; a proceeding not easily reconcilable with the notion of a positive purchase; but quite reconcilable with the notion of a mortgage. That lease contains some language not without significance on this subject. The lease is "for the term of five years from this date, yielding and paying therefor the sum of one cent annually, unless the said premises shall be redeemed by the said Luther, agreeably to the provisions of a bond, bearing even date herewith, from Walker and Fisher to said Luther." I do not lay great stress upon the word, "redeem," in this lease, as conclusive in regard to the understanding of the parties, though it is a word peculiarly appropriate to the case of a mortgage; for it is sometimes used as equivalent to "reconvey." See Lawley v. Hooper, 3 Atk. 278. But, certainly, it is not without weight in a case of this nature; and it was relied on by Lord Hardwicke in Lawley v. Hooper, as indicative of a mortgage. But the fact, that Walker and Fisher were not to go into possession of the entire premises, but that Richardson was to retain the possession of a valuable portion for five years, without payment of any rent, is certainly important. It is remarked by Mr. Butler, in his learned note to Co. Litt. 204b, that the circumstance, that the grantee was not to be let into immediate possession of the estate, affords a presumption of its being a mortgage. It is not unimportant also, that, in the very assignment made of the bond by Richardson to Flagg and Mann, the conveyance to Walker and Fisher is expressly described as a mortgage. And, supposing that assignment to be a valid and subsisting instrument, it is not easy to see, how Mann can now be permitted to set up that conveyance as an absolute estate, to defeat the rights of his co-assignee, he having purchased in the title for his sole account.

But, what strikes me as most material in this case is, the allegation by both Walker and Fisher, in their testimony, that notwithstanding the conveyance to them, they did not contract, and were not bound, to pay off any of the incumbrances. If this were true, there would be an end of treating it, as has been already suggested, as a conditional purchase. I have endeavored to show, that they were positively bound to pay off Bennett's incumbrance. In regard to the antecedent mortgages, they positively deny, that they engaged to pay them off. Now, if this be true, it would be impossible to consider this as a conditional purchase, without the grossest injustice. The purchase would be for little less than a tenth of the value of the property; for Richardson would still be personally bound for the payment of those mortgages.

Nay, he would be bound to pay to Walker and Fisher, as the assignees of those mortgages, and now to Mann, as their assignee, the full amount due on those mortgages, notwithstanding the extinguishment of his title in the premises, by the lapse of the five years. Those mortgages, in their view of the matter, are still subsisting mortgages, capable of being enforced at law, and were not to be extinguished by the purchase and assignment to themselves. So, that if this be admitted to be the true interpretation of the whole arrangement, Walker and Fisher obtained property, confessedly worth, in their own opinion, more than $10,000, by the payment, at most, of the sum of $1,200 only, to Bennett. I have not heard any such doctrine contended for at the argument, although it seems to me a natural consequence from the positions assumed. If the mortgages were not agreed to be extinguished by Walker and Fisher, when they took the conveyance, nothing has since been done by the parties to extinguish them. On the other hand, if that transaction was a mortgage, the whole proceedings are in legal operation, exactly what they should be. The debt to Bennett, and the mortgages constitute a subsisting lien on the premises; and they must be paid by Richardson, before he can claim a reconveyance. Now, it has been well remarked by Mr. Butler, in the note above cited (Co. Litt. 204b, note 1), that if the money paid by the grantee is not a fair price for the absolute purchase of the property conveyed to him, it affords a strong presumption, that the conveyance was a mere mortgage. The same suggestion was pointedly made in Conway's Ex'rs v. Alexander, 7 Cranch [11 U. S.] 241.

On the contrary, if, in opposition to the positive testimony of Walker and Fisher, we are to deem it a part of the agreement at the time of the conveyance to them, that they should pay off the mortgages, having their security for their advances upon the premises, then the same considerations apply to this as to the payment to Bennett. The payments so made were for debts of Richardson, and paid at his request.

I observe, that the assignments of these mortgages to Walker and Fisher speak of the debts as subsisting debts, and the mortgages as liable to be redeemed by Richardson; and Walker and Fisher are authorized to receive the sums due thereon for their own use. But it is said, that it was distinctly understood, that the conveyance should not be a common mortgage; and that the premises should be irredeemable after the five years; and that the shape, which the negotiation took, was for the very purpose of accomplishing this object. Be it so; still if in fact the conveyance was a mere security for advances to be made to Richardson, and the premises were redeemable upon payment of these advances within the five years, in contemplation of law it was a mortgage, whatever name the parties might choose to give to it. Nothing is better settled than the doctrine, that where the conveyance is a mere security, it is a mortgage; and that if it be a mortgage, the parties cannot—by their agreement, that there shall be no equity of redemption after a limited time—change the rights of the mortgagor. The common maxim is, once a mortgage, always a mortgage. The right to redeem is a necessary incident, and cannot be extinguished by a mere covenant, that it shall not be claimed after a limited period. See Goodman v. Grierson, 2 Ball & B. 278; Newcomb v. Bonham, 1 Eq. Cas. Abr. 313, pl. 13; 2 Story, Eq. Jur. § 1019, and authorities there cited; 4 Kent, Comm. (3d Ed.) 142, 143. It seems to me, that the shape of the transaction was merely to evade the principles of law applicable to mortgages. Walker and Fisher were willing to make advances to pay Richardson's debts, and to reinstate him in his equity of redemption. They were willing to give him five years to repay the advances and redeem the estate. But they meant, after that lapse of time, to hold the estate, if unredeemed, by an absolute title. This appears to be the manner in which Bemis understood the transaction; and the only mistake in the matter has been a mistake of law. Luther Richardson's own testimony points still more distinctly to the transaction, as being a mortgage in contemplation of law, whatever might have been the understanding of the parties as to its redeemable quality. The negotiation, according to his statement, began in asking a loan, and ended in an agreement to pay off all the incumbrances, taking the conveyance for the repayment within five years. There is an intrinsic difficulty in treating this transaction as a conditional sale, in whatever manner the circumstances are viewed. It seems to be of the very essence of a sale, that there should be a fixed price for the purchase. The language of the civil law on this subject is the language of common sense. "Pretium autem constitui oportet; nam nulla emptio sine pretio esse potest," say the Institutes. Inst. lib. 3, tit. 24. Ulpian, in the Digest, repeats the same suggestion; "Sine pretio nulla venditio est." Dig. lib. 18, tit. 1, c. 2. Now, here is not the slightest proof, in this case, of any sum being agreed on as the price of the purchase. No money was in fact paid; and if Walker and Fisher are to be relied on, none was contracted to be paid; and even the incumbrances were not to be discharged. The money, which was to be repaid on the reconveyance, was only what had been, in the intermediate time, actually paid to discharge the incumbrances, and expended in improvements. If none had been so paid, none was to be repaid. So that not only was there no fixed price; but the premises stood as a mere security for future advances.

Hitherto the case has been considered, upon the question of mortgage or not, upon the footing not merely of the conveyance and

bond, but of the parol evidence admitted as explanatory of the intent of the parties. It has been suggested, however, on behalf of the plaintiff, that as the papers, upon their face, taken together, do actually import a mortgage, it is not competent to admit parol evidence to control their legal effect. There is weight in the objection; for, in my judgment, the papers, taken together, do distinctly proclaim the case to be a present mortgage for future advances. But it is unnecessary to consider this objection, as the same conclusion is arrived at upon a full survey of all the parol evidence and circumstances attendant upon the transaction.

It remains to notice another argument, which has been brought forward to prevent the conclusion, that the conveyance is a mortgage. The argument is, that the bond is not between the same parties as the conveyance. The conveyance was by Prentiss and Luther Richardson, and the bond to Luther only; so that it cannot operate as a defeasance; for (it is said) a defeasance must be between the same parties as the deed, which it is to defeat. It does not seem to me, that the question of mortgage or not depends in this case at all upon the point, whether the bond was a technical defeasance or not. There may be a defeasance of a deed of conveyance, which at the same time will not make it a mortgage. On the other hand, there may be a mortgage, although the attendant bond does not technically constitute a defeasance. If the conveyance in the present case had been confessedly a security for a loan, there could be no doubt, that in a court of equity it would have been deemed a mortgage, whatever might be the case at law, though I am not satisfied, that it would have made any difference at law. A court of equity would wholly disregard the form of the transaction, and look to the substance. But the truth is, that, even if the bond had been between the same parties as the conveyance, it would not have constituted a defeasance of the conveyance, technically so called. Lord Coke has given a very correct definition of a defeasance in stating its derivation. It is, says he (Co. Litt. 236b), fetched from the French word, "defaire," i. e. to defeat or undo, "infectum redere quod factum." The true meaning of this language is, that it is to make void the principal deed. Lord Chief Baron Comyns (Com. Dig. "Defeasance," A) says; a defeasance is an instrument, which defeats the force or operation of some other deed or estate; and, that, which in the same deed is called a condition, in another deed is a defeasance. Sheppard, in his Touchstone (page 396), is still more direct. He says; a defeasance is a condition relating to a deed, as to an obligation, &c., which, being performed by the obligor, &c., the act is disabled and made void, as if it had never been done; which differeth only from a condition in this, that this is always made at the same time, and annexed to, or inserted in the same deed. But that is always made in a deed by itself. Mr. Justice Blackstone (2 Bl. Comm. 327, 342) gives the same definition. A defeasance (says he) is a collateral deed, made at the same time with a feoffment, or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. So that it is of the very essence of a defeasance, technically so called, that it defeats the principal deed and makes it void ab initio, if the condition is performed. See Mr. Sergeant Williams' note to Fowell v. Forrest, 2 Saund. 47n. note 1. The very distinction was taken, and acted on in Lacy v. Kynaston, 2 Salk. 575, 1 Ld. Raym. 688, 690. The present bond does not declare, that, if the condition is complied with the conveyance shall be utterly void. On the contrary, it is to remain in full validity, and a reconveyance of the title is to be made, which necessarily supposes, that, until the reconveyance, the estate remains at law in the grantees. See Erskine v. Townsend, 2 Mass. 497. Yet no one will for a moment doubt, that it makes no difference as to the question of mortgage, either at law or in equity, whether the condition be, that upon the payment of the money loaned the condition is to reconvey, or that the principal deed is to be void and of no effect. If there could be a doubt, the case of Manlove v. Bale, 2 Vern. 84, 1 Eq. Cas. Abr. 313, and Erskine v. Townsend, 2 Mass. 403, would completely overthrow it.

It is very clear in this case, that the parties did not contemplate, that the bond to be given should operate as a defeasance; for if it had been so to operate, and the condition had been strictly performed, the estate would have been revested in Prentiss Richardson, and would not have vested in Luther Richardson, contrary to the manifest intention of the parties. The bond was therefore to reconvey to Luther; and in no sense was it a defeasance of the conveyance. But mortgage or not can never depend upon the single point, whether the instrument is a defeasance or not. If a mortgagee were to covenant in the mortgage deed, that, upon payment of the mortgage money, he would reconvey to the mortgagor, it would clearly be a mortgage.[2] If, instead of that, he were to covenant to convey it to such other person, as the mortgagor should appoint, it would not the less be a mortgage. Take the case of a clear trust estate, where the cestui que trust borrows money on a mortgage of the estate, and both the trustee and cestui que trust join in the mortgage conveyance; and the covenant is to reconvey to the trustee, upon the payment of the money by the cestui

[2] The case of Erskine v. Townsend, 2 Mass. 497, is directly in point.

que trust, it would plainly make no difference, as to its being a mortgage, that the payment was not to be made by the trustee, although the reconveyance was to be to him. The conveyance would still be but a security for a loan; and that is the true test of a mortgage. The same result would arise, if the payment was to be made by the cestui que trust, and the reconveyance was also to be made to the cestui que trust, which I conceive to be the very case at bar. Mr. Preston, in his learned work on Conveyancing (volume 2, pp. 201, 202), has put several cases of mortgages of this nature, where the redemption is to be by the beneficial owner alone, although the conveyance is jointly made by him and another person as the formal legal owner, without the slightest intimation of its not being an inappropriate mode of creating a mortgage. In my view of the matter, then, it is of no consequence, that the reconveyance was to Luther Richardson alone. Nor is it necessary to decide, whether the doctrine is universally true, as laid down in Sheppard's Touchstone (page 397), that to make a deed a technical defeasance, it should be between all the same persons, who were parties to the first deed. A bond, given to a mere stranger to the original deed, certainly ought not to be construed as a defeasance. But a bond given by the grantee to one of the grantors of a deed to defeat and make void the conveyance, if executed at the same time with the conveyance, may possibly (for I do not mean to express more than a doubt) admit of a different consideration.

Upon the whole, without going more at large into this point, though there are many things, which might afford grounds for additional comments, my opinion is, that the conveyance to Walker and Fisher, connected with the bond and other transactions, was a mere mortgage or security for the advances to be made by Walker and Fisher, and not a conditional purchase by them of the estate. In cases of this sort, it is of very little consequence, what the particular language used by the parties is, whether they speak of a loan, or of a purchase, of a mortgage, or of a conditional sale. Courts of equity look to the real nature of the transaction, stripped of all the disguises, which the parties may have thrown around it. My opinion also is, that Luther Richardson had a clear equity of redemption in the premises at the time of his conveyance to Flagg and Mann, sufficient, in a court of equity at least, to make them tenants in common of that equity. I do not say, that the equity was such, as would make them tenants in common of an estate at law. It is sufficient for me to say, that they are so of an estate in equity. The great difficulty, which I have felt in arriving at this conclusion, has arisen from the decision of the supreme court of the state, in the case of Flagg v. Mann, 14 Pick. 467. That case was finally decided upon a mere question of the jurisdiction of the court, under the Massachusetts statute of 1823 (chapter 140, § 2). The court held, that the plaintiff and defendant were not tenants in common of the premises in the sense of that statute, and therefore, that the bill was not maintainable. I have not the slightest disposition to question the correctness of that decision; and, as a point of local law, I should feel myself bound by it. My distress has been with the other views suggested in the very able opinion delivered on behalf of the court on that occasion. It is true, that these views, not being founded upon local law, but upon general principles of interpretation applicable to courts of equity, are not, and cannot from their nature be, conclusive upon this court, in a suit in equity addressed to its general jurisdiction. Still, however, it is impossible not to feel the just weight of that opinion upon every point in litigation in the present cause; and that, if that opinion be correct, the conveyance to Walker and Fisher was not a mortgage, and that nothing passed by the subsequent conveyance from Luther Richardson to Flagg and Mann. After a careful survey, however, of the whole case, as now presented to this court, I have been unable to arrive at the same conclusion. This is to me matter of regret; but judicially I am compelled to follow on this occasion the results of my own judgment.

The other point, however, suggested at the argument by the plaintiff's counsel, is not undeserving of notice. It is, that even if no title in the premises did pass by the deed of Luther Richardson to Flagg and Mann; yet, nevertheless, there was a color of title in him at the time, and that the deed itself, being accepted by Flagg and Mann, and an assignment being taken and notes given, under and in virtue of the parol agreement between them, for the joint purchase from Richardson, these facts did of themselves create a privity of claim and right in the premises, sufficient to establish a fiduciary relation between them. And if such a fiduciary relation actually did exist, then the purchase of Mann, from Walker and Fisher and from the Frye heirs must be treated in equity as a purchase for the joint account of Flagg and Mann. There is great force in this argument; and I am not prepared to say, that it is not well founded.

In the first place, it seems to me clear, that if there had been a written agreement between Flagg and Mann to make the purchase from Richardson, and the purchase had been executed accordingly, while that contract and purchase remained unrescinded, it would have created a privity of contract between them, which would establish a fiduciary relation for all purposes connected with the premises, whatever might be the state of the title. I do not mean here to rely on the doctrine of estoppel, result-

ing from the joint conveyance to them from Richardson, for I agree with the supreme court of the state in thinking, that there was no such legal estoppel. See Flagg v. Mann, 14 Pick. 481; Blight's Lessee v. Rochester, 7 Wheat. [20 U. S.] 535. But I proceed upon this, that a written contract to purchase an estate upon joint account does create a fiduciary relation between the parties, as upon a mutual agency for the purposes of the contract, which neither is at liberty to defeat by a purchase on his sole account. It appears to me, that Forster v. Hale, 3 Ves. 696 (same case, on appeal, 5 Ves. 308), fully supports this doctrine; for in that case the purchase was by one partner of a banking-house of a quarter part of a colliery, and the other partners insisted, that it was a purchase in trust on joint account. And they prevailed, upon the mere proof from subsequent letters of that partner, that the purchase was a trust. There was no pretence to say, that there was any title vested in the partnership in the colliery, or that it had been paid for out of the partnership funds. The whole rested upon a fiduciary relation created by privity of contract, established in writing between the parties. In the present case, it seems to me, that although the agreement was by parol, yet having been fully executed by the passing of the deed and assignment and note between the parties, the trust is fully established, so as to extract it from the statute of frauds. If, then, there was, upon the mere privity of a contract executed between the parties, a fiduciary relation created between Flagg and Mann, that relation, in my judgment, was sufficient to make the subsequent purchase from the Frye heirs and from Walker and Fisher a purchase for the joint benefit, independently of the point, whether an actual title in the premises under Richardson was then vested in Flagg and Mann. I do not mean to deny the doctrine, stated at the bar, that a parol agreement by two to purchase lands will not create joint interest by way of trust, if the purchase is made by one in his own name. The authorities are not entirely agreed upon this point, though the weight of opinion may, perhaps, be, that such a case is within the statute of frauds. The case of Riddle v. Emerson, 1 Vern. 108, 1 Eq. Cas. Abr. 381, rather leans the other way. Lamas v. Bayly, 2 Vern. 627, is more direct in favor of the doctrine; though, upon examining the decree in the register's book, it appears, that the lord chancellor rather proceeded upon the circumstances of the case being too slight to found a decree. Raithby's note 1, Id. Atkins v. Rowe, Mos. 39, is directly against it. On the other hand, Bartlett v. Pickersgill, 1 Eden, 515, 4 East, 577, note b, supports it. In this last case, the lord chancellor said, that, if there had been any fraud used by the defendant to prevent an execution of the agreement, it might have been otherwise. Now, if, by the agreement between Flagg and Mann to purchase from the Frye heirs, Flagg was purposely lulled into a false security, relying on the good faith of Mann, and his privity in interest under the purchase from Richardson, and the negotiation of Mann was designedly kept secret from Flagg, in order to prevent any active competition on his part, there might be great reason for the application of this principle upon the ground of a constructive fraud. However this may be, I do not mean, in the present case, to rely upon any fiduciary relation arising from privity of contract, but upon a fiduciary relation arising from privity of title and estate between Flagg and Mann. In this view of the case, the purchase made directly by Mann of Walker and Fisher, and also the purchase made through Adams of the Frye heirs, must be deemed, so far as Mann is concerned, as made on the joint account of Flagg and himself. But Mann has parted with his whole title in the premises to other persons, to wit, one moiety thereof by his deed to Adams, and the other moiety thereof by his deed to Fuller; and if they are to be deemed, in the sense of a court of equity, bonâ fide purchasers for a valuable consideration without notice of Flagg's title, then they are entitled to hold the premises discharged of all claims of Flagg, except so far as may extend to any unpaid purchase-money. In regard to Adams, there is no unpaid purchase-money; for the conveyance made to him was in consideration of a contemporaneous conveyance by him to Mann of an undivided moiety of another tract of land held by Adams under a title from one Josiah Wood, Jr. In regard to Fuller, there is a considerable portion of the purchase-money still unpaid. Fuller, also, by the same deed, took a conveyance of the undivided moiety in the other tract, which had been conveyed by Adams to Mann.

Now, under these circumstances, there are various questions, which arise for our consideration. In the first place, as Mann was clearly entitled to a moiety of the premises (supposing it to be a joint purchase for himself and Flagg,) he had a right to sell that moiety to whomsoever he might choose, and the sale would be no disturbance of Flagg's rights. And, under such circumstances, notice by the purchaser of Flagg's right would not in the slightest degree affect his own title. Mann has conveyed the whole of the premises by different deeds; one moiety to Adams, and one moiety to Fuller. And the question, which meets us, is, whether Adams and Fuller are to be considered as each taking a moiety of the moiety, which Mann had a right to convey, of the premises; or whether, Adams's deed having been executed on the 6th of August, 1831, two days at least before the date of that of Fuller, he is not entitled to hold the entire moiety conveyed by the deed to him by Mann. My opinion is, that the latter

is his true predicament. At the time when Mann conveyed the moiety to him, he had a perfect title thereto; and his deed took full effect. And where a rightful estate is claimed by each of two purchasers, whose titles in other respects are equal (and Adams's deed was recorded on the 8th of August, three days before that to Fuller), the maxim prevails, "Qui prior est in tempore, potior est in jure." In this view of the matter, the question of notice to Adams becomes wholly unimportant; for, notice or no notice, his title is equally protected in law and in equity.

In regard to Fuller, in the next place, there are various questions presented upon the record, and made at the argument. (1) The first is, whether he had, at the time of his purchase, notice of Flagg's title. (2) Another is, whether, if he had no notice, his title is of such a nature (being by mere release) as entitles him to the protection of a bonâ fide purchaser for a valuable consideration in a court of equity. (3) Another is, whether, if he is so entitled, he is not still liable, as to the unpaid purchase-money, to the plaintiff's equity, as a lien attaching thereto. (4) Another is, whether the plaintiff has not, by his own conduct, either ratified the sale to Fuller, or at least disabled himself from now contesting it.

First; as to the question of notice. And here it is material to consider, that notice to affect Fuller must be notice of the title of Flagg under the joint purchase from Richardson; and also notice of the interest asserted by Flagg, as a trust, under the purchase by Mann from Walker and Fisher, and from the Frye heirs. The former is mainly dependent upon written documents; the latter is dependent upon mere oral agreements between the parties, and is properly a result arising by construction of law. I agree also to the criticism suggested at the bar, that it was not a wrongful act on the part of Mann to take the title from Walker and Fisher and from the Frye heirs in his own name; as it was his only security, either to compel Flagg to abandon those purchases, or, if he insisted on his share, to compel him to repay the advances made by Mann. Now, in regard to the joint purchase from Richardson, it is to be observed, that not a scrip of paper was to be found on record respecting it until the 15th of February, 1832. Until that time, no registration was made of the deed of Richardson to Flagg and Mann, or of the bond of Walker and Fisher to Richardson, or of the assignment of that bond to Flagg and Mann; and then the registration, it seems, was made by Flagg. So that there was no pretence of notice to Fuller at the time of his purchase in the preceding August by any registration. The whole title to the premises, so far as any search in the registry would disclose it, was in Walker and Fisher; or, if the guardianship deed was invalid, was in the Frye heirs. Mann was the purchaser from both; and his title was, therefore, as that of the sole legal owner, unexceptionable, unless notice of the trust in favor of Flagg is brought home to Fuller at the time of his purchase from Mann. In examining the charges of notice in the bill against Fuller, it must be admitted, that they are very loose and indeterminate, and hardly such as would stand the scrutiny of a court of equity, upon a demurrer for that cause. The first is a mere general charge, that "the said Fuller, then well knowing all and singular the premises." The next is, that "Fuller had some notice or intimation, or some reason to suspect and believe, that the said Luther Richardson, before the conveyance aforesaid to your orator and said Mann, had some interest or claim to said lands; and that such conveyance had been made to and such agreement had been made between your orator and the said Mann as aforesaid, and that your orator claimed to have some interest in the premises." It seems to me, that a charge so very loose and indeterminate, amounting to a mere intimation, or suspicion, or belief of the defendant, of some claim or interest of the plaintiff, is not such a charge of notice, as is required in cases of this sort. On the contrary, there should be a clear and positive allegation of full notice of the very title and claim of the plaintiff asserted in the bill, so that the defendant may know, with certainty and distinctness, to what he is to answer. The subsequent specifications are open to the like objection. They are too loose and too general in their structure. But it is unnecessary to dwell on this infirmity in the allegations of the bill, because Fuller has, in the most direct and positive manner, denied having had any notice of Flagg's claim and title, or any intimation, suspicion, or reason to suspect or believe in his claim or title at the time of his purchase, or until long afterwards. And in the same explicit manner, he denies all the specifications tending to establish notice, which are asserted in the bill.

Now, upon this posture of the case, it is plain, that these strong and direct denials being responsive to the bill, are conclusive in favor of Fuller, unless they are overcome by very direct and satisfactory evidence on the other side. It is a well-known rule in equity, that, to overcome the positive denials of an answer, responsive to the charges in a bill, there should be the testimony of two witnesses of equal credibility on the other side, or of one witness with strong and stringent circumstances. The question then is, whether such testimony exists in this case? My opinion is, that it does not. I dismiss at once all the suggestions in relation to the rumors, as well as the notoriety, of the supposed purchase of Richardson in Lowell, because they do not bring home to Fuller any presumptions of notice. He did not live at Lowell at the time of the purchase; and if he had lived there, the recollections of the witnesses, as to the exact times of those rumors and of

that notoriety (so vitally important in this case), are far too loose to found any confidence in their statements. Indeed, most of the plaintiff's witnesses on this point pretend to no exactness as to times; and this leads me to some distrust of the memory of those, who are more direct in their statements. In its very nature, such evidence, as to times and dates, is open to much question, unless it stands supported by particular fixed facts, to which it may with certainty be referred. Vague reports and rumors from strangers are not a sufficient foundation, on which to charge a purchaser with notice of a title in a third person. See Sugd. Vend. (7th Ed.) c. 17, p. 730; Hewes v. Wiswell, 8 Greenl. 98. And I think, that Lord Hardwicke stated the true doctrine, when, in Hine v. Dodd, 2 Atk. 276, he said that there ought to be a clear, undoubted notice; and that suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an act of parliament; or (as I would add) upon the legal rights of a purchaser.

As to the presumption of notice from the fact, that Mann and Adams and Fuller boarded together in the same house in the summer of 1831, it is impossible to rely upon it without violating the first principles of evidence. Men often board together for a long time in the same house, without any knowledge of each other's business. And there is not the slightest proof, that Fuller ever held any conversations on the subject of the title of Flagg with either Mann or Adams. On the contrary, all three of them expressly deny any such conversations.

As to the particular notice charged upon Fuller by the testimony of Howard, and Wood, and Hobbs, it does not in my judgment outweigh the positive denials of the answer. I cannot but think, that Howard is under some mistake in the matter; for, if the other testimony in the case, even that on the side of the plaintiff, is to be believed, it is impossible, that the title of Richardson, purchased by Flagg and Mann, could, in May or June, 1831, have been treated by any persons, as certain in itself, so as to justify the expression, that they had made a fortune by it; for there was at that time a double cloud upon the purchase, viz. that of the title of Walker and Fisher, and that of the Frye heirs, which must have been quite as notorious as the purchase itself. Besides; if we are to credit Wood's testimony, Fuller's own opinion, as expressed to him, was adverse to the notion, that the conveyance to Walker and Fisher was a mortgage; and, therefore, he could hardly have congratulated Flagg upon having made a fortune by such a purchase. As to Wood's testimony respecting the conversation, which he had with Fuller at Concord, admitting its entire credibility, it does not reach the point, which is indispensable to establish notice of Flagg's title. Nothing appears to have been said about Flagg in the course of the conversation. The sole question was as to Walker and Fisher's title, whether it was a mortgage or not; and to this extent and this extent only it brings home notice to Fuller. But it must also be taken into consideration, that Fuller, in his answer, while he admits the conversation with Wood, utterly denies, that any names were mentioned. He says, that the conversation was very short; that Wood asked his opinion "as to a question of law, which question was stated by Wood in abstract terms, without any names, application, or any intimation, that any such case actually existed; and on said Wood's statement said Fuller gave his opinion readily, that a bond, under the circumstances enumerated by said Wood, could not create a right to redeem in the obligee, such as existed in a mortgagor under a mortgage." So that here there is only one witness at most against the answer, which is directly responsive to a charge in the bill. Then as to the testimony of Hobbs. He speaks to a conversation in a stage coach in August, 1831, between himself and Fuller, Flagg, the plaintiff, being present, as follows: "I asked said Fuller, if the title of said Richardson (to the Paddy Camp lands) was good; and he replied that the title was good for nothing, because the bond of Walker and Fisher to Luther Richardson was not recorded. Said Fuller referred, as I suppose, to a bond, which had been executed by said Fisher and Walker, conditioned to convey said lands to said Richardson on the payment of a certain sum of money." He adds, that although Flagg was present, "Flagg did not take any part in the conversation; and I do not recollect any thing farther, that was said by said Fuller or myself as to the said lands or the title to them." Now, it is not a little remarkable, that the witness says, that he does not recollect, what day of the month of August it was, so that it is impossible to say, whether it was before or after Fuller's purchase; and yet it is brought forward as evidence of notice to him before his purchase; and, what is yet more remarkable, Flagg said not one word of his own title to the premises on that occasion; but he was studiously silent. Why was this silence? Why did he not proclaim his title at this time to Fuller, and insist on his rights? Fuller, in his answer insists, that this conversation was long after his purchase; and he adds, that at that time he had never heard, that the bond had been assigned to Flagg and Mann. And here, again, his answer is responsive to the charge in the bill. It is plain, therefore, that the special notice of Flagg's title, charged upon Fuller, is not established by the testimony of these witnesses in a clear and unquestionable form. And I cannot but think the doctrine of Lord Hardwicke in Hine v. Dodd, 2 Atk. 275, which was so fully ap-

proved in Jolland v. Stainbridge, 3 Ves. 478, and Eyre v. Dolphin, 2 Ball & B. 301, and was acted upon by the supreme court of New York (Jackson v. Given, 8 Johns. 105, 107), affords a very important lesson to all judges not to place much reliance upon the testimony of loose conversations or confessions of the party to overbalance his solemn denial of notice on oath in his answer. See, also, Butcher v. Stapely, 1 Vern. 363; Sugd. Vend. (7th Ed.) 730; Pow. Mortg. (by Coventry & Rand) 562, note. So far then as the point of actual notice is concerned, it fails.

We are next led to the consideration of the question of constructive notice. In the first place, it is said, that Mann, Adams and Fuller had a joint interest in the purchases from Walker and Fisher, and from the Frye heirs; and that Mann was the agent of the others in making the purchases, and the knowledge of the agent is in contemplation of law the knowledge of his principals. Admitting the operation of this principle in its full extent, it does not seem to me applicable to the circumstances of the present case. In regard to Adams, it may well be doubted, whether Mann was his agent except for the purchase of the title of the Frye heirs to the estate held by Wood; and that is not in controversy in the present suit. In regard to Fuller, there is no evidence whatsoever, which shows, that he ever had a joint interest in the original purchase from the Frye heirs, or from Walker and Fisher. On the contrary the whole evidence satisfactorily establishes to my mind, that he was a subsequent sub-purchaser.

Then, again, it is said, that Richardson was in possession of the premises or of a part thereof at the time of the purchase by Fuller, which operated as constructive notice of Richardson's title. I admit, that the rule in equity seems to be that, where a tenant or other person is in possession of the estate at the time of the purchase, the purchaser is put upon inquiry as to his title; and if he does not inquire, he is bound in the same manner, as if he had inquired, and had positive notice of the title of the party in possession. The cases cited by Mr. Sugden in his able work on Vendors and Purchasers (chapter 17, pp. 743–748, 7th Ed. 1826), and by my learned friend, Mr. Chancellor Kent, in his Commentaries (4 Kent, Comm. 3d Ed. 179, 180), are full to the purpose. See, also, Daniels v. Davison, 16 Ves. 249, 17 Ves. 433; Taylor v. Stibbert, 2 Ves. Jr. 440; Hall v. Smith, 14 Ves. 426; Meux v. Maltby, 2 Swanst. 281; Allen v. Anthony, 1 Mer. 282; Eyre v. Dolphin, 2 Ball & B. 301; Powell v. Dillon, Id. 416, 421, and cases there cited; Crofton v. Ormsby, 2 Schoales & L. 595; 4 Kent, Comm. (3d Ed.) 179, 180. But constructive notice of this sort does not extend beyond the title of the party in possession; and the purchaser is not ordinarily bound to know, or presumed to have notice of the title, under which the party in possession claims or derives his own title. That seems fairly inferrible from the language of Lord Eldon in Attorney General v. Backhouse, 17 Ves. 293; and is stated in the broadest terms by Mr. Sugden, in the work above cited (pages 745, 746): "Notice" (says he) "of a tenancy, will not, it seems, affect a purchaser with constructive notice of the lessor's title. Therefore, if a person equitably entitled to an estate let it to a tenant, who takes possession, and then the person, having the legal estate, sells to a person, who purchases bonâ fide and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession." It is true, that the learned author quotes no authority for this position; but his own great experience and acknowledged ability are a sufficient guaranty, that it is well founded. It would be pushing the doctrine of constructive notice to a great degree of extravagance to hold, that the purchaser was bound to know not only the title of the party in possession, but all its derivative sources. Indeed, the American courts seem indisposed to give effect to this doctrine of constructive notice from possession, even in its most limited form. Thus, in Scott v. Gallagher, 14 Serg. & R. 333, the court held, that the possession of a cestui que trust, and the exercise by him of acts of ownership, were not constructive notice to a purchaser of the legal title from the trustee; but that there should be direct, express and positive notice of the trust. This doctrine was probably enforced by considerations growing out of our registration acts, which are designed, and with great justice, to protect purchasers against latent equities. In McMechan v. Griffing, 3 Pick. 149, the court held, that possession of the premises was not, under all the circumstances, constructive notice of the title of the party in possession; that it is not sufficient, that the inference of notice from the circumstances is probable; but it must be necessary and unquestionable. The case of a purchase in fee by a lessee in possession is there put as one, in which no constructive notice of that purchase would be imputed to a subsequent purchaser. It is difficult to reconcile this with what is laid down in Daniels v. Davison, 16 Ves. 249, and many other cases.[3] In Newhall v. Pierce, 5 Pick. 450, it was held, that the single fact, that the grantor was in possession, would not justify the inference, that an attaching creditor had constructive notice, that the grantor remained in possession under his

[3] See Sugd. Vend. (7th Ed.) p. 744, c. 17, and cases there cited, and the cases cited in Powell v. Dillon, 2 Ball & B. 421, note a. The whole subject of notice is examined and exhausted in the notes of the learned editors, Mr. Coventry and Mr. Rand, to Powell Mortg. pp. 562–662, c. 14; Meux v. Maltby, 2 Swanst. 281; Allen v. Anthony, 1 Mer. 282; Grimstone v. Carter, 3 Paige, 436, 437.

original title, as mortgagor. In Hewes v. Wiswell, 8 Greenl. 94, the whole subject is discussed with great ability, and the conclusion arrived at, that, at most, possession is merely implied notice, which may be rebutted, and in this respect differs from constructive notice, which cannot be rebutted. See Lord Chief Baron Eyre's opinion in Plumb v. Fluitt, 2 Anstr. 438. These cases do, as I think, admonish courts of equity in this country, where the registration of deeds, as matters of title, is universally provided for, not to enlarge the doctrine of constructive notice, or to follow all the English cases on this subject, except with a cautious attention to their just application to the circumstances of our country, and to the structure of our laws. Indeed, even in England, if we may trust to the report of the case Oxwith v. Plummer, as reported in Bacon's Abridgment (Bac. Abr. "Mortgage," E, § 3), and relied on by Mr. Sugden (Sugd. Vend. 7th Ed. p. 746, c. 17), the mere circumstance, that the vendor had been long out of possession, and a party in possession under a covenant from him to convey the title, would not be constructive notice to a subsequent purchaser from the vendor. But assuming, that the possession of Richardson was constructive notice to Fuller of his title in the premises, it was notice only of his actual title, which was that of a tenant at sufferance under Walker and Fisher; and was in no just sense notice of the conveyance of Richardson to Flagg and Mann.

Then, again, it is further argued, that Fuller cannot be treated as a bonâ fide purchaser for a valuable consideration without notice, because, at the time of the conveyance by Mann to him, Mann was not seized, and did not pretend to be seized in fee of the premises, nor was he ever in possession thereof, nor did he pretend to any title in the premises; for the deed of Walker and Fisher was then a mere escrow, Mann being at liberty to receive or reject it within thirty days from its date (the 27th of July, 1831). There is no doubt of the general doctrine, that in a plea of a purchase for a valuable consideration, without notice of the plaintiff's title, it is necessary to aver, that the person, who conveyed, was seized, or pretended to be seized, at the time that he executed the purchase deed. That was held by Lord Hardwicke in Story v. Lord Windsor, 2 Atk. 630, and it has been fully recognised down to the present time. See Sugd. Vend. (7th Ed.) p. 757, c. 18. The cases of Wallwyn v. Lee, 9 Ves. 24; Daniels v. Davison, 16 Ves. 252; and Jackson v. Rowe, 4 Russ. 523,—insist, that it should also aver a possession in the vendor. But this proposition must be received with a qualification given to it by Lord Redesdale, that the conveyance purports to be an immediate transfer of the possession at the time of its execution. Mitf. Eq. Pl. (by Jeremy) 275. And indeed possession of a tenant is possession of his landlord within the meaning of the rule, as was said by Lord Eldon in Daniels v. Davison, 16 Ves. 252. But the doctrine, here insisted on, is strictly applicable only to a plea technically so called; and I cannot but think, that it is properly applicable only to cases, where such want of seisin or possession affords presumptive evidence of a defect of title in the grantor to make the grant sufficient to put the purchaser upon inquiry. See Beames, Pl. Eq. 235. But, be this as it may, here the whole merits of Fuller's title are laid open upon his answer. The true question, in all cases of this sort, where the purchaser, in his answer, insists upon the defence of his being a bonâ fide purchaser without notice, is, whether he has acted with good faith, and purchased under circumstances of an apparent right in the vendor to convey. Now, upon the reasoning and circumstances already suggested, Fuller, at the time of his purchase, had no actual or constructive notice of the title of Flagg. The question is, whether he had any notice of any defect in the title of Mann, at the time of the conveyance to him, viz. on the 8th of August, 1831. It is very clear, that Mann asserted, that he then had a complete and perfect title to convey the premises to Fuller; and Fuller paid a very large and apparently full consideration for the purchase of a good title. It is true, that, in a technical sense, Mann had not a complete and entire seisin of the premises at that time under Walker and Fisher, if their deed was then an escrow, though he was entitled thereto at his own absolute option, at any time within the thirty days. The title of the Frye heirs, however, if they had any, was actually vested in him by the deed of Adams to him. And against all the world, except Flagg, the very allegations of the bill admit, that he had a good title. But it appears to me by no means clear upon the bill and answer, that at the time of the conveyance to Fuller, there had not been an absolute delivery of the deed of Walker and Fisher to Mann. The bill explicitly states, that Walker and Fisher did actually convey their title to the premises to Mann by their deed on or about the 27th of July, 1831. The answer of Mann says, that it was an escrow at that time; but that it was actually delivered to him on or about the 8th of August, 1831. But there cannot be a reasonable doubt, that he did then affirm to Fuller, that he was then in the actual seisin of the premises, and that he had a complete title thereto; and that Fuller purchased, trusting to the good faith of Mann In point of fact, the possession of Richardson was a possession as a tenant at sufferance, under Walker and Fisher, and not adverse to them; and on the 10th of August, 1831, there was an admitted perfect title in Mann to convey the premises against everybody but Flagg. Let us put the question, then, whether, setting aside the claim of Flagg—a claim secret and unknown to Fuller—the latter is not absolutely bound by his purchase? Could Fuller, either in law, or in equity, now set

up the defence, that Mann's conveyance to him was void and inoperative, by reason of the possession of Richardson, or the title of Walker and Fisher being outstanding upon an escrow, when the conveyance was made to him? I think not; and if so, then it seems to me, that he has a right to insist, that he is, under all the circumstances, to be treated as a purchaser for a valuable consideration without notice, because Mann undertook to convey, and did convey to him, all the title of Walker and Fisher, and of the Frye heirs, in the premises. The seisin of Walker and Fisher, and the possession of their tenant, Richardson, was, if their deed was at the time a mere escrow, a seisin for the benefit of Mann under his contract with them. If a cestui que trust in fee conveys the estate to a purchaser, and the trustee afterwards confirms the sale, and releases to the cestui que trust, or to the purchaser, it seems to me, that such a purchaser is entitled to protection, against any antecedent secret trust, which is unknown to him at the time of the purchase, and the confirmation is operative, notwithstanding, that in a strict sense the cestui que trust was not seised of the estate at the time of his conveyance. But the present case is far stronger; for the title of Fuller was complete, by an absolute delivery of the deed by Walker and Fisher to Mann, on or before the 10th of August, 1831; and there is not, in my judgment, any sufficient proof whatsoever, that, between the 8th and 10th of August, 1831, nor indeed until long afterwards, Fuller had any notice of Flagg's title. After the 10th of August, Fuller was clothed with a complete legal title, and a subsequent notice ought not to affect him. It does not appear to me, therefore, that this objection ought to prevail against Fuller's title.

And this leads me, in the next place, to the consideration, whether Fuller's title, being by a mere deed of release, is such a conveyance as entitles him to the benefit of the plea of a bonâ fide purchaser without notice. This is a point, upon which I have felt very great difficulty; and it was suggested, at the argument, as matter of grave consideration. If the language of the deed had been, that Mann merely released to Fuller all his right, title, and interest in the premises, there might, perhaps, have been more difficulty to found the defence; for then it might, under such circumstances, be construed to convey no more than Mann could rightfully convey, and that the purchaser should take at his peril, subject to all the rights and equities of third persons in the premises. But, here, the language of the deed is, that Mann, in consideration of $40,000, does "remise, release, and for ever quitclaim unto the said Elisha Fuller, his heirs and assigns, one undivided half of a certain tract of land," &c. (describing it) to have and to hold to Fuller, so that neither Mann nor his heirs, nor any other person claiming from or under him, shall have, claim, or demand any right or title to the premises. If this deed were to be construed as a mere release, the objection taken to it at the bar would be well founded; that, as the releasee was not in possession, it was a void conveyance. But we all know, that this is a common mode of conveyance in Massachusetts; and that, where it is for a valuable consideration, "ut res magis valeat quam pereat," a deed of release has been construed to be a bargain and sale, or other lawful conveyance, by which the estate might pass. It was so decided in Pray v. Peirce, 7 Mass. 381; and it was still more elaborately examined and solemnly adjudged in Russell v. Coffin, 8 Pick. 143, 151–154. And indeed, it is but an expansion of the principle laid down in Sheppard's Touchstone (page 82) "that a deed, that is intended and made for one purpose, may enure to another; for if it will not take effect that way, that is intended, it may take effect another way." I am not aware, that a purchase by way of a mere release, like the present, has ever been set up in England as a defence in a case of this sort. The researches of counsel have not discovered any such case; and I am much inclined to believe, that none exists. Still, however, it is not absolutely incompatible with the nature of a release, where, by reason of a privity of estate between the parties, it operates by way of enlarging the estate of the releasee, or of passing the estate of releasor, that it should be a sufficient foundation, if bonâ fide made, for a valuable consideration, and without notice, to support the defence. There may be a difference, where the release is to operate, merely by way of passing a right, or by way of extinguishment. See the different kinds of releases stated in 2 Bl. Comm. 324, 325. The very plea in Wallwyn v. Lee, 9 Ves. 24, which is given in the appendix of Mr. Beames's work on Pleas in Equity, was of a conveyance by lease and release. And certainly it would have made no difference, if the lease, instead of being a contemporaneous act, had been an existing lease in privity of estate. It is true, that in Wallwyn v. Lee, there were covenants, that the releasor was seised of a perfect, absolute, and indefeasible estate in fee simple in the premises. But I am not aware, that any covenant of this sort, or any covenant of general warranty has ever been held necessary to entitle the purchaser to make the defence. It ordinarily affords very conclusive proof, that the purchase is of the whole estate, and not of the mere right or title of the party, whatever it may be. But if it is apparent from the whole transaction, that the purchaser bought the estate under circumstances, which demonstrate, that he had no suspicion of the title not being perfect, as by giving a full price for an unquestionable and unquestioned fee simple, it seems to me, that the absence of any covenants of general warranty ought not to take away from him the common pro-

tection. He has, under such circumstances at least, an equal equity with any person claiming under an outstanding and unknown trust; and if so, the legal title, combined with his equity, ought not to be disturbed. In the present case the release of Mann to Fuller must, as I think, be treated as a bargain and sale or other lawful conveyance, upon the doctrine already asserted by the Massachusetts courts, which seems to me founded in sound sense and solid legal reasoning. It was an effectual conveyance to pass the whole estate to Fuller; and, as far as we have any means of knowledge, the title, which actually passed, is perfect as to all persons but Flagg. It steers wide, therefore, of the doctrine in Vattier v. Hinde, 7 Pet. [32 U. S.] 271. Flagg's title is founded upon a constructive equity, not apparent upon any of the title deeds; and being secret and unknown to Fuller, cannot be allowed to prejudice Fuller's rights.

In this view of the case as to Fuller, the point, as to the supposed acquiescence of Flagg in the purchase, and thereby giving it an indirect confirmation, becomes unimportant to be considered. It appears to me, indeed, that this point cannot upon the evidence be maintained. The doctrine stated at the bar is well founded, that, in order to make such acquiescence binding on Flagg, it should be proved, that he had full knowledge of all the facts affecting his legal and equitable rights; and that, with such knowledge, he did some open unequivocal act confirmatory of or recognising the validity of Fuller's title; or that by his silence the latter was purposely and injuriously misled into the belief, that his title was valid, and that Flagg did not mean to controvert it. In Cockerell v. Cholmeley, 1 Russ. & M. 425, Tam. 445, the master of the rolls said: "In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he is fully aware at the time, not only of the fact, upon which the defect of title depends; but of the consequence in point of law." Cholmondeley v. Clinton, 2 Mer. 362, and Shine v. Gough, 1 Ball & B. 444, 445, are not so direct; but they presuppose the same principle.

The next and last point, under this head, is, as to the purchase money unpaid by Fuller. If his title to the land is to be deemed good and valid, as in my judgment it is, then it is clear, that the plaintiff has the same lien for his share thereof, as he would have had for the like share in the land itself, if it had remained in the hands of Mann. The one fund is but a substitute for the other, with this qualification, that it is the purchase money unpaid at the time, when Fuller had notice of the plaintiff's equity. My impression is, that upon the evidence, that will be found not to have been earlier than October, 1831. It may possibly have been at a somewhat later period. But, that can, if necessary, be more accurately ascertained by the master.

I have thus gone over the main grounds of this extremely complicated cause. Many other incidental topics, both of law and of evidence, were urged at the hearing, which have not escaped my subsequent notice; but which would unnecessarily encumber this voluminous case. It is sufficient to say, that they have had no tendency to shake my opinion upon the merits of the case, or upon the points already discussed.

Upon the whole my judgment is, that the plaintiff is entitled to a decree declaring him in equity entitled to one moiety of the land purchased by Mann of Walker and Fisher, and of the Frye heirs, which was conveyed to the plaintiff and Mann by Richardson's deed to them. That moiety having been sold by Mann to Fuller, the plaintiff is entitled to a moiety of the purchase money, as a substituted fund, deducting therefrom all the sums, which have been paid by Mann on account of the same lands to Walker and Fisher and to the Frye heirs, and all other expenses incurred in the premises.[4] As the conduct of Mann in these purchases, and in the sale to Fuller, was a constructive fraud upon the plaintiff, I incline to think, that the decree ought to be, that Mann should pay the amount, that shall thus be found due to the plaintiff, after the deductions aforesaid, out of the purchase money received by him from Fuller, if sufficient shall have been received for this purpose, together with interest upon the sums so received; and that there ought to be a decree against Fuller for any deficiency in the amount due to the plaintiff, not paid by Mann; for which also there is, and ought to be, as a part of the unpaid purchase money, a lien on the land in the possession of Fuller. These last, however, are matters, which can be properly adjusted, when the cause comes before the court for a final decree. At present, there must be an interlocutory decree, referring it to a master to examine and report to the court, what sum upon the principles above stated is due to the plaintiff, with such explanatory remarks, as he may think proper to bring to the view of the court upon the suggestion of either party.

From what has been already said, the bill will ultimately, though not at present, be dismissed as against Adams. But, from all the circumstances of the case I do not think, that he stands in a predicament to be entitled to costs; for he has been very properly made a party; and indeed he has been so much mixed up with some parts of the transaction, as a dux facti, as to create some doubts, if he was wholly ignorant of the plaintiff's equity.

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[4] See Fox v. Mackreth, 2 Cox, 320, 2 Brown, Ch. 400, which seems to have proceeded on similar principles.

The decree was as follows:

This cause came on to be heard upon the original and supplemental suit, before the Honorable JOSEPH STORY, associate justice of the supreme court of the United States, and the Honorable JOHN DAVIS, district judge of the district aforesaid, at this present term, in the presence of the counsel on both sides. Whereupon, and upon debate of the matter and hearing, the defendants' answers, and the testimony and proofs taken and read in the said cause, and of what was alleged by the counsel on both sides, the said court doth think fit, and doth declare, that there is full proof of the agreement of the said Flagg and Mann, for the purchase of the right and title of the said Luther Richardson, and also for the purchase of the title of the Frye heirs, in the premises on joint account, as in the said bill is mentioned; and that the said agreement is now in full force, it never having been abandoned by the voluntary consent of both of the parties. And doth further declare, that at the time of the said purchase, from the said Luther Richardson by the said Flagg and Mann in the bill mentioned, the said Luther was seized and possessed of an equity of redemption in the premises, and that the said Walker and Fisher were seized and possessed of the premises in mortgage, and not of an absolute irredeemable estate therein; and that the said Flagg and Mann became entitled to the equity of redemption of the same, under and in virtue of the purchase from the said Luther Richardson, as aforesaid. And doth further declare, that the purchases subsequently made by the said Mann from Walker and Fisher, and from the Frye heirs, ought to be deemed in equity as purchases for the joint account of the said Flagg and Mann, as in the said bill is mentioned, and not for the sole account of the said Mann; and that the said Flagg is, and ought now to be, entitled to the benefit of a moiety of the said purchases, he paying and allowing to the said Mann one moiety of the moneys paid, and costs and charges incurred in the same purchases. And doth further declare, that, inasmuch as the said Mann was, at the time of the sale of one moiety of the premises to the said Adams, fully and absolutely entitled to the said moiety, in his own right, that the conveyance to the said Adams is, and ought to be, deemed free from any equity of the said Flagg therein; but that the said Adams is not, under all the circumstances, entitled to any costs. And doth further declare, that the said Fuller is, and ought to be, deemed a bona fide purchaser for a valuable consideration, without notice of the equity of the said Flagg in the other remaining moiety of the premises, and, therefore, is entitled to hold the same free of any equity claim and lien of the said Flagg therein, except as to so much of the purchase money as was unpaid when he the said Fuller had full notice of the said Flagg's equity and claim to the premises, as the same equity and claim are affected in the bill; for all which it is hereby declared, that there is a lien on the premises for the benefit of the said Flagg. And doth further declare, that the said Mann, in the said sale of the premises to the said Fuller, as is in the bill mentioned, without the knowledge or consent of the said Flagg, was guilty of a wrong and constructive fraud upon the rights and equity of the said Flagg, in the premises, and that, therefore, the said Mann is primarily liable to pay over to the said Flagg one moiety of all the purchase money, for which the premises were sold, after deducting therefrom one moiety of the several sums paid by him to the said Walker and Fisher, and to the Frye heirs, for the purchase, assignment, and extinguishment of the interest, right, and title to the premises, and all expenses incident thereto; together with interest upon the same moiety of the same purchase money, from the time when the same was received; if the master shall, under all the circumstances, report any to be due. And the court doth order and decree, that it be referred to Charles Sumner, Esq. appointed a master for this purpose, to take an account of all the moneys received and paid, and expended in the premises; and especially to take an account of all the moneys paid by the said Mann, for the purchases aforesaid, and the expenses incident thereto. And also of all the moneys paid by the said Fuller to the said Mann, and the times when the same were paid, &c.; and whether, and at what time, he had notice of the said Flagg's equity and right in the premises, and what sums now remain due from the said Fuller. And the master is also to report upon all other matters and things, which may be necessary and proper to carry into full effect this interlocutory decree, and especially in regard to interest, &c. &c. And all further orders and decrees are reserved for the further consideration of the court.

[NOTE. For the hearing upon the master's report, see Case No. 4,848.]

Case No. 4,848.

FLAGG v. MANN et al.

[3 Sumn. 84.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1837.

TRUSTEE'S COMMISSION — SALE IN VIOLATION OF TRUST—TORTIOUS SALE OF ANOTHER'S PROPERTY—DAMAGES.

1. Commissions are not allowed to a trustee, who makes a sale in violation of his trust.

2. A person who tortiously sells the property of another, without his consent, is liable for the full value of it at the time of the sale; and

[1] [Reported by Charles Sumner, Esq.]

this, even if he does not receive a cent of the purchase money.

[Cited in State v. Berning, 74 Mo. 94.]

3. Decretal order passed on the master's report.

This case came on again—see Flagg v. Mann [Case No. 4,847]—to be heard upon the report of the master, which was as follows:

"In pursuance of an order bearing date at the May term of this court, A. D. 1837, whereby it was referred to me, to take an account of all moneys received and paid, and expended in the premises, which formed the subject-matter of the above-entitled cause, and especially to take an account of all moneys paid by the said Mann for the purchases in the said order mentioned, and the expenses incident thereto; and also of all the moneys paid by the said Fuller to the said Mann, and the times when the same were paid, &c., and whether, and at what time he had notice of the said Flagg's equity and right in the premises, and what sums now remain due from the said Fuller; also, to report upon any other matter and thing which may be necessary and proper to carry into full effect the interlocutory decree, and especially in regard to interest, &c., &c.

"I have been attended by the solicitors of all the parties; and the solicitors of the said Mann and Fuller, defendants, having brought in before me an account of the respective sums paid by the said Mann and Fuller, I have, in the presence of the solicitors for the plaintiff and defendants, proceeded to take the said accounts; and I find as follows:

"First. Moneys paid by Mann, &c. On the 8th and 9th of August, 1831, the said Mann paid to Samuel A. Coburn, Esq. for the use of Walker and Fisher, as the price and consideration of their deed to the said Mann of their title to the said land, the sum of ten thousand dollars. On the 6th August, 1831, the said Mann paid to Luther Lawrence, Esq. for the use of the heirs of Polly Frye, and some other expenses incident to the said purchase, the sum of three thousand three hundred and seventy-five dollars, being half the price and consideration of their deed of their pretended title and claim to the land in question in this cause, and other adjoining land of equal extent and value, claimed by Josiah Wood, Jr., and of the expenses above referred to, the other half of the consideration for the releases of the Frye heirs, and the expenses aforesaid being paid by John R. Adams, to whom the deeds of the Frye heirs, and of Wood were made. On or about the 8th August, 1831, the said Mann, by release, conveyed a moiety of the premises described in the plaintiff's bill to the said Adams, and Adams at the same time conveyed one half of the Wood lot to Mann in exchange; it being to make them tenants in common of the whole. There was no other consideration. The said defendant, Mann, further claimed to be allowed for his services in the purchase and sale of the land in question in this cause, and for his professional services in the same a commission of five per cent. upon the sums paid for the said land, and upon the sum for which the same was sold to the said Fuller. This claim I have not allowed.

"Second. Time when Fuller had notice of Flagg's equity and right. In my inquiries under this head I have found that the bill of the present plaintiff against Mann, Adams and Fuller, was filed in the supreme court of the commonwealth of Massachusetts, on the 15th February, 1832; that the subpoena was served on all the defendants abovenamed on the 16th February, 1832, the day on which the deed from Richardson to Flagg and Mann was recorded; that the answers of Mann, Adams, and Fuller were sworn to on the 28th of April, 1832; that the bill in the present suit was filed on the 28th of October, 1833. In further proof of notice to the said Fuller of Flagg's equity and right, Benjamin Rand, Esq., of counsel for the plaintiff, referred to the alleged admissions in Fuller's answers, in the supreme court above mentioned, and also in the present cause, now on the files of this court, and to be found at pages 84 and 118 of the printed book containing the pleadings and proceedings in this cause, to which, for the sake of convenience, reference is hereby made; also to the deposition of F. Hobbs, on the files of this court, to be found at page 188 of the printed book above referred to. On a survey of all that has been offered on either side with regard to this point, I find that the said Fuller had notice of the plaintiff's equity and right in the premises on the 16th day of February, 1832, being the date of the service on him of the subpoena under the plaintiff's bill in the supreme court of Massachusetts.

"Third. Moneys paid by Fuller to Mann, and the times when paid. On the 8th day of August, 1831, the said Mann sold to the said Fuller one undivided half of the piece of land in the plaintiff's original bill mentioned, and by him therein claimed, and an undivided half of the piece of land adjacent thereto, of equal extent and value, and claimed by Josiah Wood, Jr., in his original bill now pending in this court. The consideration for the undivided half of both the said parcels was $54,450, which was agreed to be paid by the said Fuller. Of the above sum, the following payments have been made at the times mentioned, viz.: In cash, on the delivery of the deed to Fuller, $5,000. By note negotiable at 60 days, for $5,000, with interest, which was paid at maturity, $5,050. By like note negotiable, at 90 days, for $4,450, with interest, which was paid at maturity, $4,516.75. The residue of the said consideration, being $40.000, was secured to be paid to the said Mann by a mortgage of the undivided half of both parcels of the said land to the said Mann from the said Fuller; a copy of which mortgage is on the files of the court,

and is also to be found at page 330 of the printed book abovementioned, to which, for the sake of convenience, reference is hereby made. No notes were given for the moneys mentioned in this mortgage. On receiving the said mortgage, the said Mann gave to the said Fuller a written covenant and agreement, (on the files of this court, a copy of which will be found at page 122 of the printed book abovementioned), whereby the said Mann bound himself to release to the said Fuller, and discharge from the said mortgage parts of the premises mortgaged, in proportion to payments made therefor; to wit, that he would make such releases, until two acres had been discharged, on being paid one shilling for each square foot, and all the residue on being paid twenty cents for each square so released. Of the above sum of $40,000, secured by the mortgage abovementioned, the following payments have been made, and endorsed on the mortgage, at the times mentioned; and the endorsements on the mortgage are as follows, viz.:

October 7th, 1831. Received of Elisha Fuller, twenty-eight hundred and twenty-seven dollars and twelve cents, in part payment of the sum $2827.12 secured on this mortgage, and in consideration thereof, I did yesterday release to said Fuller, sixteen 16962 3-4 feet. thousand nine hundred and sixty-two square feet and three quarters, from the incumbrance of this mortgage.
(Signed) S. H. MANN.

May 2nd, 1832. Received five thousand seven hundred and fifty-five dollars and seven cents, in part of this mortgage. (Signed) S. H. MANN.

Received five thousand dollars by note.

Received fifteen hundred and eighty-seven dollars, in part.
(Signed) S. H. MANN.

Discharged 58,522 feet of land, May 16.

Received four hundred and forty-seven dollars and thirty-one cents, by note.
(Signed) S. H. MANN.

Released 18215 feet, May 24.

"In pursuance of the covenant and agreement above mentioned, on the part of the said Mann, the said sums last above mentioned were applied to redeem certain parts of the premises, and hereinafter stated to be released at the time of the payment, from the mortgage aforesaid; that these applications were made by three deeds of release, executed by the said Mann to the said Fuller, one bearing date October 6th, 1831, and another bearing date May 16th, 1832, and a third bearing date May 24th, 1832, copies of which are hitherto annexed, and marked X. All the land contained and described in the two releases first above mentioned belonged to that part of the premises claimed by Josiah Wood, Jr. The land contained and described in the third release above mentioned party belonged to the premises claimed by Josiah Wood, Jr., and partly belonged to the premises claimed by the present plaintiff; but the relative proportions which belonged to each piece, I have had no means of determining. No other part of the premises claimed by the plaintiff, Flagg, has been discharged from the mortgage above mentioned; and this small portion was discharged, after Fuller had notice of the plaintiff's right and equity in the premises.

"Fourth. What sums now remain due from Fuller? In entering upon this inquiry, it is important to consider, that the interest purchased by Fuller of Mann was an undivided half of two parcels; one known as the Wood lot, and the other claimed by the plaintiff; that the consideration agreed to be paid was on account of the two parcels; and that the mortgage deed for $40,000, already mentioned, applied to an undivided half of both parcels. It has already appeared, that the whole consideration was $54,450;—and that, of this sum, various portions had been paid at different times. Taking into consideration the several sums already paid, and which have been hereinbefore mentioned, and applying them to the reduction of the principal above mentioned, and of the interest thereon accruing, according to the rule laid down by the supreme court of the commonwealth of Massachusetts, in the case of Dean v. Williams, 17 Mass. 417, I find that the said Fuller owes on the mortgage above mentioned, the sum of twenty-six thousand, one hundred and sixty-four dollars and fifty-one cents ($26,164.51), with legal interest on the said sum from May 24th, 1832. I further find, that the said Fuller, at the time at which he received notice of the equity and right of the said Flagg in the premises, namely, on the 16th February, 1832, owed on the mortgage above mentioned, the sum of thirty-eight thousand, three hundred and eighty dollars and seventy cents ($38,380.70), with legal interest thereon, from the said 16th day of February, 1832.

"The foregoing results seem to exhaust the inquiry with regard to the sums still due from Fuller. Some further facts have, however, appeared before me, to which, at the request of Henry H. Fuller, Esq., I beg leave to call the attention of the court; though, in estimating the sums still due from Fuller, for the purposes of this inquiry, I have not regarded them as important. It appears, that on the 29th March, 1837, by a contract of that date (a copy of which is in the paper hereto annexed), between Josiah Wood, Jr., of the one part, and Samuel H. Mann, John R. Adams, and the said Fuller, of the other part, a settlement by compromise was made of the suit of Wood against Mann and others, on account of the parcel of land adjoining that claimed by the present plaintiff. Another agreement, bearing date on the same 29th March, 1837, (a copy of which is in the paper hereto annexed), was made between the said Mann and Adams, wherein it was agreed that the said Adams should pay the whole amount, which, by the said compromise, was stipulated to

be paid to the said Wood, and that the said Mann, in order to secure to the said Adams, the half of the said sum, which ought to be paid by the said Mann, should assign the said mortgage of $40,000, made by the said Fuller, to the said Adams; and that the said mortgage should, when so assigned, be held by Franklin Dexter, Esq., who should not deliver the same unto the said Adams, until the said Mann and Fuller should settle and adjust by themselves, or some referee or referees by them chosen, the amount which ought to be indorsed as paid upon the said mortgage, upon a full hearing between the said Fuller and Mann, taking into consideration the damages and inconvenience sustained by the said Fuller, by reason of the suits of Wood and of the present plaintiff, and all other matters to be alleged, proved, and considered between the said Mann and the said Fuller, which ought to reduce the amount to be paid on the said mortgage by the said Fuller; and when the said sum should be agreed and ascertained, it should be indorsed upon the said mortgage, and should go to reduce the amount which should be payable by the said Fuller, before the same should be delivered to the said Adams. The said Fuller and Mann failing to agree upon the amount which ought to be indorsed as paid upon the said mortgage, the matter was referred, according to the foregoing agreement, to Seth Ames, Samuel A. Coburn, and Jonathan Morse. 2d, all of Lowell, Esquires, who made an award, wherein they decided that an indorsement should be made on the said mortgage, setting forth that the whole sum secured thereby had been paid, except the sum of five thousand dollars, which said sum of five thousand dollars should draw interest from the day of the making of the said award, which was the 18th of April, 1837; and the said Franklin Dexter, Esq., in pursuance of the award aforesaid, indorsed down the said mortgage to the sum of $5,000, with interest from April 18th, 1837. (A copy of which indorsement is hereto annexed, and marked 'B.')

"I have proceeded to ascertain and find the foregoing facts under this head, at the request of the said Fuller, and have hereto annexed to this report, at his request, the state of facts or petition (marked 'A'), in which the said facts, among other matters, are set forth by the said Fuller. I have not regarded the said facts, and the other matters mentioned in the said state of facts or petition, as having any practical bearing on the points of inquiry into which I have been charged to enter, or as affecting the sums which are still due from the said Fuller to the said Mann, so far as the rights of the plaintiff are concerned under the decretal order of this court.

"Fifth. Interest on the purchase money. I have found that the consideration of the undivided half of the two parcels above mentioned, was $54,450; of which $5,000 was paid in cash; $5,000 by a note negotiable at sixty days, with interest, which was paid at maturity; $4,450 by a note negotiable at ninety days, with interest, which was paid at maturity; the remainder, being $40,000, was secured, with interest, by mortgage. I therefore, find that the said Mann is justly chargeable with interest on the purchase money above mentioned.

"Sixth. Moneys due to Flagg from Mann. Deducting the moneys paid by Mann, on account of the premises claimed by the plaintiff, pursuant to the decretal order, I find that there is due from Mann to Flagg, one half of ten hundred and seventy-five dollars, being the balance which Mann received in cash and notes on the delivery of the deed to Fuller, over and above the consideration and expenses of the purchase, hereinbefore stated; also one half of forty thousand dollars, with legal interest on both the said sums from the 8th day of August, 1831; to wit, in the whole, twenty thousand, five hundred and thirty-seven dollars and fifty cents, with legal interest as aforesaid.

"Exceptions. The draft of the foregoing, being duly exhibited to the respective solicitors of the several parties, the following objections were made by Franklin Dexter, Esq., of counsel for the defendant, Mann:

"First. That the amount paid by Mann to the Frye heirs was $3,500; and not $3,375, as hereinbefore found.

"Second. That the master disallowed the claim of five per cent. made by Mann for commissions and professional services.

"Third. That the master, according to the decretal order, should have found to be due from Mann to Flagg only half the balance of cash and notes above mentioned ($537.50), and that portion of the amount received by Mann on the mortgage, which was applicable to the portion of the Flagg lot, released to the proprietors of the locks and canals.

"Henry H. Fuller, Esq., of counsel for the defendant Fuller, objected,—

"That the master refused to take into consideration the award above mentioned, and the other matters therewith connected, in determining the moneys now due from the said Fuller, so far as the plaintiff is concerned.

"Charles Sumner, Master in Chancery."

The papers referred to in the report are omitted.

The question on the validity of the exceptions was argued by Dexter, for the defendant Mann, and by Rand, for the plaintiff, and by Washburn and Greenleaf, for the defendant Fuller, who objected to the report for not taking into consideration the claims of Fuller, set forth in his petition before the master.

STORY, Circuit Justice. I lay altogether out of the case the claims of Fuller, asserted in his petition. They are not such as could in this stage of the cause come before the

master. They constitute, indeed, an equitable claim, which is to be carried into effect, if at all, by an original bill by Fuller against Mann, in some competent court of equity. But Flagg has no connection with them, and if he had, they cannot be asserted under the present bill.

In regard to the exceptions filed by Mann, the first is well founded; and the error has been corrected without objection.

In regard to the second exception; as the conduct of Mann was unauthorized by Flagg, and the sale itself was a constructive fraud upon Flagg, I cannot perceive any ground, upon which the claim of five per cent. commissions on the sale, or any other commission, can be allowed to him. A trustee, doing an act in violation of his trust and duty, ought not, upon principle, to be allowed any thing for his services. They are not, in a just sense, beneficial acts; but must be treated as torts, injurious to the rights of the cestui que trust.

In regard to the third exception, I think the master's report right. It ascertains the sum correctly, for which Mann is responsible to Flagg, according to the intent of the original decree. The sale of Mann was, as I have stated, a wrongful act, and a constructive fraud. By it Flagg has been deprived of his entire right in the premises sued for. By the decree of the court, Flagg is compelled to receive the purchase money instead of the lands. Mann must be deemed liable to Flagg for the purchase money. Flagg has not, by his voluntary election, taken the obligations of the purchaser for the purchase money, or adopted the acts of Mann in the sale. If a man tortiously sells my property, without my consent, he is liable to me for the full value of it at the time of the sale, whether he ever receives a cent of the purchase money, or not.

But the master's report does not touch the point, what, upon the whole case, the final decree ought to be, supposing the report to be accepted. It seems to me, notwithstanding this liability of Mann to Flagg, the court ought not to enforce the rights of Flagg against him, until he has exhausted the other funds, which are within the reach of the court. Fuller is personally liable for the unpaid purchase money to an amount, exceeding the amount due to Flagg; and the land, purchased by Fuller, is subject to a lien for the purchase money. I think, therefore, that the final decree ought to be, that Fuller should be ordered to pay to Flagg so much of the unpaid purchase money as will extinguish Flagg's demand, if he is able to pay it. If he does not pay it within a time to be prescribed by the court, then the land, or so much as is necessary for the purpose, ought to be sold to pay the amount due to Flagg, under an order of the court. If, upon the sale, there is any deficiency, then Mann should be decreed personally to make up that deficiency, besides immediately paying to Flagg the sum of $537.50, admitted to have been received by him, and now in his hands, as part of the purchase money. The decree for the sale should also require Mann and Fuller to join in releasing their title to the land which should be so sold, in such manner and form as the master shall, and they should, direct. Both of them are to be perpetually enjoined against setting up any title thereto, after the sale shall have been made and confirmed by the court. Report accepted.

A further decretal order was passed for a sale of the premises, &c., &c., at the same term, as follows:

Saturday, 30th December. This cause coming on again to be heard before the Honorable Joseph Story, associate justice of the supreme court of the United States, and the Honorable John Davis, judge of the district aforesaid, in the presence of the counsel for the parties, upon the report of the master, Charles Sumner, Esq., to whom it was referred by a decretal order, heretofore made, at the last May term of the said court, to report upon the matters in the said decretal order mentioned, and the exceptions taken to the said report on behalf of the said Mann and Elisha Fuller, respectively, and for further directions: Upon reading the said decretal order and interlocutory decree heretofore made in the said cause, the said report, and the exceptions thereto, and upon debate of the matter, and hearing what was alleged by the counsel for the parties respectively, the said court doth think fit, and doth order and decree, that the exceptions aforesaid to the said report, except the first, which having been allowed and admitted by the parties, had been corrected, be, and the same are overruled, as wholly insufficient, and that the said report, and all the matters and things therein contained, do stand ratified and confirmed. And the said court doth declare, that there is due from the said Mann to the said Flagg, for a moiety of the purchase-money for which the moiety of the premises mentioned in the said interlocutory decree, were sold by the said Mann to the said Elisha Fuller, after deducting from such purchase-money, agreeably to the said interlocutory decree, one moiety of the several sums paid by the said Mann to Walker and Fisher, and the Frye heirs in the said interlocutory decree mentioned, for the purchase, assignment, and extinguishment of their interest, right, and title to the same premises, and all expenses incident thereto, the sum of twenty thousand five hundred and thirty-seven dollars and fifty cents, with legal interest thereon, at six per cent., to be calculated from the eighth day of August, in the year of our Lord eighteen hundred and thirty-one, the time of the said sale of the said Mann to said Elisha Fuller, until the same shall be fully paid and satisfied unto the said Flagg. And the said court doth further declare, that inas-

much as it appears that the said Mann, at the time of the said sale by him to the said Elisha Fuller, did receive from the said Elisha Fuller in cash and promissory notes, which were soon afterwards paid to the said Mann, with interest thereon until payment, as a part of the purchase-money upon the said sale, more than sufficient to reimburse to him, the said Mann, all the moneys paid by him to the said Walker and Fisher and the said Frye heirs, and the said incidental expenses; by the sum of one thousand and seventy-five dollars; the said Mann is liable to pay immediately to the said Flagg one moiety thereof, namely, the sum of five hundred and thirty-seven dollars and fifty cents, with interest, to be calculated thereon at six per cent., from the said eighth day of August, in the year last aforesaid, until the same shall be fully paid and satisfied to the said Flagg; the same being a part of the said sum of twenty thousand five hundred and thirty-seven dollars and fifty cents and interest. And the said court doth further declare, that, inasmuch as it appears that the said Elisha Fuller was liable for, and there was due from him to the said Mann, after the said Elisha Fuller had full notice of the claim and equity of the said Flagg in and to the said premises, as a part of the purchase money aforesaid unpaid, a sum exceeding the residue of the said sum of twenty thousand five hundred and thirty-seven dollars and fifty cents, and interest thereon, to be calculated as aforesaid, there was and is a lien upon the said moiety of the said premises for the purchase money unpaid as aforesaid, to the benefit whereof the said Flagg is entitled, so far as it may be necessary to secure the payment of the said residue, that is to say, the sum of twenty thousand dollars, and the interest thereon at six per cent., to be calculated from the said eighth day of August, in the year last aforesaid, until the same shall be paid and satisfied unto the said Flagg; and that the said Elisha Fuller, on account of the said unpaid purchase money, is liable to pay to the said Flagg so much thereof as may be necessary to satisfy unto the said Flagg the sum last mentioned, and interest to be calculated thereon as aforesaid. And the said court doth further declare, that in case the said Elisha Fuller shall fail to pay to the said Flagg the said sum last mentioned, with interest thereon, to be calculated as aforesaid from the said eighth day of August until payment thereof as aforesaid, within the time hereinafter mentioned, the said moiety of the said premises, or so much thereof as may be sufficient therefor, ought to be sold under the order and decree of this court; and the proceeds thereof, after deducting all incidental charges and expenses of such sale, applied towards the payment to the said Flagg of the said sum last mentioned, and interest, to be calculated thereon as aforesaid, before the said Mann shall be required to pay any part of the said last-mentioned sum and interest thereon as aforesaid; and in case the net proceeds of such sale shall be insufficient to pay and satisfy the said last-mentioned sum to the said Flagg, the said Mann ought thereupon to be required immediately to pay and satisfy unto the said Flagg such sum as may be wanting, to supply such deficiency; and the said court doth order and decree, that the said Elisha Fuller, on or before the first Wednesday of June next, do pay and satisfy unto the said Flagg so much of the said purchase-money unpaid as aforesaid, as will be sufficient to satisfy unto the said Flagg the said sum of twenty thousand dollars, and interest, to be calculated thereon as aforesaid, from the said eighth day of August, in the year of our Lord eighteen hundred and thirty-one, until payment as aforesaid; and that, if the said Fuller shall fail to pay the same sum and interest to the said Flagg on or before the said first Wednesday of June next, the said moiety of the said premises be sold thereupon, immediately, by one of the masters of this court, under the order and decree of this court, he giving due notice of such sale in one or more public newspapers, fourteen days at least before the day appointed for such sale,—and that the proceeds of such sale, after paying therefrom all incidental charges and expenses thereof, be applied towards the payment and satisfaction to the said Flagg of the said sum last-mentioned, and interest to be calculated thereon as aforesaid; and that the said Mann, Elisha Fuller, and all proper parties, as the master shall direct, do join in releasing all right, title, and interest in the said moiety of said premises, or so much thereof as may be sold as aforesaid, upon the confirmation of such sale by this court; and that they be enjoined thereupon, perpetually, against setting up any title or claim thereto. And the said court doth further order and decree, that, if the net proceeds of such sale shall be insufficient to pay and satisfy to the said Flagg the said sum last-mentioned, and the interest thereon, to be calculated as aforesaid, the said Mann do, within thirty days immediately after the confirmation of such sale, pay and satisfy to the said Flagg such sum as shall be then wanting to supply such deficiency. And the said court doth further order and decree, that the said Mann, within thirty days from the date of this decree, do pay and satisfy unto the said Flagg the said sum of five hundred and thirty-seven dollars and fifty cents, and interest thereon, to be calculated from the said eighth day of August, in the year aforesaid, until payment thereof. And all further orders and decrees in the premises are reserved for the further order of the court.

The object of postponing the sale to so late a period was to avoid the disadvantages

of a sale arising from the extreme pressure and the commercial embarrassment of the times; and to bring the whole matter before the court during its next term, if any exigencies should require any variation or alteration of the decree.

Case No. 4,849.

FLAHERTY et al. v. DOANE et al.

[1 Lowell, 148.] [1]

District Court, D. Massachusetts. March, 1867.

SEAMEN'S WAGES—LIEN—LOSS OF VESSEL — PROCEEDS.

1. The master of a fishing vessel had hired her of the owners for the season, and undertaken to pay the men, certain of whom were hired on wages. The vessel was lost during the season, and parts of her tackle, &c., were saved, and sold in Nova Scotia: *Held*, that the owners were liable to an action in the admiralty by the men for their wages to the extent of the proceeds of the sale of the wreck.

[Cited in The Grace Darling, Case No. 5,651; The Sirocco, 7 Fed. 600; The Samuel Ober, 15 Fed. 622; Harney v. The Sydney L. Wright, Case No. 6,082a; The International, 30 Fed. 376; The L. L. Lamb, 31 Fed. 33; The Atlantic, 53 Fed. 608.]

2. Whether the owners could have been sued personally for the wages if the vessel had returned, and the voyage had proved so disastrous as not to reimburse the great general charges, quaere?

3. But the men would have had a lien on the vessel, and on her remnants, and they can follow the fund into the hands of the owners by a libel, and can recover to the extent of the proceeds of sale which have been remitted to the owners.

[Cited in The Montauk, Case No. 9,717.]

4. A fund arising out of a res upon which seamen have a lien can be followed in the admiralty, though the thing itself has been destroyed, or is out of the jurisdiction.

5. Whether such a proceeding should be in form, a proceeding in rem or in personam, quaere?

[Cited in Snow v. One Hundred and Eighty and Three-Fourths Tons of Scrap Iron, 11 Fed. 519.]

Libel by seamen [Patrick Flaherty and others] against [Valentine Doane and others] the owners of the schooner Edith, for wages said to have been earned on a cod-fishing voyage. The evidence tended to show that the schooner was let to the master by parol, on his undertaking to give the owners one-fourth of the catchings, after deducting the great general charges. The master engaged two or three men on shares, and the remainder, who were the libellants, on wages of three hundred dollars for the season. The schooner was lost on the coast of Nova Scotia, about six weeks after she sailed from home, and parts of her tackle, rigging, and fish were saved and sold by the master in Nova Scotia. The master was to man the schooner; and the owners knew that some men would go on shares and some on wages. A paper was exhibited which purported to be shipping articles, conforming to the act of June 19, 1813 (3 Stat. 2), and made all the crew sharesmen, but it was not proved that the libellants ever signed it; nor did either party rely upon it in evidence or in argument; nor was it denied that these men were entitled to wages pro rata from the master who hired them. The evidence did not show that the men knew of the contract between the master and owners unless such knowledge was to be inferred from the usages of the business.

C. G. Thomas, for libellants.

In The Adelphi [Case No. 80], decided by Judge Sprague, in 1862, it was held that the men have a lien on the vessel in exactly such a case as this. If so they have a personal action against the owners.

S. H. Phillips, for respondents.

The rule in personal actions is the same in the admiralty as at common law, that a plaintiff who founds his demand on a contract with an agent must prove the agent's authority. Here the master could not bind the owners, and their proceeding must fail. Mayo v. Snow [Case No. 9,356]; Webb v. Peirce [Id. 17,321]. These were actions for supplies, but wages follow the same rule.

LOWELL, District Judge. The decisions in the circuit court are, that, where the master of a fishing vessel becomes the owner for the voyage, the general owners are not personally liable for such supplies obtained in the home port, as the master had undertaken to furnish at his own expense. Mr. Justice Curtis, in giving his opinion in Mayo v. Snow [Case No. 9,356], refers to the then unpublished decision of the supreme judicial court, Harding v. Souther, 12 Cush. 307, as not being inconsistent with this doctrine, for certain reasons which he gives; and it is not so, though for a different reason, because, as now appears from the authorized report, the master was not in that case owner for the voyage, as he was shown to be in the case in the circuit court. The supreme judicial court construed a certain paper as not amounting to such charter as would exonerate the owners; and the circuit court construed a certain parol agreement to have that legal effect; but the two were not alike. Mr. Justice Curtis, at the conclusion of his opinion in Webb v. Peirce [Case No. 17,321], expressly reserves his decision concerning the right of seamen to proceed against general owners who have received freight earned on the voyage for which the wages are claimed. This case hardly comes within that reservation, in terms, though it may in principle, as I shall hereafter explain. Here the remnants saved from the wreck were not sufficient to reimburse the owners for the

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

great general charges; and therefore it cannot be said that they have received any thing in the nature of freight. If, therefore, this schooner had arrived safely at home, but had made a bad voyage, so that the owners were not made whole for their actual outlay, I assume that a personal action could not have been maintained against them for wages, according to the authorities which I am bound to follow, for it is admitted that the master was to pay these wages.

There is, however, a ground on which the seamen may recover the whole or a part of their wages. If the vessel had arrived they would have had a lien on her. No case has ever yet decided that seamen, hired by a charterer, lose their lien on the vessel. The contrary was held in The Adelphi [Case No. 80], if the manuscript report of Judge Sprague's decision, produced at the hearing, is accurate, and I have no reason to doubt it. Admiralty liens depend more on services rendered the ship, than on any question of agency. Where the master is charterer and owner pro hac vice, he may impress the vessel with liens for supplies in a foreign port, Thomas v. Osborn, 19 How. [60 U. S.] 22; and this, although the material-man knows the master has taken her on shares, and is to victual and man her: The Monsoon [Case No. 9,716]. So, in salvage there is usually no contract; and, where there is one, the courts will often disregard it; the lien rests on benefit conferred to the thing benefited; and in salvage there can be no personal action against the owner unless he shall have accepted the property after the service has been performed. And a master de facto can give a valid bottomry bond.

There being then a lien on the ship, and of course on her remnants, and the wreck having been sold before the libellants had an opportunity to enforce their remedy, they may follow the proceeds into the hands of the owners, and maintain their libel to the extent of what I may call the "assets." Proceedings in rem may be maintained, not only where there is a vessel or other thing which can be arrested by the marshal, but also where there is a fund in the possession of persons within the jurisdiction. In England, actions in personam, strictly so called, fell into disuse (The Clara, Swab. 3); but an efficient substitute was found in the process in rem, which was served by a monition to the owners to show cause; and this was issued even though the vessel were on a voyage, or belonged to the crown, and therefore was not liable to arrest; or even in some cases though the vessel had been totally lost (Coote, Adm. 131, etc.; The Trelawney, 3 C. Rob. Adm. 216, note; The Meg Merrilies, 3 Hagg. Adm. 346; The Stephen Wright, 12 Jur. 732). For this reason causes in the admiralty were always entitled as of a vessel or cargo, &c., for they were always in rem. The action in personam has been revived by the admiralty court act of 1861, but this is only a cumulative remedy, as I suppose, in cases where the old practice is applicable, for that practice was expressly sanctioned by the act of 1854.

The practice is not unknown in this country. We often require notice of the action in rem to be served by a simple monition, where there is no danger of loss by that form of proceeding and it is desirable to save the expense of custody. In prize, the court of the captor's country has jurisdiction, though the captured property has been sold abroad; and this is recognized by the prize act of 30th June, 1864, § 1 (13 Stat. 307). So in salvage and bottomry, in which there is usually no personal action against owners, the suit in rem is not defeated by the conversion of the property into money. In Sheppard v. Taylor, 5 Pet. [30 U. S.] 675, money paid by Spain for the wrongful confiscation of a ship, and for the loss of freight was permitted to be followed by a libel in personam, not only into the hands of the owners, but also into those of assignees, with notice. Mr. Justice Story, speaking for the court, says (page 711): "Over the subject of seamen's wages, the court has an undisputed jurisdiction in rem as well as in personam; and wherever the lien for wages exists and attaches upon proceeds, it is the familiar practice of that court to exert its jurisdiction over them, by way of monition to the parties holding the proceeds."

This explains the meaning of Mr. Justice Curtis's reservation in Webb v. Peirce [Case No. 17,321], above mentioned, that he will not say that owners who have received freight earned on a voyage are not answerable in the admiralty for wages; for such owners could be held to answer to the extent of the freight, by reason of the lien upon it.

The twenty-third admiralty rule of the supreme court requires all libels in rem to allege that the property is within the district in which the action is brought. No doubt this modifies the ancient practice so far as to establish the locality of certain actions which otherwise might have been brought in any district where the owners were found. But it cannot have been the purpose of the court to take away a right of action founded on the existence of a fund held by persons within the jurisdiction, and thus to overrule Sheppard v. Taylor by indirection, if that case should be called a suit in rem, which I doubt.

It is not necessary to put the rights of these libellants on the doctrine of salvage, that owners who have accepted the saved goods may be proceeded against in personam. The demand is really for wages, and the right to follow the proceeds into the hands of the owners by a libel is the same in both cases. It would be more regular that a full statement of the case, showing how and to what extent the owners are liable, should be made in the libel; but the trifling amount due in this case will hardly warrant the expense of an amendment; and I have not carefully examined the question whether one would be necessary, because the parties have argued the case on its

merits, without interposing any technical objections. There is reason to suppose, that after advance wages and supplies have been deducted, but little will remain due to the libellants; but that little must be paid, if the proceeds of sale are sufficient.

Decree accordingly.

Case No. 4,850.

In re FLANAGAN.

[5 Sawy. 312; 18 N. B. R. 439; 26 Pittsb. Leg. J. 128.] [1]

District Court, D. California. Nov. 15, 1878.

VOLUNTARY PETITION FILED BEFORE ADJUDICATION ON PREVIOUS INVOLUNTARY PETITION.

Where a petition in involuntary bankruptcy was filed, and the debtor, before adjudication, made a composition with his creditors which was subsequently set aside by reason of his inability to carry it into effect, whereupon he filed his voluntary petition, and was duly adjudicated: *Held*, that the pendency of the first proceeding was no bar to the institution of the second; and that the court would proceed in the latter, and the further prosecution of the former would be stayed.

In bankruptcy.

Naphtaly, Friedenrich and Ackerman, for bankrupt.

J. R. Brandon, Esq., for creditor, Cornelius King.

HOFFMAN, District Judge. On the sixteenth of May, 1878, a petition in involuntary bankruptcy was filed against John Flanagan by certain of his creditors, claiming to constitute one fourth in number of all his creditors, and to represent one third in value of his aggregate indebtedness. On this petition the usual order to show cause was issued, and on the same day a petition was presented by the debtor praying that a creditor's meeting be called to consider a composition proposed for their approval. The meeting was accordingly held, the composition was accepted by creditors to the requisite number and amount, and on the first of July the composition was duly confirmed by the court, and further proceedings in bankruptcy stayed.

On the twenty-eighth of August, one Thomas Meany, a creditor of the alleged bankrupt, filed his petition, praying that the composition be set aside. The ground of this application was, that the bankrupt had failed, and refused to comply with its terms by depositing certain notes with the register for the benefit of his creditors.

The reason of this refusal was the fact that one King had, previously to the filing of the petition in bankruptcy, levied an attachment upon the whole stock in trade of the alleged bankrupt, which attachment he refused to relinquish, and accept the terms of the composition.

As no adjudication had been made—no assignee appointed, nor assignment made by the register—the lien of the attaching creditor remained unaffected by the bankruptcy proceedings.

This petition was, after several continuances, finally brought to a hearing on the twenty-fourth of September, 1878, on which day an order setting aside the composition was made. Previously, however, to the making of this order, but subsequently to the filing of Meany's petition, viz., on the thirty-first of August, Flanagan filed his voluntary petition to be adjudged a bankrupt. The usual order of reference was made, and on the twenty-third of September he was adjudicated a bankrupt by the register. At the creditor's meeting, called by the register for the election of an assignee, King, the attaching creditor, appeared by his counsel, and objected to the proceedings, on the ground that the court had no jurisdiction in the premises by reason of the pendency of the proceedings under the involuntary petition; and that the same not having been dismissed or otherwise terminated, the court would not permit or take cognizance of the proceedings under the voluntary petition.

The question thus presented was certified to the court, argued by counsel, and submitted for decision. It is objected, on behalf of the bankrupt, that King, the attaching creditor, has no standing in court, not having proved his debt in either proceeding. To this it is replied that proof of debt was not made in the present proceeding, because the creditor, by so doing, might be deemed to have come in under it, and to have waived his right to object to it. Technically, the objection of the bankrupt seems to be well taken; but the omission can be remedied, and the rights of the creditor preserved by ordering him to make such proof, and reserving to him the right to make thereafter such objection to the proceedings as he may see fit.

In the view I take of the principal question, such an order is unnecessary, for I shall proceed to dispose of the application on its merits, and as if the attaching creditor were regularly in court.

The ground on which the court is urged to set aside the adjudication, and to dismiss the petition in the voluntary case, is that the whole proceeding is void for irregularity. In support of this position, several cases are cited, and confidently relied on by counsel. The first and most pointed of these is In re Stewart [Case No. 13,419]. In that case a petition had been filed against Stewart by his creditors, and he had, before the return day of the rule, to show cause by an indorsement upon the copy of the petition served upon him, admitted that all the allegations of the petition, except those of fraud, were true. He subsequently, and before the re-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 26 Pittsb. Leg. J. 128, contains only a partial report.]

turn day of the rule to show cause, filed his voluntary petition, and was adjudged a bankrupt. No reason for this proceeding appears to have been given, and the attorneys for the petitioning creditors moved that the two petitions be consolidated, or else that the adjudication on the second petition be set aside, and the case of the creditors held for trial.

In deciding this motion Mr. J. Duval observes: "It never was intended by the bankrupt act, and no correct rule of practice can tolerate it, that when a creditor has instituted proceedings to force his debtor into bankruptcy the latter should be allowed to become a bankrupt and be adjudicated as such on his own petition before a determination of the creditors' petition. To permit such a practice might work a flagrant wrong upon the rights of the petitioning creditor." The adjudication under the voluntary petition was thereupon set aside and the debtor was adjudged on the creditors' petition. As a general rule of practice the ruling of the learned judge in this case was very possibly correct. But it by no means follows that the right of the insolvent to avail himself of the benefit of the act is in all cases suspended by the filing of a petition against him, or that the court is without jurisdiction to entertain it if filed.

Cases may easily be imagined where it may be indispensable to the interests of the other creditors and to the securing to the debtor the benefit of the act that he should file his voluntary petition. The creditors' petition may be abandoned before adjudication or the allegation of the act of bankruptcy may be untrue, or the creditors may not be the holders of provable debts, or they may not constitute the statutory quorum of creditors. In these and the like cases it might be a great hardship upon the debtor to compel him either to admit allegations which he knows to be untrue, or else to be subjected to the delay and expense of contesting them, and in the mean time to have his right to the benefit of the act suspended and denied. At the termination of the proceedings, if the result be in his favor, his right to file his voluntary petition would of course revive. But it may then be too late to defeat attachments and preferences, and to secure the equal distribution of his assets among all his creditors. The principal object of the act would thus be defeated.

The next case cited is In re Wielarski [Case No. 17,619]. In that case the bankrupt filed a voluntary petition in 1868, on which he was adjudicated, and an assignee appointed. In 1870 he filed a second petition. The same debts were set forth, and the same creditors named in both petitions. Objection was made to the proceeding under the second petition, which objection the register held to be well taken. The matter having been referred to the court, Mr. Justice Blatchford said: "The register is correct; the clerk will enter an order staying proceedings in this matter until the further order of the court. If any good reason exists for going on with this matter, it may be shown to the court." This case, therefore, not only does not decide that the filing of the second petition was wholly nugatory and void, and that the court was without jurisdiction to entertain it, but it clearly intimates that the court would proceed in it if any good reason for doing so should be shown.

The next case—In re Drisko [Case No. 4,090]—appears to have no application to the subject under consideration. It merely decides that a voluntary bankrupt who has contracted new debts since the filing of a prior petition may file a new petition in bankruptcy.

The next case—In re Lacey, Downs & Co. [Case No. 7,965]—also has no bearing upon the present inquiry. It relates merely to the right of a creditor to intervene and prosecute to adjudication when the petitioning creditor fails to appear or proceed with the prosecution.

The above are all the cases cited by the counsel for the attaching creditor. It will be seen that only one of them lends any support to the position he seeks to maintain. I have not been referred by the counsel for the bankrupt to any case where the point under consideration has been decided under the late bankrupt act. But a decision under the former act is cited, which, by the force of its reasoning and the great eminence of the judge by whom it was made, is entitled to the greatest consideration. I transcribe the whole of Judge Conkling's opinion: "I can perceive no sufficient reason why the pendency of the creditors' petition on which no decree of bankruptcy has yet been granted, should be considered a bar to the right of voluntary petition secured by the act to the debtor. The act contains no such limitation of this right. The debtor may have good reasons for wishing to exercise it, notwithstanding the prior prosecution of a petition in invitum. He may be apprehensive that it may be voluntarily abandoned, or he may know that the charges it makes against him are unfounded, and think proper to contest their truth, and thus defeat the petition. I can not see that any injury can possibly be done to creditors by this practice, while in one respect it is advantageous by giving them the benefit of the petitioners' schedules of debts and property without expense." In re Canfield [Case No. 2,380]. These observations appear to me conclusive.

But it is urged that the bankrupt act directs that where the court has refused to accept and confirm a composition, or has set it aside after confirmation, "the debtor shall be proceeded with as a bankrupt." It is contended that under this provision the debtor, after failure to effect a composition, or after it has been set aside by the court, is to be taken and deemed to be a bankrupt, even

though no adjudication has been made against him. Whether it is supposed that a formal adjudication must in such a case be made, or whether he is to be considered and proceeded with as a bankrupt without such adjudication, I did not clearly understand at the hearing. But whichever course be adopted, it is claimed that the debtor is, under the circumstances stated, declared by law to be a bankrupt; and it is no longer open to the court to inquire into the truth of any of the allegations of the petition, either in respect to the quorum of creditors, the commission of the acts of bankruptcy alleged, or the existence of the debts alleged to be due to the petitioning creditors.

As a corollary to this proposition, it is urged that, inasmuch as the court is expressly commanded to proceed with the debtor as a bankrupt, that proceeding must be prosecuted, and no other proceeding founded on his voluntary petition can be entertained. It does not appear that the construction of the above-cited provision of the bankrupt act, which this court is urged to adopt, has hitherto received any judicial sanction. It seems to be favored, however, by Mr. Blumenstiel, as demanded by the language, and most nearly conforming to the English act from which it is modeled. Blum. Bankr. 464.

But the correctness of this interpretation is open to serious question. If, upon the failure of a proposal of composition, the debtor is to be at once adjudicated a bankrupt, it must be because the proposal of the debtor for a composition is treated as an admission of the truth of all the allegations in the creditor's petition necessary to procure an adjudication. But can this proposal be so treated?

An honest debtor, against whom a petition has been filed, and who knows himself to be insolvent, may propose or attempt an arrangement with his creditors, although he has not committed any of the acts of bankruptcy (perhaps fraudulent) with which he is charged; and although he knows that the necessary quorum of creditors have not united in the petition. His want of success in effecting the composition can not surely be treated as an admission by him of the truth of allegations which he knows to be false. His proposal for a composition is an admission of his insolvency, and nothing else. Justice seems to demand that, after failing to effect it, it should still be open to him to contest the truth of the allegations upon which it is sought to procure his adjudication as an involuntary bankrupt.

But even if his proposal for a composition could be considered as an admission by him to the extent supposed, it could have no greater effect than his written admission of the truth of the allegations. The provisions of the act which require that creditors to a specified proportionate number and amount shall join in the petition, were not intended solely for the protection of the debtor. Even when he has signed a written admission that the requisite quorum has united in the petition, the court must still "be satisfied that the admission is made in good faith." If it should subsequently appear that it was the result of collusion and fraud, the adjudication may be set aside. In re Duncan [Case No. 4,131].

The dissentient creditors have rights which the statute recognizes and the court will protect. And amongst them is the right to insist that if the debtor, contrary to their wishes and interests, is to be thrown into involuntary bankruptcy, it shall be done only under the conditions imposed by the law. The debtor's admission that those conditions exist is of no effect if the fact be otherwise. It results that even if the proposal for composition could be treated as an admission by the debtor of all the allegations of the petition, it could have no effect to conclude the inquiry as to whether the requisite quorum has joined, because his written admission of the fact, if it does not exist, would be equally nugatory.

For these reasons I am of opinion that the object and meaning of the clause in question were merely that the court, on the failure of the proceedings in composition, should resume the case at the point where its progress was suspended by the proceedings in composition, and that it should be thereafter conducted as if no proceedings had been taken. In other words, that the phrase, "he shall be proceeded with as a bankrupt," should be construed to mean that the case shall be proceeded with as a case in bankruptcy in conformity with the provisions of law. This would also seem to be the reasonable construction of the English act upon which, as Mr. Blumenstiel observes, our own is modeled. The language of that act is: "If it appear to the court * * * that a composition in consequence of legal difficulties, or for any cause, can not proceed without injustice or undue delay * * * the court may adjudge the debtor a bankrupt and proceedings may be had accordingly." That is, the court may so adjudge if a proper case for an adjudication be made out. If this construction of the clause in question be correct, the circumstance that an abortive attempt at composition has been made may be eliminated from this discussion, and the case become the simple one of a filing of a voluntary petition by a debtor against whom a petition in invitum has already been filed, but on which no adjudication has been made. It it is evident that in such case proceedings in both suits can not go on; and it is equally clear that proceedings should be continued in the case in which an adjudication has been made, and in which no questions can arise as to the concurrence of the requisite quorum of creditors, or the commission by the bankrupt of the acts of bankruptcy alleged. There will thus be secured

to the bankrupt the benefit offered by the act, and to the creditors the equal distribution of the assets discharged of any attachments which are by the act declared to be dissolved.

The objection of the attaching creditor is overruled, and the register will proceed in the matter of the voluntary petition. The proceedings in the involuntary case will be stayed, unless the petitioning creditors should desire to move for its final dismissal.

The clerk will certify this decision to the register.

Case No. 4,851.

FLANDERS v. ABBEY et al.

[6 Biss. 16.] [1]

Circuit Court, E. D. Wisconsin. Feb., 1874.

BANKRUPTCY — JURISDICTION OF CIRCUIT COURT — CHARGING ESTATE OF MARRIED WOMAN.

1. The United States circuit court has jurisdiction of a bill by an assignee to recover money or property of the bankrupt preferentially or fraudulently conveyed.

[Cited in Cady v. Whaling, Case No. 2,285; Sill v. Solberg, 6 Fed. 471.]

2. In Wisconsin a married woman, by simply indorsing a note, does not create a liability which can be enforced against her separate estate, nor one upon which a personal judgment will be rendered against her.

[This was a bill in equity by James G. Flanders, assignee, against Matilda O. Abbey and others.]

Davis & Flanders, for complainant.

I. Where a court of equity has concurrent jurisdiction with a court of law, it will retain jurisdiction of a case if there is not a plain and adequate remedy at law, or if the question of fraud is involved. Smith v. Buchanan [Case No. 13,016]; Buchanan v. Smith [16 Wall. (83 U. S.) 277]; Warren v. Delaware, L. & W. R. Co. [Case No. 17,194]; Warren v. Tenth Nat. Bank [Id. 17,202]; Garrison v. Markley [Id. 5,256].

II. There was no adequate remedy at law. Will. Eq. Jur. 651; Todd v. Lee, 15 Wis. 365, 16 Wis. 480; Yale v. Dederer, 18 N. Y. 265, 22 N. Y. 450; Phillips v. Graves, 20 Ohio St. 371; Corn Exchange Bank v. Babcock, 42 N. Y. 613.

III. The question of fraud was involved.

IV. The knowledge of the husband is knowledge of the wife in matters pertaining to wife's property when the husband manages it.

Finches, Lynde & Miller, for defendants.

HOWE, District Judge. This is a demurrer to a bill in equity brought by plaintiff as assignee of Little & Fyler, bankrupts.

The bill alleges that in February, 1871, Little executed a note for $2,000, and procured it to be indorsed by the defendant, Matilda O. Abbey, the wife of defendant, D. C. Abbey, and "by such indorsement charged her own individual and separate estate for the payment thereof;" that the note was subsequently "passed" to the defendant bank; that within two months of the adjudication of bankruptcy, all the defendants and the bankrupt Little confederated together for the purpose of obtaining a fraudulent preference over the creditors of the bankrupt, and, in execution of that purpose, obtained $2,000 from the sale of property of the bankrupts, and paid the same to the defendant bank, and took up the note; that the bankrupts were at that time insolvent, and that all the defendants knew them to be so; that the note was so paid before maturity; that the defendant bank knew that the money was obtained from the property of the bankrupts; that it was paid to and received by it to prevent its going into the hands of the assignee, for the purpose of obtaining a fraudulent preference and to defeat the provisions of the bankrupt act.

The bill further avers that defendant, D. C. Abbey, was in the employment of the bankrupts when these acts were committed, and was at the same time the agent of his wife in all the transactions; that defendant Matilda "has of her own separate estate, independently of her said husband, certain property and estate in the city of Milwaukee, Wis., which said property and estate, she, the said Matilda, charged with the payment of the note hereinbefore mentioned."

The relief prayed is that the plaintiff may be decreed to be entitled to the said sum of $2,000, and that the defendant bank and defendant Matilda be decreed to pay it to him, and for general relief. Each of the defendants files a separate demurrer.

The causes of demurrer assigned are:

1. That plaintiff has complete remedy at law.

2. That plaintiff has joined several distinct matters in his bill.

3. Multifariousness: that defendant, D. C. Abbey, is not properly a party, no relief being prayed against him.

4. That plaintiff, as to defendant, Matilda, has not stated such a case as can constitute a proper or legal charge upon her separate estate.

I. As to the alleged want of equity in the bill, as against all the defendants. The substance of the bill in this respect is that the acts of the defendants in obtaining from the property of the bankrupts the money and applying it in the payment of the note due to one of them and indorsed by the other, under all the circumstances, was a fraudulent act, both as to the other creditors and as to the bankrupt act itself.

It is a well-settled rule that courts of equity possess a general concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter; and exclusive jurisdiction

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

in cases of fraud beyond the reach of the courts of law. 1 Story, Eq. Jur. § 184.

In cases of alleged fraud, courts of law and equity have a concurrent jurisdiction, and the party may apply to one or the other, at his option. Goss v. Lester, 1 Wis. 52.

Section 2 of the bankrupt act [of 1867 (14 Stat. 517)] gives this court jurisdiction of all suits in law or equity, which may be brought by the assignee touching any property or rights of property of the bankrupt, transferable to or vested in such assignee.

This section leaves the jurisdiction as between the two courts as it was at the time of its passage. It does not enlarge the equity powers of the court, but leaves them as they were before. Whenever, then, any proper party would be entitled to invoke the aid of an equity court, the assignee in bankruptcy, by virtue of this section, has the same right, upon the same facts. The allegations of fraud confer the power upon the equity court in both cases.

These principles were applied by Judge Lowell, of the district court of Massachusetts,—Pratt v. Curtis [Case No. 11,375],—in the case of a suit in equity by the assignee of a bankrupt to set aside a voluntary conveyance of land, where the fraud alleged was an attempt to delay and hinder creditors; to a suit in equity by an assignee to set aside mortgages of personal property, where the fraud alleged was a design to give the mortgagee a preference over creditors of the bankrupt, by Justice Clifford in circuit court for the district of Maine,—Scammon v. Cole [Id. 12,432]; to a suit in equity by an assignee to recover the proceeds of goods sold under judgment in a state court against the bankrupt, taken by confession, where both parties knew of the insolvency,—Traders' Bank v. Campbell, 14 Wall. [81 U. S.] 87. These proceeds were money in the possession of the bank, and a suit at law was a plain, simple and adequate remedy.

I think these cases dispose of the demurrer, and that it must be overruled as to the defendant bank.

II. The demurrer as to the other defendants raises an entirely different question. Is the plaintiff entitled to any relief as to the defendant Matilda and her husband upon the facts stated in the complaint? We have already shown that the foundation for the claim for relief against her is the indorsement by her of the paper of the bankrupts—for their accommodation. It is not alleged that it was in any manner for the benefit of her separate estate, or that she received any consideration for the act. The bankrupts wanted to borrow money. They were unable to do it upon their own credit. She executed no paper or instrument, creating any express charge upon her estate. The bill alleges that she charged her separate estate, "by such indorsement." After the indorsement, and probably because of it, it was taken by the defendant bank. At law, independent of any statute of this state, such an indorsement would be void, creating no liability against the feme covert. The effect of the Wisconsin statute of 1850 (the only one that can affect this question) conferring certain powers upon married women, has been several times before the supreme court of this state. It was finally held, in Conway v. Smith, 13 Wis. 125, that the contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, were binding in law.

But the same court held, in Todd v. Lee, 15 Wis. 365, that all her other engagements stood as before the passage of the act, good only in equity. The change from an equitable to a legal estate has not in respect to them enlarged her power, or removed the disability of coverture, but she remains as if still possessed of an estate in equity, without restriction as to her power of disposition.

The only question, then, is: Will the feme covert by the indorsement of this note, create such a debt or incur such a liability that a court of equity will make it a charge upon her separate property? Different rules have been applied to such facts by the leading equity courts of this country and those in England. The English rule has been broader than that usually enforced here. There they have applied the separate estate of a feme covert to the payment of all her debts without inquiry into the purposes for which they were contracted. It was enough to know that she had contracted the liability; the court applied her estate to its discharge as fully as a court of law applied the property of any debtor to the payment of a judgment against him. The courts of New York went very far at one time in the same direction. Without stopping to make any examination of the many cases on this subject, it is sufficient now to remark that a more restricted rule has been generally applied by the courts of this country, and I think the true doctrine is that stated by the supreme court of Massachusetts, in the case of Willard v. Eastham, 15 Gray, 328.

When, by the contract, the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate, or its income, to the extent to which the power of disposal by the married woman may go. But when she is a mere surety, or makes the contract for the accommodation of another without consideration received by her, the contract being void at law, equity will not enforce it against her estate, without an express instrument making the debt a charge upon it. Upon this point see, also, Yale v. Dederer, 18 N. Y. 265; Peake v. Labaw, 6 C. E. Green [21 N. J. Eq.] 269; Kimm v. Weippert, 46 Mo. 534.

If a court of equity will not enforce the liability created by that indorsement upon the

separate estate of this defendant, it will be at once conceded that it will not make any decree against her personally. The only reason given for making her a party, is the fact of this indorsement. It is not alleged that she received the money from the bankrupt's property, with which the note was paid. That was paid to the bank. As no decree can be had against her, it follows that she was improperly made a defendant.

The only reason for making D. C. Abbey a defendant, is that he is the husband of Matilda, and that she could not be sued without joining him in the proceedings.

The demurrer must be sustained as to the defendants Abbey, without costs to either party, plaintiff to amend his complaint within ten days, if he so elects.

Case No. 4,852.

FLANDERS v. AETNA INS. CO.

[3 Mason, 158.] [1]

Circuit Court, D. New Hampshire. May Term, 1823.

SERVICE OF PROCESS — FOREIGN CORPORATION — GENERAL APPEARANCE—WAIVER OF OBJECTION.

A., a citizen of New Hampshire, sued a corporation established by a statute in Connecticut, in the circuit court of New Hampshire; the corporation having entered a general appearance, it was *held*, that the objection to the service under the 11th section of the judiciary act of 1789, c. 20 [1 Stat. 73], was waived.

[Cited in Clarke v. New Jersey Steam Nav. Co., Case No. 2,859; Lee v. Aetna Ins. Co., Id. 8,181; Winans v. McKean R. & Nav. Co., Id. 17,862; Baltimore & O. R. Co. v. Harris, 12 Wall. (79 U. S.) 86; Knott v. Southern Life Ins. Co., Case No. 7,894; Robinson v. National Stock-Yard Co., 12 Fed. 362; Edwards v. Connecticut Mut. Life Ins. Co., 20 Fed. 453; Romaine v. Union Ins. Co., 28 Fed. 639; Spies v. Chicago & E. I. R. Co., 32 Fed. 713.]

This was a suit on a policy of insurance underwritten by the defendants, a corporation established in Connecticut, by a legislative act, and composed of citizens of that state, by which the plaintiff [Thomas Flanders], a citizen of New Hampshire, was insured 3000 dollars on his house, barn, furniture, library, &c. against losses by fire. The defendants had entered a general appearance. A question arose at the bar upon a motion to dismiss the suit for want of jurisdiction, the defendants not being a corporation in the state where the suit was brought, and the act of 1789, c. 20, § 11, was cited in support of the motion.

Cushman and Bartlett, for plaintiff.

E. Cutts and Mr. Mason, for defendants.

STORY, Circuit Justice. By the judiciary act of 1789, § 11, the circuit court has jurisdiction of suits "between a citizen of the state where the suit is brought, and a citizen of another state." If the case stood singly upon this clause, there would be an end of this objection, for this suit falls precisely within the description. The case of Deveaux v. Bank of U. S., 5 Cranch [9 U. S.] 61, has decided, that the jurisdiction attaches in a suit where the corporation, which is a party to the suit, is composed of citizens of the state, in the same manner as if it were against the same persons in their private capacities. In other words, the court will look behind the artificial entity, the corporation, to see who are the persons really parties in interest. But the same section (section 11) goes on to provide, that no civil suit shall be brought before the circuit court "against any inhabitant of the United States by any original process in any other district, than that whereof he is an inhabitant, or in which he shall be found at the time of the serving the writ." Upon this principle, there may perhaps be difficulty in averring, that the present corporation has any inhabitancy or commorancy at all. But it is averred in the writ, that it is composed of citizens of Connecticut, and of course of persons having an inhabitancy there. The objection would therefore be fatal, if it had been interposed in the first instance. But it has been uniformly held, that this clause does not per se oust the jurisdiction, but is a privilege given to the defendant, of which he may avail himself at a proper time, or which he may waive at his pleasure. The entering of an appearance generally has been held to be a waiver of it, and an admission of a due and effectual service to compel the party to answer. Pollard v. Dwight, 4 Cranch [8 U. S.] 421; Knox v. Summers, 3 Cranch [7 U. S.] 496; Logan v. Patrick, 5 Cranch [9 U. S.] 288; Harrison v. Rowan [Case No. 6,140]; Gracie v. Palmer, 8 Wheat. [21 U. S.] 699. In the present case, a general appearance has been entered, and steps taken towards the trial of the cause, as a cause rightfully in court. I think, therefore, the motion must be overruled. Motion overruled accordingly.

[1] [Reported by William P. Mason, Esq.]

Case No. 4,853.

FLANDERS v. THOMPSON et al.

[3 Woods, 9.] [1]

Circuit Court, D. Louisiana. Nov., 1876.

TRUSTS—JUDGMENT CREDITOR OF TRUSTEE — RESULTING TRUST—BONA FIDE PURCHASER.

1. A judgment creditor is not a bona fide purchaser who as such is protected against a resulting trust.

2. Where B, holding trust funds, invested them in real estate and took the title in his own name, and was afterwards compelled, by order of court, to convey the property so acquired to the party entitled to the money: *Held*, that a creditor of B, who had recovered and recorded judgments against him long before the latter took title to the property, could not, under the jurisprudence of Louisiana, acquire a lien there-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

on superior to the equities of the party with whose money the property had been paid for, and to whom it had been conveyed by order of this court.

W. W. Howe, for petitioner.
Sam'l B. Blanc, for defendants.

WOODS, Circuit Judge. The question presented by this case is whether, under the jurisprudence of Louisiana, a trustee holding trust funds, and against whom there stand recorded judicial mortgages, can pay off such mortgages by investing the trust funds in real estate in his own name, and thus subjecting it to the lien of the judicial mortgages so recorded. The facts were these. In the year 1869 the defendant, Edward Thompson, recovered in the fourth district court for the parish of Orleans, two judgments against one H. S. Bell, amounting in the aggregate to $672, and in the same year had them placed on record in the mortgage office of said parish. Afterwards, in 1874, Bell was appointed assignee in bankruptcy of one J. W. Champlin. Certain assets of the bankrupt estate having come to the possession of Bell, in July, 1875, he invested them in two lots in the city of New Orleans, and took the deed therefor in his own name. These facts having been brought to the notice of the bankrupt court, Bell was in November, 1876, removed as assignee and Benj. F. Flanders appointed in his stead, and Bell was ordered to convey the said lots purchased with the means of the bankrupt estate to Flanders the new assignee, which he did. Thompson, by virtue of his judgments against Bell, recorded in 1869, now claims that he has a lien for the amount thereof on the property purchased by Bell and by him conveyed to Flanders, and that his judgments ought to be first paid out of the proceeds of their sale. Under the general system of equity jurisprudence, a claim so unconscionable and so bare of equity would not be listened to.

The purchase by Bell, with the money of the bankrupt estate, subjected the property, though standing in the name of Bell, to a resulting trust in favor of the bankrupt estate: Perry, Trusts § 128; Trench v. Harrison, 17 Sim. 111; Gaines v. Chew, 2 How. [43 U. S.] 619; McDonogh v. Murdoch, 15 How. [56 U. S.] 367. This same doctrine is recognized in Louisiana: Hall v. Sprigg, 7 Mart. [La.] 244; Rhodes v. Hooper, 6 La. Ann. 357; Giannoni v. Gunny, 14 La. Ann. 632; Livingston v. Morgan, 26 La. Ann. 646. The doctrine has been recognized and applied by the bankrupt court in this case, and Bell, who took the title in his own name to real property purchased with the money of the bankrupt estate has been compelled to convey to the assignee.

Now, the question is, does a judgment creditor of Bell who credited him long before he became assignee or acquired title to the property in question, and who has parted with nothing on the strength of Bell's apparent ownership of the property; does such a creditor stand in any better plight than Bell himself?

A judgment creditor is not a bona fide purchaser who is protected against a resulting trust. Story, Eq. Jur. § 410, note; Burgh v. Burgh, Cas. t. Finch, 28; Ex parte Howe, 1 Paige. 125; Keirsted v. Avery, 4 Paige, 14; Towsley v. McDonald, 32 Barb. 611; Moyer v. Hinman, 13 N. Y. 180; Rodgers v. Bonner, 45 N. Y. 379; Birchard v. Edwards, 11 Ohio St. 84; State Bank v. Campbell, 2 Rich. Eq. 179; Dunlap v. Burnett, 5 Smedes & M. 702; Money v. Dorsey, 7 Smedes & M. 15; Dozier v. Lewis, 27 Miss. 679; Watkins v. Wassell, 15 Ark. 73; Thomas v. Kennedy, 24 Iowa, 397.

But it is claimed for defendant that by the jurisprudence of this state as settled by the Code and the decisions of the supreme court, he in whose name the title is recorded must be held to be the owner as to third persons, and the latter are never required to look beyond the records. This may be true so far as it applies to bona fide purchasers or to creditors who become such after the paper title has passed to their debtor. But, as we have seen, Thompson is not a bona fide purchaser, nor is it claimed that the debt due him was contracted by Bell while the latter held the paper title to the property in question. To yield to the doctrine claimed by defendant would be to overturn the law of resulting trusts which is as firmly established in Louisiana as anywhere else. Livingston v. Morgan, supra, and other cases above cited. The right of the defendant to enforce his judicial mortgage upon the property in question is based on article 3328 of the Civil Code, which declares that "the judicial mortgage may be enforced against all the immovables which the debtor actually owns or may subsequently acquire." It is very clear that Bell never was the actual owner of the property purchased with the funds of the bankrupt estate. He was the apparent owner only. For when the bankrupt court ascertained the facts about his purchase of the property it compelled him to convey it to the bankrupt estate.

The defendant relies upon a number of cases decided by the supreme court of Louisiana, but none of them seem to me to be in point. The case of Tulane v. Levinson, 2 La. Ann. 787, is supposed to be conclusive of the point under discussion. In that case George F. Barney was the owner of a lot. On the 19th of March, 1842, he conveyed the lot by public act to Jacob G. Bartlett. The deed was not recorded in the office required by law in order to give effect to its inscription. A judgment was obtained against Barney on the 28th of April, 1842, and recorded in the proper office on the 3d of May following. The property was sold on an execution issued upon this judgment, and purchased by Tulane, and the court held the title of Tulane was good. Now, in that case the debt on which the judgment was rendered had

been contracted while the legal and equitable title was in Barney. Barney was the actual owner. His deed to Bartlett never took effect. Bartlett had an equity and the judgment creditor an equity, and the court merely decided that in such a case the legal title should prevail. In other words, the decision is that when one holding the legal title to property contracts debts which are in suit, and reduced to judgment, his property is liable to seizure on the judgment when obtained unless he has divested himself of title by an effectual conveyance. In the case under consideration, Thompson has not the shadow of an equity. His claim is the naked claim that his judgment recorded years before Bell was ever appointed assignee should be paid out of the funds of the bankrupt estate which Bell had misappropriated.

But it seems to me that the case of Tulane v. Levinson is fairly offset by the later case of Scott v. Hayden, 9 La. Ann. 336. In this case Hayden held the legal title to certain real estate. Hennen had recovered judgment against Hayden and had it recorded, and the question was whether the judgment was a lien upon the share of Mrs. Hayden's succession in the property, the same having been acquired during the community, and nothing appearing upon the record to show that the succession had any interest in the property. The court held that the registry of the judgment created a judicial mortgage on Hayden's share and not on the share belonging to Mrs. Hayden's succession. This case is later than the case of Tulane v. Levinson.

I am unable to come to the conclusion that the jurisprudence of this state would sanction so unjust and inequitable a claim as that set up by the defendant. His claim to be paid out of the proceeds of this sale of the property cannot be allowed.

Case No. 4,854.

FLANDERS v. TRIPP et al.

[2 Lowell, 15.] [1]

District Court, D. Massachusetts. April, 1871.

PILOTAGE—DISABLED VESSEL.

1. A vessel that is within pilotage ground, but disabled so that she cannot get into port without steam, is not bound to accept the offer of a pilot, or pay his fee.

2. A pilot is not bound to take charge of a disabled vessel for the usual pilot's fee.

[This was a libel in admiralty by John W. Flanders against George F. Tripp and others.] On the 5th of October, 1869, the respondent's ship, General Scott, on her return from a whaling voyage, was forced on shore near her home port of New Bedford, but was got off by her crew, and came to anchor near Round Hill light. The libellant, who was a branch pilot at New Bedford, saw the vessel at anchor, and went from that city with other persons such as usually visit a returning whaler, and was the first pilot that boarded the vessel. He found the mate in command, who informed him that the master had gone to town for a steamer and a pilot, and that the ship was unable to proceed without steam, by reason of an injury to her rudder. Some time afterwards the master came down with a steamer and a pilot, and the vessel was brought up to her wharf in safety. Whether or not the libellant actually served as pilot, or only offered his services and was refused, was the principal dispute of fact; though the extent of the injury to the rudder was not fully agreed.

G. H. Palmer, for libellant. By the laws of Massachusetts, the libellant has earned his fee, whether his services were accepted or rejected. St. 1862, c. 176; Smith v. Swift, 8 Metc. [Mass.] 329; Martin v. Hilton, 9 Metc. [Mass.] 371; Hunt v. Carlisle, 1 Gray, 257; The America [Case No. 289]; Com. v. Ricketson, 5 Metc. [Mass.] 412.

C. T. Bonney, for respondents. This ship was a wreck, and therefore not bound to accept the offer of a pilot. The master had, in fact, engaged a pilot before the libellant arrived.

LOWELL, District Judge. The facts of this case are not far to seek. The libellant boarded the ship in the hope of being the first pilot to reach her; and he was so; but the mate refused to employ him, alleging that the ship was not fit to be navigated by the power of her sails alone, and that the master had gone on shore for a pilot and a tug; which was true. The libellant made continual claim, so to speak; but his right to recover depends not upon a quantum meruit, for he rendered no services at the request or with the consent of the agents of the respondents, but upon his statute right, as being the first pilot to offer.

It is admitted to be the general rule, that the pilot who first offers his services to an inward-bound vessel, of the class mentioned in the law, has the first right, which the master may disregard, but under pain of paying the fee, as a debt recoverable against him or his vessel or owners in a civil suit. St. 1862, c. 176, Sched. 5; Com. v. Ricketson, 5 Metc. [Mass.] 412; The America [Case No. 289]; Ex parte McNiel, 13 Wall. [80 U. S.] 236. The respondents insist that there is an implied exception of vessels which cannot be navigated by the pilot without further assistance in the nature of a salvage or quasi salvage service. Upon this point I have not been referred to any decisions of the Massachusetts courts, and must therefore decide it upon my best judgment of the true intent of the statute. The better opinion is, that pilots are not bound to take

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

charge of a wrecked or disabled vessel for the established pilotage fee, because such vessels require for their successful navigation more than the ordinary skill, labor, and risk that pilots impliedly contract to give in return for that fee. They may, therefore, decline to act in such cases, if the master insists that he will only pay them wages: The Frederick, 1 W. Rob. Adm. 17. There are many other cases on the subject of pilots as salvors which virtually decide the same point, among the more important of which are Hobart v. Drogan, 10 Pet. [35 U. S.] 108; The Wave [Case No. 17,297]; on appeal [Id. 17,300]; Hope v. The Dido [Id. 6,679]; Lea v. The Alexander [Id. 8,153]; The Jonge Andries, Swab. 226; on appeal, 11 Moore, P. C. 313; Dexter v. The Richmond [Case No. 3,865]; The Hebe, 2 W. Rob. Adm. 530; The Susan [Case No. 13,630].

Some apparent discrepancies in the judgments of different courts may be reconciled by the consideration, that a pilot, once engaged on board a vessel, has become bound to render his best services, and is under an obligation, for the time being, somewhat analogous to that of the master; but before his engagement he is merely an officer appointed by public authority, enjoying a monopoly, and undertaking to render certain specified services, at whatever inconvenience short of imminent danger to his life, for a reward which the governing body has seen fit to prescribe as sufficient to compensate him. Such a person is not to set up the state of the weather, or any consideration of that sort, as making him a salvor; but to say that he is bound by his official position to do something entirely different from the duty which the very nature of the office points out, as, for instance, to tow the ship into port, without further compensation than a pilot's wages, cannot be maintained, and is not supported by the weight of authority. The decision of Judge Betts in The Wave, in which the subject was very fully and ably discussed, was reversed by the circuit court on the single ground that a statute of New York made it the duty of pilots to assist vessels in distress, and provided for an extra compensation, though not for salvage. The Wave v. Hyer [Case No. 17,300]. Two other cases in the same volume recognize the true doctrine that if pilots, not already engaged, are asked to perform duty which is not only pilotage, but something more, they are entitled to more than the pilot's fee. Hope v. The Dido [supra]; Lea v. The Alexander [supra]. What was done with the statute in the former of these cases, which appears to have arisen within the jurisdiction of New York, I do not know. As I find nothing in the statute law of this state that requires pilots to assist vessels in distress, or provides for any special mode of compensation in such cases, I consider that the general rule holds here, that they are not bound to be salvors, without salvage compensation. I am of opinion that the rule is reciprocal, and that as a pilot is not bound to take upon himself the duty of a salvor of a disabled vessel, without the advantages of that position, so a ship which stands in need of a salvage service is not bound to accept the offer of pilotage, if her need is for something more, which the pilot cannot supply. In this case, the General Scott would probably have been safe at her wharf long before the libellant discovered her, had it not been for the disaster which obliged her to anchor and wait for a steamer; and the master had actually engaged both a steamer and a pilot, though they had not yet reached the vessel. Under the circumstances, the offer to pilot the ship was an offer to do what no one could do until the ship was either repaired or taken in tow. If the ship had been coming up in tow, but without a pilot, or if the master had engaged a steamer, but not a pilot, the case might be different. I hold, therefore, that this ship was not bound to accept the offer of a pilot, under the penalty of paying his fee if his services were refused.

Case No. 4,855.

Ex parte FLANNAGANS.

In re CHAMBERLAINES.

[2 Hughes, 264;[1] 12 N. B. R. 230; 14 Am. Law Reg. (N. S.) 688; 4 Am. Law Rec. 304.]

District Court, E. D. Virginia. May 7, 1875.

CONSIGNMENT OF GOODS ON SALE—RIGHT OF CONSIGNOR TO EVIDENCES OF DEBT TAKEN FOR THE GOODS—BANKRUPTCY OF CONSIGNEE.

1. A consignment of goods under a special contract, in which the consignee gives his acceptances for their value, payable partly at sight and partly at a future day, and agrees to account for the whole price, to guarantee the sales, and to receive a commission of ten per cent., with other stipulations, making him primarily liable for the price of the goods, falls within the principle of Ex parte White (In re Nevill) 6 Ch. App. 397, and is a consignment on sale, as distinguished from a consignment on del credere guarantee.

2. Though a consignor may reserve a special property in goods consigned until bills of exchange, drawn for their price, are paid to the bill-holders, yet he cannot, in a consignment on sale to a consignee, in which no such special property is reserved to protect bills drawn upon the consignee for their price, reserve a special property in notes and accounts, which the consignee may take for the goods, from persons to whom the consignee may sell them, as against other creditors of the consignee, who goes into bankruptcy.

This case is heard on the petition of B. C. Flannagan & Son against the assignee of R. & H. Chamberlaine, bankrupts, claiming a special property in certain claims and accounts held by the assignee.

The facts of the case are stated by the judge in his decision, which was as follows: During the year 1873, B. C. Flannagan &

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

Son, manufacturers, of Charlottesville, Va., had dealings with R. & H. Chamberlaine, commission merchants, of Norfolk, in a manure called the Stonewall Fertilizer, under the following contract, made on the 6th of December preceding:

"December 6th. We propose to give you the entire agency for Stonewall Fertilizer, at Norfolk, and for the state of North Carolina, Raleigh excepted, on condition you push the sales and have a proper man to look after it, and to allow you a commission of ten per cent. for sales and guarantee. We to draw on you at sight or short time for $30 a ton. The price to be sold at is $65 in Baltimore. For balance, after paying $30, you to give your acceptances, say payable 1st December, 1873; accounts to be rendered and settlements after the selling season is over. No charge to be made for storage during the season. Any guano left over and not sold is to be at the risk and on our account. Respectfully, B. C. Flannagan & Son.

"Messrs. R. & H. Chamberlaine, Norfolk.

"P. S. We agree to furnish the guano delivered in Baltimore, 100 tons to be delivered in January, 1873, and balance as ordered by you. We will ship in lots to any point you may direct. B. C. Flannagan & Son."

Across the face of the above: "Accepted, December 6th, 1872. R. & H. Chamberlaine."

On the 7th January, 1874, at the solicitation of B. C. Flannagan, R. Chamberlaine met him in Richmond for a conference, when they signed the following paper, which was drawn by Flannagan, and which Chamberlaine with difficulty and reluctance assented to.

"January 7th. Whereas R. & H. Chamberlaine have sold as agents for B. C. Flannagan & Son, their Stonewall guano, during the spring of 1873, according to contract between them, dated December 6th, 1872, to which reference is hereby made; they having guaranteed said sales, and whereas, according to the terms of said contract, the balance due from said Chamberlaine to said Flannagan was due and payable December 1st, 1873, but owing to the failure of planters, to whom said Chamberlaine sold, to comply with their terms of purchase, the said Chamberlaine has found it impossible to meet his said acceptances at maturity, and in consequence some of them have gone to protest. The said Flannagan, in order to assist the said Chamberlaine and give more time for his collection from planters, has this day taken from the said Chamberlaine sundry acceptances, dated this day, and maturing at an interval of ten days running to 130 days inclusive, the proceeds of which he agrees and binds himself to use in payment of said protested acceptances. And as a further assistance to the said Chamberlaine, the said Flannagan agrees that if the said Chamberlaine finds it impossible to meet the said several acceptances, dated January 7th, at maturity, the said Flannagan will further assist him by a renewal of same, and will not allow them to be protested. The said Chamberlaine for his part agrees and binds himself to use all due diligence in collecting from the parties to whom he sold as agent of the Stonewall, and apply all proceeds from said parties strictly to the payment of the said acceptances, dated January 7th. It being understood and agreed that such collections are held by him as agent only, and belong properly to the payment of said acceptances aforesaid, he having sold as agent with the guarantee of payment. B. C. Flannagan & Son. R. & H. Chamberlaine."

The renewed acceptances were, ten of $1,500 each, and one of $1,000. This latter acceptance and one for $1,500, which two were the first to mature, were paid by the Chamberlaines. Those still remaining unpaid are for the aggregate sum of $13,500. The books of the Chamberlaines show that the amount of their actual indebtedness for the fertilizer, on the 27th April, 1874, was $13,143.59, exclusive of interest. They owed the Flannagans $368.09 on a cotton transaction which had no connection wtih the fertilizer. The amount of the outstanding accounts held by the Chamberlaines against planters for the fertilizer, on April 27th, 1874, was $13,974.04. The Flannagans brought an action at law on the acceptances in the summer of 1874. The effect of their suit was such, that in October, 1874, the Chamberlaines filed their petition in bankruptcy; and the suit stands suspended in the court of law. Under a consent order of this court in this case, the assignee in bankruptcy has been allowed to employ an agent for the collection of the debts due by planters for the fertilizer, who has made some collections. The unpaid claims against the planters for fertilizer will be of slow collection, and will not realize, by a considerable percentage, the amount due upon them. The Flannagans now come in by petition, setting forth the two contracts that have been described, and the condition of facts recited, and claiming not only that the Chamberlaines are bound for the amount of the unpaid acceptances, on which they have sued, but that the notes, accounts, and claims which the Chamberlaines held against the planters for the fertilizer, and which have passed to the custody of the assignee in bankruptcy, shall be turned over to themselves for collection; that when collected by themselves the amount realized from these claims shall be credited on the amounts due on the Chamberlaines' acceptances; and that the debt of the Chamberlaines shall be treated as a fiduciary debt, and dealt with as such in considering the petition of the Chamberlaines for discharge. The questions arising upon the two contracts are chiefly im-

portant with reference to the petition of the bankrupts for a discharge, though that petition is not yet before the court for hearing.

W. W. Old, for petitioners.
John S. Tucker, for assignee.

HUGHES, District Judge. The questions to be decided are these, viz.: 1st. Were the shipments of this fertilizer under the contract of December 6th, 1872, a mere consignment on a del credere guarantee, or were they on sale? 2d. If on sale, did the shipments pass the whole property in the fertilizer to the Chamberlaines, or was there a special property reserved constituting in favor of the Flannagans a preferred claim upon the proceeds of the fertilizer in the hands of the Chamberlaines?

1st. It is clear that the contract of December 6th, 1872, did not provide for consignments to the Chamberlaines as ordinary factors, for sale on the usual commissions. Nor did it provide for consignments upon the ordinary del credere commission of guarantee. Had it done either of these things, the well-settled law, either of simple or del credere agency, would have clearly determined the rights and liabilities of the parties.

But these consignments were not made upon any sort of implied contract. They were made upon an express contract, definite in terms, written and mutually signed. We cannot therefore go out of such a contract to the law of general consignments, or of del credere agencies, to ascertain the rights and liabilities arising from their own stipulations, of these parties. It is only when there is no special contract that the general law of agency applies between consignor and consignee; for it is always competent for persons in this relation to contract according to their pleasure, and thus vary or restrict, or enlarge, the general liabilities implied by the law in absence of express contract. Story, Ag. § 334.

What were the provisions of the contract of December 6th, 1872? The Chamberlaines were to be responsible for all the sales of the fertilizer which they should make. They were to be themselves primarily responsible. They were to discharge this responsibility by acceptances payable at sight or on short time as to part, and at a future day as to the residue of the price of the fertilizer. They were to have a commission of ten per cent., not on their own sales, but on the price of the article fixed in advance by the consignors. They were, at the end of the season of business, to be credited with so much of the article as should then remain on their hands. They were not to charge storage upon the fertilizer, but if any of it remained on hand after the season was over, they were then to be entitled to storage on such surplus. In the contract, the terms "agency," "guarantee," and "commission" are used, implying that the parties considered that in the transactions about to be made they should hold the relation to each other of principal and agent.

The question is whether this contract constituted the Chamberlaines purchasers of the fertilizer, or merely agents for its sale on a del credere guarantee. If the contract in its terms really constituted them purchasers, the use of words implying that they were agents does not change the fact. "Persons may suppose that their relationship is that of principal and agent, when in point of law it is not." Ex parte White, In re Nevill, 6 Ch. App. 403. If the consignments were a sale, they were a final sale as to the portion of the fertilizer which should be disposed of during the season by the Chamberlaines; and, as to the portion remaining over at the end of the season, they were consignments on "sale or return."

Upon the authority of the case of Ex parte White (In re Nevill), above cited, and of section 215, Story's Agency, about to be referred to, I think the consignments were a sale, and not a shipment on a del credere guarantee. For here the obligation of the Chamberlaines to pay for the fertilizer at a fixed price, and a fixed time, was clearly established by the contract. They were primarily liable to the Flannagans for the fixed price on their acceptances. They might sell to planters at a different price so far as the obligation imposed by the contract was concerned. If the planters were to be liable to the Flannagans at all, they were to be so only secondarily. The Flannagans looked to the Chamberlaines only, and did not know the planters in the whole transaction.

The now well-settled law of del credere guarantee is that the factor is not the primary debtor; that his engagement is merely to pay the debt if it is not punctually paid by the person to whom he sells; that he stands more in the character of a surety than a debtor; and that he is not liable to pay the debt until there has been default by the person who buys from him. Story, Ag. § 215, citing numerous English and American cases. Can it be pretended that the stringent contract of December 6th left the Chamberlaines in the secondary and optional relation to the Flannagans thus described, in respect to the article which they paid for as it arrived with their acceptances? Lord Justice Melish, in Ex parte White (In re Nevill), distinguishes between consignments on del credere guarantee and those on sale in the following explicit language: "If the consignee is at liberty to sell at any price, and to receive payment at any time he likes, but is bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contracts of sale which the consignee makes with the persons who purchase from him are not contracts made on account of his principal, for he is to pay a price which may

be different, and at times which may be different from those fixed by these contracts. He is not guaranteeing the performance by the persons to whom he sells, of their contract with him, which is the proper business of a del credere agent; but he undertakes to pay a certain fixed price for the goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells; and my opinion is that, in point of law, the alleged agent in such a case is making, on his own account, a contract of purchase with his alleged principal, and is again reselling."

The Flannagans themselves treated the consignments as a sale to the Chamberlaines. After the acceptances, which they received under the contract of December, 1872, had matured, and been protested, they did not treat the Chamberlaines as their debtors on open account, in the direct character of guarantors of the sales which had been made to planters, but they treated them as directly indebted on the acceptances which remained unpaid. If the Chamberlaines had been guarantors only, their liability would not have been fixed until after proper means of collecting the dues from planters had been exhausted. But the Flannagans declined to look to them in that character. They treated them as already indebted, and dealt with the unpaid acceptances as the evidence of their indebtedness.

Even supposing the Flannagans, by the terms of the contract of December, 1872, to have reserved for themselves the option of treating the Chamberlaines either as agents or as purchasers at pleasure, yet, by the contract of January, 1874, they availed themselves of this option, and did elect to treat them as purchasers; for they accepted a novation of new acceptances in place of the old ones for the whole value of the fertilizer not yet paid for. It is true that the Flannagans did, to the latter contract providing for the novation, append a clause in the following words, viz.: "It being understood and agreed that such collections are held by Chamberlaine as agent only, and belong properly to the payment of said acceptances, having sold as agent with his guarantee of payment." But the most that can be claimed for this stipulation in determining the question whether the consignment was upon purchase or guarantee, is that it preserved to the Flannagans the option of electing afterwards, and a second time, whether to rely upon the new acceptances for payment of the moneys due them, or to resort to the notes and accounts due from the planters. Supposing this right of choosing between these alternatives to have been reserved, still, even in that case, the choice of the Flannagans, thus reserved, was made in the summer of 1874, when, instead of going against the planters as first liable to them before the Chamberlaines were so as guarantors, they ignored the planters, and brought suit against the Chamberlaines on their acceptances.

If the Chamberlaines were liable as purchasers, then the Flannagans had a right to sue them on their acceptances. If they were not liable as purchasers, but only as guarantors, then they could have been sued only after the remedy against the planters had been exhausted, on open account.

Upon the whole case, therefore, I am of opinion that not only did the contract of December, 1872, and the transactions of 1873 under it, make the Chamberlaines purchasers instead of agents, but the Flannagans, in the contract of January, 1874, and in the suit brought in the summer of that year, themselves elected to treat them as such, and committed themselves to that view of the contract.

It may be admitted that if the terms used in the writing of January, 1874, had been employed in that of December, 1872, it would have been difficult to resist the conclusion that the consignments made under it were to the Chamberlaines as agents and not as purchasers. But the second contract came too late to have any effect upon the dealings. If the original paper of December, 1872, provided for a sale, and the transactions under it were those of sale and purchase, then the contract of January, 1874, made after all the dealings were over, could not, by any language put into it, change their character already fixed and determined. Nor could the agreement of the Chamberlaines in January, 1874, to apply their collections from the planters to the payment of the acceptances, change the previously fixed fact that they were purchasers, if they really were so. That agreement was a merely voluntary one to comply with an obligation of honor.

2d. Having concluded that the consignments of the Flannagans to the Chamberlaines were made to the latter in the character of purchasers, and not of agents, it is next to be inquired whether the sale was absolute or qualified. The principle of the leading case of Jenkyns v. Brown, 14 Q. B. 496, is that when a consignment is made, and bills of exchange are drawn for the value and bills of lading are sent to a third person to be delivered on payment of the bills of exchange, a sale is made, in which a general property passes to the consignee, and a special property is reserved by the consignor until the payment of the value. In other words, a sale may take place on a consignment, although a special property in the thing consigned be reserved by the consignor.

In the leading case of the Bank of Ireland v. Perry, L. R. 7 Exch. 14, it is decided that where a consignor reserves a special property in the goods consigned, that special property follows the goods in favor of the holder of bills of exchange drawn against them, when the consignee goes into bank-

ruptcy or composition. The principle on which the bill-holder is allowed the benefit of this special property, as against other creditors of the insolvent, is explained by Bispham, in his recent tract on Contracts in Rem, to be that under the original consignment a jus in rem in the goods is acquired by contract, as against the world, by the drawer of the bills in favor of himself and the persons holding the bills for him; and, that being a jus in rem against the world, this special property follows the goods into the hands of assignees or trustees of an insolvent consignee. If this principle be not yet conceded in courts of law, it fully obtains in courts of equity, and must be applied in this court.

I think that the intention of the Flannagans to reserve a special property in the proceeds of the fertilizer sold by the Chamberlaines to planters is too plain to be denied. But was that intention effected? The principle of the two cases just cited is that the consignor may reserve a special property in the goods consigned, for the protection of bills which he himself draws against the goods; but they do not go so far as to hold that he may reserve a special property in favor of himself in bills which his consignee may draw upon sales of the goods which the consignee shall make. Courts of law have scarcely yet recognized the principle of the cases of the Bank of Ireland v. Perry, above cited, and of Ex parte Waring, 19 Ves. 345, and courts of equity have not advanced so far as to allow the original consignor to bind the proceeds of goods after they have been received by the consignee and sold to second consignees or purchasers. The law would have allowed the Flannagans to bind the goods in favor of the holder of the drafts drawn by themselves, but it would not follow the sale of the goods by the Chamberlaines and bind in favor of the Flannagans the notes and accounts taken by the Chamberlaines. If the Chamberlaines were not acting in their own right and were responsible, the concluding clause of the contract of January 7th, 1874, would bind undoubtedly the notes and accounts due from the planters in favor of the Flannagans as against the Chamberlaines. But the bankruptcy of the latter has thrown these notes and accounts into the hands of their assignee, subject to the rights of other creditors; and it would be carrying the doctrine of jus in rem too far to hold that the Flannagans have a special property in those notes and accounts, as against general creditors. I am bound to decide, therefore, that the Flannagans have no special property in the notes and accounts due from planters for the fertilizer sold by the Chamberlaines, and that these choses in action are part of the general assets in this cause.

FLANNERY (DEAN v.). See Case No. 3,707.

Case No. 4,856.

FLANNERY v. The ONTARIO.

[1 Am. Law J. (N. S.) 436; 4 Pa. Law J. Rep. 312.]

District Court, E. D. Pennsylvania. Dec. 2, 1848.

COLLISION — TOWING ON RIVER — UNWIELD AND EXCESSIVE TOW.

[1. The number and size of the vessels which a tug or steamer takes in tow, and the manner of arranging them, should have careful relation to her power of regulating their movements, and to the nature of the voyage, the number of vessels to be passed or encountered, and the facilities of the particular navigation.]

[2. A steam boat engaged in towing has no right, in a narrow river like the Schuylkill, to attach three canal boats to each side of her guards, while towing four others behind, and, in case of collision, she must be held blameworthy for so doing.]

In admiralty.

Fish and Hazlehurst, for libellant.

W. G. Smith, for respondent.

KANE, District Judge. The steamer Rappahannock was descending the Schuylkill on the 12th of June last, having a number of canal boats in tow. Three of these were attached on each side of her guards, and four others were towed astern. The steamer with her ten boats occupied a space of 168 feet in length, by 128 feet in breadth. The wind and tide were with her. She had reached the lower part of the river, near the Rope ferry, where the channel having six feet of depth at half tide, extends over some 450 or 500 feet in width. At this time the schooner Ontario was beating up, and in her immediate vicinity. Both did what was in their power to prevent collision; but in the judgment of the experienced ship masters, who favored me with their advice as assessors, a collision had become inevitable. The result was, that the schooner struck one of the canal boats in tow of the steamer, and sunk her; and this libel is filed by the proprietor of the sunken boat to recover his damages.

As no blame is imputable to either party, other than is implied in this statement of the facts, the case would at first seem one of those in which by the maritime law each party bears his own loss. But, viewed more closely, there are circumstances connected with it which might justify the application of a still severer rule against the complainant. I readily agree that some of the rules which are obligatory on ordinary steamers when meeting sail vessels, are inapplicable to steam tugs engaged in towing. The superior control over her movements, which belongs to a steamer, her power to vary or arrest, or even reverse her course at pleasure, and which enable her generally to avoid collisions, do not belong to the steam tug, which gives a secondary impulse to a fleet either attached to her sides or following in her wake. The momentum of the system, of

which, under such circumstances, she forms part, may be altogether too great for sudden control. In a case, therefore, where the steam tug had neglected no precaution, I should be unwilling to hold her liable to the same extent or under the same law as a detached steamer.

But to exempt herself from liability on this score, she must be careful not to heighten the risk of herself and others by any want of prudence either in the disposition of her convoy or in the manner of navigating it. The number and size of the vessels which she takes in tow should have careful relation to her power of regulating their movements, and to the nature of the voyage, the number of vessels to be passed or encountered by the way, and the facilities of the particular navigation. On the open bay, or in some of the comparatively unfrequented sounds and inlets of the coast, she may occupy a larger space, and move with less anxious caution, than in the narrow, eccentric and crowded channel of a river like the Schuylkill. Where the voyage is necessarily attended by special hazards, she must sedulously avoid enhancing them. The state of the tide and of the wind are to be regarded, because these may be such as materially to impair her effective power. Where the channel becomes more tortuous or difficult, and other vessels are approaching, she should take that position in the river which may best allow them to pass her, moderate her speed, and stand ready in case of emergency to cast off from her guards and let her whole train of boats pass astern. The steamer in this case, and her train, including the complainant's boat, engrossed a much greater portion of the river than they had a right to. The wind and tide were with them, and the moving mass under their influence as well as that of steam, was undoubtedly too great to be at once arrested or adequately controlled by any action of the steamer's engine.

The captain of the steamer did his best, no doubt, to avert the accident, when he found himself close on the schooner; but it is plain, also, from the evidence, that the schooner could not then escape the collision by any effort of seamanship. Without invoking the rule, therefore, which denies recourse to the libellant where no immediate blame is imputable to the other party, I dismiss the libel on the ground that the steam tow was to blame in spreading itself so widely over the channel.

The gentlemen who heard the case with me, and whose familiarity with the subject of our river navigation gives great value to their suggestions, have communicated to me a few rules, which, if generally observed, may in a great degree prevent such accidents as the one we have been considering. I have, of course, no right to prescribe them as imperative: but they seem to me so reasonable, that, as at present advised, I shall adopt them for my guidance in cases hereafter to arise. They will be appended to this opinion.

The decree of the court is for the respondent, but in consideration of the peculiar circumstances, it will not carry costs.

PER CURIAM. Decree accordingly.

Rules proposed by Captains Gulager and Pedrick, referred to in the foregoing opinion:

We have carefully considered the subject of the collision occurring upon the river Schuylkill, and would respectfully suggest the following regulations, as proper to be observed in the navigation of that river, with the view of diminishing their frequency: 1. That all steam tow boats, bound up or down said river with vessels in tow, be required to keep as near the right hand or starboard shore as their respective drafts of water will permit. By this arrangement vessels bound up the river in tow of a steam boat, will keep nearest the eastern shore, and those bound down to the west; leaving the mid-channel for sailing vessels. 2. That in consequence of the general narrowness of the channel of the Schuylkill, steam tow boats should avoid placing more than one vessel on each side or abeam, but shall tow the remainder astern. 3. That sailing vessels be prohibited from passing between the tow boats so employed and the shore they occupy, as above mentioned. 4. And as it frequently occurs, that several vessels bound in the same direction are obliged to pass near to each other when sailing on opposite tacks, beating to windward in narrow channels, and much damage by collision takes place in consequence of neither vessel being willing to lose ground by giving way; we recommend that the law of the English waters be adopted in such cases, viz: That the vessel on the starboard tack keep her wind, or not alter her course; but the vessel passing her on the opposite or larboard tack, shall if necessary keep away, and pass astern of the vessel first mentioned. Respectfully submitted, C. Gulager. S. Pedrick.

Case No. 4,857.

The FLASH.

[1 Abb. Adm. 67.] [1]

District Court, S. D. New York. Dec., 1847.

AFFREIGHTMENT—PERFORMANCE WITHIN A STATE—LIBEL IN REM FOR REFUSAL TO RECEIVE OR DELIVER CARGO.

1. The master of a New York vessel contracted, at the port of New York, to transport a cargo across the East river to Brooklyn,—a voyage less than a mile in length, but across tide waters. He took a part of the cargo on board, but afterwards refused to take on the residue, or to deliver that already laden. *Held*, that an action in rem would lie both for the refusal to receive on board and the refusal to deliver; notwithstanding that the contract was

[1] [Reported by Abbott Brothers.]

made in the home port, and for a voyage of so local a character, and notwithstanding that only a portion of the goods were received on board.

[Cited in Oakes v. Richardson, Case No. 10,390; The Williams, Id. 17,710; Scott v. The Ira Chaffee, 2 Fed. 403.]

2. By the general law maritime, the vessel is bound to the shipper for the performance of a contract of affreightment made with the master, whether by charter-party, by bill of lading, or by parol.

[Cited in The Aberfoyle, Case No. 16; Scott v. The Ira Chaffee, 2 Fed. 403; The Monte A., 12 Fed. 333.]

This was a libel in rem, by William Churchill against the schooner Flash, to recover damages for the non-fulfilment of a contract of affreightment.

The libel alleged that an agreement was made by the master of the schooner with the libellant, to take on board the vessel, at her wharf in this city, a cargo of bricks, thirty-five thousand in number, and to transport them over tide waters,—namely, across the East river to the city of Brooklyn,—for a stipulated freight; that the vessel received on board eight thousand of the bricks; that the master had refused to deliver such part to the libellant, pursuant to the shipping contract; and that he left on the wharf in the city of New York the residue of said cargo, which had been delivered there by the libellant, ready to be taken on board, and had refused to receive and transport them according to the contract of affreightment.

The claimant, who was the owner of the vessel, demurred to the libel upon two grounds:—

1. That the court had not jurisdiction to enforce, in rem, an agreement to take and carry freight.

2. That the master of a domestic vessel had no authority to bind her while in her home port, upon a contract like the one here set up.

The cause now came before the court on the demurrer.

T. B. Scoles, for claimant.

I. The ship is tacitly hypothecated for the obligations contracted by the master, only "when acting in the quality of master, and within the scope of his authority as such." The jurisdiction of the admiralty to proceed against the ship in specie, on the ground that she is security for the merchant who lades goods on board, is altogether denied in England. Abb. Shipp. 161. It is recognized here under certain restrictions, but conceded to be "entirely due to modern invention." The Rebecca [Case No. 11,619]. But all the cases upon this subject are for injuries done to the cargo during the voyage. Cleirac, c. 58, 63, 259. See the cases collected in Abb. Shipp. (Ed. 1846), 161, note. No lien exists for a refusal to take the merchandise on board the ship, nor for a refusal to perform the voyage after the merchandise has been taken on board.

II. Conceding that the vessel could be bound for damages arising from a refusal to perform a contract to convey goods, this libel does not show a contract binding upon the owners; and it is only a contract binding upon the owners which creates a lien upon the vessel. The Waldo [Case No. 17,056]; The Casco [Id. 2,486].

1. The libel alleges a contract to transport a quantity of bricks, made with the master, in the home port of the owner, which "is not incident to his general authority as master, nor can it be presumed, under such circumstances, as an ordinary superadded agency." The Tribune [Case No. 14,171].

2. There is, moreover, no allegation in this libel that the contract was made with the knowledge or consent of the owners, nor are any circumstances shown from which the inference can be drawn that it was with their approbation, or that he had any authority to make it, or that they subsequently assented to it. On the contrary, the libel expressly avers that the owners dissented, and refused to affirm or perform the contract alleged to have been made with the master; this is the very gravamen of the complaint.

William Jay Haskett, for libellant, contended that the vessel was bound in rem, both by the failure to deliver the portion of cargo taken on board, and for the failure to perform the contract as to that which was not taken on board. Abb. Shipp. 161, and notes; The Rebecca [supra]; The Phebe [Case No. 11,064]; The Paragon [Id. 10,708]; The Volunteer [Id. 16,991]; The Reeside [Id. 11,657].

BETTS, District Judge. By the maritime law, an affreightment of goods on board a vessel operated reciprocally as a tacit pledge or mortgage of the vessel to the shipper for the conveyance and delivery of the goods according to the contract, and of the goods themselves to the ship to secure payment of the freight earned. Abb. Shipp. 160; 3 Kent, Comm. 162. The lien to the shipper arises alike, whether the contract of affreightment be by charter-party, by bill of lading, or by parol. This principle is fully discussed in the case of The Rebecca [supra]. That case shows very satisfactorily that the obscurity which is to be found in the English system of admiralty law upon this subject is attributable, not to any doubt of the existence of a lien upon the vessel for the performance of the contract of affreightment, but to the fact that the courts of common law in that country have assiduously interposed to restrain the court of admiralty from taking cognizance of the contract. And by a full examination of the continental authorities, both ancient and modern, it is shown to be an established principle of the general law maritime, that the vessel is liable in rem for the performance of the con-

tract of affreightment entered into by the master. See, also, The Phebe [supra]; The Paragon [supra]. These views are fully supported, so far as relates to foreign voyages upon the high seas, by other authorities, which clearly show that the hiring of the vessel, or of any portion of her for a voyage, or an agreement for transportation of goods by her upon the high seas, binds her to the fulfilment of the contract, and this, whether it be evidenced by charter-party, by bill of lading, or by verbal agreement only. The Volunteer [supra]; The Reeside [supra]; The Tribune [supra]; The Waldo [supra]; The Casco [supra].

This principle does not require, as was contended by the counsel upon the argument, that the goods should actually be on board the vessel, to raise the lien. There are, indeed, many classes of liens which rest upon possession, actual or constructive, as their basis. If the basis of a lien claimed upon such contract rested in a figurative possession of the vessel, imparted to the shipper by lading his goods on board, there would be force in the argument, that no lien was acquired until the actual lading of the goods was accomplished. But such is not the principle from which the liability of the vessel is deduced. It is grounded upon the authority of the master to contract for the employment of the vessel, and upon the general doctrine of the maritime law, that the vessel is bodily answerable for such contracts of the master made for her benefit.

Had the undertaking, then, in this case, been for affreightment to the West Indies or to New Orleans, the case would have come within the doctrine of the maritime law, clearly established by the decisions and elementary writers—the contract being a positive contract of affreightment, and not a mere agreement leading to such contract.

It is contended, however, that the present case does not come within the scope of the doctrine above laid down, for the reason that the contract was entered into by the master on behalf of the vessel, at her home port, where, it is urged he has no power to bind the vessel by any such agreement.

The authority of the master, at her home port, to make engagements for a vessel in the course of her ordinary employment, is always implied. To relieve the vessel from responsibility upon such engagements, the dissent of the owner must be shown. Curt. Merch. Seam. 168; Abb. Shipp. 156, 159, and note; General Interest Ins. Co. v. Ruggles, 12 Wheat. [25 U. S.] 400. It is true that this presumed authority has been said not to extend so far as to authorize the master to make a charter of the vessel at her home port. The Tribune [supra]. But if this distinction is sound, it does not affect the application of the principle to the present case, which is a contract to receive and carry cargo under the charge of her master, and not a letting of her out of his possession. If, therefore, this had been a sea-going vessel, and the contract had related to a foreign voyage, the authorities would, in my opinion, leave no ground on which the claimant could contest the liability of the vessel, as well for the refusal to take on board the portion of cargo left behind as for the failure to deliver that which she carried out.

The controversy upon this point is no doubt induced by the peculiar character of the undertaking of the master and of the employment of the vessel. She was, it seems, engaged in the carriage of cargoes from the city of New York to landing places at the city of Brooklyn, running merely across the river or bay, and probably making no trips exceeding a mile in distance. The pleadings, however, present the facts that this was a contract for a maritime service, to be performed by a vessel upon tide waters, and that the master having taken on board a part of the cargo, refused to receive the rest, and also detains on board and refuses to deliver, according to the contract of affreightment, the portion taken on board.

The distance of transportation or the danger of navigation is nowhere declared an element essential to the liability of the vessel upon a contract of affreightment.

An undertaking to carry a cargo to ports or places up the Sound, or to Staten Island or Rockaway, would be subject to the same objection. Neither of these trips would be a foreign voyage. The decisions upon this subject rest upon principles which render them applicable as well to that species of carriage as to any other kind of coastwise navigation. In this court it has been repeatedly decided, that vessels engaged in navigating the Sound, or the tide waters of the harbor, or of the North river, have become subject to the rules of maritime laws, applicable to those engaged in voyages to other states or upon the high seas. This may be regarded as in effect determined, in the recent decision of the supreme court of the United States. Waring v. Clarke, 5 How. [46 U. S.] 441. And it is understood, that in so far as the jurisdiction in rem of the admiralty courts is concerned, that court also held, in the case of New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. [47 U. S.] 344 (argued at the same term, but ordered to re-argument upon the question of jurisdiction in personam,) that admiralty jurisdiction, in cases of contract, is not determined in this country as in England, by the mere matter of locality, but obtains wherever the subject-matter of the contract is of a maritime character.

Upon these grounds I think that the libel, upon its face, shows an adequate cause of action in rem. The demurrer is accordingly overruled, with costs.

The cause came again before the court, for final hearing, in January, 1848, and the proceedings then had are reported—The Flash [Case No. 4,858]—under that date.

Case No. 4,858.

The FLASH.

[1 Abb. Adm. 119.] [1]

District Court, S. D. New York. Jan., 1848.

AFFREIGHTMENT—AUTHORITY OF MASTER TO CONTRACT IN HOME PORT — REPUDIATION BY OWNERS—LIABILITY OF VESSEL — MEASURE OF DAMAGES.

1. The master of a vessel having contracted for the transportation of a cargo, the performance of the contract was interrupted while the lading of the cargo on board was going on, by the death of the master, and by the freezing up of the vessel. The owner repudiated the contract, and refused either to take on board the residue of the cargo or to deliver up that already laden. *Held*, that the contract was binding upon the vessel and owner.

2. The owner was, under the circumstances, entitled to indulgence for a reasonable time, both to procure a new master and to await the relief of his vessel.

3. Upon the owner's refusal to be bound by the contract, the libellant was entitled to proceed against the vessel for his damages.

4. The libellant could recover damages for the value of the brick laden on board and withheld;—for the cost of transporting the residue from his store-house to the dock;—for any injuries received by them while they lay there awaiting the owner's acceptance;—and for the difference in his disfavor, if any, between the contract price of transportation and his actual expenses incurred in obtaining another mode of conveyance.

[Cited in The Oregon, 55 Fed. 676.]

5. The libellant could not recover against the vessel for injuries received by the property after notice of the owner's refusal to complete the contract, but the vessel was chargeable with the cost of transporting the portion of cargo left behind, to its place of destination.

This was a libel in rem, by William Churchill, against the schooner Flash, to recover damages for the non-fulfilment of a contract of affreightment. The cause was before the court in December, 1847, upon demurrer, and the proceedings thereupon are reported in The Flash [Case No. 4,857], where the substance of the libel is stated. It alleged that the master of the Flash, which was a New York vessel, contracted with the libellant, at New York, to carry a cargo of bricks in the schooner, from New York to Brooklyn; that the master took a portion of the cargo on board, but afterwards refused either to deliver up that portion or to take on the residue. The cause now came up for hearing upon the pleadings and proofs. The facts relied upon as a defence appear in the opinion.

William Jay Haskett, for libellant.

J. M. Cooper, for claimant, contended that the contract set up by libellant was one only binding upon the master personally, but not upon the owner, and, therefore, did not bind the vessel (The David, 1 Rob. 301; Abb. Shipp. 161); and that no breach of contract had been shown, the performance having been interrupted by "the act of God."

BETTS, District Judge. The court has already decided upon the demurrer in this cause, that the contract set up in the libel was one for the non-performance of which the libellant is entitled to a remedy in this court against the vessel herself.

It appears to me that the testimony adduced by the libellant upon the hearing substantiates the material allegations of the libel. The only important ground of defence upon the facts is, that there was no breach of the contract, but only a delay in its fulfilment, arising from "the act of God."

The facts shown in support of this defence are, that while the vessel was engaged in taking on board the cargo of brick, the master was injured by a fall, in consequence of which he died a few days afterwards. During the time he survived and remained on board the vessel, the physicians forbade the loading to go on, because of the injury likely to result from it to him in his enfeebled condition. He was carried round in the vessel, from the place she lay, to the foot of Hammond street, in this city, and there landed. Had the vessel returned to her previous station immediately after landing the master, she might, as the evidence shows, have completed her loading, and have conveyed the entire cargo to Brooklyn, its place of destination, without impediment from the weather; but she delayed several hours needlessly at Hammond street, and was in consequence frozen in at that dock, and thus prevented going on with the execution of the contract until after this suit was commenced. The libellant sent an agent to confer with the owner in respect to the completion of the contract, and on the first interview the owner manifested a disposition to continue and fulfil the undertaking entered into by the master; but upon the second application to him he positively refused to do so.

I do not think the short delay at Hammond street, although followed by the freezing in of the vessel, could have operated as a breach of the contract; and if the owner had proffered a fulfilment on his part, to be made as soon as the vessel could be extricated from the ice (Bowman v. Teall, 23 Wend. 306; Parsons v. Hardy, 14 Wend. 215), I should have regarded him free from liability as for a wilful neglect to perform it. Under the circumstances of the case, he would be entitled to a fair indulgence for time, both to replace the master and also to await the relief of the vessel from her confinement in the ice, had reasonable exertions been used by the owner to complete the undertaking for the vessel. Story, Bailm. § 545a.

But instead of thus offering to complete

[1] [Reported by Abbott Brothers.]

the agreement as soon as performance should be within his power, the owner repudiated his obligation, and positively refused to fulfil it at any time. This refusal is the gist of the owner's defalcation, and properly subjects the vessel to the consequences of not performing the engagement made by the master. There was no vis major or inevitable accident which released the vessel from proceeding in a reasonable time to complete the undertaking. The owner having taken the ground that he would not perform that engagement at all, the libellant became entitled to proceed against the vessel, and to recover the damages incurred by reason of the violation of the contract already entered upon, and in part executed.

In respect to that portion of the cargo which was taken to the vessel and not received on board, the libellant may rightfully claim the reimbursement of the expenses of transporting it from his storehouse to the ship at the dock from which it was to be laden on board, as well as compensation for any injuries received by the cargo while it lay there awaiting the convenience of the vessel to receive it on board. It must from that time be considered as delivered alongside the vessel, and the shipment, so far as libellant was concerned, must be taken to have been then completed. But it not having been received on the vessel, there may be a question whether the ship is responsible for its value, or for the subsequent expenses incurred in removing or securing it ashore—the libellant having been expressly notified by the owner of the vessel that he repudiated the contract of the master for its transportation. If the libellant elected to leave his property exposed after that notice, the loss consequent upon that exposure must be recovered for against the owner personally, and not by action against the vessel in damages for the violation of his contract of carriage. The damages in that respect, for which the vessel is liable as consequent to the neglect to transport the whole cargo offered the vessel, would be the expense incurred by the libellant in procuring the delivery at the place of its destination of that portion which was left behind, as being incidental to the placing it under the control of the vessel; but not the consequential damages flowing from taking charge of it on land after it was abandoned.

The value of the brick laden on board the vessel, and not conveyed and delivered according to contract at the time the suit was instituted, is a lien upon the vessel, and must be satisfied by her. 3 Kent, Comm. 162, 218. I find it stated, upon the brief of the claimant's advocate, that that part of the cargo has since been delivered according to the agreement. This, however, does not appear upon the proofs, and accordingly the value of that part of the cargo must be inquired into upon a reference, and the libellant must receive compensation for the amount in the final decree.

Reference ordered.

Case No. 4,859.

The FLASH.

[Blatchf. Pr. Cas. 183.] [1]

District Court, S. D. New York. June, 1862.

PRIZE—VIOLATION OF BLOCKADE.

[A schooner with a cargo of salt, soap, oil, and paper, which had cleared from Nassau for New York, was in fact destined for Charleston, if she could get into that port; otherwise, to New York. She was found off Charleston May 2, 1862, chased five hours at sea, and run into an inlet of that port. Being unable to escape, she was run ashore, and set on fire by her crew. *Held*, that vessel and cargo should be condemned for attempting to violate the blockade.]

BETTS, District Judge. This schooner and cargo were seized, May 2, 1862, near the coast of South Carolina, off Caper's island, about fourteen miles northerly from Charleston, by the United States bark Restless, and were brought into this port May 12, thereafter, and libelled in this suit May 19. The attachment issued thereon was returned on the 10th of June thereafter, duly served, and no person appearing thereto, and proclamation having been made in open court, interlocutory judgment by default was rendered, according to the practice of the court.

On the evidence before the court it appears that the schooner was chased for five hours at sea by the capturing vessel, and ran into an inlet of the port of Charleston, and, not being able to escape, was run on shore, and set fire to, and abandoned by her own crew, who then all escaped on shore. The Flash was thereupon taken possession of by the boats of the capturing ship, and made subject to these proceedings.

The vessel, as appears by her registry, found on board at her capture, was an American bottom in build, but was registered at Nassau, N. P., in the Bahamas, November 24, 1860, to Mordecai Bethel and Silvanus Bethel, British subjects. Subsequent registers were indorsed upon the registry, April 21, 1862, and Robert H. Sawyer and Ramos A. Menendez were recorded as owners, and John Smith was registered as master, April 19, 1862. The shipping agreement, also found on board, was by the master and crew, for a voyage from Nassau to New York, and back to Nassau, and was dated April 16, 1862, and was between John Smith, master, and the crew named.

The clearance of the vessel and cargo, the latter consisting of salt, soap, oil and paper, were made at the port of Nassau on the 19th of April last; and two bills of lading and

[1] [Reported by Samuel Blatchford, Esq.]

one invoice of salt, and a letter of advice for the shippers to the consignee, were on board of the vessel at the time of her arrest. The documentary proofs thus found evince an honest voyage from a neutral port to one of our own ports, with a lawful cargo, in a legal trade.

Upon proof that none of the company of the captured vessel had been arrested on her seizure, or could be produced in court as witnesses in this suit, the court, on motion of the district attorney, ordered that the prize-master, Charles Smith, be examined as a witness in the cause, before the prize commissioners, in preparatorio. He says that he is a citizen of the United States, and was present at the capture of the schooner Flash and cargo; that she was, at the time, attempting to enter the port of Charleston, which was then under blockade; that, when first seen, she was heading off; that she then altered her course inward, and was evidently bound into the port; that she was fired at, and struck in the sails, and was then run on shore, set fire to, and abandoned by her crew in a small boat; and that they took with them all her papers, except her log-book.

Before the close of the proceedings, the master and mate and one seaman of the crew having been sent to this port on board of a United States vessel, were produced as witnesses by the district attorney, and were examined in preparatorio before the prize commissioners. The master and mate testify that the vessel was owned and laden at Nassau, by British subjects, and was destined for Charleston, if she could get into that port, otherwise, to New York; that she had got inside of the blockading vessels before she was run ashore, and had broken the blockade; and that the cargo was to be delivered at Charleston for the account of the shippers. The master of the vessel says that he knew, and that he supposed the owners also knew, of the blockade; and that when they left the vesel they took with them the log-book and all the ship's papers on board, which are now in the hands of the prize commissioners. The seaman Fry says that he supposed the voyage was to New York, according to the shipping agreement.

The evidence is thus made full and satisfactory, that the voyage was undertaken and prosecuted until the capture of the vessel with the intention, on the part of the master and owners, to violate the blockade of Charleston, knowing it to be in force. Accordingly, the vessel and cargo are condemned as forfeited to the libellants.

FLECK (WOODSON v.). See Case No. 17,996.

FLECKE (UNITED STATES v.). See Case No. 15,120.

FLECKENSTEIN (SHUMAN v.). See Case No. 12,826.

Case No. 4,860.

FLEEGER et al. v. POOL et al.

[1 McLean, 185.][1]

Circuit Court, W. D. Tennessee. Sept. Term, 1832.[2]

COMPACTS BETWEEN STATES—ASSENT OF CONGRESS — EFFECT — PRIVATE RIGHTS — GRANT BEYOND TERRITORIAL BOUNDARY — WILL PROVED IN ANOTHER STATE AS EVIDENCE.

1. A compact entered into between two states, with the assent of congress, is binding on those states and the citizens of each.

[See note at end of case.]

2. Grants having been made by North Carolina and Tennessee, beyond their boundaries, as admitted in the compact between the states of Tennessee and Kentucky, such grants are void by the compact.

[See note at end of case.]

3. This cannot be considered an appropriation of private property for public use, as the grants, being beyond the limits of the state, could give no right to the land granted.

4. Private rights must always be subject to treaties made between sovereignties, and those rights cannot be interposed to modify or annul such treaties. Indemnity for an injury done, under such circumstances, must be sought by individuals of their respective governments.

[See note at end of case.]

5. A will proved in another state, according to the laws of Tennessee, if recorded in that state, is evidence. The record may be made any time before the will is offered in evidence.

6. Under a joint demise, by the statute of Tennessee, a tenancy in common may be proved.

[This was an action at law by John Fleeger and others against Burgess Pool and others.]

Mr. Washington, for plaintiff.

Mr. Yerger, for defendants.

OPINION OF THE COURT. This action of ejectment is prosecuted to recover possession of two thousand seven hundred and twenty-seven acres of land in Montgomery county, Tennessee, lying south of what is called Walker's line, which is the present boundary line between the states of Kentucky and Tennessee; and north of what is called Matthews' line, which runs in latitude 36 degrees 30 minutes, north, and which by the constitution of North Carolina, is declared to be the northern boundary of the state. The lessors of the plaintiff claim as devisees of Frederick Rohrer, who claims under a grant from the state of Kentucky, dated 24th February, 1796. The defendants claim under certain grants from North Carolina, dated in 1786, 1792, and 1797; also, under grants from the state of Tennessee, dated in 1809, 1811, '12 and '14. And the defendants have proved that possession was taken under their grants about the time of their respective dates, and that the land has ever since been occupied under the same title.

The following articles of compact between the states of Kentucky and Tennessee, have

[1] [Reported by Hon. John McLean, Circuit Justice.]

[2] [Affirmed in 11 Pet. (36 U. S.) 185.]

been read, and have a direct bearing in the case:

"Article 1. The line run by the Virginia commissioners in the year 1779, and '80, commonly called Walker's line, as the same is now reputed, understood, and acted upon by the said states, their respective officers and citizens, from the south eastern corner of Kentucky, to the Tennessee river, thence with and up the said river to the point where the line of Alexander and Munsell, run by them in the last year, under the authority of an act of the legislature of Kentucky, entitled "An act to run the boundary line between this state and Tennessee, west of the Tennessee river, approved February 8th, 1819," would cross said river, and thence with the said line of Alexander and Munsell to the termination thereof, on the Mississippi river, below New Madrid, shall be the boundary line between the two states."

"Article 4. The claims to lands lying west of the Tennessee river, and north of Alexander and Munsell's line, derived from North Carolina or Tennessee, shall be considered null and void, and claims to lands lying south of said line, and west of Tennessee river, derived from Virginia or Kentucky, shall, in like manner be considered null and void.

"Article 5. All lands now vacant and unappropriated by any person or persons claiming to hold under the states of North Carolina or Tennessee, east of the Tennessee river, and north of the parallel of latitude of 36 degrees 30 minutes north, shall be the property of, and subject to the disposition of the state of Kentucky, which state may make all laws necessary and proper for disposing of and granting said lands," &c., "and may by herself or officers do any acts necessary and proper for carrying these provisions into effect; and any grant or grants she may make therefor, shall be received in evidence in all courts of law or equity in the state of Tennessee, and be available to the party deriving title under the same," &c.

"Article 6. Claims to lands east of the Tennessee river, between Walker's line and the latitude of thirty-six degrees and thirty minutes north, derived from the state of Virginia in consideration of military services, shall not be prejudiced in any respect by the establishment of Walker's line, but such claims shall be considered as rightfully entered or granted, and the claimants may enter upon said lands, or assert their rights in the courts of justice, without prejudice by lapse of time, or from any statute of limitations for any period prior to the settlement of the boundary between the two states; saving, however, to the holders and occupants of conflicting claims, if any there be, the right of showing such entries or grants to be invalid and of no effect, or that they have paramount and superior titles to the land covered by such Virginia claims.

"Article 7. All private rights and interests of lands between Walker's line from the Cumberland river, near the mouth of Oby's river to the south eastern corner of Kentucky, at the point where the boundary line between Virginia and Kentucky intersected Walker's line on the Cumberland mountain, and the parallel of thirty-six degrees thirty minutes north latitude, heretofore derived from Virginia, North Carolina, Kentucky, or Tennessee, shall be considered as rightfully emanating from either of those states; and the states of Kentucky and Tennessee reserve to themselves respectively the power of carrying into grant claims not yet perfected; and in case of conflicting claims, (if any there be,) the validity of each claim shall be tested by the laws of the state from which it emanated; and the contest shall be decided as if each state respectively had possessed the jurisdiction and soil, and full power and right to authorize the location, survey or grant according to her own rules and regulations."

This treaty was ratified by the legislatures of the two states, the sanction of congress having been previously given. It appears that Walker's line is about eight miles north of Matthews' line, and that the land in controversy lies between them. It is also proved that the states of North Carolina and Tennessee have always claimed up to the line of Walker, after it was run, as the boundary between those states and the states of Virginia and Kentucky. And that south of Walker's line the state of Tennessee has always exercised jurisdiction, the same as over other parts of the state. And this exercise of jurisdiction would seem to have been acquiesced in by Kentucky, as her jurisdiction was not exercised south of the line. The counties of both states were bounded by it.

The will of Frederick Rohrer is offered in evidence, to which two objections are made: (1) On account of the insufficiency of the certificate and probate to authorize its registration in the state. (2) That said will was registered in Tennessee after the institution of this suit; and therefore can only take effect from the date of registration. This will purports to have been made and published and proved in the state of Pennsylvania. And it is clear, as contended by the counsel for the defendants, that a will or any other instrument to convey lands in Tennessee, must derive its efficacy from the laws of Tennessee. By the act of 1823, c. 31, the legislature of Tennessee authorizes copies of wills made out of the state to be recorded in the county where the land lies, provided they shall have been proved according to the law then in force in the state, as to wills made and executed within the state; and when so recorded shall have the same force and effect as if the original had been executed in this state, and proved and allowed in its courts; and shall be sufficient to pass lands and other estate.

This act does not appear to require that the will or the copy of the will shall be

proved in this state, as a will presented for probate would be required to be proved; but that it shall have been proved in the state where it was made and published, in the mode required by the laws of Tennessee. How could a copy of a will be proved in Tennessee, as an original will presented for probate? The probate of this will as made in Pennsylvania seems to be substantially what the law of Tennessee requires, and this is duly certified. This point, however, may be hereafter considered, should the counsel for the defendants bring it before the court by motion.

As to the objection in regard to the registration, we have no hesitancy in overruling it. The registration does not create the instrument, but makes it admissible in evidence; and it has relation back to the proof of the will. Suppose a law of Tennessee required deeds executed in another state for land in this state to be recorded in the county where the land is situated before they can be received as evidence of title, would the registration not have relation back to the execution of the deed? Is not this the rule, under the statute in regard to deeds executed and registered within the state? The will is admitted to be read to the jury.

Another objection is made that the title offered in evidence by the lessors of the plaintiff, shows a tenancy in common and the declaration sets out a joint demise. This objection is obviated by the practice of the courts in Tennessee, under the act of 1801, c. 6, § 60 [Acts N. C. & Tenn. 1715–1813, p. 342], which provides "that after issue joined in any ejectment on the title only, no exception to form or substance shall be taken to the declaration in any court, whatever." 2 Yerg. 227.

The preliminary questions having been considered, we will come to the main point in the case. Walker's line, which by the compact is made the boundary between Kentucky and Tennessee, is not the boundary described in the original charter of the colony by Charles II. and recognized in the constitution of the state of North Carolina. This was at 36° 30′ which is designated by Matthews' line. This then, was the original and true boundary. And this is admitted by the state of Tennessee in the compact, and in the sanctions given by her of that instrument. From these facts it follows that the lands granted to the defendants by the states of North Carolina and Tennessee, and which are involved in this suit, were granted when they were beyond the limits of those states. They had possession and exercised jurisdiction, but this possession and jurisdiction the state of Tennessee has admitted to have been wrongful.

There may be many acts done in the exercise of such a jurisdiction, which of necessity must be considered ever afterwards final and conclusive. But these acts are generally of a temporary character, however much they may affect the rights of individuals, and emanating from the sovereign power de facto, cannot at a subsequent period be reviewed and corrected. But this rule does not apply to a grant made of the soil, which is of itself an act of sovereignty and of a permanent character. A state no more than an individual, can grant that which does not belong to it. If the grants then made beyond the limits of the state conveyed no right, no right was taken or appropriated under the compact. The state making the grant may consider herself bound morally to make some remuneration to grantees for these lands, under the circumstances; but to admit, as the state of Tennessee has admitted in the compact, that the grants were for land beyond her jurisdiction, which must consequently render them inoperative, does in no sense impair the obligation of her contract. The contract though executed, had no legal existence as a title.

But there is another and a higher ground, on which this case may be decided. These states acted in their sovereign capacities in entering into the compact or treaty. The subject was one which peculiarly belonged to the sovereign power; and acting under the sanction of congress, their powers were ample to treat as to their respective limits; and the compact was binding upon the citizens of each. No power can supervise or object to the decision thus made. It is binding as well on the federal as the state courts. The act is one of sovereignty and can only be modified or annulled by the exercise of the same power. And if in the adjustment of boundaries the rights of individuals shall become impaired, they must look to their respective governments for indemnity. It would indeed be a novel principle in the laws of nations, for individuals to object to a treaty of limits and endeavor to annul it, because their interests were not suitably protected. This would be to place private interests above those that are national; and to subject the political power of a state to the counteraction of any one of the elements of which it is composed. The compact is a law to the sovereigns who entered into it, and it is equally a law to their citizens. It regulates the rights and remedies of all who are affected by it.

If these defendants can interpose their rights and render the treaty ineffectual in part, it must become so entirely. Kentucky cannot be called upon to give effect to her engagements, if Tennessee shall disregard hers. By such means then the treaty must fall, and the prosperity, if not the peace of the two sovereignties may be jeoparded. The compact must stand, and effect must be given to its stipulations. We will therefore instruct the jury, that as by the compact between Kentucky and Tennessee, the boundary line of thirty-six degrees thirty minutes north, was fixed several miles south of Walker's line, and of the land in controversy; the

titles of the defendants were subject to the compact, and can only be sustained under it. That the state of Tennessee, by sanctioning the compact, admitted in the most solemn form that the lands in dispute were not within her jurisdiction nor within the jurisdiction of North Carolina, at the time they were granted; and that consequently, the titles were subject to the conditions of the compact.

Under this instruction the jury found a verdict of guilty against the defendants, and a judgment was entered on the verdict. The cause was afterwards taken to the supreme court by a writ of error, and the judgment was affirmed. Poole v. Lessee of Fleeger, 11 Pet. [36 U. S.] 185.

[NOTE. After the rendering of the verdict for plaintiffs, defendants moved for a new trial, but the motion was denied, whereupon the cause was taken to the supreme court on writ of error, where the judgment of the circuit court was affirmed, with costs, Mr. Justice Story delivering the opinion. It was held that the constitutional limitation providing that "no state shall without the consent of congress enter into any agreement or compact with another state" plainly admits that with such consent it might be done; and as in the present instance, that consent has been expressly given, the compact has full validity, and all its terms and conditions are equally obligatory upon citizens of both states. The compact, by necessary implication, admits that the boundary between Kentucky and Tennessee is the latitude of 36° 30′ north, and that Walker's Line is to be deemed the true line only for the purpose of future jurisdiction. In this view of the matter, Mr. Justice Story remarked that "it is perfectly clear that the grants made by North Carolina and Tennessee under which the defendants claimed were not rightfully made, because they were originally beyond her territorial boundary; and that the grant under which claimants claim was rightfully made, because it was within the territorial boundary of Virginia."

[In the matter of the admissibility of the will of Frederick Rohrer, it seems by the record that no exception was taken to the opinion of the court permitting the will to be read; and, as no copy of the will or probate or certificate thereof was contained in the record, the question of its admissibility as evidence was not fully considered. 11 Pet. (36 U. S.) 185.]

FLEET (WOODSON v.). See Case No. 17,997.

Case No. 4,861.

FLEISHMAN v. The JOHN P. BEST.

[37 Leg. Int. 18;[1] 8 Wkly. Notes Cas. 30; 26 Int. Rev. Rec. 14; 14 Phila. 527.]

District Court, E. D. Pennsylvania. Dec. 29, 1879.

CARRIERS—FREIGHT PAID IN ADVANCE—FAILURE TO DELIVER CARGO—STOWAGE—SHIFTING BOARDS.

1. One hundred head of cattle were shipped on respondent's steamer, and $2,000 freight paid in advance During a storm eighty-seven head were washed overboard. The underdeck cargo consisted of grain, and the evidence showed that in the lower hold there were no shifting boards, and that in consequence the cargo shifted during the storm, thereby contributing to produce the "list" of the ship. Subsequent to such "list" a number of the cattle were lost, some having gone prior to the "list." *Held*, the deficiency charged in the stowage of the cargo, arising from the absence of "shifting boards," which are required by the rules and usages of the port of loading, is well founded, and the respondent is responsible for the cattle thus lost after the ship listed.

2. To entitle a carrier to freight the goods must be delivered at the destined port, or no freight is earned.

3. A partial conveyance is not a compliance with the contract; and it is no answer to a denial of freight that the delivery was defeated by calamity. And where the freight has been paid in advance, it may, under such circumstances, be reclaimed. The distinction sought to be drawn between "payment" and "advance" of freight seems to be without support, either in reason or authority.

[2] [The libellant shipped on board the steamer John P. Best, one hundred head of live cattle, to be carried on deck, and delivered at Southampton. The original contract was as follows: "New York, May 16, 1878. Engaged from Messrs. Fleishman, Edelmuth & Goldschmidt per steamship 'John P. Best,' hence to Southampton, a full load of cattle on deck; number optional with captain; not less than one hundred (100) to be shipped, at ninety-five shillings (95), Br. sterling, per head, payable here in cash, without credit or discount, before sailing, with one hundred dollars ($100) gratuity to master, also payable here. Stalls, fixtures, food, etc., for the cattle to be supplied by shippers; ship to furnish water only. Ship not responsible for loss occasioned by stress of weather or any mortality whatever. Ship agrees to supply steerage passage for two men (attendants on the cattle) back from Southampton to New York. John C. Saeger, Agent. Witness: S. Van Pragg."

[Saeger was consignee of the steamship. The vessel sailed May 16, 1878, loaded as shown by the following:

["Certificate of Loading.

["H. S. Vining's Bureau of Inspection for Vessels Loading Grain and General Cargoes at the Ports of New York, Baltimore, Philadelphia, and Boston. No. 130 Pearl Street, New York. M. Abenheim, I. C. S.

["New York, May 16, 1878.

["This is to certify that the Br. steamer 'John P. Best,' Vonder Hayden, master, 1,790 tons Br. measurement, built at Mourken in 1876, has completed her load of grain and general cargo at this port under my inspection, and has conformed to the rules of this bureau in relation thereto. She is now properly laden and in good condition to proceed on her voyage to Havre.

["H. S. Vining, Inspector.

[1] [Reprinted from 37 Leg. Int. 18, by permission.]

[2] [From 8 Wkly. Notes Cas. 30.]

["Remarks on the Loading of the Vessel.

["Loading completed May 16, 1878.

["Grain cargo consists of

49,708.20	bushels w. bulk.	}	Equal to 2,045 tons dead weight."
43 918.20	" oats in bulk.....		
13,164	" grain in bugs.....		
106,790.40	total w. and oats.		

[The vessel met with heavy weather, and became badly listed, and lost all the deck-load of cattle except thirteen head.

[Henry Flanders, for libellant.

[Freight paid in advance may be recovered back if the contract is not completed by delivery. Chase v. Insurance Co., 9 Allen, 311; Pitman v. Hooper [Case No. 11,185]; Phelps v. Williamson, 5 Sandf. 578. As to storage of cargo, see Lamb v. Parkman [Case No. 8,020]; Baxter v. Leland [Id. 1,125]. As to storage on deck, see Speyer v. The Mary Belle Roberts [Id. 13,240].

[M. P. Henry, for respondent.

[As to liability of vessel for cargo stowed on deck, see Lawrence v. Minturn, 17 How. [58 U. S.] 114. As to freight on cattle, see 3 Kent, Comm. p. 225; Maude & P. Merch. Shipp. p. 243; Macl. Merch. Shipp. 436. As to freight paid in advance, see Watson v. Duykinck, 3 Johns. 335; De Silvale v. Kendall, 4 Maule & S. 37; The Panama [Case No. 10,703].[2]

BUTLER, District Judge. In May, 1878, the libellant shipped on board the John P. Best, then lying in the port of New York, and bound to Southampton, England, one hundred head of live cattle, to be carried on deck. The vessel started on the 16th of May, and on the fourth day out, the 19th, encountered a severe gale, in which all the cattle but thirteen were lost overboard. Sustaining considerable injury, and being in such condition as made the continuation of her voyage unsafe, she returned to Philadelphia, where the libellant attached her, alleging that the loss of his cattle resulted from the "careless, negligent and improper manner of stowing the underdeck cargo, which consisted of grain; rendering the vessel thereby wholly unseaworthy;" that in the lower hold there were no shifting boards, to keep the cargo in position, and that in consequence it shifted, throwing the vessel on her beam ends; by reason of which the deck load of cattle was carried overboard, and eighty-seven head lost. Subsequently the libellant amended his libel, charging unseaworthiness of the vessel in other respects; and claiming to recover, in addition to the loss sustained, on account of the cattle, the further sum of $2,000 and interest thereon,—the freight paid respondent in New York. The respondent's contract to carry on deck, made him responsible for the seaworthiness of his vessel. The libellant assumed all risks usual to a deck cargo; but nothing more. Loss, arising from unseaworthiness of the vessel, the respondent would be liable for. Unseaworthiness is charged in several particulars: First, as respects the stowage of the cargo in the hold; second, the condition of the coal bunkers and their covers; third, insufficiency and inadequacy of the pipes connected with the pumps; and, fourth, the absence of lining in the bilge, necessary to keep the grain from the pumps. The deficiency charged in the stowage of the cargo (as we have seen) consisted in the absence of "shifting boards." This charge, in my judgment, is well founded. The rules and usages of the port of loading, as well as of most, if not all, others in this country (which must be regarded as in the minds of the parties at the time of contracting), require the employment of such boards; and all the experienced seamen who, as witnesses, have spoken on the subject, concur in the judgment, that they are necessary, in stowing grain in bulk. That the master honestly sought to perform his duty in this respect, is not doubted. A foreigner, and unacquainted with our method of stowing such a cargo, he employed an experienced and reputable stevedore of the port, on whom he had a right to depend for compliance with our rules and usages. He is nevertheless responsible to the libellant to the extent of the loss he may have sustained from the improper stowage of the grain. Whether the other charges of unseaworthiness are well founded, is open to doubt; and in the view I entertain of the case, need not be decided.

To show unseaworthiness is not of itself sufficient to entitle the libellant to recover. He must further show that this occasioned his loss. He undertakes to do so by evidence that the ship "listed," either from the shifting of the grain, or from water entering through the coal bunkers, or both these causes combined; and that in consequence thereof, the cattle went over. As a severe storm prevailed at the time of the loss, and the cattle were liable to be swept off thereby, even in the absence of the "list" stated, the burden is on the libellant to prove his allegation. No presumption arises against the respondent from the loss of the cattle. To support his allegation the libellant relies upon the testimony of Thomas C. Douglass, who was in charge of the cattle. This witness testified that the "list" existed, virtually, if not actually, from the time the vessel left the port of New York, growing worse from day to day, and by the 19th had become so bad that the cattle went over, in consequence. If this statement could be accepted, the libellant's case would be complete. But it cannot. To me it seems to be so inconsistent with probabilities, and is so directly in conflict with the testimony of all other witnesses examined on this subject, that I must reject it. I do not mean to

[2] [From 8 Wkly. Notes Cas. 30.]

disparage, or speak unkindly of, the witness; his statements may be strictly true; but the circumstances are such that I cannot accept them. That the cargo was properly stowed, save in the absence of "shifting boards," to hold it steady, in rough weather, is not open to doubt. Until the vessel had been out for three days there was nothing to disturb the cargo; and all persons on board (except this witness), and the several persons who saw the vessel start out, say she was upright—having no such inclination, as Mr. Douglass states. On the 19th, however, as we have seen, she encountered a severe gale, about 4 o'clock in the afternoon. The sea swept over her, into her coal bunkers, damaging the wheel house, carrying away skylights, and, as the witnesses say, everything from her deck. According to the clear weight of the testimony the "list" occurred at this time, and not before. All the witnesses on board (with the single exception stated), so testify, and the log (to falsify which no motive existed at that time, for the master was not then aware of any remissness respecting the cargo, or any other matter, bearing on the fact here involved) so states. For some hours previously the cattle had been going over, as a consequence, purely, I think, of the storm; and a large additional number were washed off by the sea which struck the vessel just before the "list" occurred; leaving probably not more than one-third of the number shipped, on board when the vessel settled over. Of this, in my judgment, the testimony leaves little room for doubt. For the cattle thus lost the respondent is not liable. Thirteen only of those remaining were saved; the others being lost during the following night. Is the respondent liable for the loss of these? The absence of "shifting boards" must be regarded as contributing to produce the "list." In the violent action of the vessel the grain shifted, as the log, and other testimony, shows, and assisted, at least, to hold the vessel over. It is not important that the water taken in, may have first caused the inclination. If it did, the shifting of the grain directly after, made the righting of the vessel impossible.

Although it cannot be affirmed that the cattle thereafter lost, would not have been lost, if the list had not occurred, its occurrence certainly increased the danger, and I think, must be considered as contributing to the loss which followed. While my mind is not so free from doubt respecting this branch of the case as that which precedes it, I believe the respondent should be held responsible for the cattle lost after the ship "listed." The number of these is uncertain. I think, however, it may, with reasonable safety, be put at twenty,—being one third of the whole number, less the thirteen saved. This corresponds with the master's estimate. And while it cannot, therefore, justly be complained of by the respondent, it is as favorable to the libellant as the testimony will admit of making it. His witness, Douglass, says fifty had gone over before noon.

As we have seen, the libellant paid the freight on the cattle, amounting to $2,000, in advance; and now demands its return. The rule that a shipper is not bound to pay freight without full performance of his contract by the carrier, is well understood. The goods must be delivered at the destined port, or no freight is earned. A partial conveyance is not a compliance with the contract; and it is no answer to a denial of freight, that the delivery was defeated by calamity. Where the freight has been paid in advance, it may, under such circumstances, be reclaimed. The distinction sought to be drawn between "payment" and "advance" of freight, seems to be without support either in reason or authority. To the rule that a contract for the carriage of goods is entire, entitling the carrier to freight only on delivery, an exception is made in favor of the carriage of live stock, dying on the voyage. The reason for this exception is nowhere stated. It must be found, I think, in the likelihood of such death occurring; and the justice of placing the loss of freight in that event on the shipper. It cannot be referred to the fact that the loss results from an "act of God," for such a basis would abrogate the rule. No greater reason exists for applying the exception to loss of stock from other cause—as from perils of the sea—than to any other cargo. The authorities exhibit no instance in which the exception has been applied to loss from other cause. The rule is subject of course to variation by the terms of a special contract. I find nothing in the contract before me, however, to vary it as respects this case. The respondent must therefore be required to return the freight received on account of the cattle lost on the voyage.

Case No. 4,862.

FLEMING v. FOY.

[4 Cranch, C. C. 423.] [1]

Circuit Court, District of Columbia. March Term, 1834.

WAGER RECOVERABLE AT COMMON LAW.

A wager may be recovered at common law, although the parties have no other interest in the subject of the wager, than that which is created by the wager itself.

Appeal from the judgment of a justice of the peace, for $20 and costs against Fleming, founded upon the following writing: "September 24th, 1832. I agree to pay Mr. M. Foy $20 if your colour man did not execute my thre springs of my carrage all to gether moening the four springs. John Fleming. Mr. A. Russell."

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent, but assenting). This is understood to be a wager, and that a corre-

[1] [Reported by Hon. William Cranch, Chief Judge.]

spondent writing was given by Mordecai Foy, and that the two promises were mutual considerations to each other. Mr. Morfit, for the defendant, (the appellant,) contends, that no wager can be recovered at common law, and cites the following cases, to wit:

Smith v. Ary, 3 Salk. 175, in which the court held that indebitatus assumpsit would not lie upon mutual promises. because debt would not lie. But no objection was made upon the ground that the wager was unlawful; or that it was a gaming transaction, although it was for money won at play. The case turned entirely upon the form of action; it is, therefore, rather against the point for which it is cited. Eggleton v. Lewin, 3 Salk. 176 (2 Annae); indebitatus assumpsit for £20, won at cards. Upon a writ of error, "the error assigned was, that a general indebitatus assumpsit would not lie for money won at play; and the greater number of judges inclined that it would; but Holt, C. J., and Pollexfen, C. J. of C. B., that it would not, because there must be some meritorious act as a consideration to maintain such action; it will lie against him who holds the wager, because the law implies a promise to deliver the money to the winner." This case also was decided upon the form of the action, and is against the point for which it was cited. It was before the 9th of Anne, and after the 16th of Car. II., which only prohibited wagers to the value of £100. Amory v. Gilman, 2 Mass. 5, was upon a policy of insurance; and the opinion of the court was, that a policy without interest was void; and the reason is expressed in Goddart v. Garrett, 2 Vern. 269, "that these insurances are made for the encouragement of trade; and not that persons unconcerned in trade, nor interested in the ship, should profit by it." The court expressed no opinion respecting the validity of wagers in general, but confined their remarks to wager policies of insurance. The case, therefore, is not in point. Good v. Elliot, 3 Term R. 693. This was an action upon a wager that Susannah Tye had, before a certain day, bought a wagon belonging to D. Coleman. After verdict for the plaintiff, there was a motion in arrest of judgment, upon the ground that all wagers are illegal where the party has no other interest in the subject-matter of them than that which he chooses to create by his bet. This case is cited for the opinion of Mr. Justice Buller, which was overruled by the three other judges. Mr. Justice Grose said: "In thus stating the proposition, it seems admitted that some cases are legal; and, indeed, it cannot, after the different authorities which have been decided, be doubted;" "and that after the cases which have been determined, to say that this action cannot be maintained, would be to make law and not to interpret it." Mr. Justice Ashhurst said: "As to the general ground, namely, whether an action will lie on any wager, that question does not now appear open to argument, it having been settled by so many authorities, both ancient and modern, particularly in the case of Da Costa v. Jones [Cowp. 729]; and Lord Kenyon, C. J., said, "I have not entertained the least doubt upon this question, from the time it was argued down to the present moment." "Now, in order to know what the law has said upon this subject, let us trace it back, and it will be found, that from the earliest times, the books all speak the same language." And again he says: "From the earliest times, therefore, down to the case of Da Costa v. Jones, there appears to have been no doubt on the subject." And in that case, "Lord Mansfield said, that indifferent wagers upon indifferent matters, without interest to either of the parties, are allowed by the law of this country, so far as they have not been restrained by particular acts of parliament; and the restraint imposed in particular cases, supports the general rule." And again, Lord Kenyon says: "Being bound by former decisions; not having the power to alter the law; not finding any one case against the legality of wagers in general; and finding cases without number, wherein wagers have been held to be good, and that the payment of them may be enforced, I think the wager in the present case good at common law." Robinson v. Mearns, 6 Dow. & R. 26. This was an action for money had and received, brought to recover back a sum of £20, which had been deposited by the plaintiff in the hands of the defendant as stake-holder upon a wager on the event of a horse-race. After the race, there being a dispute between the parties as to which horse had won, the plaintiff demanded his deposit. After verdict for the plaintiff, leave was given to the defendant to move for a nonsuit; and one ground taken was, that the wager itself was illegal and void, and no action could be maintained respecting it. It was admitted that the wager was illegal; and the verdict was sustained "on the ground that it" (the money) "was demanded before it was paid over, the wager itself being illegal." But Holroyd, J., said: "Upon looking into the authorities, it will be found that the right of the party to recover back the deposit paid on a wager, does not depend upon whether the wager be illegal and void, or whether it be won or lost; but upon whether the stake-holder has received it upon an illegal consideration; for if he has, he is bound to refund it." This case, we suppose, is cited because it admits that a wager of £20, upon a horse-race, is illegal; and the conclusion drawn from it is, that all wagers are, at common law, illegal. But no such conclusion can be drawn, because a wager for more than £10 upon a horse-race, is void by the 9 Anne, c. 14, taken in connection with 16 Car. II. c. 7, as decided in the cases of Goodburn v. Marley, 2 Strange, 1159; Lynall v. Longbothom, 2 Wils. 36, and Blaxton v. Pye, 2 Wils. 309. On the contrary, the statute which makes void the wager, is evidence that it was not void at common law.

But it is said that the earliest case cited in Good v. Elliot, was that of Andrews v. Herne, 1 Lev. 33, in the 12th year of Charles II., Anno, 1660, and that prior to that time the law was otherwise. But there is no case to the contrary, and Lord Kenyon says that the law was so from the earliest times. It has also been said, that we took the common law as it existed and had been expounded at the time of the first emigration to Maryland, namely, in the year 1633, the date of the charter, which was twenty-seven years before the case of Andrews v. Herne; so that that case is no authority here. If cases made the law, instead of being merely evidence of the law, this would be true; but a recent case is as good evidence of what the common law, in a like case, was, one hundred years ago, as it is of what the common law now is; and such has been the prevailing opinion in Maryland, whose courts have, up to the present time, considered the decisions of the English courts as evidence of the common law in cases in which it has not been authoritatively adjudged otherwise in the courts of Maryland.

In regard to wagers in general, the cases which have been cited have generally been considered in the United States, as settling the law. This court has so considered them; and in the case of Denney v. Elkins, at May term, 1831, in this court [Case No. 3,790], the law respecting wagers in general was considered as settled; and that case was decided upon that exception to the general rule which condemns wagers against the public policy of the country in regard to the freedom of elections. The general rule is, that a fair wager may be recovered at law. To this rule there are exceptions, as stated in the case of Good v. Elliot, 3 Term R. 693. The wager in the present case, however, does not come within any of the exceptions. Judgment affirmed, with costs.

Case No. 4,862a.

FLEMING v. NORTHAMPTON NAT. BANK.

[62 How. Pr. 177.]

Circuit Court, S. D. New York. Nov. 1881.

BANKS—LIABILITY FOR STOLEN SECURITIES—NEGLIGENCE—PROVINCE OF JURY.

[1. Banks who have in their possession collateral security for the payment of loans are called upon to take the same care that good business men or persons or corporations of their class ordinarily take of such bonds. They are liable for want of ordinary care.]

[2. Although there may be found fragmentary evidence in favor of the party upon whom the burden of proof is imposed, yet if the testimony, assuming it to be true, and the inferences which may fairly be drawn therefrom, are, in the opinion of the court, entirely insufficient to authorize the jury to find a verdict in favor of the party upon whom the onus of proof is cast, it is the duty of the court to direct the jury what verdict to render.]

[3. The fact that a watchman employed to guard a bank left at four o'clock in the morning, after which plaintiff's securities were taken from the bank by robbers, is such slight evidence of want of ordinary care that a jury would not be justified in finding for the plaintiff upon that fac alone.]

[This was an action by Emma A. Fleming against the Northampton National Bank to recover the value of certain government bonds held by defendant as collateral security for a loan, and which were taken from its vaults by robbers on the morning of January 26, 1876, after the watchman on duty had left the bank.]

Bates & Hernz, for plaintiff.

Peckham & Tyler, for the bank, moved for a nonsuit at the end of plaintiff's testimony.

SHIPMAN, District Judge. It is now well settled that, although there may be found fragmentary evidence in favor of the party upon whom the burden of proof is imposed, yet, if the testimony, assuming it to be true, and the inferences which may fairly be drawn therefrom, are, in the opinion of the court, entirely insufficient to authorize the jury to find a verdict in favor of the party upon whom the onus of proof is cast, it is the duty of the court to direct the jury what verdict to render. This rule does not imply that the court should weigh the credibility of opposing witnesses, or determine whether the uncontradicted witnesses are to be credited; but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, the court is to determine whether there is any substantial evidence which can justify a verdict in favor of the party in whose favor the evidence is offered or received. Now, in this case these bonds were left by Mr. Fleming with the Northampton Bank as collateral security for the payment of a loan. It is in proof, or sufficiently in proof, so that there can be no doubt upon the subject that these bonds, together with a very great amount of other bonds and valuable personal property, were taken by robbers from this bank on the morning of the 26th of January, 1876, and by superior force, in the absence of any of the officers or the watchman of the bank; that subsequently this note matured; that payment was tendered and refused; and that demand was made for the bonds.

Now, what is the law upon the subject of bailees of collateral securities? The law is that banks who have in their possession collateral security for the payment of loans are called upon to take the same care that good business men, or persons or corporations of their class, ordinarily take of such bonds. That is, in the old phrase of the law, they are liable for want of ordinary care. It is proper, as was stated by the court in Case of Essex Bank, 17 Mass. 479, that higher obligation of care should be imposed upon banks, which have a very large amount of property

and assets, than should be imposed upon private individuals, and therefore use the phrase, "good business people of their class who deal in sureties of this sort and who hold securities of this sort." This being so,—the state of the facts being, as I have stated, that the property was taken from them by superior force,—there is an obligation upon the plaintiff to prove in some way lack of ordinary care; and if he does not prove it, then he has not made out his case. The only proof in this case of any consequence, as it seems to me, is that there was no watchman present; that the watchman went away at four o'clock. This man watched this as well as the other banks in the neighborhood, going on at ten o'clock at night and leaving at four o'clock the next morning. The fact would seem to me to be very slight evidence from which to infer negligence or want of ordinary care, and so slight that a jury would not be justified in finding a verdict for the plaintiff upon that fact alone. It is the important fact which is here presented. I think there is no case made out by the plaintiff, and I therefore direct a verdict for the defendant.

FLESHER (COPEN v.). See Case No. 3,211.

FLETA, The (JACKSON v.). See Case No. 7,135.

FLETCHER (BERRY v.). See Cases Nos. 1,356 and 1,357.

Case No. 4,863.

FLETCHER et al. v. The CUBANA.

[N. Y. Times Jan. 10, 1864.]

District Court, S. D. New York. 1864.

COLLISION—EVIDENCE—EXPERT TESTIMONY.

[1. Failure to carry a light does not put a vessel at fault unless the discovery of her position to the colliding vessel was thereby delayed.]

[2. A steamer should stop promptly upon discovering in her course an indistinct object, which may be a sail.]

[3. Testimony of persons who have witnessed dawn and sunset at the place and season involved in the issue, together with that of eyewitnesses to the facts in dispute, outweighs the received opinion of geographers and navigators as to the time of such phenomena and the duration of twilight.]

[In admiralty. Libel by Thomas D. Fletcher and others against the steamer Cubana to recover for damages suffered by the schooner Minerva in a collision.]

Beebe, Dean & Donohue, for libelants.

Mr. Blatchford, for claimant.

SHIPMAN, District Judge. This libel is filed to recover damages alleged to have been inflicted on the schooner Minerva, at sea, on the morning of June 19, 1860, in a collision with the Spanish steamer Cubana. The schooner is an English vessel, belonging to Nova Scotia. The accident occurred about 4 or 4½ o'clock in the morning, in lat. 25° 48′ N., lon. 62° 18′ W. The schooner was under a very light breeze, and was making but little headway at the time. It was the duty of the steamer to have cleared her, and she is liable for the damages caused by the collision, unless the schooner was in fault. The only serious fault which can be charged upon her is that charged in the pleadings, and evidence of the omission to show a light. The question of her duty on this point turns upon the fact whether or not it was dark at the time. The libelant's witnesses insist that it was not, while those on behalf of the steamer assert the contrary. Two witnesses from this city have been called, who swear that they are acquainted with the navigation of the ocean in the vicinity of the place of this collision, and they state that at that season of the year it must have been broad daylight at the time the vessels collided. The court has had some hesitation in accepting this statement, as it is in conflict with the commonly received opinion of geographers and navigators touching the length of time which dawn precedes the morning and twilight follows the setting sun. But as the testimony is positive, and the witnesses say they have personally witnessed the state of the atmosphere in that region and at that season of the year and time of day, the court must accept their testimony as confirming that of those on board the schooner. The mate of the Cubana also says that he saw something on his leebow, a short time previous to the collision, his attention having been attracted to it by a cry from his lookout. He states that it was indistinct, and appeared like a sail. He soon recognized it to be a schooner, then half a mile or a mile off. He immediately changed his course and ordered the steamer to be stopped. He should have stopped her at once, on discovering indistinctly what proved to be the schooner, instead of waiting till she emerged fully into view. This was the only safe course, and would have probably averted the collision. If the evidence had satisfied the court that it was sufficiently dark to have rendered a light on board the schooner available in disclosing her to the steamer at an earlier moment, the court would have apportioned the damage. But though the evidence is not as satisfactory as could be wished on this question, the court is constrained on the whole, to conclude that it was so light that a lantern displayed on the schooner would not have led to her earlier discovery by the steamer. Decree for the libelants, with a referee to compute the damages.

FLETCHER (CURREY v.). See Case No. 3,490.

FLETCHER (EASBY v.). See Case No. 4,250.

Case No. 4,863a.

FLETCHER v. ELLIS.

[Hempst. 300.] [1]

Superior Court, Territory of Arkansas. Feb. 1836.

MAINTENANCE—ACTION FOR—PLEADING.

1. An action will lie for maintenance in this country.

2. In the declaration it is necessary to allege the pendency of a suit, in what court pending, together with time, place, and circumstances, so as to show the maintenance.

[Error to Conway circuit court.]

Before CROSS and YELL, Judges.

CROSS, Judge. The record in this case shows that the plaintiff in error [Frederick Fletcher] brought an action of trespass on the case against the defendant [William Ellis], in the Conway circuit court, and in his declaration alleged "that the said plaintiff and one Alexander Rogers, were indebted to Daniel Gilmore in a large sum of money, namely, in the amount of fifty-five dollars, upon which said Gilmore had brought suit and obtained judgment, and sued out execution against the plaintiff and the said Rogers, and the plaintiff avers that he and Rogers had, in the county of Conway, sufficient goods and chattels to have satisfied the execution, and the plaintiff avers that the defendant being an evil disposed person, fond of encouraging litigation and fomenting strife, and wishing to harass, impoverish, and distress the plaintiff, did, on the first day of October, 1834, at the county of Conway, and within the jurisdiction of this court, maliciously persuade and procure the said Daniel Gilmore, by offering him to pay all costs and charges, and to see his debt made secure, to have the plaintiff's body taken in execution; and by reason of the defendant's procurements by his several offers and promises as aforesaid made, the plaintiff's body was taken in execution." It also appears that the defendant filed a demurrer to the declaration, which was sustained by the court. The writ of error is prosecuted to reverse the judgment sustaining the demurrer.

A mere glance at the declaration will show that it has been drawn by an extremely careless pleader. The object of the action doubtless was, to charge the defendant for a maintenance, which is defined to be an officious intermeddling in a suit depending in a court, with which the person so intermeddling has nothing to do, by assisting the plaintiff or defendant in the prosecution of such suit. Co. Litt. 368; 2 Inst. 213. The court is not designated in which the suit was pending, nor is the time or place alleged when and where the execution issued or into whose hands it came. The allegation is in relation to the maintenance, that the defendant offered Gilmore to pay costs and charges, and to see that his debt was secured. Between a mere offer to assist and assistance, there is certainly a material difference, for without the latter, the maintenance is not committed at all. So far as anything can be collected on the subject from the declaration, it seems that at the time the offer was made to pay costs and see the debt secured, an execution was rightfully in the hands of an officer of some kind, and the plaintiff and Rogers had a sufficiency of property in the county to satisfy it. If so, the defendant's offers were made in relation to a matter over which neither he nor Gilmore had any control, as the officer was legally bound in the first place, to levy on and dispose of the property in satisfaction of the writ, notwithstanding the plaintiff in execution might have instructed him to arrest the body of the defendant.

That an action lies in this country for maintenance, we entertain but little doubt. Yet it certainly would be necessary, in order to sustain such an action, to allege not only the pendency of a suit, but designate the particular court in which it was depending, together with time and circumstances, none of which requisites exist in the case before us. Indeed, there is scarcely a single requisite stated necessary to constitute a maintenance, and we have seldom had occasion to examine a declaration in which there was so frail a cause of action set forth. Judgment affirmed.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 4,864.

FLETCHER et al. v. MOREY.

[2 Story, 555.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1843.

EQUITABLE LIEN FOR ADVANCES — BANKRUPTCY—RIGHTS OF ASSIGNEE—ACT OF 1841—EQUITY JURISDICTION OF FEDERAL COURTS — MORTGAGE—FRAUDULENT INTENT.

1. The bill, in this case, asserted an equitable lien against certain shipments, and the proceeds thereof, in the hands of the assignee of James Read & Co. as security for advances made by the plaintiffs, under an agreement with James Read & Co. by which Read & Co. were authorised to make drafts on the plaintiffs in payment for merchandise, the said merchandise being pledged and hypothecated to the plaintiffs as collateral security for their advances. It was *held*, that the lien was good.

2. So, also, duties and charges upon the shipments having been paid by Messrs. Read & Co.; it was *held*, that they were not to be deducted from the value of the shipments, or the proceeds in the hands of the assignee, except in respect to such goods as came into the hands of the assignee, charged with those duties, since the bankruptcy.

3. The assignee in bankruptcy takes the property and rights of the bankrupt, subject to all the liabilities and with all the rights, that would attach to them in the hands of the bankrupt; the only exception is in case of fraud.

[Cited in Gibson v. Warden, 14 Wall. (81 U. S.) 248.]

[1] [Reported by William W. Story, Esq.]

4. Where a lien, or equitable claim, constituting a charge in rem, is a matter of agreement, it will be enforced in equity, not only upon real estate, but also upon personal estate, or money in the hands of a third person; and against the party himself, or his personal representatives, or persons claiming under him, or assignees in bankruptcy.

[Cited in Lawrence v. Dana, Case No. 8,136; Holly Manuf'g Co. v. New Chester Water Co., 48 Fed. 892; Riddle v. Hudgins, 58 Fed. 492.]

[Cited in Jones v. Richardson, 10 Metc. (Mass.) 489.]

5. The proviso in the second section of the bankrupt act of 1841, c. 9 [5 Stat. 440], embraces all liens, equitable and legal, which are valid by the lex loci contractus, and is not restricted to such as can be enforced by state laws.

[Cited in Zollar v. Janvrin, 49 N. H. 117.]

6. An equitable lien is valid by the laws of Massachusetts, although no remedy for its enforcement is provided by the state jurisprudence.

[Cited in The Menominie, 36 Fed. 202.]

7. The equity jurisdiction and equity jurisprudence administered in the courts of the United States are coincident and coextensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular state, where the court sits.

[Cited in Gindrat v. Dane, Case No. 5,455.]

8. Liens and mortgages of personal property are perfectly good, as between the parties, and against creditors, although the possession remain with the owner or mortgagor, if there be no fraudulent intent. The same rule applies to sales of personal property.

Bill in equity brought by Edward Fletcher, James Alexander, Charles Kerr, Charles Dashwood Bruce, Christopher Pearse, and Charles Philip Fletcher, of London, England, merchants and copartners negotiating under the style and firm of Fletcher, Alexander & Co., bring this their bill against George Morey, of Boston, as assignee of the joint estate and effects of James Read & Co. The bill sets forth, in substance, that on or about the thirtieth day of December, 1840, James Read, of Boston, in Massachusetts, and Horace Hall, of Charlestown, in New Hampshire, merchants and joint partners negotiating at Boston aforesaid under the firm of James Read & Co., applied to Thomas B. Curtis, the duly authorized agent of the plaintiffs on that behalf, and requested him as the said agent, to grant unto them a letter of credit upon the usual terms and conditions, and thereupon the said Curtis being thereunto duly authorized, did grant unto them a letter of credit bearing date on the thirtieth day of December, 1840, addressed to the plaintiffs by their said partnership name and style, of which the following is a true copy: "Boston, December 30, 1840. Messrs. Fletcher, Alexander & Co., London. Gentlemen: This letter will be forwarded to you by Messrs. James Read & Co., a firm of the first standing in this city. These gentlemen have orders now in progress of execution towards which they would like a credit with your good selves. Believing that I cannot introduce to you better correspondents, I hereby request that you authorize such parties as they may advise you, to draw on their account for sums not exceeding ten thousand pounds in all. Drafts drawn in payment for goods to be shipped after the reception of this letter to be accompanied by bills of lading, and merchandise so purchased and shipped from Liverpool to be forwarded through your house there. Your ob't serv't (Signed), T. B. Curtis. For £10,000." That at the same time that the said letter of credit was granted, the said James Read & Co. entered into a contract in writing with the plaintiffs, of which the following is a true copy: "Boston, December 30, 1840. Received the original of the annexed letter of credit for ten thousand pounds, in consideration whereof, we, James Read & Co., do hereby agree with Messrs. Fletcher, Alexander, & Co. to provide in London, previous to the maturity of the bills, sufficient funds to meet the payment of whatever may be negotiated by virtue thereof, with commission, on the same one per cent. and also to give security here for the same at any time previous thereto, if required by them or their agent, and all property, which shall be purchased by means of the above credit and the proceeds thereof, and the policies of insurance thereon, together with the bills of lading, are hereby pledged and hypothecated to them as collateral security for the payment as above promised, and held subject to their order on demand, with authority to take possession and dispose of the same at discretion for their security or re-imbursement. For all payments, settlements and recoveries in the United States, growing out of this credit, the pound sterling is to be calculated at the current rate of exchange, existing at the time of such settlement. Interest to be charged at the rate of six per cent. per annum. (Signed) James Read & Co." And the said James Read & Co. having signed the said contract, and delivered the same to the said Curtis, and having received from him the said letter of credit, proceeded to act thereon, and from time to time through their duly authorised agents in that behalf, drew bills on the plaintiffs in London, which were accepted and paid by them under the said letter of credit; and funds to pay the same were duly provided by the said James Read & Co. until the twenty-sixth day of March, 1841, when the said letter of credit having been altogether used and executed, and bills amounting to the sum of ten thousand pounds sterling, mentioned therein as not to be exceeded, having been drawn, the said James Read & Co. applied to the plaintiffs' said agent, and desired to renew or extend the said letter of credit and their said contract with the plaintiffs, so as to enable them to continue to use the said letter of credit, and thereupon, by mutual agreement between the said James Read & Co., and the plaintiffs' said agent, the following endorsement was made upon the said letter and signed

by the plaintiffs' said agent, namely: "Boston, March 26, 1841. It is agreed that this letter of credit shall continue in force for one year from its date, and for any sums not exceeding ten thousand pounds at any one time, unless sooner annulled. T. B. Curtis, Attorney for Fletcher, Alexander & Co." And at the same time the following endorsement was made on the said contract by the said James Read & Co.: "Boston, March 26, 1841. The credit for which this obligation was given being extended per endorsement on the annexed copy thereof, we agree that the obligation shall be binding in like manner for such extension, say for any sum not exceeding at any one time ten thousand pounds sterling. James Read & Co."

That after the said letter of credit had been enlarged by the endorsement aforesaid, the said James Read & Co. proceeded to, and did authorize certain persons doing business under the mercantile firms of W. B. Huggins & Co., Cratts & Stell, and Knauth & Storrow, to purchase merchandise for them, and draw bills of exchange on the plaintiffs for the price thereof, and charges and expenses thereon, and having duly advised the plaintiffs thereof, and requested them to accept the same, they, pursuant to the said letter of credit extended as aforesaid, and relying on the said written contract of the said James Read & Co., and the hypothecation and promise of a specific lien therein contained, did accept bills of exchange drawn by the said mercantile firms, to pay for merchandise purchased by them for the said James Read & Co. That the said James Read & Co. have wholly failed to comply with their said promise to the plaintiffs to provide in London previous to the maturity of the said bills of exchange sufficient funds to meet the payment thereof together with the plaintiffs' commission thereon, and on the twenty-third day of April, 1842, by a decree of the district court of the United States, within and for the said district of Massachusetts, the said James Read & Co., upon their own petition, were duly declared bankrupts, and George Morey, Esquire, of Boston, aforesaid, was duly appointed their assignee; so that it is now wholly beyond the power of the said James Read & Co. and their assignee, to provide funds as aforesaid, nor do they, or either of them intend or expect so to do. That of the merchandise purchased as aforesaid and paid for by bills of exchange drawn as aforesaid, some has already reached the hands and possession of the said James Read & Co., whereof some has been sold, and the proceeds thereof remain in their hands, or have come to the hands of their assignee, in the form of bills of exchange or promissory notes, or in some other form, so that the same can be identified and specified; and some thereof still remain in their hands, or the hands of their assignee, unsold. And some of the said merchandise so purchased and paid for, as aforesaid, having arrived in this country after the said James Read & Co. had become insolvent, and had filed their petition to be declared bankrupts, the plaintiffs' said agent applied to them in behalf of the plaintiffs, to perform their said contract by delivering to him the bills of lading of such property as had not yet been received by them, and thereupon the said James Read & Co. did endorse and deliver to the plaintiffs' said agent the bills of lading of merchandise, which the said James Read & Co. had then received. That of the said merchandise so purchased and paid for as aforesaid, the bills of lading of some part have come to the hands of the said Morey as assignee, and of a part the bills of lading have not yet arrived, but the whole of the residue of the said merchandise is soon expected to arrive and to come to the hands of the said assignee. That on or about the twenty-fifth day of March, 1842, the plaintiffs, by their said agent, applied to the said James Read & Co., and requiring of them that all property purchased by virtue of the said letters of credit, or the proceeds thereof, if sold, should be placed in the possession of the plaintiffs' said agent, for the plaintiffs' security, in compliance with the contract aforesaid, and the said James Read & Co. admitting that they were bound to do so by their contract aforesaid, did hand to the said agent an invoice of the said merchandise then remaining unsold, and also a list of all unsettled accounts of the sales of the said merchandise, which had been sold, but by reason of their having petitioned for a decree of bankruptcy as aforesaid, refused to permit the said plaintiffs' said agent to take possession of the said merchandise. That the said Morey had actual notice before his appointment to the said trust, of the plaintiffs' lien on the said merchandise and bills of lading, and express and particular notice thereof very soon after his said appointment, and was requested to permit the plaintiffs to take possession thereof pursuant to their rights under the said contract of James Read & Co. with the plaintiffs, but the said Morey as such assignee refused and still refuses so to do.

The bill concludes with a prayer, that the court will be pleased to declare that the plaintiffs are justly entitled to and have a lien on all the said merchandise and the proceeds thereof, and the bills of lading therefor, as collateral security for the faithful performance by the said James Read & Co. of their said contract with the plaintiffs, or for such further and other relief as the nature of the case may require and to your honors may seem meet, &c.

The answer admits, generally, the facts stated in the bill relative to making and extending the letter of credit, and to the bankruptcy of the defendants, and the appointment of the defendant as assignee of the firm of James Read & Co.; it also ad-

mits, that upon application by the plaintiffs, the defendants did deliver up to the plaintiffs six bills of lading of merchandise, but he submits, that they had no right or authority so to do; and that the said delivery and endorsement were null and void.

The bill annexes a schedule of certain merchandise shipped by Fletcher, Alexander & Co. to James Read & Co., and a schedule of merchandise received and sold, and the proceeds of which were disposed of by James Read & Co. previous to their going into bankruptcy, and asserts that no part thereof has come to the possession or control of this defendant, except certain sums of money, which were due and owing to the said James Read & Co. on the said seventeenth day of March, on account thereof, which have not yet been collected, and certain merchandise received by this defendant since that time, which are set forth in an exhibit, and which conform to the exhibit annexed to the plaintiffs' bill. The bill further alleges, that the defendant to his knowledge, information and belief, received no formal notice of any claim of the plaintiffs to the said merchandise, or the proceeds thereof, until after the twenty-third day of April last, when he was appointed assignee as aforesaid, and that no formal demand has been made upon him for an account or delivery thereof, or otherwise, unless the filing of the said bill of complaint was such demand. But that the said Curtis and his solicitors did before and after this defendant's appointment as assignee, as aforesaid, and before the filing of the said bill, have one or more casual conversations with this defendant, in which they alluded to the possibility of their making such a claim and filing such a bill, but the same were not understood by this defendant as meant for or intended to be formal demands or in the nature thereof, nor as legal notices that such claim would be attempted to be enforced. That no part of the merchandise purchased by means of bills of exchange drawn under the said letter of credit and the extension thereof, was purchased by the said plaintiffs or from them, but that the same was purchased by various persons, acting as agents, or under the directions of the said James Read & Co. and for their sole account, and that these persons, in order to reimburse themselves for the said purchases, drew bills on the said plaintiffs, in pursuance of the orders of the said James Read & Co. That the merchandise, so purchased, was forwarded to the plaintiffs at Liverpool to be shipped to the said James Read & Co. at Boston, and the said plaintiffs voluntarily and of their own accord, parted with the possession of the said merchandise, and consigned the same to the said James Read & Co., and suffered the same to go into their absolute possession, and to be sold or disposed of at their pleasure, without any claim or notice of any title, interest or lien of the said plaintiffs in or upon said merchandise or any part thereof.

The defendant denies, that the said plaintiffs have, or are entitled to have, in law or in equity, any lien upon the said goods and the proceeds thereof, or any right, title or interest in or to the same, and claims, that such of said merchandise as was in the hands of the said James Read & Co. at the time of the filing of their said petition, and such as has since come to the possession of them, or of this defendant, and the proceeds of all such merchandise theretofore sold, are vested in this defendant, as the assignee of the estates of the said James Read & Co., free from and divested of all liens, claims, or demands whatsoever, in favor of the plaintiffs, and that he claims so to hold them for the benefit of the creditors of the said estate, and to be disposed of according to law. And this defendant further says, that, with regard to the goods on hand on the said seventeenth day of March, the said James Read & Co. had paid or given bonds for the payment of the duties thereon; with regard to those received since that time, this defendant has paid the duties thereon, and this defendant claims to be reimbursed for all the duties so paid or secured to be paid upon said goods, and for all expenses of freight, storage, truckage, and other incidental expenses, incurred in or about said goods, if it should be held that the plaintiffs are entitled to the same. Whereupon this defendant respectfully prays, that he may be hence dismissed and allowed his costs.

The following statement was, by consent, made a part of the case: "The letter of credit and the agreement for a lien, which was co-extensive with it, expired in December, 1841; after which time, all the drafts mentioned in the bill were drawn and accepted. The said Read & Co., and Thomas B. Curtis, were ignorant, that the letter of credit expired at that time, and acted on the belief, that it had not expired; and it is presumed, that the plaintiffs were also ignorant of the fact when they accepted the bills. This fact was not known to the counsel in the case, when the bill and answer were filed, and they may be taken as amended accordingly. C. P. & B. R. Curtis, for plaintiffs."

The cause was set down for a hearing upon the bill and answer.

B. R. Curtis and C. P. Curtis, for plaintiffs.

Francis C. Loring, for defendant.

STORY, Circuit Justice. It does not appear to me that there is any real difficulty in the present case. The bill asserts an equitable lien against certain shipments, and the proceeds thereof, in the hands of Mr. Morey, as assignee in bankruptcy of Messrs. Read & Co., under an agreement stated in the bill, and admitted by the answer, as security for advances made by the plaintiffs under the

same agreement. I say under the agreement, because, although the acceptances and advances were, in fact, made after the time stipulated in the renewed agreement for a prolongation of the original credit (in which I suspect the words "from its date" are inserted by mistake instead of "from this date"); yet it is agreed by the parties in the additional statement introduced into the case, that, in point of fact, the parties on both sides acted upon the supposition that the renewed agreement actually covered these very acceptances and advances, and that the terms of the original and renewed agreements were fully intended to apply to all the shipments made in precisely the same manner and to the same extent, as if they had been positively included therein. Under such circumstances, in a court of equity, the case stands precisely in the same predicament as if the written agreements did cover them; for, in equity, that is deemed to be done, which the parties intended to do, and which ought to be done.

Now, before proceeding to the points more directly in judgment, it is proper to remark that it is a perfectly well settled principle in equity, that the assignee in bankruptcy takes the property and rights of the bankrupt in the same plight and condition, and with all the equities attached thereto, in the same manner as the bankrupt himself held them. I recollect at present but one exception to the doctrine, and that is in the case of fraud. The general rule was laid down by Lord Hardwicke in Brown v. Heathcote, 1 Atk. 160, 162, and it has been constantly adhered to ever since. I need not cite the authorities at large. Many of them will be found referred to in a recent opinion, which I had occasion to deliver in the case of Mitchell v. Winslow [Case No. 9,673] at the last October term of the circuit court at Portland. See, also, 2 Story, Eq. Jur. §§ 1224, 1411.

This then being the established principle, the first question which arises in the case, is, whether there is any equitable lien, or right, or claim, under the agreement, which ought to be enforced specifically in equity against the shipments made to and for Messrs. Read & Co., or the proceeds thereof, so far as they can be distinctly traced in the hands of the assignee; and upon this point, I entertain no doubt whatsoever. In equity there is no difficulty in enforcing a lien or any other equitable claim, constituting a charge in rem, not only upon real estate, but also upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement, against the party himself, and his personal representatives, and against any persons claiming under him voluntarily, or with notice, and against assignees in bankruptcy, who are treated as volunteers; for every such agreement for a lien or charge in rem constitutes a trust, and is accordingly governed by the general doctrine applicable to trusts. The cases of Farr v. Middleton, Finch, Prec. 174, 175; Collyer v. Fallon, 1 Turn. & R. 469, 475, 476; and Legard v. Hodges, 1 Ves. Jr. 478,—are fully in point. In the case of Collyer v. Fallon, 1 Turn. & R. 469, Sir Thomas Plumer (the master of the rolls) said, "The argument on his side (the plaintiff's) has been, that whenever parties contract with respect to a subject-matter, that subject-matter is thereby bound. I assent to the principle when rightly understood; but it is a principle which must be received with qualifications. Contract with respect to a given matter binds the property as between the parties to the contract; but it does not affect the rights of third persons, or bind the property in reference to any claim which they may have upon it, unless they either have notice, or are volunteers. This limitation of the proposition is stated explicitly by Lord Loughborough in the very passage which was relied on (1 Ves. Jr. 478). 'Whatsoever,' says he, 'is the agreement concerning any subject real or personal, though in form and construction merely personal and suable only at law, yet, in this court, it binds the conscience;' that is to say, the conscience of the parties to the agreement, and of those who claim under them, either with notice or without consideration. For his lordship adds: 'This maxim I take to be universal, that, wherever persons agree concerning a particular subject, that in any court of equity, as against the party himself, and any claiming under him voluntarily or with notice, raises a trust.'" See, also, 2 Story, Eq. Jur. §§ 1228, 1229, 1231, 1249, note. So that, as a matter of trust directly growing out of, and provided for by, contract, the present case falls directly within the principle above stated. The goods and the proceeds thereof are expressly, by the agreement of the parties, "pledged and hypothecated" as collateral security for the advances. But then it is suggested, that in the proviso of the second section of the bankrupt act of 1841, c. 4, there is no saving of any liens, except such as are valid by the laws of the state respectively; and it is added that, by the laws of Massachusetts, where the bankruptcy took place, no equitable lien exists, or can be enforced in cases of this sort. My opinion is that the terms of the proviso in the second section embrace all liens, equitable as well as legal, which are valid by the state laws. I am yet to learn, that an equitable lien may not exist in Massachusetts, and is not valid between the parties in this state. It is no answer to say, that no remedy is provided for the enforcement of such liens by the state jurisprudence in the state courts. That does not show, that no such liens exist; for many cases of acknowledged trusts no remedy at present exists in the courts of this state; but that does not show, that they have no existence or validity. Trusts in assignments, and in last wills and testaments,

and equitable rights, growing out of partnerships, were, until a comparatively recent period, without any means of being enforced in the state courts of this state. But has any one ever doubted, that, by the law of Massachusetts, such trusts were always valid? There is not, I believe, any remedy now in the state courts to enforce the lien of a vendor for the purchase money of an estate sold by him, even when expressly stipulated for; but yet in Gilman v. Brown [Case No. 5,441]; Id., 4 Wheat. [17 U. S.] 255, the supreme court entertained no doubt, that such a lien, when express or implied, was valid, and might be enforced in the courts of the United States possessing equity jurisdiction, although not remediable in the state courts. In short, it has been long since settled in the courts of the United States, that the equity jurisdiction and equity jurisprudence administered in the courts of the United States are coincident and coextensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular state, where the court sits. This was expressly decided in Robinson v. Campbell, 3 Wheat. [16 U. S.] 212, 220, and U. S. v. Howland, 4 Wheat. [17 U. S.] 108.

But the proviso in the second section of the bankrupt act of 1841 does not limit the rights of parties to the liens created and supported by the laws of the states. It merely recognizes and preserves their validity. It was by no means intended to affect any of the equitable liens or other equitable claims of parties arising under their contracts, where the contracts themselves were, by the lex loci contractus, valid; as there can be no question, that this was, as between the parties themselves. The fullest jurisdiction is given by the bankrupt act both in the district court and the circuit court, in equity, in all matters touching the bankruptcy; and, of course, that jurisdiction must be, and is to be, exercised according to the general principles applicable to courts of equity. The objection, therefore, is untenable. Assuming, that the state courts have no power to enforce the lien, or equitable claim or charge arising under the present agreement, it is still capable of being specifically enforced in this court under its general equity jurisdiction, as well as under its particular jurisdiction conferred by the bankrupt act of 1841, c. 6, § 8. It is a valid agreement between the parties, and not prohibited by the laws of Massachusetts.

But it is said, that the agreement, if enforced, will operate as a fraud upon the creditors of Reed & Co. under their bankruptcy; and indeed, that an agreement of this sort, so far as respects creditors, is void, as against the policy of the law, and in derogation of the rights of creditors. Now, it is not pretended, nor even suggested, that any fraud was, in fact, contemplated by the parties, or any of them, upon the creditors. The transaction was bonâ fide, for a valuable consideration, and for future advances, to promote the commercial business of the firm of Read & Co., and not to withdraw any of their existing funds from their creditors. No insolvency or bankruptcy, or failure in business was then contemplated by either of the parties. It was as fair and honest a commercial transaction, in its origin, and progress, and consummation, as was probably ever entered into. How, then, it is against the policy of the law, I confess myself unable to perceive, unless we are prepared to say, that taking collateral security for advances, upon existing or future property, on the part of a creditor, without taking possession of the property at the same time, or when it comes in esse, is per se fraudulent. Possession is ordinarily indispensable at the common law to support a lien; but even at the common law, it is not absolutely indispensable in all cases. This is shown by the recent case of Dodsley v. Varley, 12 Adol. & E. 632, where goods had been sold and deposited in the warehouse of a third person for the vendee; but still it was understood between the parties, that the vendee was not to remove them, until payment therefor; and it was held by the court, that, although the warehouse must be considered as the vendee's warehouse, and he in the actual possession of the goods, yet, "consistently with this, the vendor had, not what is commonly called a lien determinable upon possession, but a special interest, sometimes, but improperly, called a lien, growing out of the original ownership, independent of the actual possession, and consistent with the property being in the vendee." What is this, but allowing the existence of an equitable lien, notwithstanding the possession of the goods is parted with, good between the parties, and good as to all persons, not claiming under the vendee, as bona fide purchasers for a valuable consideration without notice? But I take it to be clear, that not only liens, but mortgages of personal property are perfectly good and supportable between the parties, and against creditors, where there is no fraudulent intent, and the poss ssion remains, in the owner or mortgager of the property, and is consistent with the deed and the arrangements made between the parties. That was one of the points decided in the case already alluded to, of Mitchell v. Winslow [supra]. There is a long line of authorities, that in cases of sales of personal property, conditional or absolute, the transfer or conveyance is not void, even though the possession remains with the vendor, if that possession is consistent with, and a part of, the arrangements intended by the parties in the transfer or conveyance. So that the possession of the property by Messrs. Read & Co., in the present case, is not, in my judgment, a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of their creditors; and, therefore, the agreement is binding and

valid to give a lien or equitable charge upon the property in the hands of the assignee, fit to be enforced in the present suit.

In respect to the other point, suggested at the bar, whether the duties, paid by Messrs. Read & Co. upon the importation of the goods, are to be allowed for and deducted from the value thereof, or of the proceeds in the hands of the assignee, there does not seem to be any ground for the deduction; at least not, unless in respect to such goods, if any, as came into the assignee's hands charged with those duties, since the bankruptcy. The goods previously imported by Messrs. Read & Co., and the proceeds thereof, were to be chargeable with the advances; and it seems to me, that the intention of the parties was. that Messrs. Read & Co. should exclusively bear all the charges of their own importation under the agreement, the duties, as well as the freight and other charges.

These, I believe, are all the points, which it is necessary to notice in deciding the present case. A decree will be entered accordingly for the plaintiffs; and, if necessary, it will be referred to a master to ascertain the amount due to the plaintiffs, and the amount of the property or its proceeds now in the hands of the assignee, which is affected by the equitable lien or charge, growing out of the agreement.

Case No. 4,865.

FLETCHER v. PECK.

[Nowhere reported; opinion not now accessible.]

FLETCHER (ROUSE v.). See Case No. 12,087.

Case No. 4,866.

FLETCHER v. SELDEN.

[16 Blatchf. 468; 4 Ban. & A. 394; 25 Int. Rev. Rec. 249.] [1]

Circuit Court, D. Connecticut. July 9, 1879.

PATENTS—VALIDITY — CONSTRUCTION OF CLAIM—INFRINGEMENT.

1. The letters patent granted to Addison C. Fletcher, June 8th, 1869, for an improved government revenue stamp, are valid.

2. The claim of said patent, namely, "A postage or revenue stamp, having a portion of its surface composed of thin or fragile paper, or other suitable material, loosely attached, and on which a portion of the design or other matter is printed, substantially as and for the purpose or purposes set rorth," is limited to a stamp on which the flap is loosely attached to the face of the main body of the stamp, and has a portion of the design imprinted upon it, and is not infringed by a stamp wherein the design is printed on the main body of the stamp, and a portion of the printed stamp is loosely attached to an unprinted slip of paper attached to the back of the main body.

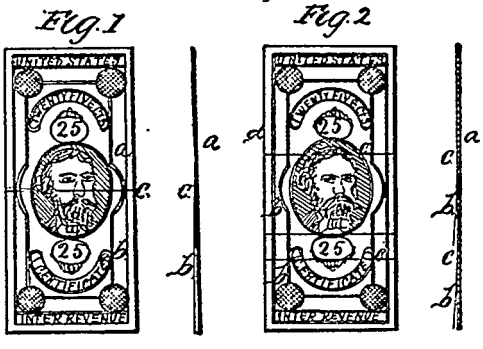
In equity.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 394; and here republished by permission.]

Treadwell Cleveland, for plaintiff.
Calvin G. Child, for defendant.

SHIPMAN, District Judge. This is a bill in equity which is based upon the alleged infringement of letters patent [No. 91,108] which were issued to the plaintiff [Addison C. Fletcher] on June 8th, 1869, for an improved government revenue stamp. The defendant [Joseph Selden] is a collector of internal revenue in the state of Connecticut, and, as such collector, under the authority and by direction of the commissioner of internal revenue, sold and used, prior to the date of the bill, the tax-paid spirits stamps, the rectified spirits stamps and the wholesale liquor dealers' stamps which the commissioner has directed shall be used. The three classes of stamps are made in the same way. The plaintiff's invention is described in the specification of his patent, as follows: "My invention consists in providing the stamp with a flap or flaps covering a portion of its face, and arranging the vignette, design, or printed matter on said stamp to extend over the flap or flaps and remaining or uncovered portion of said face or body of the stamp. By this application of my invention, as applied to an adhesive stamp, whether for internal revenue or other purposes, said stamp may be cancelled by tearing off the flap or flaps, which, if necessary, may be preserved as evidence of the cancellation; or, where not required to

[Drawings of patent No. 91,108, published from the records of the United States patent office.]



be preserved, the flap or flaps may either be torn off and thrown away, or be so mutilated by the act of cancelling, as heretofore practised on postage stamps, (which, and other adhesive stamps, my invention is equally applicable to,) as that it will be impossible to use the same stamp over again without detection of the fraud. Referring to the drawing, a is the main body of an internal revenue stamp, of the paper ordinarily used, having mucilage or other adhesive matter on its back, and having secured to its face, for a portion of its length or area, an outer piece of tissue or other thin paper or flap, b, which is loose from the main body, excepting where joined to it,

as at c, and which has impressed on it a continuation of the vignette or design, that is seen, in part, on the remainder, or uncovered portion of the main body. A stamp thus constructed may be cancelled by simply tearing off the flap, b, which may be separately preserved as evidence of the cancellation, or, in case of a postage stamp, for instance, it may be so mutilated by the ordinary method of cancellation, as to make the use of the stamp again, without detection of the fraud, impossible. The flap, b, being made of thin or bibulous paper, the portion of the design upon it is protected from being effaced by chemical agents, in consequence of the fragile or peculiar nature of such paper, while the body, a, may be made of comparatively stout paper, or, especially, where it is desired to preserve separate evidence of the cancellation, the flap, b, which is the portion torn off in cancelling, may be made of stout paper, and the main body, a, of thin or bibulous paper. In fig. 2 of the drawing, the same principle of construction is shown, but the body, a, represented as having duplicate flaps, b, b, on the face of the stamp, which, in some cases, may be preferred to one." The claim is as follows: "A postage or revenue stamp, having a portion of its surface composed of thin or fragile paper, or other suitable material, loosely attached, and on which a portion of the design or other matter is printed, substantially as and for the purpose or purposes set forth."

The stamps which are used by the defendant are made in the following manner: The body of the stamp is composed of a piece of paper of one thickness, upon which is impressed the printed matter of the stamp. A slip of red blank paper is attached to the outside edge of the back of the body of the stamp. This slip is about one-third of the length of the body of the stamp, and is of the same width. When the stamp is to be used, it is placed upon that part of the head of a barrel which has been previously covered with paste, is secured to the barrel by tacks, is varnished, is cancelled by a stencil plate, and, in certain cases, which it is not necessary to specify, the portion over the red slip and which is not attached to the barrel in consequence of the intervention of the slip, is cut out and is preserved. The blank slip adheres to the pasted surface of the barrel.

The questions in regard to the patentability and novelty of the plaintiff's invention are found in his favor. The question of infringement is the important one in the case, and depends mainly upon the extent of the plaintiff's invention, as described and claimed in his patent. The learned expert for the plaintiff understands the gist of the invention to consist in a revenue stamp having the characteristics, that one of its sides is adapted to be pasted to an article, and the other side is printed over its entire substance substantially, and that a certain portion of the printed face is so loosely attached to the portion which is to be pasted, that the loose portion may be torn or cut away, and leave over the area torn or cut away a layer of paper pasted to the stamped article. As thus understood, it is immaterial whether the flap is attached to the back or to the face of the main portion of the stamp, or whether the flap is a printed or a blank piece of paper.

Without controverting the position that this was the gist of the invention, I am of opinion that such was not the extent of the invention as described and claimed in the patent. An examination of the specification will show, I think, that the grant which the plaintiff received was much less broad than the invention is now claimed to have been, and that the patent cannot, even with the aid of the principle of liberal interpretation, properly include a stamp of two thicknesses of paper, one piece printed and the other unprinted, it being only necessary that the unprinted piece should be attached to the stamped article, and that the printed part should be loosely attached to the unprinted piece. In the specification the patentee says that his invention consists in providing the stamp with a flap or flaps, which are clearly described. The flap, upon which is impressed or printed a part of the vignette, design or printed matter, is loosely attached to the face of the main body of the stamp, upon the back of which is the mucilage or adhesive matter, and the flap, thus loosely attached, covers a portion of the face of the body of the stamp. Two particulars are indispensable, if the descriptive part of the specification clearly describes the invention. The flap must have a portion of the design imprinted upon it, and it must, also, be loosely attached to the face of the main body of the stamp. The claim, also, in substance, specifies the same particulars. It is for a stamp having a portion of its surface composed of some suitable material, on which portion a part of the design or other matter is printed, and which portion is "loosely attached." Loosely attached to what? The plaintiff construes these words to mean that the printed portion is loosely attached to any other portion of the stamp, and if, therefore, it is loosely attached to a flap, or to any unprinted portion of the stamp which adheres to the stamped article, such loose attachment satisfies the claim. But, in the descriptive part of the specification, the loosely attached portion, which is the flap, has the two characteristics which have been mentioned, one of which is that the portion is loosely attached to the face of the main body of the stamp. The words "loosely attached" must, then, mean, loosely attached to the face of the body of the stamp.

In the defendant's stamp, the design is printed upon the main body of the stamp, and a portion of the printed stamp is loosely attached to an unprinted slip of paper upon the back of the main body. The flap of the

defendant's stamp is unprinted and is attached to the back of the main body of the stamp. The whiskey stamps are an entirely different article from the plaintiff's stamp, as described, and can be included within the patent only by giving to the words "loosely attached" a meaning which they obviously did not have in the mind of the inventor when the claim was drawn. The whiskey stamp is a modification of the inventor's idea, which had not occurred to him when he drew his specification, which was so limited in its terms as not to include the stamps of the defendant.

The bill is dismissed.

[NOTE. For another case involving this patent, see Fletcher v. Blake, 26 U. S. (Lawy. Ed.) 156.]

Case No. 4,867.

FLETCHER v. TURNER.

[5 McLean, 468.] [1]

Circuit Court, D. Indiana. May Term, 1853.

JURISDICTION—SUIT BY ASSIGNEE OF PROMISSORY NOTE—CITIZENSHIP OF ASSIGNOR.

Where the assignee was on a promissory note, the declaration must show that the assignor, by his citizenship, had a right to sue in this court. If this be not done, the declaration is demurrable.

At law.

Mr. Scoby, for plaintiff.

Walpole & Walpole, for defendant.

OPINION OF THE COURT. This action is brought by the assignee of the notes against the maker, payable to George Fletcher, sen., who assigned them to the plaintiff. In the declaration there is no allegation of the citizenship of the assignor of the plaintiff, and if he were a citizen of Indiana, at the time of the assignment, under the 11th section of the judiciary act of 1789 [1 Stat. 73], this court has no jurisdiction of the case. In such a case the assignee cannot sue in this court, unless the assignor could have brought suit in it on the note assigned, and this he could not have done, if the assignor was a citizen of Indiana. In the declaration, to give jurisdiction to the court, the citizenship of the assignor should have been alleged. The demurrer which has been filed to the declaration must, therefore, be sustained.

Case No. 4,868.

FLETCHER v. UNITED STATES.

[1 Hayw. & H. 186.] [2]

Circuit Court, District of Columbia. June 4, 1844.

CRIMINAL LAW—EFFECT OF PRIOR CONVICTION AND NOLLE PROSEQUI.

A prior conviction and nolle prosequi upon a sufficient indictment at common law, though insufficient under the statute, is a bar to a subsequent prosecution on a new indictment sufficient under the statute, for the same offence.

At law. In error to the criminal court.

The prisoner [Henry Fletcher] was indicted for an assault and battery by shooting a pistol with intent to kill Elizabeth Fletcher, and was convicted.

Walter Lenox and James M. Carlisle, for prisoner.

Philip R. Fendall, for the United States.

On the trial of this cause the prisoner offered the record of a former trial and verdict of guilty and of an entry of a nolle prosequi in the case in the rendition of said verdict, no judgment having at any time been pronounced by the court on said verdict, as appears by the record of said trial and verdict of guilty and nolle prosequi, made a part hereof. The prisoner proved by Elizabeth Fletcher, a competent witness in the cause, that the prisoner was the same person tried and found guilty by the jury in the case, of which the said record is made part, and that the said prisoner is a free negro, and that the facts of this case, and of the case of trial and verdict of guilty offered in evidence are the same, and so admitted by the district attorney, and the witness is the same. Whereupon, the prisoner, by his counsel, having pleaded "autrefois convict," asked the court to instruct the jury that the prisoner under his said plea and the said record is entitled to an acquittal; which instruction the court refused to give. To which refusal the prisoner excepted. The former indictment is as follows:

"The jurors of the United States for the county aforesaid, upon their oaths present, that Henry Fletcher, late of the county aforesaid, free negro, on December 19, 1842, with force and arms, at the county aforesaid, in and upon one Elizabeth Fletcher, in the peace of God and the said United States then and there being, unlawfully did make an assault by shooting and discharging at the said Elizabeth Fletcher a pistol loaded and charged with gunpowder and thirty-one leaden shot, and her the said Elizabeth Fletcher then and there did beat and wound and illtreat, with intent her the said Elizabeth Fletcher then and there to kill, and other wrongs and injuries to the said Elizabeth Fletcher then and there did to the great damage of the said Elizabeth Fletcher, and against the peace and government of the United States.

"2d count. And the jurors aforesaid do further present, that the said Henry Fletcher, late of the county aforesaid, free negro, on the 19th day of December, 1842, with force and arms, at the county aforesaid, in and upon the said Elizabeth Fletcher, in the peace of God and the said United States then and there being, unlawfully did make an assault, and her the said Elizabeth Fletcher then and there did beat, wound and illtreat, with intent her, the said Elizabeth Fletcher,

[1] [Reported by Hon. John McLean, Circuit Justice.]

[2] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

then and there to kill, and other wrongs and injuries to the said Elizabeth Fletcher then and there did, to the great damage of the said Elizabeth Fletcher, and against the peace and government of the United States."

On which indictment the jury brought in a verdict of guilty.

The words "contra formam statuti" being accidentally omitted in the indictment, the prisoner's counsel affirmed him ready to receive the judgment at common law (fine and imprisonment), but objected to his being sentenced to the penitentiary under the statute. This objection was admitted; and the district attorney entered a nolle prosequi. The cause coming on to be heard on the transcript of the record of the criminal court and on the bill of exceptions therein set forth, and the questions of law thereon arising having been argued by counsel, and considered by the court, it was decided that the criminal court erred in refusing to give the instructions prayed, for, as appears by the bill of exceptions, the prior conviction and nolle prosequi are a good and sufficient bar to this prosecution, the former conviction being upon a sufficient indictment at common law, though insufficient under the statute; and the cause, was remanded, with directions to arrest the judgment thereon, and discharge the prisoner.

[NOTE. See Fletcher v. U. S., Case No. 4,869.]

Case No. 4,869.

FLETCHER v. UNITED STATES.

[1 Hayw. & H. 200.] [1]

Circuit Court, District of Columbia. June 4, 1844.

CRIMINAL LAW—EFFECT OF PRIOR CONVICTION AND NOLLE PROSEQUI.

Held, that a prior conviction and a nolle prosequi therein were a good and sufficient bar to a second prosecution for the same offense.

In error to the criminal court.

[This was an indictment by the United States against Henry Fletcher for assault with intent to kill.]

Walter Lenox, for prisoner.

Philip R. Fendall, for the United States.

The jury rendered a verdict of guilty as indicted, and the prisoner was sentenced by the court to imprisonment and labor. The prisoner pleaded autrefois convict. The prisoner, through his counsel, submitted the record of a former trial and verdict of guilty, and of an entry of a nolle prosequi in the case on the rendition of said verdict, no judgment having at any time been pronounced by the court on said verdict. The prisoner having pleaded autrefois convict, and asked the court to instruct the jury that the prisoner, under the said plea and the said record, is entitled to an acquittal, which instructions the court refused to give. The prisoner thereupon excepted, and prayed the court to sign and seal his bill of exceptions.

On argument by counsel on the questions of law, and being duly considered by the court, it is thereupon considered by the court that the said criminal court erred in refusing to give the instructions prayed by the traverser, as appears by the bill of exceptions, and the court, being of opinion that the prior conviction and nolle prosequi therein referred to were a good and sufficient bar to the prosecution, do order and adjudge that the cause be remanded, with directions to arrest the judgment thereon, and that the prisoner be discharged.

[NOTE. See Fletcher v. U. S., Case No. 4,868.]

FLETCHER, The WILLIAM. See Case No. 17,692.

FLICKENGER (SMITH v.). See Case No. 13,047.

Case No. 4,870.

FLINN et al. v. The LEANDER.

[Bee, 260.] [1]

District Court, D. South Carolina. 1808.

DERELICT—VESSEL CONTAINING SLAVES—FRAUDULENT CONCEALMENT OF TWO NEGROES BY SALVORS.

1. A vessel with slaves on board but no white person, considered as derelict, and one third given as salvage.

2. The captain and owner's share thereof declared forfeited, for fraudulent concealment of two of the negroes. Such share enures to the owners of the derelict.

BEE, District Judge.

The brig Norfolk, on the 19th of March last, 250 miles from this port, to which she was bound, fell in with the Leander; and on the afternoon of the third day arrived with her in Charleston. The Leander had 56 slaves on board, but no white person. In the evening of the 19th two of the slaves died. The wind was east, and the ship was standing eastward. From her manner of steering, and from a piece of a torn sail which looked like a white flag, she appeared to be in distress. On approaching the vessel, the negroes invited them to come on board, and an interpreter was afterwards found who explained their wish more clearly. Captain Marson then agreed to send on board five hands, with nearly one half of his provisions. The negroes told these men that all the white people had died; but, after their arrival in port, part of a journal was found by which it appeared that the

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

[1] [Reported by Hon. Thomas Bee, District Judge.]

crew had been driven, or thrown, overboard; two had been killed. The negroes said that eight or ten vessels had fallen in with them, without assisting them. That they had been boarded by one, who took away six or seven slaves, under a promise of supplying the rest with provisions; which, however, was not done. It appeared that the Leander was tight, and her rigging good, but she had no sails. It was evident from the last entry in the logbook that no reckoning had been kept for a month; from whence it was reasonably inferred that the negroes had been for that time in possession. Such is the evidence given by the claimants; and the nature of the case admits no better. It seems credible, and I must act upon it, in fixing the compensation due to the crew of the Norfolk. There being no white persons on board, and the slaves being regarded as cargo, I must consider the Leander as derelict: but she does not seem to have been in any immediate danger. She was in tight condition, had on deck provisions for eight or ten days, and more in her hold. They had fallen in with many vessels, the Norfolk actually took charge of them, and would have been assisted, if necessary, by a schooner called the Success bound to Boston: the services of the latter were declined, because they were not wanted. Indeed, from the prevalence of easterly winds at this season, it is highly probable that the Leander would have drifted on shore. This happened in the case of the Priscilla, and in that of the St. Peter; both within the knowledge of this court. The Leander actually arrived in port on the third day after she fell in with the Norfolk. No tempestuous weather seems to have threatened the vessel or the slaves, within that space of time. Nevertheless, considerable service was rendered; and it has been proved that the ship and cargo are worth nearly sixteen thousand dollars. I shall under all the circumstances adjudge one third of the net proceeds of this property by way of compensation. In other cases of derelict, attended with greater danger and exertion, I have sometimes given one half. But this is no general rule; every case must be judged of according to circumstances.

It appeared, in a subsequent proceeding, that the captain and owners of the Norfolk had concealed two slaves, part of this cargo; from which it was contended that they had forfeited their share of salvage; and that the forfeiture enured to the owners of the Leander, not to the other salvors. The judge said that the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, was conclusive upon both points, and decreed accordingly a forfeiture of that part of the salvage, to the owners of the Leander.

FLINT (BURLEY v.). See Case No. 2,168.

Case No. 4,871.

FLINT v. CRAWFORD COUNTY.

[5 Dill. 481.] [1]

Circuit Court. D. Kansas. 1879.

PRACTICE—DEPOSITIONS—MODE OF TAKING.

In common law actions in the federal courts, depositions may be taken pursuant to the state law or the act of congress, as parties may elect.

[Cited in Randall v. Venable, 17 Fed. 166; M'Lennan v. Kansas City, St. J. & C. B. R. Co., 22 Fed. 199.]

This was a common law action, in which depositions were taken and certified on behalf of the plaintiff [Charles L. Flint] in conformity to the provisions of the statute of the state regulating the practice and procedure in the state courts. The defendant [the board of commissioners of Crawford county] filed a motion to suppress, stating several grounds of objection, based upon the failure of the notice and procedure to conform to the requirements of the act of congress relating to taking testimony by deposition.

John T. Voss, for the motion.
J. D. Campbell, opposed.

MILLER, Circuit Justice. The motion to suppress must be denied. In common law actions in the federal courts, where, under the provisions of the act of congress, a case arises in which testimony may be taken by deposition, the parties may follow, in respect to the manner of taking them, either the provisions of the state law or of the act of congress, as they may elect. Since the notice and certificate in this case conform to the provisions of the state statute, I hold that the depositions may be read in evidence. Such has been the practice, so far as I know, in the circuit from the earliest period. Prior to the act of 1872 (Rev. St. 914), it is probable that the practice may have rested upon the rules of court adopting the state regulations as to taking and certifying depositions; but that act is broad enough to sanction the practice where the local regulations do not conflict with any special provision of the acts of congress on the subject. Motion denied.

Case No. 4,872.

FLINT et al. v. JONES.

[1 Wkly. Notes Cas. 334.]

Circuit Court, E. D. Pennsylvania. March, 1875.

COPYRIGHT—EDITION OF THE BIBLE—PRELIMINARY INJUNCTION.

[Complainant alleged that his edition of the Bible contained new and original chapter headings, marginal notes, and Greek readings; that it was copyrighted, and the proper notice published in each volume; and that defendant was infringing the copyright. Defendant filed affi-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

davits denying all the equities of the bill. *Held*, that there was nothing to identify the parts in which copyright was claimed, the notice being insufficient for that purpose; wherefore the injunction should be denied.]

[This was a bill in equity for the alleged infringement of a copyrighted edition of the Bible. Heard on motion for a preliminary injunction.]

The bill alleged: (1) That plaintiffs had printed or caused to be printed and published in the German language, and now owned, an edition of the Holy Bible, entitled "Die Illustrierte Familien-Bibel;" that said work contained a special table of contents, with headings of chapters and columns, and copious marginal notes, and Hebrew and Greek readings, collected, compiled, and translated expressly for said work, and formed a new and original compilation and arrangement which had never before appeared in print; that plaintiffs had copyrighted said work, which had always been published with the proper notice thereof prescribed by act of congress. (2) That defendant had also printed and published in German an edition of the Holy Bible of the same size (quarto) as plaintiff's edition, entitled "Neue Illustrierte Familien-Bibel," containing almost verbatim et literatim the table of contents, headings of chapters and columns, and marginal notes and Hebrew and Greek readings of plaintiffs' edition, and using almost exactly the same mode of arrangement and paging; that defendant's edition contained on the title page, substantially the same words as that of plaintiffs'. (3) That the table of contents of defendant's edition, pages 4–8, was the same in wording and arrangement as that of plaintiffs' pages 12–16; that the headings of columns, and headings of chapters, marginal notes and Hebrew and Greek readings of plaintiffs' edition, were copied literally in that of defendant's, with the exception of a few pages, even to the repetition of typographical errors.

The bill prayed (1) for an injunction restraining defendant from printing or publishing any of the copyrighted part of the plaintiffs' edition; (2) the destruction or delivery to plaintiffs of copies of defendant's edition still in his possession; (3) an account of the profits made on such copies as had been sold; (4) general relief.

Defendant averred by affidavits filed that defendant's title page was composed expressly for his edition; that it was the result of original labor, and not taken from that of plaintiffs, from which it greatly differed; that the text of defendant's edition had not been copied from that of plaintiffs' but prepared from electrotyped plates, and that the proof-sheets had been corrected and collated with other editions; that the table of contents, and headings of chapters and columns, and parallel references, marginal and Hebrew and Greek readings used by plaintiffs were not made for his edition, but had been used the former in whole, the latter in greater part in other editions, printed long before that of plaintiffs'; that in certain specified chapters in the Book of Revelations, the Apocrypha, etc., the headings of chapters and columns of plaintiffs' edition had been taken literally from older editions.

E. L. Perkins, for plaintiffs.
S. C. Perkins, contra.

THE COURT held that there was nothing to identify or distinguish the parts in which complainants claimed a copyright, the mere notice of copyright obtained in each book not being sufficient; and that, as defendant's affidavits denied the equities of the bill, an injunction could not be granted on a preliminary hearing. Injunction refused.

FLINT (LEIDERSDORF v.). See Case No. 8,219.

Case No. 4,873.

FLINT v. NORWICH & N. Y. TRANSP. CO.

[6 Blatchf. 158; 34 Conn. 554; 2 Am. Law Rev. 569.] [1]

Circuit Court, D. Connecticut. June 27, 1868.

CARRIERS OF PASSENGERS — PROTECTION AGAINST VIOLENCE—SOLDIERS CARRIED UNDER COMPULSION—MEASURE OF DAMAGES.

1. The owner of a steamboat who, undertakes to transport a passenger thereon, for hire, is bound to exercise the utmost vigilance and care in maintaining order and guarding such passenger against violence which may reasonably be anticipated, or naturally be expected to occur, in view of the number and character of other passengers on board.

2. His obligation, in such respect, is the same, even though such other passengers are soldiers, carried on compulsion.

3. The rule of damages, if the carrier is guilty of negligence, which causes a personal injury to the passenger, stated.

[Cited in King v. Ohio & M. Ry. Co., 22 Fed. 417.]

[This was a suit for damages by John Flint against the Norwich & New York Transportation Company.]

SHIPMAN, District Judge (charging jury). There are a number of facts, touching this interesting and important case, which is now finally to be submitted to you, about which there is no serious dispute. The plaintiff, a physician, residing in Boston, left his home, for New York, on the 6th of June, 1864. Before leaving, he purchased a through ticket, called a coupon ticket, by which he became entitled to a passage from Boston to Worcester, over the Boston and Worcester Railroad; from Worcester to Norwich, over the Norwich

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 2 Am. Law Rev. 569, contains only a partial report.]

and Worcester Railroad; from Norwich to New London, over the Northern Railroad; and from New London to New York, through the Sound, on one of the defendants' passage boats. He passed safely over the route from Boston to New London, where he arrived not far from half-past ten or eleven o'clock, in the evening, left the cars, and proceeded on board of the defendants' boat, the steamer city of Boston, which was then lying at the dock, with steam up, ready to start as soon as the passengers by the train, with their luggage, and some express freight, should be taken on board. The plaintiff, with other passengers, one of whom was a lady under his charge, went upon the main deck of the steamer, through her after starboard gangway. He proceeded, with the lady, through or along with a crowd of passengers, passed up the stairs, to the upper saloon, and, after some little time, leaving the lady, returned to the main deck, and went to the ticket office, to receive his state-room key, to which his ticket entitled him. He obtained the key, and proceeded to return from the ticket office to the upper saloon, by the proper route. When he had gone a short distance from the ticket office, and before he had reached the stairs, a loaded musket fell from the hands of a soldier, or non-commissioned officer, or was thrown down, and was discharged as it fell, and the ball passed through the foot of the plaintiff, just back of the toes, shattering the bones, and causing a dangerous wound, from which he suffered severely, for a long time. Finally, to save his life, as advised by his surgeons, he was compelled to have his foot amputated. He suffered for a period of nearly three months, and incurred expenses, in a city distant from his home. His activity and capacity for business and professional usefu'ness have been more or less permanently impaired. He claims that this injury, with all its serious consequences, was the result of a breach of duty on the part of the defendants, and, to recover proper damages therefor, he has brought this suit. The burden of proof is on the plaintiff, and it is now for you to say, whether or not, on the whole evidence, the claim of the plaintiff is well founded. The rules of law, which you are to apply as tests to this evidence, I will refer to particularly hereafter.

As I have already stated, before the arrival of the train which brought the plaintiff to New London, the steamboat was at the dock, with steam up, ready to start, when the passengers, the luggage, and the express freight from the train should all be on board. She had been lying there for some time. Between nine and ten o'clock, an hour or more before the train arrived, a detachment of United States soldiers, from Fort Trumbull, about sixty-three in number, with several non-commissioned, and two commissioned officers, went on board, and were there when the train arrived. Some fourteen to eighteen of these soldiers were armed with muskets, loaded and capped, and furnished with bayonets. They were detailed as guard over the rest, who were unarmed. Witnesses, called by the defence, state, that this detachment was placed on the main deck, forward of the engine room; that armed sentries were stationed, to keep them there; that a sentry was placed on each side of the engine room, to prevent them from going aft; and that two sentries were stationed at the forward starboard gangway, and one at the head of the stairway leading from the forward part of the main deck to the cabin below. Some of these witnesses say, that a sentinel was also placed at each of the two ladders which led from the forward part of the main deck to the saloon deck above. This was substantially the condition of things on the boat down to, or near to, the time when the train which brought the plaintiff arrived. On this train came a large number of passengers, among whom were about one hundred and fifty soldiers, in a detachment, under the command of officers, and who were ultimately marched on board, at the forward gangway. By the same train came, also, about a dozen or twenty soldiers, travelling, apparently, as ordinary passengers. These also went on board, but whether by the forward, or the after, gangway, it may be proper for you to consider, in deciding upon the conflicting evidence touching the condition of things on the after part of the deck, where, and at the time, the passengers were coming on board, and getting their tickets and state-room keys. The train having arrived, the plaintiff proceeded on board, by the proper entrance. Here the duty of the defendants toward him, as a passenger, commenced. They undertook to transport him, for hire, and were bound to secure him a safe passage, so far as that could be done, by the exercise of due care on their part. This was a duty imposed upon them by their contract, and by law. The precise rule of duty to which they are to be held, and which you are to apply to the evidence, in deciding whether or not they are liable in this action, is this: The defendants were bound to exercise the utmost vigilance and care, in maintaining order, and guarding the passengers against violence, from whatsoever source arising, which might reasonably be anticipated, or naturally be expected to occur, in view of all the circumstances, and of the number and character of the persons on board. Now, the plaintiff has testified, and has called a number of witnesses, who, he claims, substantially concur to the same points, that, immediately upon stepping upon the boat, he found himself in a dense crowd of persons, many of whom, like himself, were civilian passengers from the train, but among whom were a number of soldiers, some of them armed, who were boisterous, some evidently intoxicated, quarrelsome, profane, and exhibiting more or less disposition to rudeness and violence, by scuffling and jostling one an-

other and the civilians. The plaintiff claims, that the evidence touching this part of the case proves, that this disorder and uproar continued for from fifteen minutes to half an hour, until he returned from the upper saloon to seek his key, and until the discharge of the gun by which he was wounded; that, during all this time, no efforts were made, by the servants of the defendants, to quell this disturbance; and that it finally terminated in this injury to him. Now, if all these facts are, in your judgment, substantially proved, you will have a right to infer negligence on the part of the defendants, and hold them liable. If disorderly men, armed with loaded muskets, were in the space through which the passengers had to pass, it was the duty of the defendants to see that they were removed before the passengers came on board, or that the latter were notified of the danger, or that adequate protection was furnished. If armed and boisterous and quarrelsome soldiers rushed into the space referred to, after the passengers had begun to come on board, and produced and continued an uproar there, it was the duty of the defendants, through the officers and hands of their boat, to make every effort to quell the disturbance, and protect their passengers from violence and danger, and to call upon the military officers to enforce discipline.

But the defendants gave a very different version of the events of that night. They claim to have proved, by their witnesses, that the space where the passengers from the train came on board was clear, at least of soldiers, when they arrived; that there was no soldier, armed or unarmed, upon that part of the boat, at that time; and that, if any soldiers came in with, or among, the passengers, as they were pressing on to the boat, they were few in number, unarmed, and travelling as ordinary passengers, and behaved as peaceably as the civilians did. They further claim, that they have shown, by their witnesses, that, soon after the passengers got on board, one of the unarmed recruits, from Fort Trumbull, undertook to pass the sentry on the port side of the engine room, and was repulsed; that he repeated the attempt, and again failed; that he finally returned, with several of his companions, and overpowered the sentinel; that then he, or they, rushed aft, near to or into the space where the passengers came on board; that several of the guard followed, when a scuffle ensued, near the saloon stairs, between the insubordinate recruit or recruits, and the pursuing guards; and that it was in this brief, or, as the defendants claim, momentary, struggle, that the gun by which the plaintiff was shot was dropped, or thrown down.

Now, it is for you to say which of these versions is correct. As I have already said, if disorderly soldiers, armed with loaded muskets, occupied the space where the passengers came upon the deck, and no notice was given to the passengers of that fact, so that they might avoid the danger; or, if such soldiers rushed in upon that space, while the other passengers were coming on board, and securing their keys or tickets, and conducted himself in a quarrelsome and disorderly manner for a considerable time, during which the plaintiff was shot, without any effort on the part of the officers or crew of the defendants to suppress the disorder and protect the passengers, or induce the military officers to do so, and the plaintiff was injured in consequence, then you have a right to hold the defendants liable. If, on the other hand, the version given by the defendants' witnesses is the true one, then you will proceed to another inquiry, that is, whether, in this aspect of the case, the defendants did exercise their utmost vigilance and care, in maintaining order, and guarding the passengers against violence, from whatever source arising, which might reasonably be expected to occur, in view of all the circumstances, and the number and character of the persons on board. If they did this, or if it was done by the military, the defendants are not liable. If such vigilance and care were not exercised, and the plaintiff was injured in consequence, then the defendants are liable, and your verdict must be for the plaintiff.

And here it is proper that I should notice a circumstance set up by the defendants. They say, that they had no alternative but to take these soldiers from Fort Trumbull, who caused, as they assert, this disturbance, and this injury to the plaintiff; and that they were compelled to take them on this boat, by military coercion. You may assume that fact as proved, but this will not vary the liability of the defendants under the present circumstances. They took the plaintiff as a passenger, voluntarily, after this detachment was on board, and without notice to him; and their obligations to him were just the same, whether they took the Fort Trumbull troops voluntarily, or under compulsion. Those troops were on board long before the plaintiff was, the defendants knew the fact, no notice was given to the plaintiff, and they were bound to take such precautions for the protection of the civilian passengers, as were demanded by the rule I have laid down. They say that they did take them, or see that they were taken; and that the presence of the armed sentinels, at the points stated by the witnesses, to keep the soldiers in their proper place, was all that the highest vigilance and prudence required. The guard was not under their command, and the only apparent additional precautions that the defendants could have taken, that occur to me, (you will say whether they could have taken others,) would have been to apply to the military officers to have the sentries increased in number, or to place men, officers of the boat, or hands, under their own control, at the passages, to support the armed sentries, in case of difficulty, and

to act as an additional guard, and to quell any violence that might occur, as a more secure protection to the passengers. I do not say that this was, or was not, their duty. It is for you to determine. It is exclusively for you to say what their duty was—whether the condition of things on board of the boat, before the train arrived, required them, in anticipation of its arrival, to take these, or any other precautions, beyond what were taken; and, consequently, whether their neglect to do so was a remissness in their duty, and a neglect of their legal obligations, as I have laid them down. If the defendants discharged their duty, within the rule I have submitted to you, your verdict must be for them. If they failed to do so, and if the injury to the plaintiff is fairly attributable to that failure, then your verdict must be for the plaintiff.

If you find for the plaintiff, you will assess the damages at such a sum as will, in your judgment, compensate him for the necessary expenses he has actually incurred in his sickness and cure, and in providing himself with artificial limbs; for the loss of time and income from his profession, during his illness; for the permanent injury inflicted upon him; and, so far as money can compensate him, for the pain he has suffered. You will give the whole evidence a careful consideration, apply to it the rules of law, as I have laid them down, and return such a verdict as your judgment may dictate.

The jury returned a verdict for the plaintiff, for $10,000.

[NOTE. Subsequently, the defendants moved for a new trial (Case No. 4,874), which was denied.]

Case No. 4,874.

FLINT v. NORWICH & N. Y. TRANSP. CO.

[7 Blatchf. 536.] [1]

Circuit Court, D. Connecticut. Sept. 20, 1870.[2]

EVIDENCE—OBJECTION TO TESTIMONY AS A WHOLE—INCOMPETENT IN PART—RES GESTAE.

1. Where evidence admitted on trial at law was objected to only as a whole, the admission of it will not, on a motion for a new trial, be regarded as erroneous, if the testimony, as a whole, was admissible for the purposes for which it was offered, although part of it, if specifically objected to, ought to have been excluded as incompetent.

2. Where the question involved in a trial is, where certain officers of a detachment of soldiers were, on board of a steamboat, at the time of a disturbance among the soldiers, and whether they were doing anything, and what, for the preservation of order, evidence as to what was said in conversation between two military officers in uniform on board of the steamboat, at the time, and as to where such conversation occurred in reference to the place of the disturbance, is competent to show the identity of the officers and their connection with the detachment of soldiers, and also to show the time occupied in the conversation, as bearing on the question of the duration of the disturbance, and also to show the character and extent of the disturbance. The conversation is admissible, also, as a part of the res gestae.

[See note at end of case.]

The plaintiff [John Flint], on the 6th of June, 1864, at Boston, purchased passage tickets which entitled him to passage by railroads to New London, and thence to New York on a steamboat run by the defendants [the Norwich & New York Transportation Company], as common carriers of passengers and freight. He arrived at New London at about eleven o'clock in the evening, and, with other passengers, was received on board. For an injury sustained while on board of the defendants' steamer, the city of Boston, bound for New York, the plaintiff brought this action on the case, which came to trial upon the defendants' plea of not guilty, and the plaintiff had a verdict for $10,000 damages. See Flint v. Norwich & N. Y. Transp. Co. [Case No. 4,873]. The defendants now moved for a new trial, on the sole ground that certain evidence offered by the plaintiff and objected to by the defendants, was improperly received.

The plaintiff gave evidence tending to prove that, when he came upon the after deck of the steamer, by the usual place for entrance, there were a number of soldiers in the service of the United States on that deck; that some of them were armed with muskets loaded and capped; that some of them were "crazy drunk;" that they were noisy and quarrelsome, using profane and indecent language, and pushing each other and the passengers about the deck; that one of them, with arms, in particular, struck the hat of a civilian passenger down over his eyes, by a severe blow given without provocation; that said soldiers remained upon the said after deck, in substantially the same condition, for about half an hour; and that finally, in a struggle between some of them, one of the said muskets was thrown down upon the deck and discharged, and the ball passed through the plaintiff's foot, producing a very severe injury. The defendants gave evidence tending to prove that—in pursuance of general orders from the United States adjutant general's office, at Washington, and an order made by the officer in command at Fort Trumbull, requiring that recruits and men fit for duty, belonging to the 14th regiment of infantry, army of the United States, rationed and equipped for field duty, should leave the post of New London that evening to join their regiment in the field, and requiring the quarter-master of the post to furnish the necessary transportation—a detachment of the said 14th infantry, consisting of sixty-three enlisted men, among whom were a sergeant and two corporals, accompanied by two lieutenants in said regiment, left the said fort under the command of said officers, and, with their regimental band,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirmed in 13 Wall. (80 U. S.) 3.]

marched on board of the defendants' said boat, and were stationed on the forward deck by their officers, at about half past nine o'clock in the evening of that day; that eighteen of said men were detailed by their officers as a guard; that said guard were armed with muskets loaded and capped, and furnished with bayonets, and the remainder of said detachment were unarmed; that sentinels were also selected from the said guard and stationed. to confine the detachment to the forward deck and to prevent their going on shore; that, soon after the said passengers from the said railroad came on board, one of the unarmed recruits from Fort Trumbull attempted to pass the sentinel on the port side of the engine room and was repulsed; that he repeated the attempt and again failed; that he finally returned with several of his comrades and overpowered the sentinel; that they then rushed aft near to the place where the passengers came on board, and several of the said guard followed, when a struggle ensued near the saloon stairs, between the insubordinate recruits and the pursuing guards; and that, in the struggle to arrest these men, a musket was snatched by one of them from the hands of one of the guard, and was thrown violently upon the deck and discharged, by which the plaintiff was shot. For the purpose of proving the condition of affairs on said deck, the extent and character of the disturbance, the condition and situation of the officers and soldiers on board, and the manner in which they discharged their duty prior to and at the time when the plaintiff received his injury, and as evidence of the length of time between the beginning of the disturbance and the firing of the shot, and for the purpose of showing a failure on the part of the officers of the said soldiers to keep them in proper order and repress disorder amongst them, (it being admitted that there were no persons on board directly charged with the care of preserving order and repressing disorder among said soldiers other than their officers,) the plaintiff offered in evidence the testimony of three persons who were passengers on said boat, who testified, that, after they had gone down to the dining saloon and were at the table, a man in military uniform, whom they supposed to be a sergeant, came into the saloon, and saluted an officer in uniform, whom they supposed to be a lieutenant, and who was sitting at the table with another officer, whom, from his uniform, they supposed to belong to the navy, and said to him, "There is a row on deck and I cannot suppress it;" that the officer who was addressed, replied, "Mind your orders;" that the person supposed to be a sergeant said, "I am afraid some one will be hurt;" that the officer replied, "You have your orders, mind your orders;" that the person supposed to be a sergeant then retired; and, that, after a few minutes, he came down again into the saloon very hurriedly, and very soon after the report of a gun had been heard by one of the witnesses, and, addressing the same officer, said, "For God's sake, come up, a man has been shot." The case made for this motion stated as follows: "To the admission of this evidence for all the purposes for which it was offered, the defendants objected, and particularly for the purpose of showing the condition of affairs upon the deck of said boat just prior to and at the time the plaintiff received his injury." But the court overruled the objection on all the grounds, and admitted the evidence.

Linus Child, Richard H. Dana, Jr., and Simeon E. Baldwin, for plaintiff.

Lafayette S. Foster and Jeremiah Halsey, for defendants.

Before WOODRUFF, Circuit Judge, and SHIPMAN, District Judge.

WOODRUFF, Circuit Judge. It was conceded, on the argument of this motion, by the counsel for the defendants, that the general question, whether a common carrier of passengers is liable for an injury received by one passenger through the negligence or from the misconduct of a fellow passenger, is not raised by this motion or involved therein. Nor does the case now before us disclose upon what grounds, either of law or fact, the verdict for the plaintiff in this case was rendered. It must, however, have necessarily proceeded upon some neglect of duty or violation of obligation to employ the utmost care and diligence that the plaintiff might be carried safely to his destination.

Against what possible injuries the defendants were bound to adopt precaution; what dangers they were bound to foresee and guard against in advance; whether, in these days, in which the means of carriage are customarily furnished on a large scale and are used by many hundreds together, owners of steamboats and proprietors of railroad lines are under obligations to have at command a force adequate to the protection of passengers against possible assaults and injury from other passengers, and, therefore, should be prepared in advance to furnish such protection, even against the just presumption that their passengers will be orderly, keep the peace, and do each other no harm; and, especially, whether the presence of a detachment of soldiers received as passengers, under the ordinary command of proper officers, ought to have suggested to the defendants that there was any danger whatsoever that other passengers would be injured, and so required them to provide special defence or protection to such other passengers—are, it may be, questions of interest to carriers of passengers. It would seem that, in respect to such a detachment, the presumption of obedience and subordination should obtain, and that a common carrier would not be bound to anticipate the contrary. On the other hand, if a carrier has

already received a company of soldiers, or a party, whether soldiers or not, whom he finds to be "crazy drunk," (to use the language of the case before us,) and who become riotous and disorderly, so as to menace danger to other passengers to thereafter arrive for carriage, a different question arises. The case, as made for the purposes of the motion, is not very distinct upon that point; but if, before the train on which the plaintiff and other passengers arrived, such a condition of the soldiers had already become manifest, the duty of the defendants to adopt such precautions as were in their power to restrain them, for the protection of the plaintiff and such other passengers, would seem obvious. And if, after their arrival on board, disorder and violence arose among the soldiers or among any passengers, it is no harsh rule that holds it to have been the carrier's duty to use such means as he had, or, by ordinary care, might have had, for the protection of the peaceable. The evidence which was objected to and was received, was, if pertinent at all, applicable to this view of the duty of the defendants. The rule of liability prescribed by the court is not stated in the case before us, but, as it was not excepted to, it must be assumed, for all the purposes of this motion, to be the correct rule, and I have made the foregoing suggestions for the sole purpose of seeing whether, under any rule of liability, the evidence so given was competent in its nature and relevant to the question.

Assuming that the defendants, when the disorderly conduct of these soldiers began, became bound to employ their means diligently for the protection of other passengers, the question for the jury was, did they do so? and, if not, did their negligence in this cause the injury to the plaintiff of which he complained? It was pertinent to this question to inquire how many riotous persons there were, how long the disturbance continued, and to what extent it was carried, and, as especially bearing on the question of due diligence, how far the officers of the soldiers, whose plain duty it was to use every means which even military law would warrant to preserve order, were in the actual discharge of that duty; for, under any view of their own duty to be diligent, the defendants had a right to rely upon and take the aid of such officers, and, until it appeared that such aid was withheld or inefficiently furnished, a jury might well conclude that the defendants were themselves excused from any interference. In this view, then, was the evidence in question competent and relevant?

The objection on the trial was not to any parts of the testimony of the witnesses, but to the whole; and it would not now be just to the plaintiff, or conformable to the rule of law governing the subject, to permit the defendants to divide the testimony into parts or sentences, and argue as to one or more, that it or they are not competent. If, on the trial, the defendants had objected to a part or portion of the testimony, the plaintiff might have waived it. If it were claimed that the words of the sergeant addressed to the officer in the cabin were not competent evidence, as against the defendants, of the fact which he stated, still, if the testimony apart from these words was admissible, the objection must fail. In short, if the whole testimony, as an aggregate, was admissible for the purposes for which it was offered, then it was properly received, although specific parts of it might have been pointed out which it would have been the duty of the court to exclude. Counsel should make their objections in such case specific, so that the adverse party may have an opportunity to waive what is objectionable, and so that the court may have its attention called specifically to the precise point which counsel propose to urge, in any stage of the cause, to the testimony offered.

Another preliminary observation should be made, in view of the arguments presented on the motion. The objection which was made is itself of a somewhat equivocal meaning. The defendants objected to the admission of the evidence for all the purposes for which it was offered. This, it is argued by the plaintiff, means simply a general objection to the evidence for the purposes for which it was offered, and is not a specific objection that the evidence is not admissible for any of the purposes for which it was offered, and, hence, that if the evidence was admissible for any one of the purposes for which it was offered, (other than to prove the condition of affairs on deck, which was particularized,) the objection was not well taken and should be overruled. Although the form in which the objection is stated is somewhat equivocal, I am inclined to think its import, as intended and understood, was particular and not general. The plaintiff had stated several purposes for which he offered the testimony, and, when the defendants said they objected to its admission for all the purposes for which it was offered, they meant for each or any of these purposes, and they added their particular specification of the purpose to show the condition of affairs on deck, because they laid special stress upon that point. I admit that the language is not the best chosen to convey the idea, but, on a motion for a new trial, a rigid technical criticism ought not to have much weight, if the court are satisfied that there was error operating to the prejudice of the party objecting.

I shall deal with the objection, therefore, as if it were made distinctly and consecutively, to the admission of the testimony for each of the purposes specified by the plaintiff, as each purpose was separately announced.

Reverting to the questions in issue, it was material, or certainly relevant, to show the character of the disturbance on deck, whether formidable or slight, to show its duration, and whether any and what efforts were made to repress it, or to protect passengers

from injury therefrom, and, as connected with this last, whether the officers of the detachment were using their power and means for the purpose. Indeed, it was not denied, on the argument of this motion, that these were relevant and proper subjects of inquiry; and these are the precise purposes for which the testimony was received. If, then, the testimony bore on these matters, and was, in its nature, competent, the objection was properly overruled.

1. There was evidence that a detachment of soldiers, in command of two lieutenants, a sergeant and two corporals, were on the boat, and that a conflict between some of the men and others who had been selected as a guard, was in progress; and that it began shortly after the other passengers came on board. At a time plainly concurrent with the disturbance, a person in uniform, with stripes on his arm, descends from the very place of the disturbance, near the saloon stairs, into the saloon, and, with the form of military etiquette, salutes a man in military uniform, which, in the judgment of the witnesses, was that of a lieutenant, the latter replies to him in manner and terms of military authority, and the former yields obedience, but again returns and invokes the aid of the other. Now, all this is not conclusive evidence that these were officers of the disorderly soldiers; but the uniforms, and the evident relation between them, testified by acts as well as words, were circumstances which were proper to be submitted to a jury on that question of identity. If a witness had been produced, and had testified that he saw a person, in the uniform of an officer, give orders to the detachment, which they obeyed, it would not be conclusive evidence that such person was an officer, or that he had, in fact, any authority; but it would tend to show both. Transactions which, in all probability, would not take place unless certain other facts existed, are evidence oftentimes from which such other facts may be inferred; and the affairs of life are to be judged of according to their usual and natural signification.

When, therefore, proof has been given that a detachment of soldiers and their officers are on board the steamer, and persons are pointed out, in the uniform of officers, acting toward each other as such, and, in reference to the soldiers, giving and obeying commands, although not in the very presence of the soldiers, there is, certainly, a presumption that they are the officers, because it would be unnatural, and against the ordinary course of human experience, to think otherwise. Although the witnesses had no actual knowledge other than what they witnessed, the transaction would, certainly, aid the jury in determining whether they were officers of the detachment, because, in the absence of counter evidence or explanation, it was grossly improbable that they were not. I have no hesitation in saying that, upon the question of the identity of the officers, and their connection with the detachment of soldiers, the testimony was proper for the consideration of the jury. It follows, that it bore distinctly on the question—where were such officers, and were they doing anything, and what, for the preservation of order, the repression of the violence, and the protection of peaceable passengers?

2. It was of some materiality, under the rule of duty resting on the defendants, above stated, to show how long the disturbance continued before the plaintiff was injured, because, in view of the other evidence as to the number of men engaged therein, the jury were to consider whether the defendants made suitable endeavors, by the means then in their power, to suppress it. If the acts of the supposed sergeant and lieutenant were any evidence of the condition of things on deck, then, clearly, his coming and departure, and the subsequent report of the gun, were evidence, slight, I admit, and of very little importance, but yet evidence, that the duration was somewhat greater than the time thus consumed in these acts of the sergeant, at least, that it began before he came down, and continued during his interview and afterwards, until the report of the gun was heard.

3. Did the transaction legitimately tend to show the condition of things on the deck? Clearly, in the view above taken, it tended to show that the soldiers were left without the care of the lieutenant. For, if the jury should be satisfied that the supposed sergeant and lieutenant were officers of this detachment, then they necessarily must find, first, that such lieutenant was doing nothing personally for the promotion of order, and that temporarily, at least, the men were left without the presence of either him or the sergeant; and this to some extent appertained to the condition of affairs on deck.

But, more than this, the entire transaction was of significant import touching the extent and character of the disturbance there; for, there was other proof of the fact of disturbance and that it was caused by the soldiers. Pending the disturbance, their chief non-commissioned officer comes to his superior officer, expresses his inability to deal successfully with it, and invokes his aid in suppressing it. It is refused, and he returns, and soon after hurries in evident excitement down the stairs and implores assistance in terms of despair. It seems scarcely possible to doubt the significance of these acts, or their relevancy, if competent. An illustration alike in kind and only differing in that its competency and relevancy may be more strikingly obvious, may be suggested. A company of disorderly persons enter a house and begin a disturbance, and women and children come rushing from the house in evident fright and screaming for aid. This would be evidence that what was en-

acted within was of a character and extent calculated to create alarm and awaken apprehension of danger. It would not, perhaps, be proof of particular acts, and, possibly, their declarations might not be used to fix guilt upon particular individuals, but, of the general fact that the disturbance, the existence of which was otherwise proved, was of such proportions or extent as to excite and alarm, and so to call for interference to stay or suppress it, it would clearly be competent evidence.

4. It is strongly urged that the declarations of the sergeant to his superior are not evidence as against the defendants, and should not be received. I have already observed that the declarations were not objected to as such. The objection was general, to all the testimony. But I do not think it necessary to dispose of that objection by any technical answer. In my judgment, the declarations were admissible, as indicating, first, the relation of the sergeant to his officer—not as a mere declaration, but as an act of subordination; second, as showing the alarm and fright of the sergeant and a state of mind indicating need of assistance; and, finally, the whole transaction was a part of the res gestae, in such sense that the jury might properly be permitted to hear it. His declarations were not, upon their own isolated and separate credit, to be received as evidence of the facts he stated, but the facts to be inferred do obtain credit from the circumstance that, in the situation in which he was placed, in the fright and alarm under which he spoke, and in the condition of things on deck already proved, he did make such utterances to his superior officer. Declarations, when part of the res gestae, bear the character and have oftentimes the force of acts, and, still oftener, are used as proper evidence, giving character and explanation to other acts. Mr. Starkie says, with singular pertinency to the declarations now in question: "If the declaration has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the credit of the person making the declaration, it is not admissible; but, if any importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances, independently of any credit to be attached to the speaker, then the declaration is admissible." This describes the testimony in question. The connection of the whole with the circumstances of the case, gives it credit and significance, not as the isolated act or statement of the sergeant, but as a narrative of occurrences in their connection with the principal events, receiving significance and inviting belief. Confining myself to the single question presented on this motion, I am constrained to say that the motion for a new trial must be denied.

[NOTE. In affirming the judgment of the circuit court, the supreme court (Mr. Justice Bradley delivering the opinion) referred to the opinion of the circuit court as being sufficiently full upon the subject. It was held that the evidence showing the manner in which the military officers attended to their duty during the disturbance, etc., was admissible as part of the res gestae. Norwich Transp. Co. v. Flint, 13 Wall. (80 U. S.) 3.]

Case No. 4,875.

FLINT v. ROBERTS et al.

[4 Ban. & A. 165.] [1]

Circuit Court, D. Minnesota. March, 1879.

PATENTS—REISSUE—ANTICIPATION—INFRINGEMENT.

1. Reissued letters patent No. 7,254, granted to George T. Flint, as assignee of Orange N. Hart, August 8th, 1876, for an improvement in hot-air furnaces, *held* to be for the same invention as that described in the original patent, No. 92,822, granted to the said Hart July 20th, 1869.

2. The invention described and claimed in the reissue was not anticipated.

3. The defendants infringe by using the invention in connection with an improvement patented by another.

4. While the complainant would not be permitted to use the improvement in connection with his invention, the defendants cannot use the complainant's invention in connection with their improvements.

In equity.

West & Bond, for complainant.

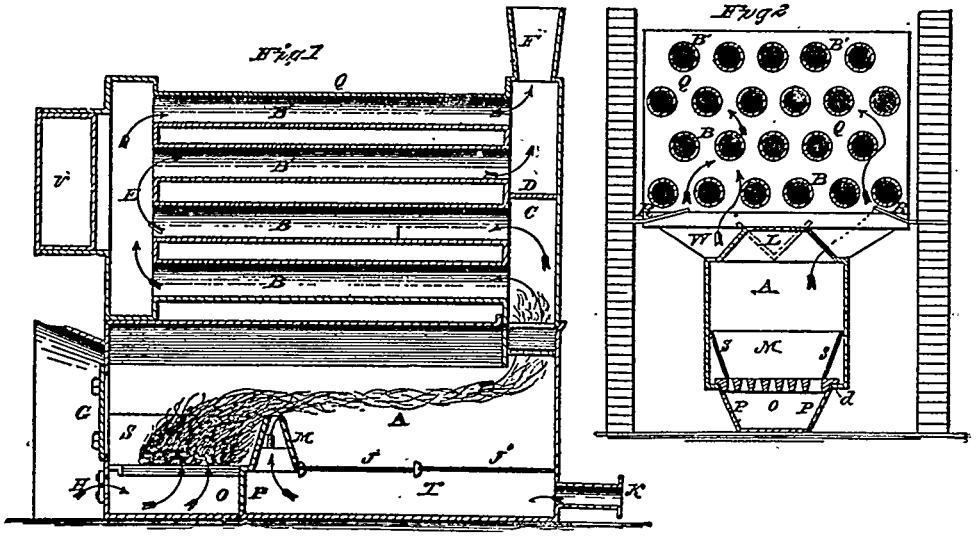
W. B. Phelps, for defendants.

NELSON, District Judge. This suit is brought by complainant, to recover for an alleged infringement by the defendants [Oliver N. Roberts, and others] of patent, reissue No. 7,254, for an improvement in hot-air furnaces.

The complainant is the assignee. The patentee in his specifications of the original patent, No. 92,822, describing his invention states, inter alia, that it "consists in the novel construction and arrangement of the fire-box and smoke flues whereby I obtain a large radiating surface." He then describes in detail: "* * * At the back end of a fire-box A, I put an escape flue W, for the passage of the flame and smoke. This flue increases in width from the fire-box upwards, and is about twice the width of the fire-box at its widest part. At the centre of this flue I place a V-shaped diaphragm L to divide the ascending flames. On the top of the flue W, I locate a rectangular drum C, open at its lower side and divided at its middle by a horizontal partition D. On top of the front end of the fire-box I place another rectangular drum E * * *. The drums C and E, I connect by a series of horizontal flues or pipes BB' * * *. In

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

[Drawings of reissued patent No. 7,254, published from the records of the United States patent office.]



the drum C, the lower flues B open below the partition D, and the upper series B' above the partition." In describing the operation of the furnace, the specifications state: "* * * The flame and smoke pass along to the back of the fire-box and up through flue W (being divided or spread in their ascent by the diaphragm L), into the lower portion of the drum C, where they are stopped by partition D, and caused to pass back through flues B to the drum E, and from thence along through the flues B' to the upper portion of drum C and into the smoke stack * * *."

The following claim is made: "No. 2. The combination of the furnace or fire-chamber, constructed as herein described with the air heating devices consisting of the drums C E, flues B and B' with the stationary diaphragm D and deflector L all constructed and arranged substantially as described."

In the reissue he claims: "1. The combination of the drums C E B and B' having division partition D" (diaphragm), "and constructed and arranged as described with the fire-chamber of a furnace or heater substantially in the manner and for the purposes set forth." "3. In combination with a drum and furnace substantially as described, the deflector L arranged in the exit flue W as and for the purposes set forth."

The third claim in the reissue is the second claim in the original patent, and contains the deflector L, which in the specifications is stated to be used for the purpose of dividing flames. It is manifest this deflector is only necessary when the drum of the radiator over the flue is wider than the fire-box and flue. The radiator is an entire and distinct device, and the patentee on a reissue is entitled to add a claim for the drums forming the radiator in combination with the fire-box. It is fully warranted by the description in the specifications and drawings, and, being his original invention, can be claimed in the reissue. Morris v. Royer [Case No. 9,835]; Hoffheins v. Brandt [Id. 6,575]; [Battin v. Taggert] 17 How. [58 U. S.] 83; Woodward v. Dinsmore [Case No. 18,003]. It is a device capable of being placed on or taken off of any fire-box of its length, having an escape flue for the flames equal to the opening of the rectangular drum C at its lower side. The reissue, therefore, in my opinion, is for the same invention as the original, and valid.

There has been no anticipation of Hart's improvement in furnaces. The locomotive-tubular boilers are of an entirely different structure, and have no resemblance to the radiator used by Hart. The fact that they have tubes, surrounded by water, through which the products of combustion pass for the purpose of generating steam, does not affect the validity of this patent.

The date of Hart's invention is October 5th, 1867. This is established by the evidence, so that the Bartlett patent is the only exhibit of the defendants which is prior in date. All other exhibits set up to anticipate the invention are out of the case. The defendants have taken no testimony in respect to this exhibit, but from the evidence of Dean, an examiner, at one time, in the patent office, and complainant's witness, there is nothing in this patent to sustain the position of the defendants.

An examination of the two models, and the specifications, and the description of the operation of the two machines, show that the defendants use the Hart invention in connection with the Henderson improvement. The most careless observer could not fail to detect this. The front part of the Hender-

son radiator is a formal alteration of Hart's. He makes the head drum over the flue of the furnace, narrower at the base, so as to bring the lower row of the series of pipes or tubes on a line with the products of combustion as they pass up into the drum. This construction performs substantially the same function as the deflector L, and enables the lower tubes to take a portion of the flame and smoke passing up.

Henderson, however, has added a rear extension of tubes and an extra drum at the end, almost, if not quite, a duplicate of Hart's, so that he divides the ascending flames from the fire-box, passing a portion of the products of combustion through his extension, which reunites with the portion passing through the front tubes at the smoke-pipe or chimney. He increases the radiating surface to twice the length of the same length of stove used by Hart. And it is claimed that, by dividing the currents of flame, they being forced to unite again from opposite directions, the heat is increased, and the soot will be consumed, and thus prevent the clogging of the tubes and filling up of the chimney.

Whether this is true or not it is unnecessary to determine, but upon the testimony of the expert, and an examination of the Henderson patent, I am of the opinion that he has taken the invention belonging to the complainant, and has thus infringed his patent. [McCormick v. Talcott] 20 How. [61 U. S.] 405; Forbes v. Barstow Stove Co. [Case No. 4,923]. While the complainant would not be permitted to use the Henderson improvement in connection with his radiator, it is also evident that the defendants cannot use the Hart radiator in connection with their extension, which they now do.

Decree will be entered in favor of the complainant, and a reference to the clerk, as master, to ascertain damages.

Case No. 4,876.

FLINT v. RUSSELL et al.

[5 Dill. 151;[1] 8 Cent. Law J. 68; 7 Reporter, 265; 7 Am. Law Rec. 575; 19 Alb. Law J. 226.]

Circuit Court, E. D. Missouri. Jan., 1879.

NUISANCE—LIVERY STABLE IN CITY—INJUNCTION AGAINST THREATENED NUISANCES.

1. A livery stable in the residence portion of a city is not, as a matter of law, necessarily to be considered as a nuisance to the improved property adjoining or near it.

2. Where the facts stated in the bill showing that the erection and use of a livery stable would be a nuisance to the adjoining property were denied by the answer, a preliminary injunction to restrain the erection of a building to be used as a livery stable was refused.

[Cited in Keiser v. Lovett, 85 Ind. 243; Julia Building Ass'n v. Bell Telephone Co., 88 Mo. 262.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

On motion for an injunction. The bill alleges, in substance, that the parties are owners of adjacent premises, in block 1,014, between Ewing and Garrison avenues, on Locust street, in the city of St. Louis—the premises of complainant being occupied solely for residence purposes, and those of the defendants having been acquired by them only recently, for the purpose of the erection thereon of a public livery and sale stable. It is alleged that the property fronting on Locust street, for many blocks east and west of the defendants' property, is occupied and used for residence purposes, and that it has been, to that end, handsomely and expensively improved—there being no erection upon the street within the boundaries indicated which are, or have been, used for business or manufactures. It is alleged that, well knowing the established character of the neighborhood, and its occupation and use for residence purposes, the defendants, having bought the property adjoining that of complainant, have announced their intention to erect thereon a public livery stable; that in such stable will be kept great numbers of horses and vehicles; that there will be stored in it, for purposes of feed, large quantities of hay and other combustible materials; that the presence of so many horses in such a stable will cause great noise, the generation of offensive odors, the congregation of swarms of flies, and will attract numbers of improper and disreputable characters; and that, by reason of the said matters, the value of complainant's premises will be irreparably damaged, they will be rendered unfit for residence purposes, and the dwelling which stands thereon will be rendered untenable by complainant, or any one who might otherwise be desirous to occupy the same. It is alleged that the livery stable of defendants is to be constructed with board floors, and that the stamping of horses thereon, and the rolling of vehicles on the same, by reason of the close proximity of the stable to the dwelling of complainant, will cause any occupant great and interminable annoyance, uneasiness, and disquiet, and render it impossible for any person or family to occupy said dwelling without great physical discomfort and inconvenience, and that the presence of combustible materials so near the said dwelling will cause every occupant of said dwelling grave fears and anxiety by reason of the increased danger and peril from fire.

It is alleged, also, that the mere beginning of the stable has greatly diminished the value of complainant's property, and that he is advised that the maintenance of such stable will be prejudicial to the health of the residents within its immediate neighborhood. It is alleged, further, that the eastern wall of defendants' stable will be built so as to immediately cover the western wall of complainant's dwelling, and will be extended to the sidewalk on the north, so as to cut off the light and view westward from complain-

ant's said premises, and that defendants have actually begun the erection of their building, and announce their purpose to complete the same. As a further ground of relief, the bill alleges that the defendants have begun the erection of their building, and will complete the same, for unlawful purposes of extortion and blackmail, and that they have purchased the lot now occupied by them with the expectation that, upon their announcement of their intention to build a livery stable, or upon the completion of the same, the property owners in the immediate neighborhood will be compelled, from motives of self-protection, to unite and buy the defendants' lot at a price to be fixed by defendants, greatly in excess of what they paid and of the real value of said premises. It is alleged, furthermore, that in other neighborhoods devoted to residences the defendants have bought property, and, having announced their intention to build a public livery stable, and having begun the same, have been bought off by the property owners of the neighborhood, at an exorbitant advance over and above the price paid for the property by the defendants; and that, even in the present instance, the defendants have indicated that what they might ultimately do would depend upon the action of the owners of the property in the neighborhood. The bill alleges that the defendants have been notified to desist from the erection thus begun by them, but that they persist in continuing the work already begun. The bill prays an injunction and general relief. In support of the bill, the complainant has filed numerous affidavits.

The defendants answer, under oath, in which they admit the ownership, as alleged, of lots in block 1,014, on Locust street; that the defendants are erecting a brick building thereon, adjoining the plaintiff's property, to be used as a livery and boarding, but not, as alleged, a sale stable; deny that the complainant is in actual possession of the adjoining building, but only in possession by his tenant; deny that the neighborhood is fixed in its character as a residence neighborhood, and set forth various trades that are carried on in said block 1,014—among them, on Olive street, a large livery stable, two meat shops, and other shops; deny that the building they are constructing will be a nuisance, or that the business to be carried on therein will in any way constitute a nuisance, and they put in issue every averment to that effect in the bill. They aver that they have purchased and paid for the land occupied by them in good faith; that they have employed an architect, who stands well in his profession, to design the building in such a manner that defendants shall reside in the second story, and so as to suppress all noises and be free from all nuisances averred in the bill. They aver, further, that Thomas P. Russell, for thirty years previous to March, 1878, carried on the business continuously in the same building on Franklin avenue, in a residence portion of the city. Their change from that place was occasioned by the expiration of his lease; that his son was admitted as a partner some years previous to 1878. They aver that they bought and paid for the ground now owned by them with the intention of pursuing their trade in a lawful and proper manner, and that they propose only to enjoy the lawful use and control of their own land, and in no manner to interfere with the rights of others; that the said livery stable, when constructed, will not be a nuisance, nor carried on in any way so as to interfere with the complainant, and they will carry it on in a proper and lawful manner; that their business, when so conducted, is a useful and necessary calling, and they deny all the imputations in the bill against their good faith. Numerous affidavits were filed in support of the answer.

J. M. & C. H. Krum, for complainant.

Broadhead, Slayback & Haeussler, for defendants.

DILLON, Circuit Judge. The prayer of the bill is "that the defendants be perpetually enjoined by the decree of the court from further proceeding with the erection of said livery stable upon the said lot, and from the use and occupation of said premises for the purposes of a public livery stable, and for general relief." The present application is for a special preliminary injunction restraining the defendants from making such erection, and from so using the said premises.

The questions which may finally be involved in the merits of the case are of very great importance, as they arise out of the point where two plain principles of law meet. The one is that every owner of private property may make any lawful use of it which he sees proper. The other is that private property must be so used as not to injure the property of his neighbor, or invade the just rights of the public. St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642.

The essential groundwork of the bill in this case is, that the proposed erection of a livery stable on the lot in question, and its use for this purpose when erected, will constitute a nuisance to the plaintiff's adjoining property. The bill can have no other foundation. On a street, and in a locality such as this portion of Locust street is, many erections can readily be imagined that would be extremely objectionable to the owners of residences, such as a meat market, a green-grocer's establishment, or, indeed, a store building or a business house of any kind. But the general law of the land does not limit the rights of ownership by the tastes and wishes of one's neighbors. Possibly, under the charter provisions, the municipal authorities might be invested with more power, in the nature of police regulations,

over the uses to which private property may be put, than can be exercised by the courts under the general law; but it is conceded that the city authorities have not undertaken to regulate the erection or use of livery stables. It is, therefore, clear that this application must rest upon the proposition that the livery stable proposed to be erected and used by the defendants is, and will be, in the legal sense of the term, a "nuisance." To be a nuisance it must be something which unreasonably and sensibly interferes with the comfort and enjoyment of life or property—which may be by noises, noxious and offensive smells, injurious gases, the collection of flies and insects, and the like. The books abound in cases where nuisances of this kind are held actionable at law, and where, when the fact is ascertained, either by a verdict or by admission in the pleadings, or from the essential and unavoidable character of the trade or occupation, that the thing or matter complained of is a nuisance, courts of equity have interfered by injunction.

Counsel have referred to a number of adjudications in which the legal rights of the proprietors of livery stables and those of the adjoining or near proprietors have been considered by the courts. The principal cases are the following: Aldrich v. Howard, 7 R. I. 87, 8 R. I. 246; Burditt v. Swenson, 17 Tex. 489; Dargan v. Waddill, 9 Ired. 244; Kirkman v. Handy, 11 Humph. 406; Coker v. Birge, 10 Ga. 336; Harrison v. Brooks, 20 Ga. 537; Morris v. Brower, 1 Anth. N. P. 368. The judgments in these cases concur in establishing this doctrine, viz., that a livery stable in a town or city is not per se—that is, necessarily and unavoidably—a nuisance, but it may be or become a nuisance, and this depends upon its location, as respects the property near by, and the manner in which it is built, kept, and used. The foregoing observations are well illustrated by Aldrich v. Howard, 8 R. I. 246, where it was decided that a livery stable may be a nuisance, notwithstanding it was properly built, properly kept, and was in a location as fit as any in that part of the city. The court say: "It has been held, in other cases, that a stable in a town is not necessarily and per se a nuisance; yet if it is so built or so used as that it destroys the comfort of persons owning and occupying adjoining premises, creating such an annoyance as to render life uncomfortable, then it is none the less a nuisance that it is well kept, carefully built, and as favorably located as the town will admit."

This principle, that a livery stable is or is not a nuisance according to circumstances, is decisive of the present application for a preliminary injunction. The stable is not yet erected—its erection has just been commenced. The complainant seeks relief by injunction against an apprehended mischief and nuisance. The principles upon which the courts of equity proceed in such cases are well settled, and are thus clearly stated by Lord Chancellor Brougham in the case of Earl of Ripon v. Hobart, 3 Mylne & K. 169, 179: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question." I consider the principles thus laid down as to the time or stage at which equity will interfere as founded on the soundest of reasons; and they have been approved by the supreme court of Tennessee in Kirkman v. Handy, supra, which refused to prevent the erection of a livery stable upon a lot adjoining the plaintiff's, "on Cherry street, in one of the best neighborhoods in the city of Nashville." In Coker v. Birge, 9 Ga. 425, an injunction against the erection was granted, but it was for the reason that, no answer having been filed, the allegations of the bill that the stable would be a nuisance were admitted; but when this was denied, the same court, in the subsequent case of Harrison v. Brooks, refused such an injunction. In Burditt v. Swenson, supra, the livery stable having been found to be a nuisance by the verdict of a jury, the court awarded a perpetual injunction.

No case has been referred to in which the erection of a livery stable has been enjoined where the fact that it would be a nuisance was denied, and where it had not been ascertained to be such by an appropriate judicial inquiry, before the injunction was awarded. And, so far as my researches have gone, Lord Brougham is entirely correct in his statement in the Earl of Ripon's Case, supra, "that no instance can be produced of the interposition by injunction in the case of an eventual or contingent nuisance." Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201; Duncan v. Hayes, 22 N. J. Eq. 25; Rhodes v. Dunbar, 57 Pa. St. 274; Wood, Nuis. § 789. The difficulty in thus interfering is greatly increased, if not insurmountable, when it is the use to which the structure is to be put, and not the intrinsic nature of the structure itself, which forms the basis of anticipated grievance. Duncan v. Hayes, 22 N. J. Eq. 25.

That the parties may not be misled, it may be well to add that we deny the injunction on the ground that the answer having denied the fact that the building, when erect-

ed and used as proposed, will be a nuisance to the property in the neighborhood, and the case being one in which the question of nuisance or no nuisance depends upon circumstances hereafter to be ascertained, it is, therefore, not one in which it is proper to issue the writ asked at this stage of the controversy. The filing of the bill may not, however, prove to be eventually useless, since "it is generally good policy," says Mr. Wood (Law of Nuisance, § 790), where there are strong reasons to believe that the thing will be a nuisance, to institute proceedings to stay its progress, particularly if its erection involves large expenditures, as in such cases the party cannot be charged with laches, nor can acquiescence in any measure be imputed to him, and the diligence used by instituting the proceedings, operating as a notice and protest against the use of the property in the manner contemplated, strengthens the plaintiff's equities when he asks for an injunction after the use of the property actually proves injurious." The defendants now proceed at their peril, and if it shall be hereafter found by a jury, or otherwise judicially ascertained, that the stable in this place, as used by them, does interfere with the comfortable enjoyment of the neighboring property, they cannot complain if they are then perpetually enjoined from the further use of it for the purpose for which it was designed. Injunction denied.

FLINT (UNITED STATES v.). See Case No. 15,121.

FLINT, The BEN. See Case No. 1,299.

FLOATING DOCK (JEROME v.). See Case No. 7,291.

FLOATING ELEVATOR.

[Note. Cases cited under above title will be found arranged in alphabetical order under the names of the elevators; e. g. "The Floating Elevator Hezekiah Baldwin. See Hezekiah Baldwin."]

FLOATING STEAM PUMP (WINSLOW v.). See Case No. 17,880.

FLOATING ZEPHYR, The (JONES v.). See Case No. 7,462.

Case No. 4,877.

FLOOD v. HICKS.

[2 Biss. 169; 4 Fish. Pat. Cas. 156; 1 Chi. Leg. News, 377; Merw. Pat. Inv. 193.] [1]

Circuit Court, N. D. Illinois. July Term, 1869.

PRIORITY OF INVENTION—SIMILARITY.

1. A patent for an improvement in a wagon reach, consisting of an upward curve, whereby, in turning, the forward wheels are allowed to pass under the reach, combined with an extension of the ordinary sway-bar, so arranged upon the hounds that it will still form a support for the reach, can not be sustained when it is proved that a carriage fitted with a reach which had a bend allowing the wheels to pass partly under, and with a circular sway-bar or wheel by which the reach would be sutained in all positions, had been in use for several years.

2. Increasing the curve in the reach, or diminishing the diameter of the wheel, would allow it to pass completely underneath, as in the plaintiff's patent; and this is a change which would naturally suggest itself to any mechanic, and cannot be the subject of a valid patent when the substantial invention had been previously in use.

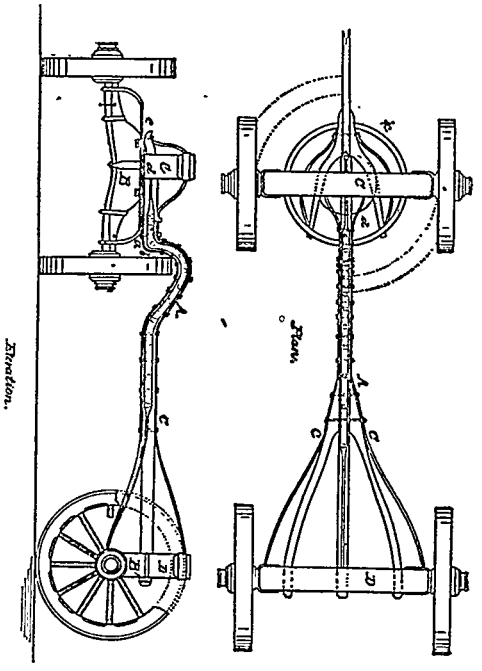
[Cited in Preston v. Manard, 116 U. S. 664, 6 Sup. Ct. 697.]

3. The circular sway-bar would have performed the same office as the plaintiff's improved extended sway-bar, had the wheel passed beneath the reach, and the plaintiff's patent for the curved reach having failed, his claim for the improved sway-bar must fail with it.

4. The name by which any structure or part is designated is immaterial.

This action was a suit at law for infringement. The parties waived a jury, and the cause was by consent tried by the court.

[Drawings of patent No. 69,789, granted October 15, 1867, to E. F. Flood. Published from the records of the United States patent office.]



L. L. Bond, for plaintiff.
S. A. Goodwin, for defendant.

DRUMMOND, District Judge. The plaintiff claims, by virtue of a patent, dated the 15th of October, 1867 [No. 69,789], an improvement in a wagon reach, and the allegation is that the defendant, who also has a patent,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. Merw. Pat. Inv. 193, contains only a partial report.]

dated the 27th of October, 1868, violates the patent of the plaintiff.

The specifications attached to the plaintiff's patent describe the particular manner in which the reach is made, and declare that the object of the invention is so to construct the reach that the vehicle with which it is used can be turned in the least possible space, and so that the wheel can never strike against the reach; and this object, it is said, is accomplished by the peculiarity of the form of the reach, the peculiarity being by giving it a turn or curve upward at the point where the wheel would strike an ordinary reach, which is always straight.

The claim of the plaintiff consists of two parts. He claims, First, a curved or bent reach, when so constructed that the line of draft is the same as in a straight reach, and so that the reach rests on and is supported by the sway bar, as in the ordinary reach, substantially as described in the specification; and secondly, he claims a curved reach —referring to the drawing A in combination with the iron E of the sway bar, when such iron is extended, and so constructed as to furnish a support for the reach in all positions, substantially as and for the purpose mentioned.

This last claim consists of the extension of the ordinary sway bar upon which the reach rests, which bar is usually placed upon hounds, as they are termed, round and forward, so that the reach shall rest upon the sway bar, when the forward wheels of the wagon pass under the reach and are placed at right angles with the hind wheels.

The question is, whether this patent can be sustained, in view of the evidence which has been produced before the court. No question was made, and, of course, none can be made, that if the plaintiff's patent is sustainable, the defendant's wagon or reach infringes, and therefore the only question is whether the plaintiff's patent can stand.

I am of opinion that it is not sustainable in point of law, under the facts which have been adduced.

The position taken by the counsel of the plaintiff as to the first claim, was that it was not a broad claim for a bent reach, but that it was a claim for a bent reach under certain conditions, one of which was that the line of draft must be the same as in a straight reach, and another that the curve must be so returned to the straight line that the reach will rest on the sway bar and be supported by it, and thirdly, that it must be so curved that the wheels must not strike against it. Taking that view of it, can the claim be sustained?

It was in evidence that a wagon or carriage had been used for many years, manufactured as early as 1854 or 1855, in which the reach had a bend or curve upward, so as to admit of the forward wheels passing under the reach to a certain extent, when the carriage was in the act of turning, and with a sway bar, or what is sometimes called the fifth wheel of the wagon, forming an entire circuit, resting upon the forward axle and upon the hounds.

It is true that in this carriage the forward wheels could not pass entirely under the reach, but it is clear to my mind that when the idea is once presented of a curve or bend in the reach, so as to admit of the forward wheel passing to a certain extent beneath the reach, that you have got the substantial invention of the plaintiff, so far as concerns the reach, because the idea once being suggested that by a curve in the reach the wagon or carriage is permitted to make a sharper turn by the forward wheels going partially beneath the reach; all you have to do is to make the bend greater or the forward wheels smaller, and you accomplish to all intents and purposes the object stated by the plaintiff. That is to say, by elevating the curve more or diminishing the circumference of the forward wheels, either, or by both combined, you cause the forward wheels to pass completely under the reach, and with this carriage before us as it was, bodily in court, and which had been in existence some fifteen or sixteen years, it was not possible to say that a man could have a patent simply by making the curve greater in the reach or diminishing the circumference of the forward wheels of the carriage. There is the idea. There is whatever of invention there is, and it is a mere mechanical expedient to change the structure either of the reach or of the forward wheels.

Again, so far as the sway bar is concerned. In that carriage thus having existed for so long a time, there was this circular sway bar, sometimes called the fifth wheel, and it was clear that if the wheel was lessened so as to pass beneath the reach, or the curve increased, that the reach would rest upon the sway bar as the carriage was turned and as the wheels passed beneath the reach. It is because the idea is apparent in the carriage that was manufactured some fifteen years ago, of the effect of the curve in the reach, that the first claim of the plaintiff's patent cannot be sustained. In that the reach passed from the axle of the hind wheels in a straight line toward the axle of the forward wheels until it came to a curve, and then there was a sweep upward and it came down to a straight line and was so continued on to the axle of the forward wheels.

The idea in the first claim of the plaintiff was in that carriage, and to make the forward wheels go beneath was simply a change which any mechanic could make and which would naturally suggest itself, if that was the desideratum, to any mechanic looking at the construction of the carriage.

Then, as to the second claim. The plaintiff constructs his wagon with what he calls a fifth wheel, that is, a circular piece of wood, iron, or of any other material, (of course it may be so constructed) passing over hounds

and on the forward axle, and outside of and concentric with that, what he terms a sixth wheel, which constitutes a sway bar, also passing over the hounds and on the forward axle, and upon which the reach rests as the wagon turns, in the manner suggested by this model, which is a perfect resemblance of the plaintiff's wagon.

The question is, what is the difference between the structure of this and the one which was referred to in the testimony, and which, it was established, has been in existence for fifteen or sixteen years? Of course, what this circular piece of wood, of iron, or of other material is called is immaterial; calling it a sway bar does not change the nature or form of the thing itself, and in that carriage which was constructed long before the plaintiff's there was the equivalent to all intents and purposes, as it seems to me, of what the plaintiff calls the sway bar; that is to say, there was a circular piece of wood or iron. There was in this, which is a representation of the carriage, what the draughtsman has called a sway bar; it, perhaps, may not have been called so by the man who constructed the carriage, but it is clear that it would perform the functions of a sway bar precisely as in the plaintiff's wagon, if the wheels passed beneath the reach, so that the question arose in my mind, and it was the only one about which I had any doubt in the case, whether this could properly be the subject of a patent; whether the invention was of such a character that it could be considered patentable; and on the whole, when comparing it with the carriage already referred to, I could not perceive that there was any material difference in the structure of the two things. In this wagon of the plaintiff, it passes around, the wheels go beneath the reach, and of course, the reach rests upon the sway bar. The same office would be performed by this circular piece of wood or of iron, as the case may be, in the carriage, if the wheels went beneath the reach, and then the only point that could possibly arise was, whether changing the form of the structure of the reach or of the forward wheels of the wagon so as to permit them to go under the reach was a matter of invention and patentable as such, and for the reasons that I have already given it seems to me that it was not, and therefore that the second claim must fail as well as the first.

In looking at this case I am struck with the facility with which patents are obtained, because it would be incomprehensible to me if the officers in the patent office had known of the existence of such a carriage as that which was proved, with the reach as there constructed, they could have granted a patent in such a case as this, and while it is perfectly just that every real, genuine invention devised by any one should be protected; still it is not just to the public that mere changes of form should have the protection of the law. Perhaps there is reason to believe they are not sufficiently rigid on this point in the patent office. It is true that, the officers there being the persons to whom the law intrusts the examination of inventions and the granting of patents, the courts are liberal in the construction which they give to patents, with a view of protecting any possible right which a party may have. But to allow a person by a mere change in the structure of a machine, such as would suggest itself to any mechanic, to acquire a monopoly for that change, and the shield and protection of the law would be an abuse of the law itself.

The finding in this case will be for the defendant.

FLOOD (ODELL v.). See Case No. 10,428.

Case No. 4,878.

The FLORA.

[1 Biss. 29;[1] 3 Chi. Leg. News, 130.]

District Court, N. D. Illinois. Oct. Term, 1853.

ORIGIN OF ADMIRALTY JURISDICTION ON WESTERN WATERS.

1. The admiralty jurisdiction on the western lakes and rivers is not limited to cases within the act of February 26, 1845 [5 Stat. 726].

2. The district court may resort to the act of September 24, 1789 [1 Stat. 73], to sustain its jurisdiction.

In admiralty. In this case the libel alleged that a scowboat, of the burthen of sixty tons, the property of the libellant, was engaged in carrying earth from the excavation of the Chicago harbor, on the waters of the western shore of Lake Michigan, and upon that lake and the navigable waters thereof; that on the 14th of June, 1853, the boat was lying alongside the north pier of the Chicago harbor, and while there was run into and sunk by the brig Flora, a vessel licensed and enrolled, etc., of about two hundred tons burthen, and then bound on a voyage from a port in Michigan to Chicago, loaded with lumber. The objection was taken that the boat sunk was not licensed and enrolled for the coasting trade, and was not employed at the time in business of commerce and navigation between ports and places in different states and territories, upon the lakes and navigable waters thereof (all of which was admitted), as required by the act of February 26, 1845 [supra], and that the court had no jurisdiction of the case.

DRUMMOND, District Judge. The ninth section of the judiciary act of 1789 (1 Stat. 76) gave to the district courts cognizance of all civil causes of admiralty and maritime jurisdiction. The tenth section gave the same jurisdiction to the district court of Kentucky. The case of The Thomas Jefferson, 10 Wheat. [23 U. S.] 428, was a libel filed in

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

the district court of Kentucky for wages earned in a voyage from a port in that state up the Missouri river and back again to the port of departure. It was a voyage throughout, several hundred miles above the ebb and flow of the tide, and the supreme court of the United States held that the decree of the district court, dismissing the libel for want of jurisdiction, was right, because the contract was not a maritime contract "upon acknowledged principles of law."

In The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, the supreme court overruled the decision in the case of The Thomas Jefferson; that is, the court decided that the district court, in point of law, had jurisdiction of the matter contained in the libel in that case, and should have proceeded to an adjudication of the rights of the parties, and that the supreme court ought to have so held in 1825. If this was correct, then the adjudication of the district court of Kentucky would have been right, if so made under the tenth section of the law of 1789. There was no other law conferring general admiralty jurisdiction upon that court. And this section shows that the later decision is the true one, because congress, after granting general admiralty jurisdiction to the district courts in the section immediately preceding, in this confers the same jurisdiction upon the district court of Kentucky, and yet the geographical position of Kentucky was of course well known to congress. The second section of the act of March 3, 1819 [3 Stat. 502], establishing the district court of Illinois, gave it the same jurisdiction as the district court of Kentucky had by the act of 1789. Of course then, under the ruling of the supreme court, it had general admiralty jurisdiction over all the navigable waters within the district, and could have taken cognizance of a case like The Thomas Jefferson before the passage of the act of 1845. If, then, it had general admiralty jurisdiction prior to the act of 1845, how could that act "confer a new jurisdiction?" The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 451. The supreme court, in Fretz v. Bull, Id. 466, ruled in accordance with the principles of the case reported in the same volume, and already referred to, that the district court had jurisdiction in admiralty for a tort on the Mississippi above tide-water (The Genesee Chief v. Fitzhugh, Id. 458); this was not under the law of 1845, and consequently the admiralty jurisdiction of this court would not be confined to the limits and restrictions contained in that law in cases arising on the Mississippi and its tributaries, but we must refer to the act of 1789 as our guide. Does it not follow, if there is no other admiralty jurisdiction on the lakes than what is conferred by the act of 1845, that this court must adjudicate differently when it has cases in admiralty before it on the Ohio or Mississippi, and on the waters of Lake Michigan? For example, in the one case the parties are entitled to a jury, and in the other not. Is there, then, that perfect equality which is referred to, "not only in the laws, but in the mode of administering them"? The court compares the acts of 1789 and 1845, and declares that the jurisdiction under both laws is confined to vessels enrolled and licensed for the coasting trade, and the act of 1845 extends only to such vessels when they are engaged in commerce between the different states and territories. Is this strictly correct? Certainly the jurisdiction under the act of 1789 is not so restricted. Is there no admiralty jurisdiction on the lakes except what is brought within the act of 1845? Suppose a vessel is engaged in commerce between one of the states and Canada, is it not within the admiralty jurisdiction of this court if it enters the harbor of Chicago? We have Canadian vessels here daily in our season of navigation. It may happen, too, that a vessel from Europe may visit us, owned in England or France; such a vessel is not enrolled and licensed for the coasting trade, and is it for that reason alone beyond the jurisdiction of this court? Again, does the word state or territory, in the act of 1845, mean a foreign country? It seems to me clear that the act intends to speak only of the states and territories of the United States, because it refers to vessels and steamboats enrolled and licensed under their authority. The case of foreign vessels has been mentioned, because this court has not unfrequently had such cases before it, and considerable difficulty and embarrassment have been felt in acting upon such cases under the law of 1845, as well as in cases where the vessel was enrolled and licensed under the law, but employed at the time not in business of commerce and navigation between ports and places in different states and territories of the United States, but between one of the states and Canada, a foreign country. In the act of 1789, the jurisdiction of the district court is to include all seizures under the laws of imposts, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen within the district, and stress is justly laid on this clause by the court in the case of The Genesee Chief. We are beginning to have considerable foreign commerce in some of the ports of Lake Michigan, and it is not improbable that seizures may be made here. Is this law not still in force, or can there be no seizures unless the vessel is of twenty tons burthen or upwards, as is expressed in the law of 1845? It has been generally supposed that the act of 1845 was passed by congress under the influence of the decision in the case of The Thomas Jefferson and subsequent cases founded on it, and with a view to avoid those decisions. It may safely be affirmed if congress had thought the supreme court would make the decision that was made in the case of The Genesee Chief, the law of

1845 would not have been enacted. If the district courts already had general jurisdiction in admiralty on the lakes, why did congress pass a law extending their jurisdiction? It should rather have been entitled an act limiting their jurisdiction. If the law of 1845 supersedes the law of 1789, then clearly, in this district and in all others that border on the lakes, and also possess navigable waters other than the lakes, there must be, in some respects, two different modes of administering admiralty law.

I confess, in view of these considerations, and many others that might be urged, I do not well see how we can administer admiralty law on these lakes, in many cases, without resorting to the law of 1789; and yet, to hold that to be in force, as well as the law of 1845, leads to difficulties, which are apparent from an examination of the opinion of the court in the case of The Genesee Chief.

From the foregoing considerations, even if I were obliged to resort to the law of 1845 to sustain the jurisdiction of the court, I should be disposed to give it an extremely liberal construction, and to hold, whenever in a case of collision, either craft is within that law, and the circumstances bring it within the admiralty jurisdiction upon general principles of the maritime law, that this court can take cognizance. This case is within that rule. The Flora comes strictly within the provisions of the act of 1845. I therefore think the court has jurisdiction, and the motion to dismiss the case must be overruled.

NOTE. This is believed to have been the first case declaring the doctrine that the admiralty jurisdiction of the district courts, upon the western lakes and rivers, did not depend upon the act of Feb. 26th, 1845, and it is printed, unchanged, from the original manuscript of Judge Drummond.

The question of admiralty jurisdiction of the western lakes and rivers has since been much discussed, and it is believed that a historical view of the rulings of the supreme court may be of interest.

It had long been the doctrine that admiralty jurisdiction extended only as far as the ebb and flow of the tide, and did not exist at all upon the western lakes. The Thomas Jefferson, 10 Wheat. [23 U. S.] 428; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; Waring v. Clark, 5 How. [46 U. S.] 441; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344. See, also, The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443; Fretz v. Bull, Id. 466; Walsh v. Rogers, 13 How. [54 U. S.] 283; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 195.

In the case of Jackson v. The Magnolia, 20 How. [61 U. S.] 296, the supreme court held that the admiralty jurisdiction of the courts of the United States extends to cases of collision upon navigable waters, although the place of such collision be within the body of a county, and above the flux and reflux of the tide, and this by virtue of the judiciary act of 1789, and not from the act of 1845. This ruling was made by a divided court, three of the justices dissenting, and Justices Daniel and Campbell delivering elaborate opinions, protesting against the doctrines asserted by the majority, as a usurpation on the part of the judiciary and a violation of rights reserved by the constitution.

The case of Allen v. Newberry, 21 How. [62 U. S.] 244, decided that admiralty had not jurisdiction of a contract for shipment of goods between ports of the same state.

In Nelson v. Leland, 22 How. [63 U. S.] 48, jurisdiction was sustained in a case of collision on the Yazoo river two hundred miles above its confluence with the Mississippi, Justices Campbell and Catron dissenting.

The admiralty jurisdiction is not taken away by the fact that the collision or other tort was committed within the body of a county.

If the collision occurred on those navigable waters which empty into the sea, or into the bays and gulfs which form a part of the sea, the maritime courts have jurisdiction. The Commerce, 1 Black [66 U. S.] 574.

The Eagle, 8 Wall. [75 U. S.] 15, is a leading and well considered case. The court there ruled that the district courts can take cognizance of all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same as upon the high seas, bays, and rivers navigable from the sea; that it is not necessary, in a libel on the lakes, to bring the case within the act of 1845; but on the contrary, this act, instead of being an extending and enabling act, as was intended, having become, in consequence of the decisions of this court, inoperative, must be regarded as obsolete and of no effect; and that the saving clause, as to the concurrent remedy at common law, is also of necessity useless and of no effect. It was further held, that the ninth section of the judiciary act of 1789, conferring upon the district courts exclusive original cognizance of all civil causes of admiralty jurisdiction, "including all seizures under laws of impost, navigation, or trade of the United States where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas," is also inoperative.

In Taylor v. Carryl, 20 How. [61 U. S.] 583, and The Moses Taylor, 4 Wall. [71 U. S.] 411, the question of state jurisdiction was fully discussed.

In the case of The Hine v. Trevor, 4 Wall. [71 U. S.] 555, some of the previous decisions are discussed. The rule is laid down that the act of 1845 is a limitation of the powers granted by the act of 1789, as regards cases arising upon the lakes and navigable waters connecting said lakes, and sums up the doctrines as follows: 1. The admiralty jurisdiction, to which the power of the federal judiciary is by the constitution declared to extend, is not limited to tide-water, but covers the entire navigable waters of the United States. 2. The original jurisdiction in admiralty exercised by the district courts, by virtue of the act of 1789, is exclusive, not only of other federal courts, but of the state courts also. 3. The jurisdiction of admiralty causes arising on the interior waters of the United States, other than the lakes and their connecting waters, is conferred by the act of September 24, 1789. 4. The admiralty jurisdiction exercised by the same courts, on the lakes and the waters connecting those lakes, is governed by the act of February 3, 1845. See, also, The Revenue Cutter [Case No. 11,713]; Cunningham v. Hall [Id. 3,481]; The Great West, No. 2 v. Oberndorf, 57 Ill. 168.

The following are the reported decisions of the circuit and district courts on the subject of admiralty jurisdiction: De Lovio v. Boit [Case No. 3,776]; Gloucester Ins. Co. v. Younger [Id. 5,487]; McGinnis v. The Pontiac [Id. 8,801]; The Revenue Cutter [Id. 11,713]; Western Transp. Co. v. The Great Western [Id. 17,443]; Franconet v. The F. W. Backus [Id. 5,048]; Scott v. The Young America [Id. 12,549]; Eads v. The H. D. Bacon [Id. 4,232]; Williams v. The Jenny Lind [Id. 17,723]; Parmlee v. The Charles Mears [Id. 10,766]; The Globe [Id. 5,483]; Brooks v. The Peytona [Id. 1,959]; Whitaker v. The Fred Lorentz [Id. 17,527]; Merritt v. Sackett [Id.

9,484]; Poag v. The McDonald [Id. 11,239]; Thackeray v. The Farmer of Salem [Id, 13.852]; Wallis v. Chesney [Id. 17,110]; The Ann Arbor [Id. 408]; The Leonard [Id. 8,256]; Cunningham v. Hall [Id. 3,481]; The Volunteer [Id. 16 990]; The Eli Whitney [Id. 4,345]; U. S. v. 269½ Bales of Cotton [Id. 16,583]; The Mary Washington [Id. 9.229]; Francis v. The Harrison [Id. 5,038]; The America [Id. 289]; The Sarah Jane [Id. 12,349]; The Island City [Id. 7,109]; The A. R. Dunlap [Id. 513]; Place v. The City of Norwich [Id. 11,202]; Wright v. Norwich & N. Y. Transp. Co. [Id. 18,086]; The Circassian [Id. 2,722]; The Sailor Prince [Id. 12 218]; The Adele [Id. 78]; The Eledona [Id. 4.340]; The Antelope [Id. 482]; The Norway [Id 10.359]; The Leonard [Id. 8,256]; The Missouri [Id. 9,652]; The Transit [Id. 14,-139]; The Hardy [Id. 6,056]; McAllister v. The Sam Kirkman [Id. 8,658]; Cheeseman v. Two Ferryboats [Id. 2,633]; The Elmira Shepherd [Id. 4,418]; The Circassian [Id. 2,720a].

Case No. 4,879.

FLORA v. The GLOBE.

[See Case No. 5,484.]

FLORA, The MARIANNA. See Case No. 9,-080.

Case No. 4,880.

The FLORENCE.

[2 Flip. 56;[1] 23 Int. Rev. Rec. 105; 4 Cent. Law J. 249; 2 Cin. Law Bul. 60.]

District Court, E. D. Michigan. June Term, 1877.

MARINE TORTS—ADMIRALTY JURISDICTION.

1. The master of a scow took possession of a lighter, having no authority therefor, and used her in carrying wood off the shore of Lake St. Clair to the scow, but neglected to return her: *Held*, the court of admiralty has jurisdiction, and the scow is liable in rem for the conversion.

[Cited in The Ella B., 24 Fed. 508.]

2. Though originally seized in a fish pond staked off from the Detroit river, yet as the scow employed the lighter in its service upon navigable waters she is liable.

Libellant, being the owner of a lighter, averred that the master of the scow had, without authority, seized and used his lighter and neglected to return her, though requested so to do. He claimed $60 damage, and also the rental value of the lighter from the time of seizure, April 15, 1875, to the filing of his libel. Exceptions were taken to the jurisdiction on the ground that the facts did not constitute a lien upon the scow by the admiralty law. The principal allegations in the libel were denied in the answer, and it was claimed that the lighter had been detained by a ship carpenter, who had been directed by the libellant to put certain repairs upon her. The facts were that while the vessel was in a sunken condition the claimant applied to a brother of libellant for permission to use the lighter in carrying off wood to the scow. This the brother, Wallace Lemaire, granted without authority. The claimant used her two or three days only; left her lying near the lake shore where she pounded and became leaky. It was agreed, on demand made by libellant for the lighter, that she should be left at a ship carpenter's to be repaired. After this was finished the carpenter refused to deliver her to libellant, who filed this libel to recover her value.

Geo. W. Moore, for libellant.

H. A. Swan, contra.

BROWN, District Judge. The principal question discussed upon the argument related to the jurisdiction of the court. The libel sounds in tort, and it was strenuously insisted by claimant's advocate that no lien attached to the scow for the conversion of the lighter, both parties conceding that claimant took possession of her without authority from the owner. Cases of spoliation and damage are of admiralty and maritime jurisdiction. These include illegal seizures or depredations upon vessels or goods afloat. Every violent dispossession of property on the ocean is, prima facie, a maritime tort, and as such belongs to the admiralty jurisdiction. Benedict, §§ 310, 311. And the owners of a vessel are liable for torts committed by the master in the course of his employment.

There can be no doubt that if this were a case of contract—that is, if the agent of whom the claimant hired the scow, and whom claimant in good faith believed to have authority to loan it, had in fact possessed that authority, a libel in rem could have been sustained for the use of the lighter. A person furnishing a small boat or a lighter for the use of a vessel has as valid a lien upon her as though he had furnished an anchor, a compass, a chronometer, or any other of the articles usually denominated materials. In the case of The Dick Keys [Case No. 3,898], Mr. Justice McLean held that, where the master of a steamboat, on her behalf, agreed to pay $20 per day for the use of a barge, a libel might be maintained against the steamboat for the amount. Mr. Parsons says (2 Pars. Shipp. & Adm. 148): "If a barge is necessary to a steamboat, its hire to it will be regarded as material furnished for its equipment;" citing Amis v. The Louisa, 9 Mo. 621; Gleim v. The Belmont, 11 Mo. 112; The Kentucky v. Brooks, 1 G. Greene, 398,—cases which fully sustain the text of the learned commentator.

Now, upon principle, it is difficult to say why, if an action in rem will lie for the use or value of property lawfully obtained, a similar action will not lie for the use or value of property unlawfully obtained; in other words, where the wrong is greater, the remedy should not be less. The general rule with regard to torts seems to be, that the owners and the vessel are liable for all

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

the acts of the master done in the execution of the business in which he may be employed, by which third persons are injured, whether the injury was occasioned by the unlawful acts or by the negligence or want of skill of the master. Dias v. The Revenge [Case No. 3,877]; Dean v. Angus [Id. 3,702]; The Martha Anne [Id. 9,146]. The principle underlying these decisions is that, for torts committed in the business of the master as such, or in which the ship is the active, the injuring or the benefited party, the injured party has his remedy as well against the vessel as against her owner and master. The mere fact that the person committing a tort is master of a vessel, of course, does not make her liable; but, if it be an act done in pursuance of his business as master, or is beneficial to the vessel, she becomes liable in rem. The English cases hold that the vessel is not liable for a willful collision. This doctrine, however, is denied in the case of Ralston v. The State Rights [Id. 11,540], where a libel was sustained for running down the libellant's vessel, done by the express direction of the master of the colliding vessel.

It is further insisted in this case that, locality being the test of jurisdiction in cases of tort, the injury was not done upon navigable waters, but that the lighter was seized within a fish-pound staked off from the river. I do not regard this fact as material. In the case of Plummer v. Webb [Case No. 11,233], a libel was sustained for the abduction of a minor son upon a voyage upon the high seas. Mr. Justice Story observed: "Here it is true that the tortious act, or cause of damage, might be properly deemed to arise in port; but it was a continuing act and cause of damage during the whole voyage; it was in no just sense a complete and perfected wrong until the departure of the vessel from port, and it traveled along with the parties as a continuing injury through the whole voyage, and terminated only with the death of the son at sea." See, also, Sherwood v. Hall [Id. 12,777]. In the case of The Yankee v. Gallagher [Id. 18,124], the court held that, "if the tortious act originates in port, and is not a perfected wrong until the vessel leaves the port, it is a continuous act, and travels with the tort-feasor and the injured party during the whole voyage, and comes within the jurisdiction of the admiralty upon the principle that, if the thing be done on the high seas and brought to land, it is appropriate to a court of admiralty to decide the question as a maritime tort." In this case the libellant had been seized in the city of San Francisco by a vigilance committee, and carried on board the bark and landed in the Sandwich Islands. In the case at bar, admitting that the fish-pound was not navigable water, the lighter was taken to the scow then lying in navigable waters, and was used by her there, and I think the case falls within the authorities above cited.

No willful misconduct or wrongful purpose on the part of the claimant need be shown; for the gist of the action is the use of the lighter by the vessel, and I hold that it makes no difference whether the claimant became possessed of her by a contract, or by an act which was technically a conversion. The exception to the jurisdiction must therefore be overruled.

Ouillette, the owner of the scow, took possession of the lighter without authority from the libellant. After he had her for some time, and she had been injured either by Ouillette's negligence in allowing her to pound upon the bottom, or by becoming leaky, libellant went to Ouillette and demanded that the lighter should be returned to him in good order. Ouillette then put her into the hands of a carpenter, who repaired the damages done her, and also made some alterations and repairs on her at the request of the libellant. When libellant went to the carpenter to demand her, he refused to give her up, either until the repairs put upon her by Ouillette's directions were paid, as libellant says, or until libellant would release Ouillette from all liability, or would clear Ouillette of the law, as the carpenter says. As it is clear that libellant offered to pay for the repairs which he had ordered, and the carpenter did not detain her upon that ground, his further detention of her must be attributed to Ouillette, notwithstanding his statement that the carpenter detained her without authority from him. It was the duty of Ouillette to see that the lighter was returned, and no excuse for the nonperformance of that duty, not attributable to the libellant, can be accepted.

There is considerable conflict with regard to the value of the lighter; but, upon all the testimony I think that $45 is as much as she is worth. There must be a decree for the libellant for this amount, with interest.

See, also, Tillmore v. Moore [4 Fed. 231]; The Chas. Morgan [Case No. 2,618]; and The Garland (by Brown, J.) 5 Fed. 924.

Case No. 4,881.

The FLORENCE.

[13 Eng. Law T. (N. S.) 613.]

District Court, E. D. New York. 1866.

SEAMEN'S WAGES—FORFEITURE BY MISCONDUCT.

1. Where a mate of a vessel, having a dispute with the master about the rate of his wages, on leaving the ship took the ship's chronometer with him, and retained it in order to force a settlement of his claim, until compelled to give it up by the police: *Held*, that this was an act of misconduct which should cause a forfeiture of wages.

2. Forfeiture of wages is not given merely as a compensation to the owner for actual loss suffered by the seaman's misconduct; it is enforced also by way of punishment.

In admiralty. This action was brought by Frederick Munderloch against the barque Florence, to recover wages due to him for services as mate on board the barque. There were some immaterial questions about the rate of wages at which he was employed, as he had not signed articles; but it appeared that, after the dispute arose as to the rate of wages, the libellant was discharged, and, on leaving the ship, he took the vessel's chronometer with him to his boarding house, and refused to give it up till the amount which he claimed was paid. The master was compelled to apply to the police, and by their aid he recovered the chronometer without any loss to the ship. On this ground a forfeiture of all the wages was claimed.

BENEDICT, District Judge. This proceeding cannot be deemed other than an act of gross misconduct on the part of the libellant. He was not an ignorant sailor, but an intelligent chief mate. He was at the time in sole charge of the vessel, and in the position of a trustee. He is presumed to know, and must, in fact, have known, that the law gave him a perfect security, for any sum justly due to him, and that the court of admiralty stands always open to adjudicate upon such demands with promptness, and in the liberal spirit of the maritime law, and he deliberately undertook to decide for himself the question between him and the master, and to compel payment of his claim as he made it, by removing and unlawfully detaining a portion of the property committed to his charge. Such an act should not be allowed to pass unnoticed in a court where violations of duty far more venial in character, when committed by seamen, are constantly punished by forfeiture of wages. But it is contended here that no wages can be declared forfeited to the owner, for the owner sustained no loss, inasmuch as the chronometer was regained by the police, and returned without expense. This defence cannot prevail according to the view which I entertain of the law applicable to such cases. I am of opinion that it is the law of the sea, as well for the quarter-deck as for the forecastle, that any unlawful appropriation of any part of the vessel, her tackle, apparel, or furniture, or of the cargo, will, in a court of admiralty, be visited with forfeiture of wages, either partial or total, according to the circumstances of the case, whether actual pecuniary loss to the owner by the act be proved or not.

I am aware that expressions can be found in books of high authority which seem to countenance the idea that forfeiture is but a compensation allowed to the owner for his loss to prevent circuity of action. I am also aware that in most of the reported cases of embezzlement, the amount of the forfeiture has been limited to a sum sufficient to compensate the owner for the loss resulting from the unlawful act. A careful examination of the cases satisfies me, however, that the view here taken is sustained by good authority, and rests upon principles well settled. No such limit as is contended for by the libellant is suggested by Lord Tenterden in his statement of the law of forfeiture. "It seems," he says, "that neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during a voyage, will also deprive him of his wages." Abb. Shipp. pt. 4, c. 3, § 4. The language used by Chancellor Kent is: "Whatever unjustifiable conduct will warrant the act of the master in discharging a seaman during the voyage, will equally deprive the seaman of his wages." 3 Kent, Comm. p. 198. In the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 267, Chief Justice Marshall declares that forfeiture of salvage reward by embezzlement, and forfeiture of wages for embezzlement, rest upon the same ground. But it has never been supposed that the forfeiture of salvage was limited to the amount of loss sustained by the owners of the property; nor do I understand that forfeiture of salvage for this offence has been inflicted as a method of compensating the owners for the damage sustained by them in the loss of their property. The distinction in the law of forfeiture here involved is clearly alluded to by Lord Stowell in the case of The Baltic Merchant, Edw. Adm. p. 93, and was more distinctly announced by Judge Story in Cloutman v. Tunison [Case No. 2,907]. In the latter case, which was a case of absence without leave, the learned judge, while he finds that there was no statutory desertion, nor desertion under the maritime law, inflicts a partial forfeiture, and deems the owner entitled to withhold part of the wages due, "not merely as a compensation for the loss of the services of the second mate during the period, but something more —as a just admonition to officers having such high and responsible duties devolved upon them, and designedly departing from them." This view has been followed by the learned judge of the southern district of New York, who, in Scott v. Russell [Case No. 12,546], inflicted a partial forfeiture "by way of correction and amends," and "with a view to operate as a proper check to seamen, rather than to compensate the owner." "The forfeiture authorized by law in cases of this nature," says Judge Story, in a case of insubordination, "is not given to the owner as a mere boon, but is designed to operate primarily as a warning penalty upon seamen for misconduct." The Mentor [Id. 9,427]. It is in accordance with this view of the maritime law that forfeitures are inflicted for insolence, for petty plunder of esculents, &c.; for it cannot be supposed that in such cases the amount of pecuniary damage sustained by the owner is to be computed, and its compensation the object of the decree. Forfeiture is inflicted in these cases "for the good of the service," to adopt an expression of Judge Story in one of the cases cited. The

power to withhold part of the wages is given by the maritime law, in order the better to secure faithfulness and efficient service from an ignorant, unreliable, irresponsible class of men, and this power, when exercised in a proper case, with caution, and a due regard for the weaknesses and temptations of this unfortunate class, a court of admiralty will always sustain. If such be the reason of the law of forfeiture, and such its application by the courts, I see no reason for excluding a case like the present from its operation. It comes within the letter of the law, as declared by Lord Tenterden, Chancellor Kent, and perhaps within the more restricted language of Dr. Lushington, in the case of The Blake, 1 Lush. [1 W. Rob. Adm. 74]. The act of the libellant was one calculated to put at considerable risk a valuable article. The ship was already cleared, and might well have been detained by his action. The master was put to the trouble of obtaining the assistance of the police, so that the case might well have permitted a deduction from the wages upon the ground of compensation for a "supposed loss," as has been done in some of the adjudged cases. I prefer, however, to place my decision upon the ground that the act was one of gross misconduct in a chief officer; a method of procedure calculated, if encouraged, to put every owner at the mercy of the crews to which he is obliged to intrust his property; an offence to be classed with the offences of insubordination, insolence, theft, and the like, and like them to be visited with the maritime penalty of forfeiture. I do not, however, think it necessary, in this case, to cast upon the libellant all the expenses of this proceeding in addition to the loss of his wages, and shall, therefore, allow him a portion of his demand. His claim is for $75. I allow him $25, but it must be without costs.

Case No. 4,882.

FLORENCE MANUF'G CO. v. BOSTON DIATITE CO.

[1 Ban. & A. 396;[1] 1 Holmes, 415; 6 O. G. 728.]

Circuit Court, D. Massachusetts. Sept. 3, 1874.

PATENTS—INFRINGEMENT—PORTABLE TOILET MIRRORS.

The claim of the patent was, "As a new article of manufacture, a hand or portable toilet mirror, constructed substantially as described, of a base-piece, B, with its handle-extension piece or stiffener, C, glass, A, and outer back and handle, D, made of any suitable composition or cement, substantially as specified." The specification described the mirror, as being constructed, by first using a base-piece of wood or other suitable material, preferably of similar contour to the glass designed to be mounted on it, and elongated at one end, with a strip of metal or other stout material at its back, to form a stiffener for the handle of the mirror: *Held*, that the patent was not infringed by making and selling hand-mirrors, in other respects like those described in the patent, but having no base-piece of wood or other suitable material behind the glass designed to be mounted on it, and having no extension from such base-piece into the handle.

[This was a bill in equity by the Florence Manufacturing Company against the Boston Diatite Company to enjoin infringement of letters patent No. 92,942, granted to W. U. Dudley and Lawrence W. Clark.]

E. W. Bond, for complainant.
T. W. Clarke, for defendant.

SHEPLEY, Circuit Judge. This suit is founded on the letters-patent granted to Dudley & Clark, assignees of W. U. Dudley, July 27, 1869, for an improved hand-mirror. The mirror was constructed by first using a base-piece of wood or other suitable material, preferably of similar contour to the glass designed to be mounted on it, and elongated at one end, with a strip of metal or other stout material at its back to form a stiffener for the handle of the mirror. The base-piece, with its handle extension or stiffener, is laid face downward on a mould, and a composition of any suitable plastic material, in sufficient quantity to cover the back and extend beyond the edges of the base-piece and surround the handle-stiffener, is applied; then an upper mould of suitable configuration, and with its interior embellished with any ornamental devices, is pressed down on the plastic composition, thus making a smooth finished ornamental outer back and handle. The advantages claimed for his new manufacture by the patentee are, that the handle and back of the mirror are "smooth finished, and may be highly ornamental, impervious to damp, exempt from warping, with its consequent liability of fracturing the glass, and preservative of the wooden or other base-piece, which may be of a cheap and rough construction; and that by its end extension, with strengthening-strip at the back, gives not only a general stability to the whole article, but especially stiffens the handle at its junction with the back or body, where it is naturally weakest or most liable to break."

The claim is: "As a new article of manufacture, a hand or portable toilet-mirror, constructed, substantially as described, of a base-piece, B, with its handle-extension piece or stiffener, C, glass, A, and outer back and handle, D, made of any suitable composition or cement, substantially as specified."

Defendant made hand-mirrors, in other respects like those described in the Dudley patent, but having no "wooden or other base-piece of suitable material" behind the "glass

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

designed to be mounted on it," and having no extension from such base-piece into the handle. In the smallest and weakest part of the handle two nails of iron were embedded in the plastic compositions, which formed the entire frame and handle of the mirror; but they did not extend behind the mirror, or form any base or support for the glass or the frame behind or around it.

This is clearly no infringement of the Dudley patent. The practice of moulding a plastic material around a skeleton, or partial skeleton, of a material of greater rigidity is as old as any thing known in the arts, was practised by the Assyrians in moulding bronze, and has been in common use to the present day. Hand-mirrors date back to an equally remote antiquity. Hand-mirror frames, moulded from a plastic composition of papier-maché and other plastic compounds, were well known before the date of Dudley's invention. Frames for pictures and photographs of a plastic composition of shellac and other substances, moulded and ornamented, were well known and described in Merrick's patent of Dec. 16, 1868, for his new composition of matter. The patentable matter in Dudley's patent must, therefore, be found, if found anywhere, in his new composition of a base-piece, with its extension or handle stiffener, with the other elements in his combination. Without such combination there would have been no new article of manufacture. It is not every new article put upon sale in the market which is a new article of manufacture. If one were to substitute a Claude Lorraine glass for the plate with its stiffened back in the Dudley hand-mirror, it would be a new article of commerce, but not a new manufacture.

In the case of Clark v. Scott [Case No. 2,833], Judge Blatchford held that hand-mirrors made of cement, applied in a plastic state and afterward hardened, and having embedded in the cement, and concealed from view, two flat wires or strengtheners, made of metal, which run from the body of the mirror part through the neck and into the handle, and which serve to strengthen and stiffen the article, particularly at the junction of the handle with the body, were infringements of the Dudley patent. But this was upon the ground that he found in those mirrors the base-piece, the handle-extension piece or stiffener, the glass and outer back and handle of cement. He says, "The defendant's wires act as a base-piece or support for the glass, and the wires extend through the neck and in the handle as stiffeners." But in defendant's mirrors there is no base-piece or support for the glass, and no substitute or equivalent therefor. He makes a hand-mirror with a moulded frame of plastic compound, and he re-enforces or strengthens the handle with metallic rods. There was nothing new in this before the date of the Dudley patent. Bill dismissed.

Case No. 4,883.

FLORENCE SEWING MACH. CO. v. GROVER & BAKER SEWING MACH. CO. et al.

[Holmes, 235.] [1]

Circuit Court, D. Massachusetts. Aug., 1873.

REMOVAL OF CAUSES—CITIZENSHIP—ACT OF MARCH 2, 1867.

Under the act of March 2, 1867 (14 Stat. 558), a suit brought in a state court may be removed to the United States circuit court, by a defendant who is a citizen of a different state from that in which the suit is brought, although there are other defendants who are citizens of the state in which it is brought.

[See note at end of case.]

Motion by the plaintiff to dismiss a suit at law for want of jurisdiction. The plaintiff was a citizen of Massachusetts; of the defendants, one was a citizen of Massachusetts, one of Connecticut, and one of New York. The suit [see Florence Sewing Mach. Co. v. Singer Manuf'g Co., Cases Nos. 4,884 and 4,885] was originally brought in the supreme judicial court of the state of Massachusetts, whence it was removed and entered in this court by the foreign defendants, under the act of congress of March 2, 1867 (14 Stat. 558), which provided for removal of suits "in which there is controversy between a citizen of the state in which the suit was brought and a citizen of another state." All the formal proceedings for the removal and entry in this court, required by the act of 1867, had been duly taken, and the only question on this motion was, whether or not that act applied to a suit in which a citizen of the state in which the suit was brought was defendant together with non-resident defendants. Petitions of the foreign defendants for removal of the suit had previously been denied by the supreme judicial court of Massachusetts.

E. R. Hoar and A. L. Soule, for plaintiff.

The case has not been properly removed from the state court.

I. The act of March 2, 1867, applies only to cases in which all the plaintiffs are citizens of one state, and all the defendants are citizens of some other state or states. The act provides for removal of a suit "in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state." Under the act of September 24, 1789 (1 Stat. 73), § 12, the language of which is: "If a suit be commenced in any state court * * * by a citizen of the state in which the suit is brought, against a citizen of another state," &c., it has been uniformly held, that, to authorize a removal, all the defendants must be citizens of some other state or states, than that in which the suit is brought. Strawbridge v. Curtiss, 3 Cranch. [7 U. S.] 267; New Orleans v. Win-

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

ter, 1 Wheat. [14 U. S.] 91; Hubbard v. Northern R. Co. [Case No. 6,818]; Moffat v. Soley [Id. 9,688]; Beardsley v. Torrey [Id. 1,190]; Commercial & Railroad Bank v. Slocomb, 14 Pet. [39 U. S.] 60; Irvine v. Lowry, Id. 293; Wilson v. Blodget [Case No. 17,792]; Bank of Cumberland v. Willis [Id. 885]; Susquehanna & W. V. Railroad & Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 172. And where there are several defendants, all must join in the petition. Smith v. Rines [Case No. 13,100]; Beardsley v. Torrey [supra]. The same doctrine as to removal has been laid down under the act of 1867. Cooke v. State Nat. Bank (Sup. Ct. N. Y.) 1 Lans. 494; Peters v. Peters, 41 Ga. 242; Ex parte Andrews, 40 Ala. 639; Bliss v. Rawson, 43 Ga. 181; Case v. Douglas [Case No. 2,491]; Bixby v. Couse [Id. 1,451]; Bryant v. Rich, 106 Mass. 180; Florence Sewing-Machine Co. v. Grover & Baker Sewing-Machine Co., 110 Mass. 1.

II. If the act is to be construed as applying to a case in which one of the defendants and the plaintiff, are citizens of the state in which the suit is pending, it is submitted that the act is unconstitutional. It provides for the removal of the whole cause, with all the parties. But by the constitution (article 3, § 2) the judicial power extends only, in this behalf, to controversies between citizens of different states. The construction claimed by the defendants presupposes a jurisdiction in the United States courts, of controversies between citizens of the same state; and a power in those courts to oust the state court of jurisdiction in controversies between citizens of the state, at the request of citizens of some other state, even against the will of both plaintiff and defendant, citizens of the state in whose court the suit is instituted. The construction of the judiciary act (section 11) by the United States supreme court, is the construction of language substantially the same.

B. R. Curtis, J. G. Abbott and Elias Merwin, for defendants.

The suit was brought by a citizen of this state; the petitioning defendants were citizens of another state; the matter in dispute, exclusive of costs, exceeded five hundred dollars; and the necessary petitions, affidavits, and bonds were made and filed before the trial. All the requirements of the United States statute were thus apparently fulfilled.

I. The United States statute of 1867 in question was designed to, and does in terms, clearly provide for the removal of suits, for cause, upon the petition of a foreign defendant, although there are other parties defendant who are citizens of the state where the suit is brought. This is apparent from the language of the act itself, and from the previous legislation upon this subject. The judiciary act [of 1789 (1 Stat. 73)], c. 20, § 12, confined the right of removal to suits commenced "by a citizen of the state in which the suit was brought against a citizen of another state;" and also required that the petition for removal should be filed by the defendant at the time of entering his appearance. This provision applied only to a suit between a citizen of the state in which the suit was brought and a citizen of some other state, and did not apply to a case where a resident defendant was also a party. The act of 1866, c. 288 (14 Stat. 306), for the first time, made provision for the removal of a suit to the federal court by a non-resident defendant, although a citizen of the state where the suit was brought was also a defendant therein. That act made two changes in the previous law: 1. It allowed the cause to be removed to the federal court so far as the non-resident defendant was concerned, "if the suit was one in which there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants as parties in the cause," but left the suit in the state court, so far as it related to the resident defendant; and, 2. It allowed the petition for removal to be filed at any time before the trial, instead of requiring it to be filed with the defendant's first appearance, as in the judiciary act. To provide what was supposed to be a more impartial tribunal for non-resident defendants in every case, congress passed the act of March 2, 1867, to supply the obvious deficiencies of the statute of 1866, and to allow a non-resident to remove the cause to the federal tribunal, whenever he had reason to believe that, from prejudice or local influence, he would be unable to obtain justice in the state courts, although there were other co-defendants who were residents of the state in which the suit was brought. The statute of 1867 cannot be confined to those cases where non-residents are the only defendants, without violating its language and intent.

(a) It is an act "to amend the act of 1866." The purpose of the act of 1866 was to provide for a removal of suits in behalf of non-resident defendants in those cases in which resident parties were also defendants. The obvious purpose of the statute of 1867 was to add another case to those which might be removed by non-resident defendants, although resident parties were also defendants. Neither the act of 1866, nor the judiciary act (section 12), is repealed by the statute of 1867. All subsist, and each provides for a distinct case.

(b) Under statute of 1789 (§ 12), non-residents (if the only parties defendant), can now remove a case to the federal tribunal, under the provisions of that act, without affidavit, and without the cause of local prejudice. If the statute of 1867 is also to be confined to the same class of cases (where all the defendants are non-residents), then, as it requires cause and affidavit for removal, it is a restriction upon the right of

removal as originally given by the statute of 1789,—a result which is obviously absurd.

(c) The peculiar phraseology of the statute of 1867 fairly admits of no other interpretation. The language is, that "when a suit is now pending, or may hereafter be brought, in any state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state," &c. The language of the statute of 1789 was, "if a suit be commenced by a citizen of the state, &c., against a citizen of another state," &c.; but here the striking phrase is, "where a suit is now pending . . . in which there is controversy between a citizen," &c. It is enough, however the parties may be distributed as to citizenship, if in the suit there is controversy between a citizen of one state, as plaintiff, and a citizen of another, as one of the defendants. The statute does not limit the right of removal to the case where a citizen of one state, as plaintiff, and the citizen of another state, as defendant, are the only parties to the controversy. St. 1868, c. 255, § 2 (15 Stat. 226); Johnson v. Monell [Case No. 7,399]; Fields v. Lamb [Id. 4,775]; Sands v. Smith [Id. 12,305]. The decision of Blatchford, J., in Bixby v. Couse [Id. 1,451], and other similar decisions, proceed upon the mistaken assumption that the statutes of 1789 and 1867 are substantially alike, overlooking the radical change which the latter statute makes, and was intended to make.

II. The constitution provides (part 1, art. 3, § 2) that "the judicial power shall extend to . . . controversies between citizens of different states." The constitutional right of the non-resident to have his controversy determined in the forum contemplated by the constitution cannot be defeated by the fact that others not entitled to go into that forum have been joined with him. Fisk v. Union P. R. [Id. 4,828]; Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738; Railway Co. v. Whitton's Adm'r, 13 Wall. [80 U. S.] 270; Lexington v. Butler, 14 Wall. [81 U. S.] 282.

SHEPLEY, Circuit Judge. The second section of the third article of the constitution extends the judicial power of the United States to controversies "between citizens of different states." There are no words in this grant of judicial power restricting it to controversies in which citizens of different states are the sole parties. Nor are there to be found any words of limitation which would deprive congress of the power to confer upon the federal courts jurisdiction over a judicial controversy between citizens of different states arising in a suit or case, although all the persons constituting the party on one side of the case were not citizens of states different from the states of which the persons composing the other party to the suit or case were citizens. The judicial controversy contemplated by the constitution is not limited to one in which citizens of different states are exclusively interested. The grant of jurisdiction is not over "suits" or "cases" between citizens of different states, but over "controversies" between citizens of different states. Whenever, therefore, a case or suit is pending, in which there is involved a judicial "controversy" between citizens of different states, the case is one coming clearly within the terms of the constitutional grant of judicial power, although in the same case there may be a controversy between citizens of the same state. In all the debates in the convention which framed the constitution, it seems to have been admitted by all the members of the convention that the jurisdiction of the national judiciary should embrace every subject which might endanger the national peace, by reason of the relations of the respective states to each other, and of their citizens to the citizens of other states. Before the conclusions of the convention had been reduced to the form of a written constitution, a resolution had unanimously passed the convention, "That the jurisdiction of the national judiciary shall extend" (among other things) to "questions which involve the national peace or harmony."

"Nothing," says Mr. Justice Story, "can conduce more to general harmony and confidence among all the states than a consciousness that such controversies are not exclusively to be decided by state tribunals, but may, at the election of the party, be brought before the national tribunals." "And if justice should be as fairly and as firmly administered in the former as in the latter, still the mischiefs would be most serious, if the public opinion did not indulge such a belief. Justice, in cases of this sort, should not only be above all reproach, but above all suspicion. The sources of state irritations and state jealousies are sufficiently numerous, without leaving open one so copious and constant as the belief or dread of wrong in the administration of state justice." "Probably (he subsequently remarks) no part of the judicial power of the Union has been of more practical benefit, or has given more lasting satisfaction to the people. There is not a single state which has not at some time felt the influence of this conservative power; and the general harmony which exists between the state courts and the national courts in the concurrent exercise of their jurisdiction in cases between citizens of different states, demonstrates the utility, as well as the safety, of the power. Indeed, it is not improbable that the existence of the power has operated as a silent but irresistible check to undue state legislation, at the same time that it has cherished a mutual respect and confidence between the state and national courts, as honorable as it has been beneficent."

This clause in the constitution was intend-

ed to protect citizens of different states from danger of injustice in the state courts, through local influence or prejudice. An interpretation is contended for, which would take from congress forever the power to legislate so as to bring under its protection citizens of other states, whenever the nature of the controversy required or permitted the joinder with them, as parties, of persons who were citizens of the same states as the person or persons composing the opposite party. Such a construction would manifestly impair the end which the clause was designed to attain. The basis of the Union is in the constitutional provision that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." It is essential to the upholding of any government that it should possess the power and the means of executing its own provisions by its own authority. To secure the inviolable maintenance of that equality of privileges and immunities guaranteed by the constitution to the citizens of the Union, it may be necessary, whenever a controversy arises in which one state, or its citizens, are opposed to another state, or its citizens, (whether the controversy be, or be not, exclusively confined to different states or the citizens of different states), to commit it to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded. How far congress will exercise this power of legislation must depend upon the state of the country, and such considerations as to the necessity for such legislation as have heretofore, or may hereafter, affect its action. Manifestly, thus far, congress has never deemed it necessary to exhaust the legislative power conferred upon it by this clause of the constitution. The twelfth section of the judiciary act (1 Stat. 79) authorized a removal to the circuit court of the United States, by a defendant, of any suit commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, where the matter in dispute exceeds the sum of five hundred dollars. Under this section, it was held, that a cause could not be removed except upon the petition of all the defendants; that to bring the case within the act, all the plaintiffs must be citizens of the state in which suit is brought, and all the defendants must be citizens of some other state or states. Smith v. Rines [Case No. 13,100]; Hubbard v. Northern R. Co. [Id. 6,818]; Beardsley v. Torrey [Id. 1,190]; Ward v. Arredondo [Id. 17,148]; Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267. These cases all turned on the construction of the words used in the eleventh and twelfth sections of the judiciary act, not on the construction of the clause of the constitution conferring judicial power. As the eleventh section of the act of congress, in prescribing the jurisdiction of the circuit court, had limited it to cases "where the suit is between a citizen of the state where the suit is brought and a citizen of another state;" and the twelfth section had limited the right of removal to the circuit court to a "defendant in any suit commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state;" the courts held these expressions to mean that each distinct interest should be represented by persons all of whom are entitled to sue, or be sued, in the federal courts. In the language of Chief Justice Marshall: "That is, where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

The modification of the jurisdiction conferred by the eleventh section, subsequently made by the act of February 28, 1839, it is not necessary here to consider. Then followed the act of July 27, 1866 (14 Stat. 306), entitled "An act for the removal of causes in certain cases from the state courts." This act applies to suits "commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state." It contemplates suits in which the plaintiff is a citizen of the state in which the suit is brought, and in which there are several defendants, some residing in the state in which the suit is brought, and some, either aliens or citizens of a state other than that in which the suit is brought. "If the suit, so far as relates to the alien defendant, or to the defendant who is the citizen of a state other than that in which the suit is brought, is, or has been, instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case, the alien defendant, or the defendant who is a citizen of the state other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause, as against him, into the next circuit court of the United States to be held in the district where the suit is pending." Upon the filing of this petition and giving the security required by the statute, the state court is to proceed no further in the cause as against the defendant so applying for its removal. But "such removal of the cause, as against the defendant petitioning therefor, into the United States court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the state court, as against the other defendants, if he shall desire so to do." Before the passage of this act, no removal could be made

in the causes to which the act applies, because all the defendants were not entitled to petition for removal, and the courts had decided that unless it was removable as to all, it was not so as to any. After the passage of the act of 1866, in certain cases the alien, or non-resident, defendant could have the cause removed as to him, while it was allowed to proceed in the state courts as to the resident defendants. But, as in the judiciary act, the right of removal was limited to the alien, or non-resident, defendant, and does not extend to the plaintiff.

Next followed the act of March 2, 1867 (14 Stat. 558), upon which the right of removal in this case is claimed. This act provides "that where a suit is now pending, or may hereafter be brought, in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, . . . such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state courts an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court," may have the cause removed to the circuit court of the United States. This act purports to be an amendment of the act of July 27, 1866. It differs from all previous legislation of congress upon the subject of removal of suits in this respect; the previous acts referred to "suits between citizens of different states," which expression the courts had construed to be limited to suits in which all the persons constituting the party plaintiff were citizens of other states than those of which all the persons composing the party defendant were citizens, as we have before seen. The act of 1867, for the first time, uses the broader expression of the constitution, and refers to suits "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state." It differs also from the prior acts in relation to removal, by using, as to the plaintiff, the language of the eleventh section of the judiciary act, instead of the language of the twelfth. The plaintiff may or may not be a resident of the state in which the suit is brought, and the right of removal of the suit is given to the non-resident citizen, be he plaintiff or defendant. The change of the form of expression from suits between citizens of different states to suits in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, was evidently made advisedly, and for the purpose of extending and enlarging the right of removal, not of limiting it, as would be the effect if the construction contended for were admitted. The only conditions requisite to the right of removal under the act of 1867 are: that in the suit pending in the state court there shall be a controversy between a citizen of the state in which the suit is brought and a citizen of another state; that the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs; that the citizen of such other state, either plaintiff or defendant, shall make and file the affidavit required by the statute; and that he shall give the requisite surety for appearing and entering the case in the circuit court at the proper time, with the copies of the papers in the case. Johnson v. Monell [Case No. 7,399], opinion of Mr. Justice Miller; Sands v. Smith [Id. 12,305]. These requisites to the right of removal all exist, and have been complied with in the present case. The motion to dismiss for want of jurisdiction is therefore overruled.

Case to stand for trial.

[NOTE. The petition of the foreign defendants for removal of the suit to the circuit court of the United States was denied by the supreme judicial court of Massachusetts, to which decision an exception was taken, and the case taken to the supreme court of the United States on writ of error. In the meantime, it seems, the cause had been removed to the circuit court by the foreign defendants, and was heard August 18, 1873, as given above, on motion by plaintiff to dismiss for want of jurisdiction. Argument was had on the writ of error to the state court in the supreme court of the United States in January, 1874, and a decision rendered in March (Mr. Justice Clifford delivering the opinion), in which it was held that "either the non-resident plaintiff or non-resident defendant may remove the cause under the last-named act, provided all the plaintiffs or all the defendants join in the petition, and all the party petitioning are non-residents, as required under the judiciary act, but it is a great mistake to suppose that any such right is conferred by that act where one or more of the plaintiffs or one or more of the petitioning defendants are citizens of the state in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right unless all the plaintiffs or all the defendants are non-residents and join in the petition." The judgment of the state court denying the petition for removal was affirmed. Case of Sewing Machine Companies, 18 Wall. (85 U. S.) 553.]

Case No. 4,884.

FLORENCE SEWING MACH. CO. v. SINGER MANUF'G CO.

[4 Fish. Pat. Cas. 329; 8 Blatchf. 113.] [1]

Circuit Court, S. D. New York. Dec. 29, 1870.

EQUITY JURISDICTION — CONSTRUCTION OF CONTRACTS — REMEDY AT LAW—PROPER AND NECESSARY PARTIES.

1. Where an association of companies licensed another company under letters patent for a specific royalty, with a proviso that if the fee were not paid the license might be revoked, but that if a license at a lower rate should be granted to any other party, the fee should be correspondingly reduced: *Held*, that the rights of the parties to such an agreement were purely legal rights.

2. If the case justifying the reduction of the license fee should arise, the licensee would be

[1] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 4 Fish. Pat. Cas. 329, and the statement is from 8 Blatchf. 113.]

no longer bound to pay the original fee, and so long as he paid or tendered the reduced fee the parties granting the license could not revoke it. Any attempt to do so would be idle and nugatory.

3. Upon the payment or tender of payment of the reduced rent, the licensee's continued right to use the licensed inventions becomes perfect and unimpeachable.

4. Courts of equity lend their aid to parties standing in a trust relation, for the construction of wills, trust deeds, etc., in aid of executors and trustees, but no such jurisdiction exists, entitling parties to ordinary contracts to ask an interpretation of such contracts.

[Cited in Cookingham v. Ferguson, Case No. 3,182; Baker Manuf'g Co. v. Washburn & Moen Manuf'g Co., 18 Fed. 174.]

5. The apprehension that the licenser will deny the rights of the licensee to use the licensed invention, or that the former threatens to give notice of his election to terminate or revoke the license, does not justify the latter in an application to a court of equity for an injunction.

6. One holding title upon condition, must perform the condition at his peril, and, on a dispute arising on a question as to whether the conditions are performed, or even as to the true import of the stipulations, he cannot come into a court of equity to have those questions settled in order to save him from the consequences of a mistake in fact or of a misconstruction of the contract.

7. Where the objection for want of proper parties defendant was not made by demurrer, plea, or answer, it should be *held* too late if the rights and interests of the defendant are so far several and distinct from the parties not joined, that a decree can be made granting the relief sought without affecting the rights of the absent parties.

8. Where, however, a final decision can not be made between the parties litigating without directly affecting and prejudicing the rights of others not made parties, the court can not proceed.

9. The objection, in such a case, can be taken at the hearing, and it may, and ought to be raised and acted upon by the court itself.

10. Where the case can not be decided between the parties to the record, it will not avail to suggest that the absentees are beyond the jurisdiction of the circuit court or have such residence or citizenship that to make them parties would defeat that jurisdiction.

11. Where the suit was brought by a licensee against one only of three companies who were joint owners of the patents and joint grantors of the license, the purpose of the suit being to obtain a reduction of the license fee: *Held*, that the rights of the absent companies inseparably connected with the right of the defendant were the very subject in controversy, and would be directly affected by the result of the suit.

[Cited in Florence Sewing Mach. Co. v. Singer Manuf'g Co., Case No. 4,885; Brigham v. Luddington, Id. 1,874; Alexander v. Horner, Id. 169; Land Co. of New Mexico v. Elkins, 20 Fed. 546.]

12. The case is not like many actions brought against one of two or more parties jointly liable to pay money, in which the whole may be collected from either.

13. It is not possible to decree as to the present defendant, that an abatement of a possible one-third of the license fee should be made without prejudice to the rights of the absent companies, because the interest and property of the three corporations is essentially joint, and the court can not, in this action, settle the respective shares of the respective corporations.

14. A decision, not upon pleadings and proofs, but a decision or opinion on a motion for an injunction, can hardly be claimed to settle a question of identity between two machines, though it may have force as an admission of the complainant that there was an infringement.

In equity. The complainant was a corporation, created under or by virtue of the laws of the state of Massachusetts, and doing business in that state. The defendant was a corporation, created under or by virtue of the laws of the state of New York, and doing business in that state. On the 20th of February, 1868, the Singer Manufacturing Company, the Wheeler & Wilson Manufacturing Company (a corporation created by or under the laws of the state of Connecticut), and the Grover & Baker Sewing Machine Company (a corporation created by or under the laws of the state of Massachusetts), were the owners of certain letters patent for inventions in sewing machines, or parts thereof, or improvements therein, and particularly numbers 346 and 414, granted to Allen B. Wilson, dated respectively January 22d, 1856, and December 9th, 1856, relating to the apparatus for feeding to the needle the material to be sewed. Being such owners, the three corporations last mentioned, on the 20th of February, 1868, entered into an agreement with the complainant by which they, according to their respective rights and powers, severally authorized and licensed the complainant to manufacture, use, and vend for use, the inventions above mentioned, including a large number of patents which were described by their numbers, dates, names of patentee, &c., so far as the same, or any of them, were contained in certain specimen sewing machines, deposited, &c., marked, &c., and in the form in which said inventions were embodied in said specimen machines, and not otherwise, except that one of such machines might also be made with a drop-feed. The agreement declared that the patent rent should be five dollars for each and every sewing machine which should be made or sold under the license by said licensee while the license remained in force, and that the prompt payment thereof should in all cases be adequately secured by said licensee. Besides various other stipulations, not material to be stated, the licensee (the complainant) agreed to render to the licensers, or to such persons as they should appoint to receive the same, quarter-yearly, from January 1st, 1868, a true and full account of all sewing machines made or sold by it, verified by oath, and, on or before the 10th of July, October, January, and April, of each successive year, to pay said licensers, or their duly authorized receiver, the said patent rent for each and every sewing machine made or sold by said licensee during the last preceding quarter year, which should not have been before paid for; but it was further provided, that, for each machine actually exported for use in foreign countries, and not

returned to the United States, the patent rent to be paid to the licensers should be two dollars, instead of five dollars, for each machine. It was further agreed as follows: "No other license for a drop-feed shuttle sewing machine, using two threads, is to be granted by said licensers, under the before mentioned patents, at a less patent rent per machine, without a corresponding reduction in the patent rent hereby reserved;" and, also, that said licensers "reserve the right, at their option, to terminate this license, upon thirty days' written notice thereof, for breach of any of the agreements herein contained on the part of said licensee." There were other provisions and stipulations in the agreement, not material to the right understanding of the matters in controversy.

The bill of complaint alleged the making of this agreement, and the payment by the complainant of the patent fee stipulated by the terms of the agreement down to the 1st day of October, 1868, and that, on that day, the licensers, in consideration of $20,000, authorized and licensed the Davis Sewing Machine Company, a corporation or firm doing business at Watertown, in the state of New York, to manufacture, use and vend for use the invention described in letters patent issued to one Johnson, upon sewing machines, not exceeding fifty thousand in number, of the kind and like the one deposited with the licensers, and marked "Davis Sewing Machine," and no others, to be built at their shop in Watertown aforesaid; and that the licensers agreed with the last named company that they would not, while the said agreement remained in force, and was performed on the part of the Davis Sewing Machine Company, make any further claim of license fees from that company, under any other patents which they then owned or controlled, or might thereafter own or control, for making or selling sewing machines like said specimen Davis machine. The bill further stated that the said Davis machine was "a drop-feed shuttle sewing machine, using two threads;" that the licensers had, before the 1st of October, 1868, applied for and obtained, from the circuit court of the United States for the northern district of New York, a decree enjoining the Davis Sewing Machine Company against making or selling sewing machines substantially like the said specimen Davis machine, because the same infringed said letters patent numbered 346 and 414; that the licensers, intending to defraud the complainant, by keeping it in ignorance of the terms of the said license, concealed the same and the terms thereof from the complainant, who could not obtain such information till November, 1869; that the complainant had paid to the licensers, for machines made and sold since October 1st, 1868, at the said rate of $5 for each machine not exported, and $2 for each machine exported, amounting to $63,912, as patent rent on 13,211 machines, whereas, in truth, the licensers were entitled, under the said license to the complainant, as modified by the granting of the aforesaid license to the Davis Sewing Machine Company, to the sum of forty cents only on each of said machines, amounting to $5,284.40; that, in November, 1869, the complainant paid to the receiver appointed by the licensers, the sum of $19,758, which was claimed by said receiver and said licensers to be due on machines made and sold prior to the 30th of September, 1869; that the same was paid by the complainant, believing and protesting that the same was not due or owing, but because the licensers, through their receiver, threatened that, unless the same was paid, they would give notice of the termination of said license, and publish abroad the statement that the same was terminated, and the rights of the complainant thereunder forfeited; that the complainant was, at the time of making the said agreement, and still was, engaged in the business of manufacturing sewing machines for sale, and selling them in various parts of the United States, and in Europe, employing a large capital therein, invested partly in land and buildings, and partly in stock, tools, and machinery; that the requirements of the business of selling sewing machines were such, that the retailers of said machines were obliged to invest a large amount of capital in machines and in the notes and obligations of purchasers; and that any interruption of the sale of machines manufactured by the complainant, arising from any fear on the part of the public that said machines were made or sold in violation or infringement of the rights secured to any other parties by letters patent, would be productive of great and ruinous loss and injury, not only to the complainant, but to those persons who had purchased machines from the complainant to sell to others, of which persons the number was very large. The bill prayed a discovery, and that the defendant be ordered to reduce the patent rent reserved in the license to the complainant, to the sum of forty cents for each machine made or sold under said license after the 1st of October, 1868, and that the defendant account for and pay to the complainant the sums received by the licensers under said license, to which they were not entitled, and that the licensers might not claim or demand any other or further sums than at the rate of forty cents, and that an injunction issue to restrain the defendant, its servants, agents, and confederates, and each of them, from giving notice during the pendency of the suit, of their option, purpose, or election to terminate said license, and from attempting to collect license fees, or patent fees, from the complainant. The bill stated, as a reason for not making the Wheeler & Wilson Manufacturing Company, and the Grover & Baker Sewing Machine Company, parties, that those corporations were not citizens of, or created by, the laws of the state of New York, and that this court, sitting for

the southern district of New York, had no jurisdiction over them, or either of them.

The defendant, by answer, denied many of the allegations of the bill, and especially that the said specimen Davis sewing machine was "a drop feed shuttle sewing machine, using two threads." It averred, that the licensers had never, since the date of the complainant's license, licensed any drop-feed shuttle sewing machine at a less patent rent than that reserved by the terms of the complainant's license, and that, although the said Davis Company made and sold sewing machines like said specimen Davis machine, from the 1st of October, 1868, till the 1st of December, 1869. such manufacture and sale were of no detriment or injury to the complainant's business; that the sum of $20,000, paid by the Davis Company, amounted to more than $5 for each domestic, and $2 for each exported machine, on all machines it made during the continuance of the license to it; that, if the Davis machine should be held to be a "drop-feed shuttle sewing machine," within the meaning of that phrase, as used in the complainant's license, the granting thereof was a mistake, from the effect of which the defendant was entitled to equitable relief at the bar of this court; that the licensers' counsel advised them that such license to the Davis Company was so framed that it did not include or license a drop-feed machine, and they believed such advice to be correct, and they then believed and still believed and averred that such specimen machine did not contain the drop-feed, or any feed substantially like it, or what was known or usually called the "drop-feed;" that the licensers considered, in fixing the price, only what was a fair consideration for the use of the needle-feed, in a needle feed machine under the Johnson patent, not at any time supposing or having the least idea that the Davis machine was a drop-feed machine or would ever be so regarded; that, at the time the license was given to the Davis Company, the term "drop-feed," as applied to sewing machines, was well understood by all persons engaged in the manufacture and sale of sewing machines; and that the feeding device contained in the specimen Davis machine was not, as understood by persons engaged in the trade and by all the parties to the said Davis license, a drop feed. The answer admitted that, prior to the 1st of October, 1868, the defendant and its associate licensers obtained an order for an injunction under the reissued patents for a feeding apparatus, Nos. 346 and 414, and stated that, on the 1st of December, 1869, the licensers procured the cancellation of the Davis license. "having heard that it was obnoxious to the complainant," and the defendant and the Wheeler & Wilson Manufacturing Company made a contract with the Davis Company to make and sell to the last named company sewing machines like the specimen Davis machine; that this was done, not because they believed the Davis machine contained a drop-feed, but for the purpose of avoiding any possible conflict on the subject, or ground of complaint on the part of the complainant; and that the profit on each machine to be so made and sold to the Davis Company, after deducting a fair manufacturer's profit, would exceed, upon each machine, the sums of five dollars and two dollars, respectively, payable according to the terms of the complainant's license, and was more advantageous to the defendant than to permit the Davis Company to work under a license reserving those sums as license fees. There were other denials and other averments in the answer, but what is above stated exhibits the issues of fact chiefly discussed. There were a denial that the complainant was entitled to the specific relief sought, and the general denial that the complainant was entitled to an injunction or an account, or to any relief.

The proofs taken related chiefly to the question whether the feeding apparatus in the specimen machine mentioned in the license to the Davis Company was a "drop-feed," to the circumstances and the belief under which that license was given, and to the questions whether the term "drop-feed," as known and used among those who manufactured, sold or used sewing machines at the time the license to the complainant was given, had acquired a meaning which would include the feeding apparatus contained in such specimen machine, and whether that feeding apparatus was a needle-feed in fact or in name, as distinguished from a drop-feed. There was great conflict of evidence on the question, whether, in the specimen machine, the needle performed, in whole or in part, the work of feeding, or moving the material sewed to the place required to receive the successive stitches, the other part of the apparatus, called the "helper," being merely auxiliary thereto, or whether the helper, in truth, performed the work of feeding. The machines produced as examples of the drop-feed as used by the complainant, and various others conceded to be drop feed machines, contained a serrated horizontal bar, lying beneath the plate of the machine, on which the material to be sewed was placed, and a smooth pressure-foot was placed above, which rested upon such material. The pressure thereon was a spring, which yielded as occasion required. In the operation of the machine, as the stitches were successively made, and as the needle was completely withdrawn from the material, the serrated surface of the bar was raised through a slit or opening in the plate on which the material was placed, and its roughened or serrated surface was forced against the under surface of the material, held down by the pressure-foot, and then the bar was moved forward the distance necessary for the length of the stitch, carrying with it the material, whereupon, as the

needle descended, the bar dropped below the plate. and was drawn backward, to be in readiness to rise again as the next stitch was made and the needle withdrawn, and again to press the material against the pressure-foot and move it forward as before. In the specimen Davis machine, the feeding of the material was effected while the needle was in the material and in the act of withdrawal therefrom, the needle itself, as it was withdrawn, moving in the direction in which it was desired to move the material before the needle should descend again to make the next stitch. A perpendicular bar, called a "helper," was placed and adjusted nearly parallel with the motion of the needle, so that its lower end pressed upon the cloth, holding it firmly down upon the plate while the needle descended, and moving forward, as the needle ascended, in the same direction as the motion forward of the needle in its ascent, such forward motion of the needle and of this perpendicular bar being the same. The forward movement of the material being accomplished. the lower end of this perpendicular bar was raised and moved to its former position, very near to, and, it being grooved, partly surrounding the needle, and pressed the material upon the plate, while the needle again descended to make another stitch, and then the ascending needle and the perpendicular bar moved forward again, and so on, successively, the motion forward of the lower end of the bar corresponding, in time and distance, with the forward movement of the ascending needle, and the bar, at the end of each forward movement, rising and returning to its former position near to and partially surrounding the needle. In the testimony, there was much conflict on the question, whether, in such Davis machine, the needle in fact moved the material, the perpendicular bar acting only as an auxiliary or helper, by keeping the material smooth and even during the process, or whether both the needle and the helper assisted in the moving of such material, or whether the helper was the chief and only useful instrument in the movement of the material, its motion being made to coincide with the forward motion of the needle while being withdrawn.

Ebenezer R. Hoar and Augustus L. Soule, for complainant.

Edwin W. Stoughton, George Gifford, and Solomon J. Gordon, for defendant.

WOODRUFF, Circuit Judge. Three principal questions were discussed on the hearing of this cause: (1) Whether a case is made entitling the complainant to any relief in this court, as a court of equity? (2) Whether the relief sought can be granted in a suit to which the Wheeler & Wilson Manufacturing Company and the Grover & Baker Sewing Machine Company are not parties? (3) Whether the proofs establish that the defendant and the Wheeler & Wilson Manufacturing Company and the Grover & Baker Sewing Machine Company have given such a license to another company, as entitles the complainant to a reduction in the patent rent or license fee originally stipulated to be paid in the agreement mentioned in the bill of complaint?

(1) Upon the first of these questions, I find great difficulty in sustaining the present suit. The rights of the parties to the agreement by which the license was granted to the complainant are, under that agreement, purely legal rights; and what those rights were, when the suit was brought, was dependent, as a matter of strict law, upon the facts, and did not result from any equities which existed apart from or beyond those purely legal principles.

By the express terms of the agreement, if the parties granting the license to the complainant have licensed to any other party the use of a drop-feed shuttle sewing machine using two threads, at a less patent rent or license fee than the rent or fee reserved in the complainant's license, then such last-named rent or fee is reduced; and the complainant is no longer bound to pay the rate originally stipulated. So long as the complainant pays or tenders the reduced fee, the parties granting the license cannot revoke it. Any attempt to do so will be idle and nugatory.

Viewed as an action to obtain a decree establishing in the complainant's favor the future right to enjoy the license on paying the reduced rent or fee, the complainant has no need of the assistance of any court. The rule that a court of equity will not interfere when there is full, complete, and adequate remedy at law need not be invoked. Nor is it essential to rely upon the 16th section of the act of congress of September 24, 1789 (1 Stat. 82), which declares, that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law;" for, here, the complainant has the remedy in its own hands, and can assert, exercise and maintain its rights without invoking the aid of a court of law or equity. If the fact be as alleged in the bill, that the said parties granting the license to the complainant have granted the specified license to another at a less rate, it is only necessary for the complainant to pay, or, if payment be not accepted, to tender, the reduced rent, and the complainant's continued right to use the licensed inventions is perfect and unimpeachable.

On what ground, then, can the power of this court be invoked for the protection of the complainant in the future use of these inventions?

The complainant has no need of a discovery. The bill of complainant avers, that it has already discovered the facts upon which the right to use the invention at a reduced rent

or fee arose. The instrument alleged to work that result is annexed to the bill, and the whole endeavor in this suit has been to prove that such instrument, by its true meaning and effect, is a license to a third party to use the specified invention, and thereby to reduce the complainant's license fee.

There is no doctrine akin to the principles upon which bills quia timet are sustained, that will avail the complainant. Nothing is to be apprehended from the lapse of time or the loss of evidence. That is not suggested in the bill. The complainant can bring the matter to an immediate test by standing on the agreement, and insisting upon and acting according to the legal rights secured thereby, and the written license granted to the third party is known and susceptible of proof at any time.

The complainant cannot be disturbed in the use of the inventions; for, if the fact be as alleged, the other parties cannot restrain such use, or collect more than the reduced rent or license fee. The complainant's defence is perfect without resort to a court of equity.

Nor has the complainant a right to come into this court to obtain a construction of the contract made with the defendant, and the companies associated with the defendant. Courts of equity do, it is true, lend their aid to parties standing in a trust relation, and entitled, by reason thereof, to the peculiar protection of a court of equity, having special jurisdiction of trusts, as, for example, for the construction of wills, trust deeds, &c., in aid of executors and trustees charged with trusts; but no such jurisdiction exists entitling parties to ordinary contracts to ask an interpretation of such contracts. Indeed, the complainant here does not claim, or even admit, that the agreement is of doubtful meaning, but proceeds upon the fact that the defendant and the other associated companies deny that they have given any license to use the invention mentioned in the agreement; and the appeal to this court is, that the court decide whether the act mentioned in the agreement has been done. Neither party denies, that, if a license has been granted at a less rate than was stipulated in the agreement with the complainant, the right of the latter to a reduction is clear, according to the terms of such agreement. In saying this, I do not overlook the allegation by the defendant, that, if the license granted to a third party is in fact a license to use the specified invention, it was a mistake as to which the defendant is entitled to relief. I am now dealing with the case of the complainant. The allegation of such mistake, even if made before the bill was filed, did not warrant the complainant in coming into court to obtain a decree in negation of any such allegation. It will be enough for the complainant to assert and exercise its legal rights, and, if the defendant and the other companies attempt to restrain the continued use of the inventions licensed, put them to their proof of mistake, and, as I think, to the proof of a very different case from that which, in that respect, is set up in this answer, and proved by the testimony.

The allegations in the bill would seem designed to assimilate the case to suits brought to remove a cloud upon title, by its statements, that any fear on the part of the public that said machines were made or sold in violation of the right secured to any other parties by letters patent, would be productive of great and ruinous loss and injury to the complainant, and also to those persons who had purchased machines from the complainant to sell again. What has already been said seems to me sufficient to meet this view; and I am not aware that an apprehension that the defendant will deny the right of the complainant to use the licensed invention, or the fact that the defendant and the other associates threaten to give notice of their election to terminate the license, justifies an application to the court for an injunction. In that respect, each of the parties has a legal and equitable right to insist upon the agreement according to its proper meaning; and the defendant's denial that any act has been done entitling the complainant to a reduction of the license fee, in no wise hinders the complainant in the exercise of the rights secured by the license. If the defendant and the other companies should hereafter slander the complainant's title, and if no adequate redress therefor can be had at law, a case will be presented, which, to say the least, is not here presented.

The complainant has made a contract, by which, if the other contracting parties have granted to another the right of using the licensed inventions at a less rent or fee than the complainant agreed to pay, a reduction is wrought in favor of the latter by its very terms. The complainant avers that such license has been given, and that thereby the fee or rent is reduced. The defendant denies that such license to a third party has been given. The parties are in conflict upon that question. What, then, does the complainant ask, and why does it ask it? Because it is not certain that it can establish its title to a reduction, can it attempt an experiment in this court, through which it will be protected against the loss of the privilege if it fail to prove such title? If the fact be as is alleged, the complainant requires no protection. If the fact be not as alleged, the complainant is entitled to no protection. It is bound to pay a rent or license fee. It differs with those who gave the license as to the amount which it is bound to pay. The other parties are entitled to terminate the license if the rent which is payable be not paid, and there is nothing inequitable in the assertion, or in the exercise, of that right. No rule of equity is involved in such a controversy. Its determination depends solely

upon a question of fact, upon the ascertainment of which the legal rights of the complainant are clear, according to its own view of the subject.

It would be a novel experiment, if a tenant were to come into a court of equity alleging that he had paid or otherwise satisfied, or been discharged from, the rent reserved in his lease, but that his landlord denied the fact of such payment or discharge of the rent, and threatened to declare his election to terminate the tenancy pursuant to the option reserved in the lease, and thereupon to ask the court, upon proof of the facts alleged by the tenant, to adjudge that such rent is paid, satisfied, or discharged, and enjoin the landlord against declaring such election. The court would be bound to say: Upon the facts stated by you, your possession cannot be disturbed, and, if the landlord declares such election and brings ejectment, you are in no danger. So, here, the right of the defendant and the other companies to terminate the complainant's license, if the sums due for fees are not paid, is a clear legal right. Its exercise is according to the stipulations expressly assented to by the complainant, and was distinctly contemplated when the agreement was made. There is, therefore, nothing inequitable in the assertion of the right or the threat to exercise it, and it would, as it seems to me, be an unwarranted interference with their legal rights were this court to suspend its exercise.

The complainant's position is not unlike that of any other who holds title upon condition—he must perform the condition at his peril—and not unlike that of a contracting party who will be unable to enforce the contract against the other party unless he has on his part performed its stipulations. On a dispute arising on a question whether the conditions are performed, or even as to the true import of the stipulations, they cannot come into a court of equity, to have those questions settled, in order to save them from the consequences of a mistake of fact, or of a misconstruction of the contract. So, here, I think a bill to determine the meaning of the license to the complainant, if that were doubtful, which is not claimed, or to ascertain whether the defendant and the other associated companies have done the act upon which the right to a reduction of the license fee arises, and thereupon to decree that the complainant is only bound to pay the reduced rent, cannot be sustained. For that purpose it is wholly unnecessary, and such a determination is not called for by any view of the office and jurisdiction of a court of equity. The suit is, in substance, an endeavor to obtain the advice of this court, to enable the complainant to act with safety in his dealings with the defendant and the other parties to the license, in a matter depending solely upon legal principles, in order that it may not omit the payment of the stipulated rent or license fee, until it has been here adjudged that such payment is not necessary to the preservation of the license.

(2) The objection, that the Wheeler & Wilson Manufacturing Company and the Grover & Baker Sewing Machine Company are not made parties to this suit, was not made by the defendant by demurrer, plea, or answer. If, therefore, the rights and interests of the defendant are so far several and distinct from those of the other two companies, that a decree can be made granting the relief sought without affecting the rights of those two companies, the objection should be held to be too late. Story v. Livingston, 13 Pet. [38 U. S.] 359, 375, and cases there cited; Segee v. Thomas [Case No. 12,633]. On the other hand, where a final decision cannot be made between the parties litigating without directly affecting and prejudicing the rights of others not made parties, the court cannot proceed. The objection can be taken at the hearing, and it may, and ought to be, raised and acted upon by the court itself. And, where the case cannot be thus decided between the parties, it will not avail to suggest that the absentees are beyond the jurisdiction of the circuit court, or have such residence or citizenship that, to make them parties, would defeat that jurisdiction. Mallow v. Hinde, 12 Wheat. [25 U. S.] 193; Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 152, and cases therein referred to, and in the notes; Story v. Livingston, 13 Pet. [38 U. S.] 375, 376. The decision in the case of West v. Randall [Case No. 17,424] is in no conflict with these cases.

This was the rule before the act of congress of February 28, 1839 (5 Stat. 321), which provides, that "where, in any suit at law, or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, * * * it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it; but the judgment or decree * * * shall not conclude or prejudice other parties, not regularly served with process * * * and the non-joinder of parties who are not so inhabitants * * * shall constitute no matter of abatement, or other objection to said suit." But the effect of the statute, and of the 47th rule of the supreme court in equity, containing a similar provision, have been considered by the supreme court, and it is held by that court, in the language of Mr. Justice Nelson, in Coiron v. Millaudon, 19 How. [60 U. S.] 113, 115, that it is well settled, that neither the act of congress of 1839, nor the 47th rule of the supreme court, enables the circuit court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and that the objection

may be taken at any time, upon the hearing or in the appellate court. In that case, the absent parties were out of the jurisdiction of the court, and that was assigned in the bill as a reason for not making them parties, but the excuse was held unavailing. In Shields v. Barrow, 17 How. [58 U. S.] 130, this statute was declared to be no more than a legislative affirmance of the rule previously established, and not to touch the principle, that the court could not adjudicate directly upon the right of a party not actually or constructively before the court; and the case of Payne v. Hook, 7 Wall. [74 U. S.] 425, in effect affirms these decisions. The decision in Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. [66 U. S.] 233, as stated by Mr. Justice McLean, was to the like effect, when there, also, the reason for not making an absent party a defendant was, that to make such party a defendant would oust the jurisdiction. These cases seem to me to require that I should decline to make the decree prayed for.

In Greene v. Sisson [Case No. 5,768], on demurrer to a bill, the court held, that, notwithstanding the act of 1839, the circuit court could not proceed in a suit in the nature of a bill to redeem, and for a relinquishment of a mortgage interest, unless all the parties beneficially interested in the mortgage were parties, and that their being out of the jurisdiction did not obviate the difficulty—citing, also, Hagan v. Walker, 14 How. [55 U. S.] 36, and Wilson v. City Bank [Case No. 17,797]. Shields v. Barrow, already referred to, was a bill to rescind a contract, and it was held that it could not be rescinded in part, so as to set it aside as to the parties before the court, and leave it in full force as to persons not parties to the suit; and that if, in any case, that could be done, it must be a case in which the rights of those before the court are completely separable from the rights of those who are absent. In the case of Coiron v. Millaudon, supra, where it was sought to set aside a sale of mortgaged premises made in proceedings in insolvency, and the purchasers were defendants with others, but the mortgagees were not parties, the court held that, as setting aside the sale might affect their interests, they were indispensable parties.

In this suit, the complainant seeks, not to rescind the agreement in question, but to alter and change its otherwise import and obligation, by reason of alleged acts of the contracting parties done since its execution. In principle, this is the same as if, by reason of facts alleged, it was sought to rescind it altogether. The three corporations granted to the complainant the license to use certain inventions upon certain specified terms and conditions, and the complainant agreed to pay to these corporations, for this license, a specified rent or license fee. The right to terminate the license in case such rent or fee was not paid was reserved, and was to be at the option of the latter. This court is now asked to decree a modification of that agreement, to declare that, by reason of subsequent events, a less rent or fee only is payable, to order the defendant to reduce such rent, and to enjoin the defendant and its agents, servants, and confederates, and each of them, from giving the notice, during the pendency of the suit, of their option or purpose to terminate the said license. Such relief cannot be given without directly affecting the absent parties, any more than the agreement could be declared completely rescinded. It touches their property and rights under the license. It would disable the three to assert the right reserved to them to terminate the license, or to proceed thereafter against the complainant for infringing the patents. The rights of the absent companies, inseparably connected with the right of the defendant, are the very subject in controversy. The case is not like many actions brought against one of two or more parties jointly liable to pay money, in which the whole may be collected from either, and in which, contemporaneously with the foregoing decisions, the courts have held that the action could be sustained against those who are within the jurisdiction. There, a recovery establishes the obligation of the defendant to pay the debt, and only leaves the question of contribution to be settled without prejudice to the absent parties by reason of the judgment. Here, the object and effect of the decree sought, is to destroy the right of the three companies to enforce their agreement, and assert their rights to the inventions in question as against the complainant.

If it were possible to decree that, as to the present defendant, an abatement from a possible one-third of the license fee should be made without prejudice to the right of the three corporations to terminate the license if the residue be not paid, there might be some plausibility in the claim to such decree; but the interest and property of the three corporations under the agreement is essentially joint, and the court cannot, in this action, settle the respective shares of the several corporations therein.

(3) These considerations render it unnecessary, and perhaps improper, that I should discuss the proofs taken upon the contested question of fact chiefly discussed on the hearing, whether such a license has been given by the three corporations as entitles the complainant to a reduction in the stipulated patent rent or license fee.

If it had appeared, that, upon proofs, such as have been produced in this case, it had been adjudged by Mr. Justice Nelson, that the specimen machine, the making and sale of which was licensed by these corporations to the Davis Sewing Machine Company, was an infringement of A. B. Wilson's patent for the four-motion feed, called also the "drop feed," I should greatly hesitate to act upon a different view of the subject, but should prefer

to rest upon the opinion of that greatly esteemed and experienced judge as an authority. A decision not upon pleadings and proofs, but a decision or opinion on a motion for an injunction, can be hardly claimed to settle the question. Its influence in this case is rather to be derived from its force as an admission by the three corporations that it was such an infringement.

But, if that be conceded, it does not follow, by necessity, that the Davis machine contains what has ever been, or is now known as, a "drop feed;" and there is much evidence to the contrary. It would be going a great way to say that every feeding apparatus which infringes the Wilson or Fitzgerald patent is, ex vi termini, a drop feed. I do not, however, intend to go any further, nor to express any opinion upon the question, whether, upon all the proofs, the complainant has shown that the three corporations have granted a license for a drop-feed shuttle sewing machine or not. Entertaining the opinions I have expressed, I could make no decree based upon the affirmative of that question. And I think it just to leave both the parties to their legal rights, unaffected by a decree herein based upon any decision of that question.

For the reasons stated, the bill should be dismissed.

[NOTE. See Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., Case No. 4,883; Same v. Singer Manuf'g Co., Id. 4,885.]

Case No. 4,885.

FLORENCE SEWING MACH. CO. v. SINGER MANUF'G CO.

[4 Fish. Pat. Cas. 348;[1] 8 Blatchf. 177.]

Circuit Court, S. D. New York. Feb. 4, 1871.

INJUNCTION — MONEY PAID INTO COURT BY COMPLAINANT—EQUITABLE LIEN OF DEFENDANT.

A. licensed B. to use sundry patents at a specified fee, with a proviso that if a license was granted to any other party at a less rate, the fee to be paid by B. should be proportionately reduced, and with a further proviso that upon the failure of B. to pay such royalties as were due, A. might terminate the license. B., claiming that A. had granted a license at a lower rate to C., filed a bill to obtain a reduction of the fee, and to enjoin A. from terminating the license; and, pending the suit, obtained an injunction upon the condition of depositing in court the amount of license fees in dispute. The court dismissed the bill for want of equity and proper parties, and thereupon each party moved that the fund in court be paid over to it. *Held* that, although the money belonged to the complainant, he had received such protection from the injunction as to give to the defendant an equitable lien upon the fund, and that the court would retain it until the final determination of the controversy by a proper tribunal.

This was a motion arising out of the case of Florence Sewing Mach. Co. v. Singer Manuf'g Co. [Case No. 4,884], under circumstances fully set forth in the opinion of the court.

Ebenezer R. Hoar and Augustus L. Soule, for plaintiffs.

Edwin W. Stoughton and George Gifford, for defendants.

Before WOODRUFF, Circuit Judge, and BLATCHFORD, District Judge.

WOODRUFF, Circuit Judge. The plaintiff is a licensee of three associated companies, namely, the defendant, the Wheeler and Wilson Manufacturing Company and the Grover and Baker Sewing Machine Company. By the terms of the license, the plaintiff agreed to pay a license fee or royalty of five dollars for each machine made and sold in the United States, and two dollars for each machine exported; and, under the license, the plaintiff was making and selling machines to such a number, at the time when the bill herein was filed, that the amount of fees payable at the specified rates was nearly twenty-five thousand dollars a quarter, or nearly one hundred thousand dollars a year, payable in quarterly payments, on rendering quarterly accounts of the machines manufactured and sold in each quarter. The license contained a provision, that the associated companies should not license the making of a dropfeed shuttle sewing machine using two threads, at a less patent rent, without a corresponding reduction in the patent rent thereby reserved; and, also, a reservation to the licensers, of the right to terminate the license, at their option, on thirty days' notice, for any breach of the agreement by the plaintiff.

The bill of complaint herein alleges, that the licensers gave such a license to a third party as operated to reduce the plaintiff's rent or fee to forty cents for each machine; that the plaintiff has paid to the said associates $63,912, since the right to the reduction arose; and that the larger part thereof was paid in ignorance of the fact, and the residue under a protest that it was not due, but was paid in order to prevent a revocation of the license, which was threatened, and which would, as the plaintiff alleged, be very injurious to its business. The bill prays a decree establishing the plaintiff's right to a reduction in the rent or license fee, and directing a repayment of the sums overpaid, and that the defendant be enjoined from giving notice of an option to terminate the license, and from attempting to collect the sums reserved as rent or license fee by the terms of the license.

After the filing of the bill, the plaintiff applied to this court, by motion, for an injunction, pendente lite, to restrain the defendant according to the prayer of the bill, having offered, in the bill, to deposit with such receiver as the court should name, all such sums as the patent rent, under the terms of the license, would amount to, for each quar-

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

ter which should expire during the pendency of this suit, at the times when the same would fall due, the said sums to be held by such receiver subject to the order of this court, and to await the final decree in this suit. Thereupon, on the 8th of January, 1870, the court ordered that an injunction issue, restraining the defendant, until the further order of this court, from giving notice to the plaintiff of a termination of the license, and from attempting to collect license fees or patent rent thereunder, on condition, "that the plaintiff deposit with the clerk of this court all moneys which shall become due under said license, according to the full patent rent reserved therein, on or before the tenth days of each and every January, April, July and October, * * * said moneys to be deposited by the clerk with the United States Trust Company, * * * on interest, to the credit of the suit, and subject to the order of this court." An injunction was issued in pursuance of such order, addressed to the defendant, enjoining such defendant as in the order directed; and, in performance of the condition prescribed in the order, and under a subsequent modification thereof reducing the rate of fees, the plaintiff has paid to the clerk of this court, from quarter to quarter, sums which, including the quarter ending on the 1st of October, 1870, amount to $76,793, which is now on deposit, at interest, as directed.

The cause was brought to a hearing upon pleadings and proofs, and, in December, 1870, the decision of the court thereon, was made—Florence Sewing Mach. Co. v. Singer Manuf'g Co. [Case No. 4,884]—that the bill should be dismissed on two grounds—first, that no case was made appealing to the jurisdiction of a court of equity, or requiring the interference of the court to determine the rights of the parties; and, secondly, that the relief sought by the bill could not be granted in a suit to which the Wheeler and Wilson Manufacturing Company and the Grover and Baker Sewing Machine Company were not parties. The court, therefore, declined to pass upon the merits of the controversy, and the question whether the license fee or rent payable by the plaintiff has been affected or reduced by the acts of the associated companies since the license was granted, remains wholly undetermined. Upon the publication of the decision of the court, and before a final decree has been settled and entered, the plaintiff has applied for an order that the money paid to the clerk, and now on deposit as above stated, be repaid to the plaintiff; and, on the other hand, the defendant has made a cross motion or application, asserting title to the money as in truth the proceeds of the use of the patents covered by the license, and profits made by such use by the plaintiff during the period in which the defendant has been, by the injunction of the court, restrained of its legal right to revoke the license, and that, the plaintiff having failed to establish, in this suit, the right to a reduction of the rent or fee, the defendant is entitled, according to the just construction of the condition upon which the plaintiff took the injunction, to have the money paid over for the use and benefit of the defendant and the companies thus associated with the defendant, in satisfaction, pro tanto, of their claim to license fees while the court has held them in restraint, and thereby protected the plaintiff in the use of their patents.

The question presented by the circumstances above detailed and by the motion of the parties respectively, is novel and embarrassing. So far as we have derived aid from counsel, and so far as my examination has extended, it is without precedent. The money was undoubtedly paid to the clerk, and made subject to the order of the court, in the expectation that the court would, in this suit, determine, by its final decree, upon the pleadings and proofs, whether the plaintiff was still bound to pay the full license fees or rent reserved to the defendant and the other associated companies, or whether, on the other hand, the plaintiff was entitled to retain the license on paying the reduced rent which the plaintiff insisted was alone due, and in the expectation that the money, paid in, would thereupon be paid over to the defendant, for the use of the associated licensers, or would be apportioned between them and the plaintiff, according to such rights as were found to arise out of an adjudged reduction of the license fee.

The money paid in was the money of the plaintiff. However true it is, that it was the precise amount of the license fee reserved to the associated companies for the use of their patents, and, in a sense, may be the fruit or proceeds of the use of their property, presumptively earned in such use, and even derived therefrom, by the plaintiff, by a use of their patents against their will, still, the money itself was the plaintiff's money, and the plaintiff, in paying it over under the order made upon a voluntary offer to pay it, did not admit for a moment that the money was due to the defendant and the other associates, but was acting throughout in denial of their right, and was earnestly insisting that they were largely overpaid at the time the bill was filed; and the money was offered to be paid, and was in fact paid, in confidence that the court would retain it, not suffering it to pass to the defendant, or to the defendant and the other companies, unless it should be adjudged due under the license.

It is equally clear, that the defendant did not suppose, and could not suppose, that paying the money to the clerk, ex vi termini, gave the defendant and the other associates a title to the money, or that, if the court should adjudge that the plaintiff's license fee had, by the acts of the defendant and the other associates since the license was

granted, been reduced to forty cents for each machine, the plaintiff would not be entitled to an order of the court, (after proper computation,) for the repayment to the plaintiff of the whole or of a considerable part of the money. To this may be added the further suggestion, that, if the court had decided the question between the parties on the merits either way, and the decree had been appealed from, it cannot be doubted that the party appealing would have insisted that no order disposing of the fund should be made pending the appeal.

The court having declined to determine the controversy on the merits, the plaintiff re-asserts title to the money, claiming that the purpose for which it was paid has failed, while the defendant insists, that, as the plaintiff has failed to establish a right to a reduction of the fee in this suit and by a decree herein, the defendant is entitled to the money, as prima facie due upon the face of the license, and that the condition, on which the restraint was imposed, should be construed to mean, that the money should be paid to the defendant for the use of the associates, if, in and by this suit, such right to a reduction was not decreed in the plaintiff's favor; and that, to hold otherwise, is to lend the aid of the court to a great injustice, in this, that, but for the interference of the court by injunction, the plaintiff would have been, by revocation of the license, prevented from using the patents, or would, by action, have been compelled to pay the associates the very money now in question. Obviously, this last suggestion assumes that the defendant could have successfully revoked the license, or have compelled the plaintiff to pay the whole rent originally reserved—the very claim which this court declined to determine, and which this court cannot now assume in the defendant's favor. Yet, it is equally obvious, that the consideration upon which the plaintiff offered to pay the money, and for which the plaintiff did pay the money to the clerk, has not wholly failed. The plaintiff did thereby obtain an injunction, and restrained the defendant from interfering with the use of the patented inventions, and from attempting to collect the license fee or rent, and did thereby secure to itself the uninterrupted use of the inventions and such profit as might accrue therefrom.

In this conflict of claim, so peculiar and so complicated, the essential inquiries are—why was the money paid to the clerk of this court?—what protection to the defendant was intended thereby?—what purpose was to be effected?—and, from the answer, it must be determined what equitable rights result from the payment.

The technical suggestion, that, because the money was paid in by the plaintiff, in the suit, it became so identified therewith, that, when the court declines to decide the merits and dismisses the suit, the money goes out of court with the plaintiff and ceases to be subject to any order of the court, save the formal order of repayment, is not quite satisfactory. There is, it is true, a species of logical sequence in the suggestion, but it largely overlooks the enquiries last above suggested and the equities which may result from the very facts, that the plaintiff offered to pay in the money in order to obtain the protection which the injunction gave, and that the defendant was required to submit to the restraint, suffer the uninterrupted use of the patents, and forego all attempts to collect the money; and the suggestion further assumes, that the money was subjected to no order of the court which does not, in this suit, determine the title to the license fees or patent rent and the amount payable from the plaintiff.

The defendant and the associated companies held the agreement of the plaintiff for the payment of the license fees stipulated therein. They also had the unquestionable right to terminate the license if the amount of fees actually due or accruing were not paid. The plaintiff was actually using their inventions for its own profit. As to the company made defendant here the plaintiff was a foreign corporation, and could not be sued upon the agreement, for the collection of the money, in this district. In this posture of the parties, the plaintiff, alleging that, at that time, the defendant and the other associates were overpaid, and claiming that the license fees had, by acts subsequent to the license, been largely reduced, asked that the defendant be put under injunction, forbidding the revocation of the license, which revocation was the clear legal right of the defendant, if the plaintiff could not establish a right to a reduction, forbidding the defendant from bringing an action to collect the fees, which were as clearly due, as a legal right, if the plaintiff could not establish the title to a reduction, and even restraining the defendant from bringing an action to test the plaintiff's claim to a reduction. As a necessary incident, the plaintiff secured to itself the uninterrupted use of the licensed inventions and, what was deemed of great importance to the plaintiff, the opportunity to prosecute the litigation without hazard of losing the license, or losing any right to the money paid, if it established its right to a reduction. That is to say, the plaintiff would hold on to the license, whether right or wrong in the litigation, and not lose its claim to the money, if successful. For these by no means inconsiderable advantages to the plaintiff, and summary disadvantages wrought to the defendant, the plaintiff offered and accepted the condition of paying the money to the clerk, subject to the order of the court. To what end? Was it that the defendant should, by the very acceptance of the condition and the payment of the money, gain any equivalent for the advantage gained by the plaintiff and the disadvantage wrought

to the defendant and the other associates? Was it that the money should be brought within convenient reach and be, by the very transaction, made subject to the defendant's claim to license fees?

Again, the plaintiff is a corporation, presumptively dividing its gains among its shareholders. No allegation is made here that it was not, nevertheless, perfectly solvent and able to pay all the fees which had accrued, at whatever rate may be finally established, and it might not be assumed, as a presumption, that it would not be able to pay all that should accrue during the litigation. But, on the other hand, the defendant had a right to insist, on behalf of the associates, that no risk whatever should, by the action of the court, be cast upon them; that the plaintiff ought rather to be required to pay the money to them, in reliance on their solvency and ability to refund, if it should be determined that the license fee was reduced; that the accruing quarterly payments were very large and the duration of the litigation very uncertain; that the defendant and the other associates ought not to have their hands tied, and be restrained of the opportunity to test their legal rights, to find, after, it might be, years of litigation, that the plaintiff, (though without any fraud or dishonesty,) in the fluctuations and vicissitudes which affect the prosperity of business of every sort, had become unable to pay the large arrears which would accrue if the defendant was right in the claim to the full license fees reserved. In this view of the subject, was not the defendant to derive some benefit from the payment of the money to the clerk, as a security and protection against the possible loss of what should be due at the termination of the litigation? The offer by the plaintiff, the condition imposed by the court on granting the injunction, and the paying of the money, ought not to be permitted to operate as a delusion. They were certainly not so intended. The proceeding against the defendant was wholly in invitum. Some protection to it against the possible consequences of restraining the assertion of its alleged legal rights was intended. A consideration was offered and accepted for the immunity granted, pendente lite, to the plaintiff. It is not the fault of the defendant that the plaintiff came into this court without a cause of action which warranted an appeal to the court, as a court of equity, or came into a court in which the relief could not be granted for want of necessary parties. For all the purposes of these motions, the decision that the plaintiff did so come must be taken to be correct. The plaintiff chose voluntarily so to come, and, so coming, subjected the money to the order of the court, for the protection and benefit of the defendant, who was in constant resistance of the plaintiff's endeavor.

What, in equity, is the result? I cannot resist the conclusion, that the circumstances gave to the defendant an equitable lien upon the fund—not a lien created by the license—not a lien or title established by any decision that the whole fee or rent reserved by the license is payable—but a lien resulting solely from the paying in of the money for the security and protection of the defendant, and as the consideration upon which the plaintiff obtained and accepted an actual benefit, and placed the defendant at disadvantage and in a condition of risk or hazard. This protection and security the defendant ought not to be required to relinquish, for the mere reason, that it turns out that (according to the views governing the decision the court has made) the plaintiff ought not to have come into this court at all in the form and manner it came, and had no case for any injunction. To order the payment of the money to the plaintiff, on the ground that, although the bill be dismissed, the merits are undecided, is to make the error the court were invited, by the offer of the plaintiff, to commit, the ground for accomplishing the precise injustice against which the condition of granting the injunction was intended to guard. The equities of the defendant seem to me analogous to the rights which would have arisen in its favor, if the condition of granting the injunction had been a pledge of money or other security for the payment of whatever sums might accrue to the defendant and the other associated companies pending the injunction. If the pending suit ascertained and settled the amount due, the disposition of the money would be simple and convenient. But it would by no means follow, that, if that litigation failed to settle the question on the merits, the pledge could be withdrawn, the plaintiff having had the benefits of the injunction in the meantime.

For these reasons, I conclude that the court ought not to order the repayment of the money to the plaintiff. The defendant has acquired an equity which arose not out of the license, nor out of the mere litigation of the questions raised by the bill of complaint, but out of facts arising after bill filed, and proceedings collateral to the issues therein—proceedings intended to be protective of the defendant, and conservative of the rights of the plaintiff. Such an equity has not been lost. It can still be preserved and protected, and I think there is no want of power in the court to preserve and protect it.

It does not follow that the defendant is entitled to an order that the money be paid to the defendant, as the amount, or on account, of license fees accrued, nor as payable according to the proper construction of the condition on which the injunction was granted. That condition did not contemplate the disposition of the money except upon some ascertainment that the defendant and the other associated companies were entitled to receive from the plaintiff the whole or some part of the fees or rent reserved in the license. Such ascertainment has not been

made, and, to direct the payment to the defendant, would, in substance, be, to determine the question between the contestants, on this motion, which, on the pleadings and proofs in the suit, the court declined deciding.

If, in fact, the condition prescribed in the order had been, that the plaintiff pay in the accruing fees or rent at the rate prescribed in the license, to be paid over to the defendant for the benefit of the associated companies, if the plaintiff should not prevail in the suit, then it might be regarded as a consequence consented to, and of which the plaintiff could not afterwards complain, but the order does not so read, and the submission of the disposition of the money to the order of the court shows that that order must proceed upon some future ascertained right.

What, then, shall be done with the money? If the court refuse an order for the payment to either of the parties, shall it remain on deposit indefinitely? If I am correct in the views I have expressed, that question may, perhaps, be answered by another. Suppose, as a condition of granting the injunction, the court had required a pledge, as security, in terms, for the payment of whatever fees or rent should accrue and be of right payable pending the injunction, what would be done with the pledge, on the dismissal of the present bill of complaint? The plaintiff ought not to be permitted to withdraw the pledge. The defendant ought not to be permitted to appropriate the pledge, while the amount of fees or rent of right payable is in contest and undetermined.

I admit that the case is novel, and the condition of the fund, and, perhaps, the relation of the court to the fund, is peculiar. But it seems to me that, until, in some appropriate proceeding, either at law or in equity, the question between the parties is determined, this court can make no order disposing of money now held for the defendant's security. Whether that determination shall be had in this court—whether the disposition of the money has not, by its payment to the clerk, been so submitted to its jurisdiction that such a determination may be had here, on grounds which were wholly inapplicable to the suit which was brought by the plaintiff—whether the defendant should proceed at law to establish its right to rent or fees according to the terms of the license, and then apply, in a summary form, for the order which would give effect to the deposit as a security for their payment—whether such an adjudication in any court of competent jurisdiction would not warrant such summary application—and whether the equitable lien which, in my opinion, the defendant has acquired, may be executed by a suit in the nature of a foreclosure of any right or equity of the plaintiff—are questions upon which we are not here called upon to express an opinion. There is no doubt that, on the determination of the question in dispute, this court has power and jurisdiction to give effect to the deposit of the money as a security and apply it as the rights of the parties may then require

The motions should be denied.

BLATCHFORD, District Judge. The plaintiffs, licensees from the Grover and Baker Sewing Machine Company, the Wheeler and Wilson Manufacturing Company, and the Singer Manufacturing Company, under patents held by those companies, filed the bill in this suit against the latter company alone. The substance of it was, that, by reason of acts done by the licensers, the plaintiffs were, by the terms of their license, entitled to have the license fee of five dollars for each machine not exported, and two dollars for each machine exported, contracted to be paid by the license, reduced to forty cents for each machine; that the plaintiffs, on such view, had everpaid the licensers by more than $58,000, up to the filing of the bill; and that the licensers threatened, if the plaintiffs refused further to pay according to the rates specified in the license, to terminate the license, by notice, under a clause therein to that effect. The plaintiffs offered, in the bill, to deposit with a receiver the future patent fees to accrue at the rates reserved in the license, as they should become due thereunder, "the said sums to be held by such receiver subject to the order of the court, and to await the final decree in this suit." The bill averred, that the licensers other than the defendants, were, one of them a Connecticut corporation and the other a Massachusetts corporation, and they were not made parties because this court would have no jurisdiction over them, the plaintiffs being a Massachusetts corporation and the defendants a New York corporation. The bill prayed that the defendants be ordered to reduce the patent fee reserved in the license to forty cents for each machine, and to account with the plaintiffs for, and pay to them, the sums received by the licensers under the license, to which they were not entitled, and that the defendants be restrained from giving notice, during the pendency of this suit, to the plaintiffs, of their option to terminate the license, and from attempting to collect patent fees from the plaintiffs, until the further order of the court.

On the filing of the bill and after a hearing on notice, an order was made by the court, that an injunction issue restraining the defendants, until the further order of the court, from giving notice of a termination of the license and from attempting to collect patent fees thereunder, on condition that the plaintiffs deposit with the clerk of this court all the moneys which should become due under the license according to the full patent fees reserved therein, quarter yearly, as provided in the license, said moneys to be deposited by the clerk with the United States Trust Company in the city of

New York, on interest, to the credit of this suit, and subject to the order of this court.

When such order was presented to the court to be settled and signed, it contained the following clause, which the court struck out before signing it: "And it is further ordered, that, in case complainants fail to recover in this suit, they shall pay to the defendants an amount sufficient to make them receive seven per cent, per annum on the sum or sums paid to the clerk as herein directed, from the time of such payment or payments to the time when the injunction hereby ordered shall be dissolved, and that the same shall be added to and taxed in the costs to be taxed for the defendants."

An injunction in conformity with this order as so settled and entered, was issued and served on the defendants. Subsequently, the rates of payment were, for future machines, fixed, by order of court, at three dollars for each machine not exported, and one dollar for each machine exported, as being, by agreement of the licensers and the plaintiffs, the full license rates for future machines, if the plaintiffs were not entitled to the reduction claimed by them. Under these orders the plaintiffs have paid to the clerk of the court the sum of $76,793, which is on deposit, on interest, at the rate of 4 per cent. per annum, in the United States Trust Company, to the credit of this cause, and subject to the order of this court.

Meantime the cause went to final hearing on pleadings and proofs. The conclusions of the court in the cause were: (1.) That the plaintiffs did not require the aid of a court of equity to exercise or maintain the rights asserted by their bill, but their remedies were complete, both offensive and defensive, without such aid, to resist an attempt to stop their working under the license, or to defend a suit for license fees already paid, or to bring a suit to recover back license fees overpaid; (2.) That the relief asked could not be given without directly affecting the two licensers who were not made parties to the suit, and that, therefore, it could not be given, as respected the defendants. On these two grounds, the conclusion of the court was, that the bill must be dismissed, the merits of the controversy not having been considered or disposed of.

The case being thus ready for the entry of a final decree on such decision, the plaintiffs now apply to the court for an order that the clerk pay to them the moneys so deposited by them with him, together with all interest which has accrued thereon. The defendants also apply for an order that the clerk pay to them such moneys and interest.

The court did not, by its decision, dispose of the merits of the controversy raised by the plaintiffs in their bill. So far as any action of this court is concerned in respect to such merits, the controversy is exactly where it was when the bill was filed, and before the injunction was issued or any of the money was deposited. The object of depositing the money was to secure the licensers against loss, in case the court should, on the merits, decide that the licensers were still entitled to fees at the license rates, and that the plaintiffs were not entitled to the reduction claimed. The money deposited was the plaintiff's money and continued to be such until the court should decide, on the merits, that the licensers were entitled to it under the license. To award the money now to the defendants would be to decide the merits in favor of the defendants. This the court has declared it cannot do in this suit. The case stands as if, as a condition of the granting of the injunction, the plaintiffs had given a bond, with sureties, conditioned to pay to the defendants, if the court should, in this suit, decide, on the merits, that the licensers were entitled to them, the full license fees provided for by the license. On such a decision as has been made in this case, there could be no recovery on such bond.

The view urged on the part of the defendants is, that the money was deposited subject to the right of the plaintiffs to show affirmatively in this suit a better title to it than the title of the licensers; that the money, when deposited, became, prima facie, the money of the licensers, subject to such right of the plaintiffs: that the plaintiffs have failed to establish such right; and that, therefore, the money must go to the defendants. This view is not sound. The money was deposited subject to the determination of the title to it. It has not been established, on the merits, that the plaintiffs owe it to the licensers under the license. The title to it has not passed from the plaintiffs, and has not passed to the licensers or to the defendants. If it had been established in this suit that the plaintiffs owed it to the licensers, it would have gone to the defendants, on such determination. A contrary determination would have carried it to the plaintiffs by a title reposing on such determination.

The suggestion that the money was, under the order of the court, deposited with the clerk to the credit of the suit, and that, as the defendants have been successful in dismissing the bill, they must, therefore, have the money, is not warranted by the action of the court. The money was not deposited by the plaintiffs with the clerk to the credit of the suit, in the sense claimed, nor did the order of the court direct that it should be so deposited. It directed that the clerk should deposit the money with the trust company to the credit of the suit, meaning that the money should be deposited in the trust company in the name of the suit, so as to be easily identified and drawn against. So, also, the action of the court in striking out from the order, as proposed for settlement, the clause before referred to, indicates an intention to

retain absolute control of the ultimate disposition of the money, and an absence of intention that a mere failure by the plaintiffs to recover in the suit should confer on the defendants any rights in respect of the money to be deposited.

There is another view which is conclusive against an award at this time of the money or any part of it to the defendants. The court has held that it can make no decision on the merits between the parties to this suit without affecting and prejudicing the rights of the two co-licensers who are not made parties. It thus has decided that it cannot recognize the defendants as representing, in this suit, such two co-licensers. Therefore, it cannot now award to the defendants such share of the money as belongs to such two co-licensers, and it has no means of determining, and no right to determine, in the absence of such two co-licensers, as parties to a controversy respecting the money, what such share is, and it cannot award such share to such two co-licensers, as long as they are not parties to such controversy. As respects such share of the money as might belong to the defendants, the court cannot determine that question in the absence of the two co-licensers, any more than it can determine the merits of the suit in such absence. Besides, it has decided that the interest and property of the three licensers under the license are essentially joint, and that it cannot, in this suit, settle their respective shares under the license. It follows, that it cannot settle in this suit, as it now stands, the share of the defendants in the money in the court, so as to award to them that share.

The case is not presented to the court in the view that the defendants are entitled to the whole or a part of the money as compensation for the damages sustained by them, or by the licensers, by the issuing of the injunction. If it were, it would be a sufficient answer to the claim to say, that the court could no more, in this suit, settle the amount of such damages, as respects the defendants, or their co-licensers, or all the licensers jointly, without the presence of such co-licensers, than it can settle the merits of the controversy without such presence. The interest of all the licensers under the license being joint, the defendants can have sustained no separable or severable damages through the operation of the injunction, which this court can ascertain or award, unless it has all the licensers before it.

Thus far, the question only of the claim of the defendants to receive the money has been considered. But many of the views stated are equally conclusive against the claim of the plaintiffs now to be paid the money. It was deposited on the plaintiffs' own offer, to secure the licensers against loss, in case they were in fact entitled to fees at the license rates, and in case the plaintiffs were not in fact entitled to the reduction claimed. As the plaintiffs obtained, through and by means of the deposit of the money, as a condition precedent, the granting and continuance of the injunction restraining the defendants from terminating the license, and from bringing suit for the patent fees, and have gone on working under the license, and enjoyed the consideration for which the money was deposited, the good sense of the transaction, and good faith towards all parties, require that the money should be regarded as having been deposited subject to a decision as to the title to it by a competent tribunal, whether this court or some other court. To award it now to the plaintiffs, would be to decide the merits of the suit in favor of the plaintiffs. It has not been established that the plaintiffs do not owe it to the licensers under the license. Although it is still the money of the plaintiffs, because it was their money when deposited, and the title to it has not passed to the defendants or the licensers, still it is subject, in the hands of this court, to the equitable claim and right, on the part of the defendants and the licensers, not to have it paid to the plaintiffs until it is properly established that the plaintiffs do not owe it to the licensers under the license.

Under these views, the fund may be held by this court, although brought into it as an incident of this suit, notwithstanding the suit is discontinued or the bill dismissed. It will be so held, subject to be disposed of on a proper application showing a state of facts demanding its disposition. It is not for this court to suggest in what tribunal, whether this or another, the adjudication as to the title to the money is to be made, or by what form of suit or proceeding, or what will be regarded by this court as sufficient warrant for disposing ultimately of the money. It can only declare, that it holds the money on the terms above stated, subject to the showing of a title to it by the plaintiffs or the licensers, as being or not being license fees due under the license.

For these reasons, I am of opinion that the motions of both parties should be denied.

[NOTE. See Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., Case No. 4,883.]

FLORENS v. The SAM KIRKMAN. See Case No. 8,658.

Case No. 4,886.

The FLORENZO.

[Blatchf. & H. 52.] [1]

District Court, S. D. New York. Feb. 6, 1828.

SHIPPING — REGISTRATION OF AMERICAN VESSELS —ACT OF DEC. 31, 1792—PURCHASE BY ALIEN—FORFEITURE—SUBSEQUENT BONA FIDE PURCHASER—PRIOR LEVY BY SHERIFF.

1. A bona fide purchaser of the whole interest in a vessel, subsequent to a forfeiture incurred

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

under the 16th section of the act of congress of December 31, 1792, (1 Stat. 295), by the sale or transfer to an alien of any interest in an American registered vessel, is not within the proviso of that section. That proviso relates only to persons who are joint owners of a vessel at the time of the commission of the act which produces the forfeiture.

[Cited in U. S. v. Sixty-Four Barrels of Distilled Spirits, Case No. 16,306; Harrington v. U. S., 11 Wall. (78 U. S.) 368.]

2. Such a purchase will not prevent the forfeiture. The forfeiture takes place at the moment of sale or transfer to an alien, and any subsequent judgment of forfeiture relates back to that time.

[Cited in U. S. v. The Reindeer, Case No. 16,144.]

3. The title of the alien purchaser, if he acquires any, is divested eo instanti by the statute, and he has left in him no interest which can be seized on execution.

4. A levy on the forfeited property, under an execution against the alien, previous to the prosecution of the forfeiture, will not prevent the forfeiture.

5. Whether previous possession by a state sheriff, under a fi. fa. issued by a state court, excludes the marshal from arresting and taking into his possession, under an attachment issued by this court, a vessel forfeited for a breach of the laws of the United States, quaere.

[Cited in Riggs v. The John Richards, Case No. 15,132.]

6. A forfeiture under the statute above cited does not avoid the lien of seamen and material men, existing at the time of forfeiture.

[Cited in The Ranier, Case No. 11,565.]

In admiralty. Various proceedings were taken against the brig Florenzo in the port of New-York, which were brought before the court upon the following pleadings: Two libels were filed on the 7th of September, 1827, by different parties of her crew, to recover wages earned on her last voyage. On the same day the court ordered these suits to be consolidated. Process of attachment was issued in them, returnable on the 25th of September, under which the vessel was arrested. A petition was subsequently filed by a material man, praying to be paid out of the proceeds of the vessel. There was no dispute as to the services rendered by these parties; and the amounts due to the libellants and to the petitioner were decreed to be paid them.

The United States subsequently filed a libel of information against the vessel, claiming her condemnation and forfeiture to the United States. The collector had previously seized the brig as forfeited under the provisions of the act of December 31, 1792 (1 Stat. 287), entitled "An act concerning the registering and recording of ships or vessels," the 16th section of which enacts, "that if any ship or vessel heretofore registered, or which shall hereafter be registered as a ship or vessel of the United States, shall be sold or transferred, in whole or in part, by way of trust, confidence or otherwise, to a subject or citizen of any foreign prince or state, and such sale or transfer shall not be made known in manner herein before directed, such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited." The manner of making known such sale or transfer is prescribed by the 7th section, and is by giving up the certificate of registry to be cancelled. The libel alleged a transfer of the Florenzo, in whole or in part, by way of trust, to an alien, within the meaning of the act, namely, to one Pettit, without making known such transfer in the manner prescribed by the act, and claimed a forfeiture of the vessel, her tackle, apparel and furniture.

Against the libel of the United States two claims were interposed. One was put in by Whitehead Cornell, as owner, alleging a bona fide purchase by him of the vessel on the 1st of September, 1827, by a regular bill of sale therefor, from George Marsden, her master, an American citizen, and at that time her registered owner, for $2,500, without knowledge or notice on the part of the claimant of any cause of forfeiture existing at the time. It was insisted for this claimant that Marsden was the real owner in his own right, or, if not, that the claimant's case came within the proviso to the 16th section of the act referred to, which is, "That if such ship or vessel shall be owned in part only, and it shall be made to appear to the jury before whom the trial for such forfeiture shall be had, that any other owner of such ship or vessel, being a citizen of the United States, was wholly ignorant of the sale or transfer to or ownership of such foreign subject or citizen, the share or interest of such citizen of the United States shall not be subject to such forfeiture, and the residue only shall be so forfeited."

Upon the question whether the vessel belonged to Pettit or to Marsden, it appeared in evidence, that in September, 1826, the vessel was registered in the name of one Weathersby, and in November, of the same year, in the name of Marsden; but Weathersby testified that he transferred the vessel and cargo, by a bill of sale, for $3,700, to one Arnold, who was a partner of Pettit, and an alien also, and that afterwards, at the request of either Arnold or Pettit, he made a bill of sale to Marsden, but that no part of the consideration moved from Marsden; and it was proved that he had not the means to purchase a vessel of the price of the Florenzo. Marsden, though cited to appear, could not be found; but it was proved by several witnesses that his statements as to his interest in the vessel, subsequent to her alleged purchase from Weathersby, were contradictory, he at one time alleging that he was her sole owner, at another time that he was part owner, and at another time that she belonged to Pettit and Arnold. Arnold testified that he and Pettit advanced money to Weathersby on the security of the brig and her cargo; that he afterwards, in October, 1826, by Weathersby's consent, and with his advice, sold the brig, without the cargo, to Marsden, for

$2,500, and that Marsden paid him one-half, namely, $1,250, but whether Pettit received the other half he did not know; and that he had previously taken Marsden's note for $4,000, to be given up on payment of the $1,250. The register in Marsden's name was in November. The bill of sale from Weathersby to Marsden was not produced on the trial.

Upon the question of the bona fides of the sale from Marsden to Cornell, it was proved that at the time of the sale the brig was in the possession of the sheriff of New-York, under a fi. fa., to satisfy the claim of a judgment creditor of Pettit, and that the mate of the brig informed Cornell of the fact, who replied, "that it was nothing to him." The only payment made by him on the purchase was his promissory notes for $2,500, which were accepted by Marsden, to whom he was a stranger, without inquiry. Cornell purchased the vessel immediately on her return from a long voyage, without examination or inquiry into her condition, and without going on board of her. It was matter of consultation among the parties concerned in the sale and purchase, how the brig might be kept from forfeiture, and it was suggested between them that a bona fide transfer to an American citizen might save her.

The second claim was made by Samuel Candler, as a judgment creditor of Pettit. He proved that on the 23d of August, 1827, he caused a writ of fi. fa., issued in his favor on a judgment rendered in the supreme court of New-York for $5,501 08 against Pettit, to be levied by the sheriff of the city and county of New-York on the brig, as the property of Pettit. He averred that the brig was then the property of Pettit, and was, as such, lawfully arrested and held by the sheriff under his fi. fa. at the time of her seizure by the United States marshal. It was insisted for this claimant, that the title acquired by the United States under a forfeiture, dated from the time of its completion by a judgment of forfeiture by a competent court, and not from the time of the commission of the act inducing the forfeiture; that, at all events, the United States could not usurp the possession of a vessel, already in the custody of the law under state process; and that it belonged exclusively to the state courts to decide whether the execution of the claimant could be satisfied out of the vessel or not.

Robert Tillotson, Dist. Atty., for the United States.

George Brinckerhoff, for Cornell.

Robert Sedgwick, for Candler.

BETTS, District Judge. There is no controversy concerning the first libel pending against this vessel, and the claim of the seamen and of the material man must be allowed.

The second libel is filed by the United States. It claims a forfeiture of the vessel and of her equipments, for a violation of the act of congress of December 31, 1792 (1 Stat. 287), entitled "An act concerning the registering and recording of ships or vessels," the 7th section of which prescribes certain formalities in the transfer of American registered vessels to aliens, which are not now in question, and the 16th section of which makes any transfer to an alien, by way of trust or otherwise, without the formalities prescribed in the 7th section, a cause of forfeiture. The libel alleges a transfer of the vessel, in whole or in part, to one Pettit, an alien, in such manner as to cause her forfeiture within the meaning of the act.

Two claims are interposed: One on the part of Whitehead Cornell, who asserts that he acquired the vessel by a bona fide purchase of her on the 1st of September, 1827, from George Marsden, the then owner, and he produces a bill of sale in support of his title. Although the evidence is not in all respects free from doubt, yet I am satisfied the weight of it proves that Marsden was not at the time the owner of the brig in his own right, but that, being an American citizen, he took the nominal title in his name, to hold her in trust for Pettit, or for Arnold and Pettit, both of whom were then aliens. This brings the case within the words of the statute, and the vessel must be declared forfeited, so far as the claimant, Cornell, is concerned, unless he brings himself within the proviso to the 16th section of the act. It is plain, however, from the language of the proviso, that it applies only to the case of joint-owners of a vessel, one of whom admits an alien to an interest in the vessel, without the privity of his citizen co-owner. The substance of the provision is, that if it appears that the other part owner was ignorant of the transfer to the alien, his share shall not be forfeited, but the residue only. He will not lose his interest in the vessel, by the misfeasance of his associates, to which he was not party or privy. Without this proviso, his interest would not be protected, because an absolute forfeiture of a vessel transfers the entire interest in her to the government, without regard to the claims of parties who did not participate in the cause of forfeiture. This is invariably so in respect to vessels confiscated for violations of the revenue laws.

Two things are necessary to protect the claimant under the proviso to the 16th section. First, he must be a part owner (The Margaret, 9 Wheat. [22 U. S.] 421), and, secondly, he must be such part owner at the time of the commission of the act which produces the forfeiture. But the claimant makes title to the whole vessel. He does not allege that he acquired a share in her, which the proviso might protect from the forfeiture incurred, because of the ownership of an alien in common with him, but he claims

that he is the bona fide owner of the entire vessel. In the second place, he does not allege any interest in the vessel at the time of the commission of the act which produced the forfeiture. He acquired his alleged title subsequently. Clearly, then, he is not protected by the proviso to the 16th section, even if he had proved himself to have been a bona fide purchaser, without notice of any cause of forfeiture existing at the time of his purchase.

But there are forcible reasons to question the bona fides of the sale to Cornell. If he had not full knowledge of the situation of Pettit in respect to the brig, he had sufficient notice to put him upon his guard, and, if he then neglected to make proper inquiry, the law deals with his claim as if it were acquired with knowledge of the facts which reasonable inquiry would have disclosed. The Ploughboy [Case No. 11,230]; The Mars [Id. 9,106]. Cornell and Marsden stand, therefore, in the same position before the court, and the vessel must be decreed to be forfeited, so far as their rights are concerned.

A second claim is interposed on the part of Samuel Candler. He alleges that he is a judgment creditor of Pettit, and that, at the time of the seizure of the brig by the United States, she was in the lawful possession of the sheriff of the city and county of New York, under a fi. fa. issued on a judgment rendered in his favor by the supreme court of New York.

It is not necessary, in this case, to decide whether the interest in the vessel which Pettit may have acquired was a subject of seizure and sale by the sheriff on a fi. fa. For, supposing it were, that will be of no avail, if the claim of title to the brig by the United States, from the time of the commission of the offence which caused the forfeiture, be upheld; for, in that case, all title, of whatever nature, of all persons, which was not saved by the proviso, was divested out of them, and became vested in the United States. A judgment of forfeiture is necessary to effectuate the title of the government, but, when declared, it dates back, by relation, to the time of the commission of the offence, and consequently overrides all intermediate titles, however acquired. Against this general doctrine the position is taken, that where no specific mode of effectuating the forfeiture is prescribed by statute, it has no other effect than at common law, where the title to the thing forfeited does not become complete until judgment of forfeiture is pronounced by a competent court. This is no doubt the common law doctrine, and the principle, to the extent above indicated, has the support of Judge Winchester, and of Chief Justice Marshall, Mr. Justice Story and Mr. Justice Washington. U. S. v. The Anthony Mangin, 3 Cranch [7 U. S.] 356, note; U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 398; The Mars [Case No. 9,106]. These cases suppose that relation, being a fiction of law, should not be allowed to work an injury to any one, and therefore should not override the title of an innocent purchaser intermediately acquired; that if the forfeiture, which must often be secretly incurred, be indissolubly attached to the property, so as to divest the title of a purchaser without notice, great injury would result to the commercial interests of the country; and that the mere attaching of a forfeiture as a punishment to a statute offence, does not exclude the common law doctrine of forfeiture, unless the statute distinctly so provides.

The weight of authority is, however, the other way (U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Grundy, 3 Cranch [7 U. S.] 338), and the distinction between forfeitures at common law and under a statute is established. The words of the statute are held to be imperative, making the forfeiture the necessary consequence of the offence, and dating its operation from the commission of the act. The same doctrine is laid down by the supreme court of this state. Fontaine v. The Phoenix Insurance Co., 11 Johns. 293; Kennedy v. Strong, 14 Johns. 128. The tenor of English adjudications is to the same effect. Roberts v. Wetherall, 1 Salk. 223; Roberts v. Withered, 5 Mod. 195; Robert v. Witherhead, 12 Mod. 92; Wilkins v. Despard, 5 Term R. 112. It has been for years the settled construction of acts of congress which declare the absolute forfeiture of property as consequent to an offence committed therewith, that a judgment of conviction shall take effect, by relation, as of the time when the forfeiture was incurred. U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Grundy, 3 Cranch [7 U. S.] 338. Congress has not seen fit to change or interfere with this construction. Without, therefore, speculating upon what might have been the rule most consonant with equity when the question first arose, it is the duty of this tribunal, as the subordinate court, to administer the law as it is interpreted by the supreme court, and, accordingly, whatever property Pettit acquired in this vessel by the sale to him, was, because of his alienage, divested eo instanti, and was vested in the United States by force of the statute. I shall accordingly hold that no interest of Pettit subsisted in the brig, which could be the subject of levy and arrest under the execution of the claimant, Candler.

It is further contended by the claimant, that the brig was in the custody of the law under the state process; that jurisdiction accordingly attached to the state court, to determine the legal effect of the execution and the character of the interest of Pettit; and that, to pursue the case in this court, would be to create a conflict between the judicial authorities of the state and of the United States. Under our system of federal and state governments, questions may arise

rendering inevitable a conflict of judicial powers between their respective judicatories. Each will sedulously avoid encroaching upon the jurisdiction of the other, and, if the difficulty must be encountered, it will no doubt be met in a spirit of mutual forbearance and conciliation, and neither will attempt, except in most urgent extremities, to resist or counteract the authority of the other. When the same remedy may be had by litigant parties under either jurisdiction, there can be no occasion for any collision of powers, because the subject matter, if not transferable from one court to the other, by way of error or appeal, will naturally be left to the disposal of the one first acquiring cognizance of it. Such was the case of The Robert Fulton [Case No. 11,890]. The libel in this court was by material men, to enforce a lien on the ship for materials and labor supplied her in this port. She was a domestic vessel, and the lien was one under a state statute. The vessel was held under a prior arrest for a like demand, by process from a state court. There was no ceding to the authority of the state court, but the United States court decided in effect, that, as both tribunals were administering relief by virtue of the same law, the one first having possession of the subject matter could rightfully retain it. There was, moreover, a special fitness in that case, in the forbearance of the federal court to interfere, inasmuch as, in the state tribunal, the property would be held sequestered for the common benefit of all lien creditors, whilst in admiralty the decree would have regard to no other parties than those litigant before the court. That case does not, in any aspect, supply a formula for the present one, the proceedings in the two tribunals being now diverso intuitu, not looking to a common purpose or a common method of attaining it. In the state court, the proceeding seeks to satisfy an execution in favor of a single judgment creditor, out of the vessel, as being the property of a judgment debtor. In this court, the action demands the entire proprietorship of the vessel, under a title anterior to any supposed interest of the judgment debtor in her, which title is confirmed by an act of congress. Jurisdiction over this demand belongs appropriately to the United States court, and, if a suit were brought upon it in the state court, that court, if competent to take cognizance of it, would not be bound to do so by lending its support to the enforcement of a penal law of the United States. U. S. v. Lathrop, 17 Johns. 4.

If the levy of a writ upon a vessel, under such circumstances, in a suit between individuals, could retain in a state tribunal authority to pass upon the title to the vesesl as against the government, an easy means might be afforded, not only of evading a punitive law of the United States, but also of counteracting the national polity, which exacts that ships enjoying the privileges of American bottoms shall be the property of American citizens. In the municipal tribunals, a ship might, in all respects, be dealt with as a chattel interest, in which an alien could have a right of property, and that interest might be pursued irrespective of the navigation laws; and the government, if it litigated there, might be subject to hindrance and embarrassment in enforcing the policy upon which its commercial regulations are founded.

Moreover, the proceeding in the state court could not have prevented a different party from arresting the vessel in the same or in another court, or from taking her out of the possession of the sheriff by a writ of replevin or of detinue. The title or ownership was not in contestation under the levy. A purchaser under a sale on execution takes, by force of the judgment awarding the writ, no more than the interest of the defendant in the chattel. The judgment does not assume to determine that any legal interest of the defendant exists in the chattel. In the present case, the attachment of the vessel in behalf of the United States, on the claim of a full title to her, older in inception than the supposed interest of the defendant in the execution, creates no competition of jurisdiction between the two courts. A conflict of authority would only arise, in case the court out of which the execution issued should consummate a sale under it, by ordering the vessel to be put into the possession of the purchaser. This case is in no position for such a procedure, and there is no legal impediment to the arrest and condemnation of the vessel, as demanded by this libel.

If the possession of property by a state sheriff, under a fi. fa., is to exclude the marshal from taking possession of it in execution of the laws of the United States, it might be made the means of preventing the revenue laws, including the laws against smuggling, from being enforced against vessels or their cargoes. An arrest by a sheriff, under state process, in behalf of a friendly creditor, might thus, by connivance, be made to exempt the guilty property from seizure under the process of this court. This difficulty, however, does not arise in this case. The sheriff levied the execution on the 23d of August, and, on the 31st, an informer gave notice to the custom-house that the brig had incurred a forfeiture. She was immediately seized by the United States' officers, and has since remained in their charge. The sheriff proceeded to sell the cargo, but did not attempt to sell or hold the vessel. He made no objection to her passing into the custody of the marshal, and he now interposes no claim to her possesion. It may be inferred from this, that the execution is satisfied, or that the levy under it is abandoned, leaving the brig within the sole power of this court. The claimant, by acquiescing in the seizure, by his notice to the custom house, and by putting in his claim here, is precluded from

questioning the jurisdiction of the court over the subject matter.

I shall therefore decree the condemnation of the vessel. The claim of Candler must be dismissed, with costs. The seamen and the material man are first to have their claims and costs out of the fund in court. The forfeiture does not avoid their rights.

Decree accordingly.

Case No. 4,887.

The FLORIDA.

[4 Ben. 452.] [1]

District Court, S. D. New York. Jan., 1871.

NEUTRALITY ACTS.

The steamship F. was libelled as forfeited for an alleged violation of the 3d section of the neutrality act of April 20th, 1818 (3 Stat. 447). On the trial of the case, it was claimed, on behalf of the government, that the vessel and her cargo, consisting of arms and munitions of war, were really owned by agents of insurrectionists in the island of Cuba; that the vessel was to proceed with her cargo to Vera Cruz; that there vessel and cargo were to be transferred by the nominal owner to persons acting for such insurrectionists; and that thence the vessel was to take the cargo to some point off the coast of Cuba, and land it on shore by the use of rafts made out of lumber found on board of the steamer, towed by a steam launch also found on board. *Held*, that such facts, if made out, did not establish a violation of the 3d section of the act of April 20th, 1818. The landing of a cargo contraband of war, on the shore of the country of one belligerent, at a point not blockaded, is not an act of hostility against the other belligerent.

[Cited in The Carondelet, 37 Fed. 802. Applied in U. S. v. Trumbull, 48 Fed. 107; The Itata, 56 Fed. 517.]

This was a suit against the steamship Florida for an alleged forfeiture incurred under the 3d section of the act of April 20, 1818 (3 Stat. 447), in that she was fitted out to commit hostilities against the government of Spain. Francis Darr appeared as claimant of the vessel, and denied the allegations of the libel, and the cause was heard on pleadings and proofs.

H. E. Davies, Jr., Asst. Dist. Atty. and J. B. Craig, for the United States.

Beebe, Donohue & Cooke, for claimant.

BLATCHFORD, District Judge. Admitting that persons acting as agents of the insurrectionary party in Cuba were the real owners of the vessel and her cargo of arms and munitions of war, and that the transaction of the borrowing, by Darr from Castillo, of the money wherewith the vessel and her cargo were purchased, was a sham, and that the vessel was to proceed with her cargo to Vera Cruz, and there vessel and cargo were to be transferred by Darr, their nominal owner, to persons acting for the insurrectionary party in Cuba, and that thence the vessel was to take the cargo to some point off the coast of Cuba, and land it on the shore by the use of rafts made out of the lumber on board, towed by the steam launch on board, through shallow water, to the shore, and that Darr and such real owners of the vessel and cargo had an intent to do all this in fitting out the vessel, and putting her cargo on board, still a violation of the 3d section of the act of 1818 is not thereby made out. A vessel fitted out with intent to do this, is not fitted out with intent to cruise or commit hostilities, within the sense of that section. If so, then every vessel fitted out to run a blockade, with a cargo of munitions of war, is necessarily fitted out, within the sense of that section, to commit hostilities against the country whose forces have instituted the blockade. To land a cargo contraband of war on the shore of the country of one belligerent, at a point not blockaded, is no different an act in its quality of being an act of hostility against the other belligerent, from the running of such a cargo through a blockade into a blockaded port; and the latter act is no act of hostility against the blockading power.

There is no satisfactory evidence that the vessel was furnished, or fitted out, or armed, or attempted to be furnished, or fitted out, or armed, with intent that she should be employed to cruise or commit hostilities, in the sense of the 3d section of the act, in the service of the insurrectionary party in Cuba, against the government of Spain. There is no evidence that she was intended to do anything more than transport her cargo to the coast of Cuba, and cause it to be landed there on rafts, by the aid of the steam launch on board. To do this was no violation of the 3d section of the act, which is the one on which the libel is founded.

The libel is dismissed.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

Case No. 4,888.

The FLORIDA.

[Blatchf. Pr. Cas. 327.] [1]

District Court, S. D. New York. Feb. 26, 1863.

PRIZE—VIOLATION OF BLOCKADE—FALSE DESTINATION AND OWNERSHIP.

1. Vessel and cargo condemned as enemy property, and for an attempt to violate the blockade.

2. A false destination and a false ownership of the vessel were alleged on her papers.

In admiralty.

BETTS, District Judge. The libel charges that this vessel and cargo were captured as prize by the United States vessel-of-war Matthew Vassar January 11, 1863, at sea, near Little River inlet, off the coast of South Carolina. The prize was arrested in this port, in the hands of the prize commissioners, by the marshal, on process of attachment and

[1] [Reported by Samuel Blatchford, Esq.]

monition, February 2, 1863, and his return of the process, with certificate of due service and of public notice, was made and filed in court February 24, thereafter; whereupon, on motion of the district attorney, a decree of default was rendered against the prize and all persons interested therein.

The proofs returned by the prize commissioners consist of depositions in preparatorio, given by the master and the mate of the vessel, and also the ship's papers found on board of her at the time of her capture, identified by the testimony of the prize-master.

The vessel, when arrested, was carrying the British flag, and had a certificate of British registry, dated at Nassau, N. P., December 4, 1862, to R. N. Menendez, of that place, indorsed January 2, 1863, as transferred to H. R. Saunders, of that place, merchant. The clearance was for Beaufort, N. C., then an open port, and the vessel was arrested while running into Little River inlet, a blockaded port on the North Carolina coast. The master testifies that he was the owner of the vessel and of all the cargo; that he bought the vessel in Nassau from the firm of Sawyer & Menendez, in December, 1862, and she was delivered to him there by one of that firm; that he is a native of North Carolina, and resident in that state; from which he came to Nassau the same month; that he knew that the ports of North Carolina were under blockade, and that the one he was attempting to enter was so at the time of the capture; that his real voyage was from Nassau to any port of North Carolina he could get into, and thence back to Nassau; and that the vessel was American-built.

It is unnecessary to pursue the detail of testimony further. The adventure was a flagrant, undisguised effort to break the blockade and carry on an illicit trade with the enemy, with property belonging wholly to an enemy, and under papers representing a false destination and a false ownership of the vessel.

A decree of condemnation and forfeiture of the vessel and cargo is ordered to be entered.

Case No. 4,889.

The FLORIDA.

[4 Blatchf. 470.] [1]

Circuit Court, S. D. New York. Oct. 30, 1860.

COLLISION—DOUBT AS TO VESSEL AT FAULT—REVISION BY CIRCUIT COURT—SPEED IN EAST RIVER.

1. Where, on an appeal, in a suit in rem in admiralty, for a collision, the question, on the proofs, was a close one, as to which vessel was in fault, this court refused to revise the decision of the district court.

[Cited in The Maggie P., 25 Fed. 206; The Rockaway, Id. 776; The Parthian, 48 Fed. 564; The Albany, Id. 565; Re Hawkins, 13 Sup. Ct. Rep. 527.]

2. A speed of nine miles an hour, in the East river, in a crowd of vessels, is an unreasonable speed.

[Appeal from the district court of the United States for the southern district of New York.]

This was a libel in rem, filed in the district court, against the steamship Florida, to recover damages for a collision between her and the barge Owen Gorman, while the latter was in tow of the tug New York, in the East river. [Case unreported.] After a decree for the libellant, the claimants appealed to this court.

John E. Burrill, Jr., for libellant.

Charles Donohue, for claimants.

NELSON, Circuit Justice. The Florida had left pier No. 4 in the North river, and was bound for the Novelty Works, at the foot of Twelfth and Thirteenth streets, in the East river. The tug, with several barges in tow, the Gorman being the farthest from her on the larboard side, was also going up the East river, some distance ahead of the Florida, the latter being somewhat nearer the New York side. The witnesses on the part of the barge insist, that when the Florida overtook the tug, although there was sufficient room on either side for her to have passed clear, she passed so near to the Gorman that her wheel struck the stern of the Gorman and occasioned the damage complained of. The witnesses on the part of the Florida insist, that when she reached within some two hundred feet of the tug, the latter suddenly sheered towards the New York side and produced the collision. The question is a close one on the proofs, and I am not inclined to revise the conclusions arrived at by the court below, which held the Florida in fault. It appears that there was a sloop at the point of collision, between the Florida and the New York shore, and she had to pass between this vessel and the tug, and it may very well be that, in attempting to avoid the sloop, to which she was quite close, she unconsciously inclined towards the tug. The river, was, as usual, filled with vessels, and great care was necessary, in moving in any direction, to avoid a collision. The Florida was going, as admitted by her hands, at the rate of nine miles an hour, which, in the place, and under the circumstances, I am inclined to think was an unreasonable speed

Decree affirmed.

FLORIDA, The (MERCER v.). See Case No. 9,433.

FLORIDA, A. & G. C. R. CO. (RANKIN v.). See Case No. 11,567.

FLORIDA R. CO. (CARRINGTON v.). See Cases Nos. 2,447 and 2,448.

FLORIDA R. CO. (VOSE v.). See Case No. 17,007.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Case No. 4,890.

FLORIO v. PEASLEE.

[2 Curt. 452.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1855.

CUSTOMS DUTIES—PROTEST—ACT FEB. 26, 1845.

The act of congress of February 26, 1845 (5 Stat. 727), requires the protest made on payment of duties supposed to be illegally exacted, to be signed by the claimant, and his signature to another distinct paper writing to which the protest is annexed by a wafer, not referring to the protest, nor in any manner making part of it, is not a compliance with the statute requirement.

[Cited in Bodart v. Schell, 33 Fed. 826.]

[This was an action at law by Ignazio Florio against Charles H. Peaslee relating to the signing of a protest made on the payment of illegally exacted duties.]

Mr. Griswold, for plaintiff.

Mr. Hallett, Dist. Atty., contra.

CURTIS, Circuit Justice. At the trial of this case, which was an action to recover back duties alleged to be illegally exacted, the plaintiff offered in evidence a paper purporting to be a protest, but not signed. It was annexed by a wafer to an affidavit, which was signed and sworn to by one of the consignees, and both papers were annexed to the entry. I was of opinion at the trial, that this was not a sufficient protest, under the act of Feb. 26, 1845 (5 Stat. 727), which requires "a protest in writing, signed by the claimant." I remain of the same opinion after consideration of the question, and of the argument submitted on behalf of the plaintiff. This is not a question of interpretation of the writing. If it were, the three papers would be considered as parts of the same transaction, and each might aid in interpreting the others. It is simply a question whether the protest was signed. I can no more take the signature of one of the consignees to the affidavit, to be a signature of the protest, than I can take the signature of another of the consignees to the importers' oath on the back of the entry, or the name of the consignees' firm in the entry, to be a signing of the protest. They all exist on papers attached together, but neither is there, as a signature of the protest. Each is manifestly put on the paper for a distinct and particular purpose, and this purpose has no reference to or connection with the protest. These signatures must have been there, and with the same intent, and answering the same end, if the protest had never been in existence. The plaintiff's counsel has given very good reasons for believing, that the want of a signature to the protest, under the peculiar circumstances of this case, could be of no practical importance. But it is a statute requirement, which I have not power to dispense with, whether, in the particular case it be important or otherwise. The motion for a new trial is overruled.

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

FLOURNOY (PENARO v.). See Case No. 10,916.

Case No. 4,891.

FLOWER v. PARKER et al.

[3 Mason, 247.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1823.

GARNISHMENT — JUDGMENT IN STATE OF SUSPENSION—EFFECT ON SUBSEQUENT SUIT FOR SAME DEBT.

Judgment in a trustee process against the defendant as garnishee of the plaintiff, is no defence in a suit for the debt, if the plaintiff in the original trustee process has, by his neglect to comply with the local laws, put his judgment in a state of suspension, so that execution can no longer issue upon it, and it cannot be revived by a scire facias.

[Cited in Burnham v. Webster, Case No. 2,179.]

[Cited in Burnham v. Folsom, 5 N. H. 568; Whittier v. Wendell, 7 N. H. 259; Adams v. Filer, 7 Wis. 323; Wilbur v. Abbot, 60 N. H. 51; Rankins v. Goddard, 54 Me. 29.]

Assumpsit. The cause came before the court upon a statement of facts as follows:

"At the January term of the court of common pleas for the county of Suffolk and state of Massachusetts, one Silas P. Tarbell and Joseph Eveleth, who were copartners in business, commenced an action of assumpsit on an account annexed to the writ, against the said [William D.] Flower, as surviving partner of one Finley, and summoned said Parker and Stevens (who were then and are now copartners) as the trustees of said Flower. At the time said writ was issued, said Flower was an inhabitant of, and resident within, the city of New Orleans in the state of Louisiana, and has been so ever since. No service of said writ was ever made on said Flower, or any other person as his attorney, the return of the officer on the writ mentioning, that said Flower resided out of the state so that no service could be made upon him. The said writ was dated November 19, 1817, and was served the same day on said [Ebenezer] Parker and Stevens as trustees of said Flower, by reading the same to them. The said action was continued two years upon a suggestion, that the defendant was out of the commonwealth, and at the July term of said court of the next year, judgment on default was rendered against said Flower, who had never appeared to defend said action nor any one for him. The said Parker and Stevens as trustees were also defaulted, and judgment was rendered in the usual form for the sum of three hundred and ninety dollars and twelve cents, damages, and costs taxed at ten dollars, to be levied on the goods, effects, or

[1] [Reported by William P. Mason, Esq.]

credits of said Flower in the hands or possession of said Parker and Stevens. It is further agreed, that said Tarbell and Eveleth never filed a bond in the clerk's office of the court of common pleas, or ever made any such bond, conditioned to repay to said Flower the whole, or any part of the amount of said judgment, within one year from the condition thereof, in case said Flower had brought an action thereon within said year against said Tarbell and Eveleth, and had obtained judgment for such repayment. It is also further agreed, that said Tarbell and Eveleth have never taken out execution on the said judgment recovered against said Flower as principal, or against his goods, effects, or credits in the hands of said Parker and Stevens as trustees. But said judgment has never been annulled or reversed by any process of error. It is also agreed, that said Parker and Stevens have never paid over to said Tarbell and Eveleth the amount of said judgment, or any part thereof, but still have in their possession property sufficient to respond the same and no more, if by law they are compellable so to do. The said Tarbell and Eveleth now claim to be creditors of said Flower, as such surviving partner, according to said judgment. But said Flower denies that he owes to said Tarbell and Eveleth, or that he ever owed them, any sum of money."

H. G. Otis, Jr., for plaintiff, contended, that the plaintiff was entitled to recover upon these facts. 1. The plaintiff is not bound by the judgment against him on the foreign attachment. A judgment may be conclusive, if the court has jurisdiction, and its jurisdiction is always open to inquiry. The plaintiff was not a resident of Massachusetts at the time of the trustee process, and he never was amenable to the jurisdiction of the court of common pleas. He never appeared in the suit, and therefore was not bound by it. [Mills v. Duryee] 7 Cranch [11 U. S.] 484–486; 1 Mass. 407; 4 Mass. 303; 7 Mass. 439; 8 Mass. 274; 9 Mass. 464–467; 12 Mass. 270; Kirb. 119; 1 Caines, 472; 5 Johns. 40; 8 Johns. 197; 13 Johns. 204; 15 Johns. 121; 11 Mass. 488; 1 Camp. 163; 9 East, 194. 2. The judgment in the trustee process is not now binding on the defendant. I agree, it originally bound the property in his hands. But the plaintiff in that suit omitted to make it effectual, by giving the bonds required by law, so that he never took out execution and cannot now do it. No scire facias lies in his favour by our laws. It lies only where defendant lives within the state, not where he lives without it. The right therefore under the judgment in the trustee suit is gone for ever by the neglect of the plaintiff. Act 1797, c. 50; 1 Mass. Laws, 555; Act 1783, c. 57, § 1; 1 Mass. Laws, 140; Id. 164; Id. 464, § 6; 15 Mass. 473; 16 Mass. 324.

Morse & W. Sullivan, for defendants, contended, that the judgment in the trustee process bound both the plaintiff and defendants, and has still a subsisting judgment. The plaintiff was a party. The service upon the trustee was service upon the principal, and the trustee might defend for him. This is not the case of a lien merely, but an attachment. The judgment binds the property in the defendant's hands absolutely; and it may now be revived against him. There is no reason, why a scire facias at common law may not issue against him. There is no difficulty in framing it, so as to meet the case. 1 Mass. 117; 3 Johns. 20, 86; 6 Term R. 1.

STORY, Circuit Justice. The whole of this case turn upon the question, whether the trustee process, upon which Tarbell and Eveleth obtained judgment against the goods, credits, and effects of the plaintiff in the hands of the defendants, is now a subsisting judgment, capable of being revived and enforced against the defendant; if so, it binds the property in his hands; if not, then the plaintiff has a right to recover. The question turns principally upon the true construction of the trustee act of this state (Act 1794, c. 65), sometimes called the "Foreign Attachment Act," and of the act of 1797 (chapter 50), regulating the issuings of executions on judgments, against defendants living out of the state. It is not necessary to go into a minute examination of the trustee act. It is sufficient to say, that it authorizes a writ or process to be issued against the debtors of persons, who are not inhabitants of the state, and in case of judgment against the principal and trustee, whether they appear or not, the act in express terms declares, "that the goods, effects, and credits of the principal in the hands and possession of his trustee, &c. at the time such writ was served upon him or them, shall stand bound and be held to satisfy such judgment as the plaintiff shall recover against the principal." The act further authorizes a trustee, having goods, effects, or credits of the principal in his possession, "to appear in his behalf and in his name, plead, pursue, and defend to final judgment and execution." In the present case neither the principal nor trustee appeared, and judgment passed against them both, by default.

That the judgment personally binds the plaintiff in this case, so that it can be revived, as conclusive against him, by a scire facias, or by action of debt, is more than I am prepared to admit, at the present moment. The judgments of no state courts can bind, conclusively, any persons who are not served with process, or amenable to their jurisdiction. No legislature can compel any persons, beyond its own territory, to become parties to any suits instituted in its domestic tribunals. If they voluntarily make themselves parties, that is quite a different business. But the principle seems universal, and is consonant with the general principles of justice, that the legislature of a state can bind no more than the persons and property within

its territorial jurisdiction. As to the plaintiff, I should have difficulties in allowing this judgment to possess any validity, whatsoever, binding him personally, or concluding any of his rights. But as to the defendant and the property attached in his hands, it is far otherwise. The judgment operated in rem, and created a lien, which the defendant had no authority to resist. Payment under that judgment would have been a good discharge to him from the debt, not merely in Massachusetts, but, upon principles of national comity, in any other place.

The question then arises, whether the lien, thus created by the judgment in rem, has been discharged, or extinguished. If that judgment can no longer be enforced; if it is de facto defunct and cannot be revived; if in short there is no remedy now existing, by which Tarbell and Eveleth can obtain any satisfaction under it from the defendant; then it must be considered as discharged, so far at least, as to revive the right of the plaintiff to assert his claim to payment of the debt, and to take from the defendants the trustee judgment, as a defence.

This brings me to the consideration of the act of 1797 (chapter 50). That act provides, that in cases of judgments obtained by default against defendants, who are absent, or are not inhabitants or residents within the state, "execution or writ of seisin shall be stayed and not issue forth, until the plaintiff or demandant shall have given bond with one or more sureties in double the value of the estate or sum recovered by such judgment to make restitution, and to refund and pay back such sum as shall be given in debt or damages, or so much as shall be recovered upon a suit therefor to be brought within one year next after entering up the first judgment, if upon such suit the judgment shall be reversed, annulled, or altered." No such bond was ever given by Tarbell and Eveleth, and consequently no execution ever issued on the judgment by default in the trustee process. If execution were now allowed to issue without giving bond, it would issue against the very terms of the act. If a bond were now given, it would be against the very spirit of the act, for such bond would be of no legal effect, as more than one year has elapsed since the first judgment was given, and it is only within that period that the plaintiff can bring a suit to reverse the first judgment. By the state laws (Act 1783, c. 57, § 1), if a party neglects for the space of one year, next after obtaining judgment, to take out execution, he is no longer entitled to it, but is put to his scire facias, and that scire facias must be served personally on the adverse party, or a copy left at his last and usual place of abode within the state, or if he was at no time an inhabitant or resident within the state, by leaving a copy with his tenant, agent, or attorney (Compare Act 1783, c. 57, with Act 1797, c. 50, § 3). It has been suggested that these provisions may be applied to the present case. But it is clear that they apply only to cases of judgments obtained by the ordinary process of our courts in suits at common law, where the adverse party is the original debtor, and not to the extraordinary process of the trustee act. The form of the scire facias contained in the act of 1784 (chapter 28) shows the true construction. The form of executions and the scire facias against trustees under the trustee process are specially prescribed by the act of 1794 (chapter 65). The sixth section of that act declares, that when any execution, issued under the act, (which embraces a capias against the principal, and a fieri facias against his goods and estate, as well as a seizure of the property in the possession of the trustee) shall be returned not fully satisfied, &c. &c. "the plaintiff may sue out against the trustees, &c. a scire facias in due form of law, requiring the defendants, in such writs of scire facias named, to show cause (if any they have), why judgment for the sums remaining unsatisfied should not be rendered against them." The scire facias is, by the very terms of the act, to issue only upon an execution returned unsatisfied. If no execution has issued, a scire facias is unprovided for. The present judgment then is in a posture, in which no execution can issue upon it, without a revivor, for more than a year has elapsed since the rendition of the judgment. No scire facias against the principal and trustees is provided for; and no scire facias, unless after execution issued, against the trustees. The judgment then so far as it respects the present defendant, as trustee, is in a state of legal suspension, and can be no longer enforced as a lien or demand against him.

It is suggested however that a process may be devised by analogy to a scire facias at the common law, by which the judgment may be revived. I know of no such process, nor of any authority in any of our courts to devise one for this purpose. The trustee process is an extraordinary and peculiar process, and not to be extended by implication. We may see from cases, like the present, the danger of attempting to give it effect against non-residents, at least beyond the boundaries (sufficiently large,) which the state laws have already prescribed. The state courts have confined their construction of the act to cases, substantially within its purview. In Patterson v. Patten, 15 Mass. 473, the court considered it a sufficient bar to a scire facias against a trustee, that no execution had been sued out on the judgment.

The cases of Perkins v. Parker, 1 Mass. 117,[2] and Wood v. Partridge, 11 Mass. 488, are distinguishable. In neither of them was the process against a non-resident principal; and it does not appear that judgment in those cases were not in such a state, that an execution or scire facias might issue against

[2] See, also, Stevens v. Gaylord, 11 Mass. 265.

the trustees. If the present question had been directly litigated in the state courts, I should, as a point of local law, bow to their decision, although it might not meet the entire approbation of my own judgment. As no such decision exists, my opinion is, that the lien by the judgment against the trustee is gone by the neglect of the plaintiff to give bonds and take out his execution in due season, to keep it in a state capable of revival. If hereafter it should be revived by any means devised by the ingenuity of the profession, my opinion is, that the recovery in the present suit will constitute a sufficient defence to protect the defendant from a second payment. Judgment for the plaintiff.

FLOWERY (UNITED STATES v.). See Case No. 15,122.

FLOYD (HOTCHKISS v.). See Case No. 6,716.

FLUES (DALLAS v.). See Case No. 3,544.

FLUSHING & N. R. CO. (JOHNSON v.). See Case No. 7,384.

Case No. 4,892.

The FLYING FISH.

[2 Gall. 373.] [1]

Circuit Court, D. Massachusetts. May Term, 1815.

PRIZE—GOODS FOUND ON ENEMY'S SHIP—BRINGING IN OFFICER OF CAPTURED SHIP—DOCUMENTARY EVIDENCE OF NEUTRAL CHARACTER.

1. All goods found on board of an enemy's ship, are presumed to be the property of the enemy, unless a distinct neutral character is impressed upon, and accompanies them.

[Applied in The Lilla, Case No. 8,348.]

2. It is a great irregularity for the captors not to bring in the master, or some principal officer of the captured ship, and this, combined with other circumstances, will sometimes induce a condemnation to the United States

[Cited in U. S. v. The Lilla, Case No. 15,600.]

3. Indulgence to captors, who had released the master from motives of compassion.

4. If the shippers in a hostile ship neglect to put on board any documentary evidence of its neutral character, they will not be allowed the benefit of further proof. See The London Packet [Case No. 8,474]; The Frances, 8 Cranch [12 U. S.] 348; The Betsy [Case No. 1,364].

[Cited in Shattuck v. Maley, Case No. 12,714.]

This was the case of a British vessel [the Flying Fish (Coulson, master)] captured on a voyage from London to Trieste, by the private armed schooner David Porter, Fish commander. Though the cargo was very valuable, there was no paper found on board, which declared its national character or proprietary interest. The only papers produced were the ship's register, the manifest, cocquets of the shipments, and bills of lading. The latter did not state on whose account or risk the shipments were made, and, with a single exception of a consignment to order, they were all consigned to persons at Trieste, whose national character was not even surmised.

G. Sullivan and G. Blake, for captors.

STORY, Circuit Justice (after reciting the facts). Under these circumstances, there can be little doubt, that the property must be deemed hostile. It is a general rule of the prize law, that all goods found on board of an enemy's ship, are presumed to be the property of the enemy, unless a distinct neutral character is impressed upon and accompanies them. "Res in hostium navibus praesumuntur esse hostium donec contrarium probetur." Locc. lib. 2, c. 4, n. 11; Gro. de J. B. lib. 3, c. 6, § 6; Bynk. Quest. Jur. Pub. lib. 1, c. 13; 2 Voet ad Pand. p. 1156, § 5. If a neutral will ship his goods in an enemy's ship, he is bound to send with them such documents, as shall clearly evince their neutral character. If he neglect so to do, he justly incurs the penalty of forfeiture. Any other course would subject the prize tribunals to endless impositions and frauds; and enable the enemy, by suppressing the documentary evidence of his ownership, to obtain in all cases the benefit of further proof, and to evade the just rights of cruisers. In the present case, considering the number of shipments, it is almost incredible, that there should not have been some invoices and letters of advice on board; and it is quite as difficult to believe, that the whole cargo was neutral. The only possible explanation is that asserted to have been made by the master, that the invoices and letters were transmitted by land to Trieste; and this, if true, affords an irresistible presumption of the hostile character of the cargo.

Under these circumstances, I should not have felt the slightest hesitation in pronouncing a decree of general condemnation, if it had not been for a very great irregularity on the part of the captors. I refer to the omission to bring in the master or mate of the Flying Fish. The only witnesses, brought in and examined on the standing interrogatories, were one seaman and the cook, neither of whom has spoken, nor could in the nature of things be presumed to speak, to the ownership of the cargo. It is matter of surprise, that, at so late a period in the war, captors should have been so ignorant of their duty, as to suppose, that they were at liberty to discharge the officers of the ship, without any examination before the prize court; or so negligent, as to suppose every frivolous pretence would authorize them to omit it. It is an imperative rule of the prize court, that the master or other principal officer of the captured vessel, should be examined in preparatory, to testify to the proprietary interest of the vessel and cargo. This rule, so indispensable to the regular execution of judicial authorities, is one of the last, which this

[1] [Reported by John Gallison, Esq.]

court has been disposed to relax, since a reasonable time has elapsed after the war, to enable the captors to understand the nature of their duties. The rule is also enforced, in the most positive manner, by the president's instructions accompanying the prize commission. The absence, therefore, of the regular evidence, cannot but awaken suspicion; and, in some cases, would induce the court to apply heavy penalties against the captors. Cases have even occurred in this court, in which this omission, combined with other circumstances, has afforded such a conclusive presumption of fraud, that condemnation of the property has been adjudged in favor of the United States. In the British prize courts, the omission has been reproved in a very severe manner, and sentence of condemnation has been withheld, even in the clearest cases, until it has been supplied, or satisfactorily accounted for. The Speculation, 2 C. Rob. Adm. 293–296; The Anna, 5 C. Rob. Adm. 373, 385f, note a.

The affidavits, brought in by the captors to account for this omission, disclose a very humane motive, but certainly form no legal justification or excuse. The master, or chief officer, ought to have been left on board of the prize, and it was a great irregularity to remove both of them. Taking it, however, as a case of compassion, I am disposed to adopt a more indulgent course, than I should otherwise have pursued. In no event should I have allowed further proof; for the owners of the property, whether neutral or hostile, had, by suppressing, or omitting to put on board, any documentary evidence of property, completely forfeited all title to relief. The most, that could in their favor have been allowed, would have been to suspend a decree for a year and a day, to give opportunity for proof of any misconduct on the part of the captors in dismissing the master. Having no doubt that the property in the present case belonged to British subjects, I shall condemn the whole as good prize to the captors.

FLYNN, Ex parte. See Case No. 2,086.

FLYNN v. The FALCON. See Case No. 4,619.

FLYNN (UNITED STATES v.). See Cases Nos. 15,123 and 15,124.

Case No. 4,893.

The F. MERWIN.

[10 Ben. 403.] [1]

District Court, S. D. New York. April, 1879.

COSTS.

1. A libel having been dismissed with costs, the clerk taxed for filing and entering "claim," "answer," "appearance" and "consent" twenty-five cents each: *Held*, that the clerk was entitled to only ten cents each, and could not charge as for "making a record."

2. The clerk taxed five oaths at ten cents each, and five jurats at fifteen cents each: *Held*, that the charge for the oath did not include the jurat, and the charges were correct.

3. A charge of $3 for the attendance of the clerk on the justification of sureties was correct, as being a reasonable compensation for the service.

4. A clerk's fee of fifteen cents for making up the costs on the bonding of the vessel was proper.

5. A charge of $9.50 as for taking depositions by a commissioner was correct, although it appeared that the witnesses appeared before the commissioner and were sworn, and then by consent of the proctors the examination of the witnesses was written down, but not by the commissioner or in his presence, and the witnesses were then brought before him and sworn to the depositions, and he made the customary certificate.

[Cited in Kelly v. The Topsy, 45 Fed. 487.]

6. An item of $50 paid to a notary public for taking depositions was correctly allowed, although he was a clerk of the proctor of the claimant.

7. The charge of $2.50 a day allowed to the marshal, by statute, for "expenses of keeping vessels," does not include wharfage, and a bill for wharfage paid by the marshal, for the vessel, while she is in his custody, can be properly taxed as a disbursement.

[This was a libel by the Newark Transportation Company against the schooner F. Merwin for damages resulting from a collision between the schooner and the steamboat Novelty, in New York Bay. The steamboat was adjudged wholly in fault, and the libel against the schooner was dismissed, with costs. Case No. 10,369.]

W. R. Darling, for libellant.

R. H. Huntley, for claimants.

CHOATE, District Judge. In this case, in which the claimants have obtained a decree dismissing the libel with costs, the libellant has appealed from the clerk's taxation. The clerk allowed twenty-five cents each for filing and entering "claim," "answer," "appearance" and "consent." The fee bill (Rev. St. § 828) allows for "filing and entering every paper," ten cents. Libellant insists that ten cents only should be allowed for these items, and in this I think he is correct. The additional charge of fifteen cents appears to have been made under that clause of the fee bill which allows the clerk for "making any record" fifteen cents a folio, but there was no record made upon the filing and entering of these papers which is not fully and aptly described under the terms "filing and entering." It is objected to the item for "consent," that no such paper was filed. The allowance of this item by the clerk indicates that he found such a paper on file, or evidence in his books that such a paper had been filed. Of course, if this was not so, the allowance of any fee therefor is improper. The same remark applies to the item of ten cents for "entering order of approval," which is

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

objected to on the same ground. The item for "drawing claim and stipulation" is correct, if the papers were drawn by the clerk; otherwise not. The item "6 acknowledgements," twenty-five cents each, is correct, there appearing, by the record, to have been that number of acknowledgements. The charge for "5 oaths at 10 cents and 5 jurats at 15 cents," is objected to, on the ground that the fee of ten cents for administering an oath includes the service of the clerk in making the certificate of the administration of the oath—the jurat. I think the charge is correct. The fee bill allows ten cents for administering the oath. It allows fifteen cents for "making a certificate." The two services are distinct and are both here rendered. The item "attending on justification one day, three dollars," is also correct. This is a commissioner's fee for a service rendered by him in conformity with a general rule of the court requiring the testimony upon the justification of sureties to be taken before a commissioner. And it has been held that where the court calls on an officer of the court to render services, for which no fee is by law established, he is entitled to a reasonable compensation,—The Alice Taintor [Case No. 196],—and the fee here charged is reasonable in amount and established by long usage. The item of fifteen cents for "making up the costs" on the bonding, is also proper. It became necessary for the clerk to make up for the parties a statement of the costs at that time and for this as a "certificate" or a "record" he is entitled to the fee.

The item of $9.50 paid to the commissioner for taking depositions of witnesses, is objected to, on the ground that the services thus charged for were not rendered by the commissioner, that the witnesses were merely sworn before him, but that no such service was rendered. I understand the point to be that the witnesses were sworn before the commissioner and then by consent of the proctors for the two parties, the testimony was actually written down not by or in the presence of the commissioner, and the witnesses were afterwards brought before the commissioner and sworn to the depositions as made, and he made thereon his customary certificate. If this was so, I think the commissioner was entitled to his regular fees for taking and certifying the deposition, in the absence of an express stipulation between him and the parties waiving the same in whole or in part. The item of fifty dollars paid to the notary public Bowers for taking depositions is objected to on the ground that he was acting in the matter as clerk or amanuensis for the claimants' proctor. It appears that besides being a notary he was also attorney's clerk to claimants' proctor. It is claimed by libellant's counsel that the understanding was that to avoid the expense of taking the depositions before a commissioner, they should be taken down by the proctors themselves and sworn before a notary; that in pursuance of this understanding, the libellant's proctor wrote down his examination, and claimants' proctor employed his clerk, who was also the notary, to write down his. There was, however, no written stipulation to this effect, and as the depositions were apparently taken by and sworn before the notary, and the parties do not agree that there was such a stipulation or understanding, the court cannot take notice of it. The fact that the notary happened to be the clerk of one of the proctors did not disqualify him to act as notary upon the consent of the parties, nor disentitle him to his just fees therefor. This disbursement is duly vouched for and properly allowed.

Objection is made to an item of $130.50 included in the marshal's bill, for "wharfage," on the ground that under Rev. St. §§ 823, 829, no such charge is proper. Section 823 provides: "The following and no other compensation shall be taxed and allowed to attorneys * * * marshals * * * except in cases otherwise expressly provided by law." Section 829 regulates the fees of the marshal, and contains the following clause: "For the necessary expenses of keeping boats, vessels, or other property attached or libelled in admiralty, not exceeding two dollars and fifty cents a day." It is insisted that this charge for wharfage is to be deemed a charge for an "expense of keeping" the vessel. Section 823 refers in terms only to compensation, and not to expenses or disbursements of the officer, incurred by him in the discharge of his duties. Section 829, however, does restrict, within certain limits, many of those items or kinds of expense and disbursements which the officer is likely to incur in the performance of his duty, and actual disbursements beyond those limits must, of course, be disallowed, where they fall within the description of the kind of expenses thus limited; but as to expenses and disbursements not provided for in section 829, and necessarily incurred by the marshal in the performance of the duties of his office, I see nothing in either section to forbid his being reimbursed such expenses as without any legislation and upon general principles of law he would be entitled to, as for money paid out at the request and for the use of another. It appears to me that the "expense of keeping," here referred to, is the expense which the marshal is put to in maintaining the actual custody of the vessel under his process, and that what he may have to pay for "wharfage" or the use of a berth for her to lie in, in safety, is not properly to be considered such an expense. The marshal as the actual custodian of the vessel, especially if the owner or master leaves her, would be bound to use reasonable efforts to protect the vessel from danger, while in his custody, as, for instance, to move her in case of fire, or to use proper endeavors to put out a fire. No express provision is made for his taxing such disbursements, but I think that such disbursements

may properly be taxed, if reasonable in amount and necessarily incurred; and wharfage belongs rather to this class of expenses than to the expense of "keeping" the vessel. This and the other small items in the marshal's bill are properly allowable, if duly vouched for.

Let the costs be re-taxed in conformity with this opinion.

F. MERWIN, The. See Case No. 10,369.

Case No. 4,894.

FOCKE et al. v. LAWRENCE.

[2 Blatchf. 508.] [1]

Circuit Court, S. D. New York. Nov., 1852.

CUSTOMS DUTIES—PROTEST—INVOICE VALUATION AS DUTIABLE VALUE—PLACE OF SHIPMENT AND PURCHASE.

1. A protest against the payment of duties must point out specifically the particular omission or irregularity complained of, or it will not be available in an action to recover back the duties. The doctrine of the cases of Pierson v. Lawrence [Case No. 11,158] and Pierson v. Maxwell [Id. 11,159] applied to the protests in this case.

[Cited in Cornett v. Lawrence, Case No. 3,241; Wilson v. Lawrence, Id. 17,816; Crowley v. Maxwell, Id. 3,449.]

[See Bangs v. Maxwell, Case No. 841.]

2. A collector is not bound to take the invoice valuation of goods, supported by the owner's oath on the entry, as their dutiable value.

3. A collector is justified, in the absence of written notice of a different state of facts, in assuming the place of shipment of goods, as stated in the entry invoice, to be the place of their purchase, and the date of the invoice as the time of their purchase.

[Approved in Crowley v. Maxwell, Case No. 3,449.]

This was an action [by Julius Focke and Francis Boult] to recover back an alleged excess of duties and a penalty, paid to [Cornelius W. Lawrence] the collector of the port of New York. A verdict was taken for the plaintiffs, subject to the opinion of the court.

Elias H. Ely, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. The plaintiffs, merchants of Liverpool, shipped at that port three invoices of iron, in March, April and May, 1849. They took the owner's oath upon the invoices before the American consul at Liverpool, and swore that the iron was charged at the prices paid on actual purchase. On entry at New York, in May and June following, the invoice value was raised by the appraisers to the market prices of the iron at the dates of the respective invoices, and duties were exacted by the collector on that valuation, with the addition of a penalty. The importers subjoined to each entry a written protest against the additional duty. The language of two of the entries was, "claiming to enter the iron at actual and invoice cost." That of the third was, "claiming to enter it according to the sworn invoice."

The case differs from that of Pierson v. Lawrence [Case No. 11,158], in this, that the plaintiffs were residents of Liverpool, and shipped the iron there on their own account. Their contracts of purchase were made with the manufacturers in Glasgow, October 30th, and November 1st, 1848, for future delivery, and the iron was all delivered at Liverpool in March and April, 1849. The plaintiffs offered no evidence against the correctness of the appraisers' valuation, taking the time of shipment as the time of purchase.

The plaintiffs urge, as in the case of Pierson v. Lawrence [supra], in avoidance of the appraisement, First, that the invoice, verified by the owners' oath, is conclusive proof of the purchase-price of the goods; secondly, that the course pointed out by the acts of congress, to be pursued on the appraisement of imports at the custom house, was not conformed to in this instance; thirdly, that no legal order to appraise was made. They also claim that the contracts of purchase were entered into in October and November, 1848; that the increased valuation and the imposition of the additional duty and penalty were all carried out at the custom house in obedience to a circular from the secretary of the treasury, and not by regular appraisement and the observance of the requirements of the revenue acts; that a part of the purchase was in praesenti, the plaintiffs having the right to an immediate delivery of the iron; and that, in that respect, this case is distinguishable from that of Pierson v. Lawrence, and from that of Pierson v. Maxwell [Case No. 11,159], where the purchases were prospective.

The plaintiffs proved, in this case, that an advance in the price of iron at Glasgow took place between the dates of the contracts of purchase and the shipments of the iron, but there does not appear to have been any distinct proof of the time or amount of that advance, nor of the market value of the iron in Glasgow at the period of the contracts, otherwise than by the testimony of a broker resident at Liverpool. These facts are stated in this opinion, not as the basis of the judgment of the court, but that the case may appear substantially as presented to the court.

Our decision is placed essentially upon the terms of the protests. The plaintiffs cannot go beyond or out of those, with their objections to the exaction of duties. If they supposed that the officers of the customs had committed any irregularity in ascertaining the dutiable value of the iron, or if they desired more formal action on the part of the collector, the protests should have called his attention to the particular omission or irregularity complained of. In the case of Barker v. Lawrence [Case No. 991], cited by the

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

plaintiffs' counsel, in which the duties paid were recovered because of an irregular appraisement, no question was raised by the defendant as to the sufficiency of the protest.

The presumption is, that the duties were levied according to law, and the collector is not personally subject to an action unless he exacts them against the protest of the importer, "setting forth distinctly and specifically the grounds of objection to the payment thereof." Lawrence v. Caswell, 13 How. [54 U. S.] 488. This is demanded by the statute, and it is a wise safeguard to a public functionary who exercises a very delicate and difficult trust, while it at the same time affords every reasonable protection to the rights of the importer. This court has repeatedly expressed its purpose to adhere to the language and spirit of this requirement of the law; and, applying that provision to this case, it is clear to our minds, that the plaintiffs have not shown that the collector violated any right set up by their protests, and which was secured to them by law. The protests import that the plaintiffs claimed the invoice charges to be conclusive evidence of the purchase-price and market value of the goods, but they give no intimation to the collector that the purchases were at a time different from the dates of the invoices, or that the market prices at the periods of purchase were different from what they were at the times of the shipments or at the dates of the invoices.

It is a great misapprehension to suppose that the collector is bound to take the entry of goods at the valuation of the invoice, supported by the owner's oath. His duty is directly the contrary. The 16th section of the act of August 30, 1842 (5 Stat. 563), directs the collector to cause goods subject to ad valorem duties to be appraised, and specifically enacts that it shall be the duty of the appraisers, or of the collector, by all reasonable ways and means in their power, to ascertain, estimate and appraise the true and actual market value and wholesale price of the goods, at the time purchased, and in the principal markets of the country whence the same shall have been imported into the United States, "any invoice or affidavit thereto to the contrary notwithstanding." To enable the importer to avoid the penalty of twenty per cent., when the appraisement exceeds the invoice value by ten per cent., the eighth section of the act of July 30, 1846 (9 Stat. 43), permits the importer to make an addition to the entry price. That provision goes upon the assumption that the invoice price in no way determines the value of the goods.

If the plaintiffs were entitled to enter the goods at their market value at the place where purchased (Maxwell v. Griswold, 10 How. [51 U. S.] 242; Greely v. Thompson, Id. 225), still, the collector was not bound to know that the place of the purchases was different from that of the shipments, nor, more especially, that the times of the purchases were different from the dates of the invoices, unless he was expressly notified of such facts by the protests. It does not appear that he or the appraisers had any notice whatever of such facts. A verbal notice would be of no avail, even if the court might be authorized to imply one, for the plaintiffs would be excluded from all advantage under it by the express provisions of the act of February 26, 1845 (5 Stat. 727), which require it to be in writing.

We adhere to the judgment rendered in this case at the last term, finding that the plaintiffs, by their protests, point to no fact which in law can invalidate the appraisement, and also that, by the entries and the invoices, the collector was justified in taking the place and times of shipment as those of the purchases of the goods in question.

Judgment for the defendant.

Case No. 4,895.

FOGARTY v. GERRITY.

[1 Sawy. 233; 4 N. B. R. 450 (Quarto, 148); 5 Am. Law Rev. 163.] [1]

District Court, D. California. July 23, 1870.

RESIDENCE OR PLACE OF BUSINESS MUST BE WITHIN DISTRICT TO GIVE COURT JURISDICTION.

Where a petition had been filed against certain parties praying that they be adjudged bankrupts, and on the return day they appeared and with their own consent were so adjudged; and subsequently another creditor moved the court to dismiss the proceeding on the ground that the bankrupts had never resided or carried on business in this state: *Held*, that the court was without jurisdiction and that the proceedings should be vacated and set aside.

[Explained in Re Bergeron, Case No. 1,342. Cited in Re Mendelsohn, Id. 9,420; Re Jonas, Id. 7,442; Re Austin, Id. 662; Re Donnelly, 5 Fed. 786; Allen v. Thompson, 10 Fed. 124.]

[In bankruptcy. In the matter of Edward Fogarty and James Gerrity.]

J. Naphtaly, for petitioning creditor.

HOFFMAN, District Judge. On the twenty-seventh of May, 1870, a petition was filed on behalf of I. D. Fish & Co., of New York, praying that the above named parties be adjudged involuntary bankrupts. On the return day of the order to show cause the alleged bankrupts appeared and consented to the adjudication, which was accordingly made and the matter referred to the register.

A motion is now made on behalf of one P. D. Casey, an attaching creditor, that the adjudication be set aside and all proceedings in bankruptcy vacated on the ground that the court has no jurisdiction over the case.

In support of this motion various affidavits were read, from which it clearly ap-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 5 Am. Law. Rev. 163, contains only a partial report.]

pears that the alleged bankrupts have never conducted any business within this district, nor had any place of business established therein as distinct from their place of residence. That they reside in the state of New York, where they have a notorious place of business, and that they arrived in this city about April 12, 1870, some six weeks prior to the filing of the petition against them. On this state of facts it is evident that this court would be without jurisdiction to entertain a petition in voluntary bankruptcy presented by the bankrupts. By the 11th section of the bankrupt act [14 Stat. 517], a debtor desirous of availing himself of the provisions of the act, is required to apply by petition "addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months." Under this and a somewhat similar clause, in the act of 1841 [5 Stat. 440], the district courts have frequently declared themselves without jurisdiction to entertain the petition, make an adjudication or grant a discharge where it appeared that the application had not been addressed to the judge of the proper district.

In the Case of Kinsman [Case No. 7,832], the late judge of the southern district of New York, the objection appears to have been made on the part of creditors.

In the Case of Little [Case No. 8,391], the discharge of the bankrupt was opposed by creditors, and refused; the court declaring that "the question, whether the petition was filed in the proper district, was a question of jurisdiction." The discharge was refused "for want of jurisdiction in the court to grant it." In another case, the register to whom the matter was referred, of his own motion, after examination of the petitioner, refused to adjudicate, for the same reason, and his decision was sustained by the court. In re Magie [Id. 8,951].

In the Case of Walker [Case No. 17,061], a creditor filed a petition similar to that preferred in the case at bar, to vacate all proceedings in the cause, for want of jurisdiction, averring that the bankrupt had not resided in the district for the greater part of the six months next preceding the filing of the petition. The court (per Lowell, J.) held, on the facts, that the residence was established, but no doubt seems to have been entertained, that if the facts had been otherwise, the prayer of the petition must have been granted.

The thirty-ninth section, on which proceedings in involuntary bankruptcy are founded, does not, like the eleventh section, designate the district judge to whom the petition of the creditor shall be addressed. It provides, that "any person residing and owing debts aforesaid, who, after the passage of this act, shall—(the various acts of bankruptcy are then enumerated, and the sentence continues)—shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors," etc.

The succeeding section provides, that "upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order," etc.

The forty-first and forty-second sections provide for further proceedings, and for the final adjudication, that the debtor is a bankrupt. These proceedings are to be taken in the court in which the creditor's petition has been filed; but in which of the district courts the petition is to be filed, the act does not in terms declare. It cannot, I think, be contended that any of the district courts, at the election of the creditor, can entertain the petition; for, in such case, it might be filed and the debtor cited to appear in a remote district, where he has never resided nor carried on business; where he has no property, and where none of his creditors live. The inconveniences, and the opportunities for collusion which would thus be presented, make it evident that such could not have been the intention of congress.

It may, with more plausibility, be urged that the court to which the petition is to be presented, is the court of the district in which the act of bankruptcy has been committed. But the objections to this construction are insuperable. The alleged act of bankruptcy may have been committed in a district where neither the debtor nor any of the creditors reside or carry on business. It may have been done by the debtor while temporarily passing through a district remote from his residence or place of business, or even while traveling through various districts. To compel him to appear to answer before the court of the district in which he happened to be when the alleged act was committed—to oblige all the creditors whose places of residence may be distant, to appear before the same tribunal, to appoint an assignee in that district to take possession of the property, no part of which might be found within it, would be productive of intolerable hardships and vexations.

Moreover, if the jurisdiction to entertain the petition is deemed to be given exclusively to the court of the district where the act of bankruptcy has been committed, cases might often occur where no court would have jurisdiction. For the fraudulent payment, gift sale, conveyance or transfer might have been made out of the limits of any district; as for example by a passenger on a voyage by sea to or from this place and an eastern port.

The fifth clause of section 39 numerates as an act of bankruptcy the making of any assignment, gift, sale, etc., of estate, property, rights, etc., either within the United States or elsewhere, with intent to hinder, delay

or defraud creditors. Under the construction we are considering no court could take jurisdiction of an act of bankruptcy of this description if committed without the limits of the United States.

That this construction of the act was not contemplated by the supreme court, is evident from the language of the sixteenth order in bankruptcy. It provides that where two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil.

If petitions could be filed only in the court of the district in which an act of bankruptcy had been committed, the general order referred to would afford no means of determining in which court the first hearing should be had. The terms of this general order indicate that where several petitions are filed against a debtor, one of them at least will have been filed in the district of his domicil, and it may fairly be inferred from the tenor of the order that the supreme court understood that proceedings against a debtor to procure an adjudication of involuntary bankruptcy, were like those instituted by himself to obtain an adjudication of voluntary bankruptcy, to be had in the court of the district in which he has resided or carried on business for the preceding six months, or for the longest period thereof. And this construction seems not only reasonable, and less objectionable than any other which can be suggested, but most in accordance with the other provisions of the act.

It has been said that the scope and purpose of the thirty-ninth section are to oblige insolvent debtors to take the benefit of the bankrupt act, and thus to insure an equal distribution of their estates under its carefully framed provisions. Bump, Bankr. 128, and cases cited.

By the thirty-ninth section he can be compelled to do what by the eleventh he is permitted and invited to do. The fact that in one case the adjudication is demanded by a creditor, and in the other is asked for by the bankrupt, ought not reasonably to affect the determination of the question as to what tribunal has jurisdiction over the case. The only case cited where the question we are considering has arisen, is that of In re Palmer [Case No. 10,680], in the southern district of New York. In that case the debtor, against whom a petition had been filed in the southern district, resided and carried on business in the northern district of New York. The learned judge of the southern district dismissed the proceedings for want of jurisdiction.

It is urged, that inasmuch as the bankrupt has assented to this proceeding, the objection cannot be raised by a creditor who has intervened. But consent cannot give jurisdiction —and that the question is one of power and jurisdiction in the court is evident—nor can it make any difference whether the proceeding is voluntary or involuntary bankruptcy. In the one case the petition is filed by the bankrupt, and in the other by a creditor. But in either case it must be addressed to the court authorized by law to take cognizance of the case, and to none other. Nor can it even be said in this case that the parties have submitted to the jurisdiction. One creditor has invoked it, and the bankrupts have not objected. But all other creditors are parties to and bound by the proceeding. If it be sustained, their ordinary remedies against the debtors will be suspended—the whole of his property will pass into the hands of an assignee, and they will be obliged to come into this court to prove their debts, enforce their liens, adjust their accounts, and receive the dividends—and their unsatisfied claims may be forever barred by the discharge of the bankrupt.

They have, therefore, a clear right to be heard, and to resist the proceeding, on the ground, that the court is without jurisdiction. My opinion is, that, under the facts of the case, the court has no jurisdiction. and that the adjudication and other proceedings in this cause should be set aside and vacated.

FOGARTY (GREAT WESTERN INS. CO. v.). See Case No. 5,737.

FOGERTY, In re. See Case No. 4,895.

Case No. 4,896.

FOGERTY v. PRATT et al.

[2. Hall, Law J. 238.]

District Court, D. Pennsylvania. Jan. 6, 1809.

SEAMEN — LIABILITY FOR LOSS BY NEGLIGENCE — LIMITATION ON DUTY OF OBEDIENCE.

[1. Where the mates and crew of a vessel discharge ballast into a lighter or barge so carelessly as to load her on one side, and cause her to sink, they are liable to the owner for the loss.]

[2. Mariners are not required to obey all orders unconditionally; but it is their right and duty, when they believe that work is being done in an improper or dangerous manner, to call their officers' attention thereto, and remonstrate with them. If they fail to do so, they are liable with the officers for a resulting loss.]

[3. When the fault or negligence is not clearly fixed on any particular one connected with the ship, all must contribute in the ratio of wages.]

In admiralty.

Mr. Peters, Jr., for complainant.

J. Ingersoll, for respondents.

PETERS, District Judge. At Norfolk in Virginia, the ship was discharging stone ballast. A flat bottomed scow was used as a lighter to convey the ballast to the strand. The ballast was thrown into the scow from buckets, in which it had been hoisted out of the hold. These were borne to and off the side of the ship; both mates, at times,

assisting. They were discharged into the scow lying alongside at random, and their contents left to find their own position in the scow, or part to fall into the sea, as chance directed. No pains or care were taken to trim the scow, which had a considerable list towards the ship's side, and was so left, with about six inches free-board, when the mate, second mate and all hands went to dinner. After their meal, they proceeded to discharge the ballast in the mode which had been previously pursued. Three buckets being (after dinner) emptied into the scow, she began to take in water; and not till then did the mate (who commanded in the captain's absence) direct measures to be taken for trimming the ballast in the scow, though a hand might have been spared for that purpose from the commencement of her lading. She went down and was lost soon after the discharge of the third bucket. The mate's idea was that the scow, before any danger occurred, could be turned round so that the off side might receive more ballast, and settle her on an even bottom. He viewed from time to time her situation; and so did the second mate, and most, if not all, of the crew, though generally engaged at the tackle fall. No apprehension of danger was expressed on going to dinner, or at any other time, by any person. The second mate and some of the crew who were witnesses (under releases, from claim of contribution) now declare, that the scow was injudiciously laden, and that a hand should have been kept in her constantly to trim the ballast. Being asked why they did not remonstrate at the time against the mode taken to lade the scow, they replied, that "the mate was in command; and they had no right to interfere; especially as he had high notions of his authority." He appeared to have been a strict, and therefore not a favorite, officer.

The respondents set up a claim to the value of the scow lost, against the mate solely. The complainant's counsel contended that it was either a loss by unavoidable accident, for which neither the mate nor crew were responsible; or, if gross negligence appeared, or misfeasance, there should be a general contribution. It was difficult to determine whether the mate was solely amenable and in fault; though I had no doubt as to the injudicious mode of lading the scow, which should have been more carefully attended to, as it was the first attempt to load this lighter. If the second mate or any of the crew had deemed (as the former said he had) this mode of lading the ballast uncommon, or dangerous, it was their duty to have represented the matter to the mate. If they had so done, and he had persisted, it would indubitably have been at his sole risk. By not thus representing or protesting against it they took their share of risk and responsibility. It is a mistaken notion among mariners (many of whom are disobedient enough in plain cases) that they are compelled unconditionally to obey all orders. This is not seldom an affectation of strict duty; and they obey orders evidently wrong, or perceive in silence ruinous omissions when the consequences are exposures of officers they dislike. But this is a nice and dangerous game. If a casualty producing loss occurs, they share in the retribution; notwithstanding such insidious obedience, and hypocritical delicacy. They are bound by a superior duty, to guard the property of the owner. The law thus reconciles obedience with justice, by making it their duty to remonstrate and warn on proper occasions, before they obey, under the penalty of sharing the consequences. But if they give due warning and information they are free from participation in retribution for loss. Thus it has often been decided here,[1] in cases of bad stowage, bad ropes, or other defective tackle and furniture. Their remonstrances are not to be considered as impertinent interferences, but just and warrantable exercises of their rights and duty.

In the case in question, no warning or opinion was given; and the whole were thus inculpated. An officer may err in judgment, without perceiving the consequences. It is the interest as well as the duty of those who must respond with him to the owners, at least to endeavor to set him right. If he persists in error, it is solely at his own peril. There have been cases of exception to this rule, attended with special circumstances. If, in this case, the lighter had been (as was alleged but not proved) rotten and incompetent, the owner or his agent must have suffered the loss. The officers and crew would not have been liable to contribution, unless they, or some of them, knew the circumstance, and failed to warn or remonstrate to the master or mate, who in such cases, may be ignorant of the deficiency. The general contribution is first regarded. Strong circumstances must exist to charge an individual; and those of this case do not seem to be so strongly marked as to warrant an exception. At least, doubted whether the proof amounted to error in judgment or culpa negligentia. But being clearly of opinion that there had been misfeasance; and no warning or protest, I deem it right to retribute the owner by general contribution. This must be made in the ratio of wages. The master and the whole of the ship's equipage, must contribute. Where the fault is not clearly fixed on an individual, the obligation of the whole to retribute the owner predominates;

[1] See Wilson v. The Belvidere [Case No. 17,790], for the general duties of mates; Crammer v. The Fair American [Id. 3,347], as to claims of exceptions from contribution; Mariners v. The Kensington [Id. 9,085]; and Wilson v. The Belvidere [supra], as to the duty of seamen to remonstrate.

and prevails against any allegation of innocence, as to any one or more of the officers or crew. This may bear hard on the faultless; but it is the policy of the maritime law, thus to compel the innocent to watch, and bring to retribution or punishment, those who are really chargeable with negligence, delinquency or crime. This obligation arises out of a peculiar necessity, appropriate to those of this occupation, who, from the nature of their employment, are thus made sponsors for each other.

Case No. 4,897.

FOGG v. LAWRY.

[See 71 Me. 215.]

Case No. 4,898.

FOGG v. STICKNEY.

[11 N. B. R. (1875) 167.] [1]

District Court, D. New Hampshire.

BANKRUPTCY—PROOF OF DEBT—PROMISSORY NOTE HELD AS COLLATERAL SECURITY—CONSIDERATION.

F. offered for proof against the bankrupt's estate three promissory notes signed by C., to his own order. The assignee appeared before the register and objected to the allowance of the notes. On the hearing before the court, the evidence showed that the notes were accommodation notes, delivered to F. as collateral security for an existing debt, before they were due, and without notice of any infirmity or defense; that not being paid at maturity, they were protested, and due notice given to the indorsers. The only question before the court was whether the notes, being delivered to F. as collateral security, were open to the defense of want of consideration on the part of the bankrupt. *Held*, that want of consideration to one who becomes a bona fide holder for value before a note becomes due is no defense, and that the notes in question should be admitted to proof.

[See Bank of Columbia v. French, Case No. 867.]

In bankruptcy.

CLARK, District Judge. Before the register, Fogg Bros. offered for proof against the bankrupt, three notes, all signed by Wm. H. Crawford, payable to his own order, and by him indorsed; and also by the bankrupt, and others. The first of these notes was dated January 10th, 1872, for one thousand dollars. on five months. The second, January 22d, 1872, for one thousand dollars, on five months. The third, February 21st, 1872, for one thousand dollars, on five months. The assignee [W. W. Stickney] appeared before the register and objected to the allowance of the notes against the estate of the bankrupt, and thereupon an issue was framed and transmitted to this court. Upon hearing had before the court, it appeared that these notes were accommodation notes, for the benefit of the maker, Crawford; that he delivered the same to Fogg Bros. as collateral security for an existing debt, before they were due, and without notice of any infirmity or defense, and not being paid at maturity, the notes were protested, and notice given to the indorsers.

The only question before the court was, whether the notes, being delivered to Fogg Bros. as collateral security, were open to the defense of want of consideration, on the part of the bankrupt. In New Hampshire, it has been repeatedly held, that notes pledged as collateral security are open to the same defense as they would be in the hands of the payee. Williams v. Little, 11 N. H. 66; Fletcher v. Chase, 16 N. H. 39; Bank v. Kent, 15 N. H. 579; Rice v. Raitt, 17 N. H. 116. But in Swift v. Tyson, 16 Pet. [41 U. S.] 15–22, 14 Curt. Dec. 166, the subject of the transfer of notes was fully considered, and a different doctrine was held. In delivering the opinion of the court, Justice Story remarked, "establish the opposite conclusion; that negotiable paper cannot be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value of such securities must be essentially diminished, and the debtor driven to embarrassment in making sale thereof, often at a ruinous discount." In the same case, and also in Watson v. Tarpley, 18 How. [59 U. S.] 517, it was held, that the decision of a state court could not control the decision of the United States courts as to the commercial law, and this court feel bound by the decision of the United States supreme court, rather than by the decisions of the state court.

It is well settled, that the want of consideration is no defense to a note against one who becomes a bona fide holder for value, before the note is due. This is so even in New Hampshire, if the holder had no notice of the invalidity of the note. Perkins v. Challis, 1 N. H. 254; Peck v. Maynard, 20 N. H. 183. Other authorities hold, that it is not any defense or bar, that the note was known to the holder to be an accommodation note, between the other parties, if he takes it for value, bona fide, before it comes due. Story, Bills, 230, § 194, and authorities cited; Brown v. Mott, 7 Johns. 361. There was no proof in this case that Fogg Bros. had any notice of any want of consideration for the notes.

The only question then would seem to be, did the Fogg Bros., holding the notes as collateral security, hold them for value? Chitty says, if a bill or note be indorsed as a collateral security, that is an adequate consideration to enable the party to sue thereon though he advance no new credit on the bill or note. Chit. Bills, 85; Heywood v. Watson, 4 Bing. 496. Story says, every person is, in the sense of the rule, treated as a bona fide holder for value, not only when he has advanced money or other value for it, but

[1] [Reprinted by permission.]

when he has received it in payment of a precedent debt, or when he has a lien on it, or has taken it as collateral security for a precedent debt; or for further, as well as for past advances. Story, Notes, 231, § 195, and authorities cited. Guided by these considerations and authorities, I think the creditors may prove their debts in this case for the notes and interest, with costs of protest, as stated by them in their proof before the register.

FOLGER (CROSBY v.). See Case No. 3,421.

FOLGER (HYDE v.). See Case No. 6,971.

Case No. 4,899.

FOLGER v. The ROBERT G. SHAW.

[2 Woodb. & M. 531;[1] 17 Hunt, Mer. Mag. 508.]

Circuit Court, D. Massachusetts. May Term, 1847.

NONSUIT—OF RIGHT BY PLAINTIFF AND WITHOUT PREJUDICE—IN APPELLATE COURT—APPEAL IN ADMIRALTY—JUDGMENT ON THE MERITS.

1. In cases at law, as in chancery or admiralty, the prosecuting party could of right become nonsuit in the original court, on payment of costs, at any time before the case was ready and opened for trial, and some pertinent evidence offered, so that the merits could be ascertained and decided; but after that, he could not become nonsuit so as not to be barred, unless the opposite party consented, or the court for sufficient reason gave leave. Such reason might be surprise, or unexpected absence either of witnesses or counsel.

[Cited in Carr v. Gale, Case No. 2,435.]

2. Formerly a nonsuit could be of right by the plaintiff at any time before judgment, and now in some states at any time before verdict. But the first gave undue advantage to plaintiffs over defendants, and is not the law now in England. Nor can this court order a nonsuit, unless as a penalty for not obeying some rule. If the plaintiff object, and has offered any evidence proper to be weighed by the jury, the corresponding test is in each the same.

[Cited in Jackson v. Waldron, 5 Fed. 246.]

3. In an appellate court, after a case is entered, the original plaintiff, who is appellant, and recovered judgment below, but not for so much as he desired, cannot become nonsuit without prejudice on payment of costs, if the defendant object. But when the appellant declines to prosecute his appeal further, the court should give judgment on the merits.

[Cited in U. S. v. Humason, 8 Fed. 73; Johnson v. Bailey, 59 Fed. 673.]

4. This course is proper on an appeal in admiralty, and in all other appellate courts, where a judgment can be rendered in chief on the merits.

5. It is especially proper in such cases, if the evidence is in writing, and comes up with the case, as the court has full means then to render judgment on the merits, if the plaintiff declines to prosecute the appeal further. But if the evidence does not come up in writing in the record, or has not yet been filed in the appellate court, the judgment below must be the guide, and be affirmed. It is prima facie right till shown to be wrong.

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

[Appeal from the district court of the United States for the district of Massachusetts.]

This was a libel brought originally July 23, 1846, in the district court for salvage for assistance rendered to the vessel called the Robert G. Shaw, while stranded and in distress. [Case unreported.] A decree was given in favor of the libellant [Peter Folger] for $275, November 17th, 1846, and an appeal claimed from it, by the libellant to this court, on account of the smallness of the salvage allowed. The appeal was entered here, May term, 1847, and towards the close of the term in June, 1847, the libellant moved that he have leave to discontinue his prosecution entirely, by a dismissal of the case without prejudice to his bringing another action elsewhere.

Mr. Crowninshield, for libellant.

Mr. Fletcher, for respondent.

Before the opinion was pronounced, at an adjourned session in September, 1847, the counsel stated that the case had been arranged, but they wished to hear the opinion of the court.

WOODBURY, Circuit Justice. A court of admiralty differs in various respects from a court of law in its forms of proceeding, as well as in its principles of decision. But it has rules of practice, though more flexible, and to sustain them can award costs, and should against a party guilty of a false clamor, or in fault either in preliminary or final proceedings. See Deshon v. Medora [Case No. 3,820], and cases in Burnham v. Rangely [Id. 2,177]; 2 Bac. Abr. "Court of Admiralty," E. When it ought to do more and bar other suits, by rendering judgment in chief between the parties as well as awarding costs, is the chief question in the present case, and is not without difficulty both in theory and practice. Certain it is, that there is one test where such a judgment cannot be rendered. There would be some absurdity involved in giving a final judgment as if on the merits, when the case had not proceeded so far as to exhibit the merits either in the pleadings or evidence. What judgment must then be rendered in such cases, when either party has neglected or refused to proceed so far as to exhibit the merits? Manifestly, if it be the plaintiff, the judgment should be a nonsuit, or discontinuance, or dismissal of the case, varying in form, but not in substance, all being, in such preliminary stages of the action, but a mode of punishing the plaintiff merely by costs for his neglect to proceed, or for his apparent false clamor. Jac. Dict. "Nonsuit"; 3 Bl. Comm. 295; Gilbreth v. Brown, 15 Mass. 178; 5 Dane, Abr. 676. See the form of entry, Cro. Jac. 213; 5 Bac. Abr. "Nonsuit," A.

It is true, that nonsuits and dismissals may be on the merits at times, but then they are rendered on a different state of facts,

and usually in a different stage of the proceedings, the case having gone forward so far, that the merits can be ascertained and properly settled. The presumption is, however, that all nonsuits and dismissals are formal, in order to mulct negligence in costs; and they imply merely a failure to prosecute, an unwillingness to proceed further in this action, rather than necessarily a want of merits. Apsden v. Nixon, 4 How. [45 U. S.] 467; Burnham v. Webster [Case No. 2,179]; Greely v. Smith [Id. 5,749]; Minor v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 74. When they are designed as a bar and are voluntary by the plaintiff, they should be in the form of a retraxit, and thus stipulate to prosecute no further in another suit. 5 Coke, 58; Bac. Abr. "Nonsuit," A. Under certain statutes in England, judgments in later stages of a cause may, also, be "as in case of a nonsuit" (see 14 Geo. II. c. 17, § 1; 1 Dowl. Pr. Cas. 561); in case the plaintiff, for neglect to be ready or comply with various orders of the court, is punished by a nonsuit and costs, and compelled, if he sues further, to begin his case de novo (see 13 Car. II. c. 2; Oldham v. Burrell, 7 Durn. & E. [Term R.] 26; 2 Tidd, Pr. 730, 785, and cases cited; 2 Chit. Cas. 283; 2 H. Bl. 219; 5 Bac. Abr. "Nonsuit," A). But there is no judgment on the merits so as to prejudice or bar another suit.

In chancery the entry in like circumstances is, that the bill is dismissed. Yet the effects of all of these are the same when under like circumstances; and if they happen before the merits can be ascertained, they are allowed on payment of costs, and are no bar on the merits. The books of practice are rather meagre as to the form adopted in admiralty, under similar circumstances. But as the libel there is a substitute for the writ and declaration at common law, and for the bill in chancery, I see no reason why it may not be abandoned, or discontinued in a like stage of proceedings with the others, and with a like effect. Whether it be called a nonsuit, or discontinuance, or desertion of the cause, is immaterial; but it should operate as a mere discontinuance, if at a time when the merits are not developed, and cannot be ascertained. I have assumed as the guiding principle, it being the only one conceivable by me, that the precise stage, in which the discontinuance should be allowed without a judgment on the merits, and as a matter of right if claimed by the prosecuting party, is any progress in the cause, which has not yet furnished means to the court for a correct final decision.

Another proof showing this to be the best test is, that where a cause has advanced to that extent in a court of law, or has become ready and opened for trial on pertinent evidence, but the trial is not yet closed, the court, before which it is thus proceeding, cannot nonsuit the party without his consent. He has then become entitled to a hearing and decision by a jury on the pertinent evidence he has offered. But, in most cases, if no evidence is offered by the plaintiff, and objections in law appear on the record which are fatal and final, the court can order him to be nonsuited on the merits; and a nonsuit should then operate as a bar to another action. Tidd, Pr. 796; 1 Wend. 376; 2 Greenl. 5; 2 South. [5 N. J. Law] 851. So if the plaintiff makes out no case, before a rebuttal by the defendant. 3 Greenl. 97; 1 Pick. 328; Conk. Pr. 275. But if there be any evidence to be considered, it is improper for the court to dispose of the case on the merits by nonsuit, unless the plaintiff consent, but rather must submit the evidence to a jury, with appropriate instructions. Rose v. Learned, 14 Mass. 154; 17 Mass. 249; [Doe v. Grymes] 1 Pet. [26 U. S.] 469; [Crane v. Lessee of Morris] 6 Pet. [31 U. S.] 598; 13 Johns. 334; 6 Pick. 117; 2 Bin. 248, 254; 4 Vt. 363; Anonymous [Case No. 475]; Huidekoper v. McClean [Id. 6,852]; Doe v. Grymes, supra; D'Wolf v. Rabaud, 1 Pet. [26 U. S.] 497. There are some qualifications of this rule (8 Mass. 336; 17 Mass. 1), that need not be now examined. This rule proceeds on the ground, that when a plaintiff appears once and enters on the trial of his case, having offered pertinent evidence, he is entitled to go on, and, if he can, obtain final judgment upon the merits, unless he assents to withdraw, and be put out of court without such judgment. Watkins v. Towers, 2 Durn. & E. [Term R.] 275; 2 Tidd, Pr. 798; 2 Adol. & E. 166; Doe v. Grymes, supra; Ward v. Mason, 9 Price, 291; 13 Price, 222; 2 Bing. 258; Grahame v. Harris, 5 Gill & J. 489. This illustration furnishes the true clue for the corresponding proposition, when the plaintiff has a right to become nonsuit, without prejudice to the merits. It is where the action has reached such a stage, that the defendant cannot be obliged by the plaintiff to let the latter go out of court without some final judgment on the matter itself, which is in dispute.

Each party should have somewhat similar rights in respect to such a subject; and the great inquiry is, when the plaintiff must be compelled to stop to exercise this power, as a right of withdrawing, without being barred from bringing another action? That is the precise question here; when that stage must be considered as reached? The rules of practice do not seem to be entirely uniform on this point, and have become more rigid in modern times than anciently. But I apprehend that the principle which must govern it, is that before indicated, and which is, that this act must be done at some period before the merits can be ascertained for a final judgment, or the plaintiff is not entitled to do it as a right. Thus it seems plain, from the great current of the cases, and it is reasonable in principle, that a party, if he pleases, on paying costs, should abandon his suit, and a nonsuit be permissible, after ev-

ery continuance before trial, on a call of the case to see if the parties are in readiness for trial. Then the plaintiff is demandable in court and does not choose to appear, and there is nothing yet by which the merits can be ascertained. 3 Salk. 244, 245; Haskell v. Whitney, 12 Mass. 48. Formerly a nonsuit used to be common during the trial and before verdict. Steph Pl. 130, 313; 3 Bl. Comm. 376. Once it could be even after a verdict, if the court took time to consider on the case. Id.; 1 Inst. 139, C. The test as to the time then was before a final judgment (Steph. Pl. 130); and the plaintiff might be nonsuit even after a verdict, if he did not like the amount of damages given by the jury (5 Mod. 208; Co. Litt. 139b). But this practice held out too great an encouragement to repeated and vexatious suits, and gave an advantage to a plaintiff which the defendant did not enjoy, of a prolonged litigation, and new and various experiments and trials. In the hands of wealth and power, exercised against moderate means, it would be likely in time to break down any antagonist. Consequently now, it is forbidden by statute in England in such cases (2 Hen. IV.; Bac. Abr. "Nonsuit," D), though it is still allowed sometimes as a favor after a special verdict, which is considered a mere finding of facts which are further to be considered by the court (3 Leon. 28). So after that statute passed, a nonsuit was for a time allowed after a demurrer. Co. Litt. 139. But I find no modern cases of allowing a nonsuit, as a matter of right, after a special verdict or a demurrer joined, and I doubt the propriety of them in principle. Cro. Jac. 35.

The true test seems to be the progress in the case, so that the court have means to decide on the merits. The defendant then has rights, and may well insist on a final judgment, to avoid further expense and litigation. Thus it often happens in the supreme court of the United States. on an appeal, that the court, when one side does not appear, proceed to hear the other, and render judgment on the merits. U. S. v. Palmer, 3 Wheat. [16 U. S.] 626. And by the 30th rule of that court, either party can claim a hearing and decision on the merits. 1 How. 30, pref. Because in that court no new testimony or pleadings generally take place, and the case is in a state to be heard and decided on the merits whenever it is entered. Looking to this condition of things as the general test, whenever it exists, whether in a court of original or appellate jurisdiction, it settles the question, when of right the plaintiff can be nonsuit or not. Hence it is according to several decisions, strengthening that test. customary, before trial, to allow a nonsuit at the assizes as a right; but not at or after the trial is begun, by offering evidence. 6 Mart. [La.] 678; 8 Mart. [La.] 20; Cree v. Roll, 3 Salk. 246; Semb. Creswell, J., in 5 Man. & G. 590, and 6 Scott, N. R. 631. Nor is a discontinuance allowed, except for special cause after a rule for judgment on a demurrer or on pleas, for like reasons; as then the merits can be decided on, and the defendant then has gone far enough to claim final judgment on the controversy. Turner v. Turner, 1 Salk. 179. So it has been held to be too late for the plaintiff to claim a right to be nonsuit, without consent of the defendant or leave of the court, after a submission of a case to referees. even though no testimony has been put in at that time. 12 Mass. 49. Because neither party, after such submission, is demandable in court till a report is made, and either may proceed ex parte, if the other declines, and have a report made. It seems also, by some cases, to be too late, if the defendant is ready to enter on the trial, with his evidence present, and then the plaintiff proposes a nonsuit as a right (2 Rolle, Abr. 131), while in other states the plaintiff is allowed to become nonsuit, at any time before the verdict is read by the clerk (3 McCord, 559; 4 Watts, 308; Wooster v. Burr, 2 Wend. 295; 5 Dane, Abr. 677). In others, it is limited to any time before the trial itself (Haskell v. Whitney, 12 Mass. 47), and is not allowed after the verdict is returned, though not recorded, unless then allowed by leave of the court, for good cause (Locke v. Wood, 16 Mass. 317; 6 Ham. [Ohio] 144; 1 Overt. 476; Veazie v. Wadleigh, 11 Pet. [36 U. S.] 61). In some states it is granted before the verdict is recorded. Hunt v. Morris, 6 Mart. [La.] 677.

I think, however. the readiness for the trial, the call of the case, the expiration of the notice, and the introduction of any pertinent evidence, is, as before intimated, the true punctum temporis, when the right of the plaintiff to become nonsuit ceases, and that of the defendant begins for a final judgment; because, then, the parties have agreed in court, that final proceedings shall be had, then there is a presumed readiness for them, then they have begun, and means are before the court to settle the merits. Both parties then stand on an equality; neither is taken at disadvantage then, by requiring judgment on the merits, unless special and good cause be assigned to the court for leave to become nonsuit; and then, so far as regards the defendant, a nonsuit by the plaintiff, at pleasure, as a right, is more vexatious; as then the mere costs are usually an inadequate remuneration for the expense of another preparation, and then a decision on the merits, if desired by the defendant, is practicable in most cases, without being subjected to another action and preparation. It will be seen, that this test requires the case to have been opened to the jury. and some pertinent evidence submitted, if it be a trial on the general issue; or that the pleadings be closed if ending in a demurrer, so that the merits can be judged of understandingly upon them. 2 Madd. 389; 13 Ves. 168, note; 1 Story, Eq. Jur. § 456. So in chancery, the

evidence must be to some extent filed or published; and by like analogy, in admiralty, in the court where the original proceedings are instituted, the evidence must be put in, so far as to enable a decision on the merits to be made. See cases, supra. Applying this principle to the present case, this motion could be easily disposed of, if no appeal had taken place. and the cause was still pending in that court. It probably would not be contended, that after a hearing and judgment in the district court a nonsuit was permissible as a matter of right in that court. All the analogies heretofore referred to, as well as principle and precedents, forbid it. [Veazie v. Wadleigh] 11 Pet. [36 U. S.] 61.

The next and last inquiry is, whether this case being now in an appellate court, this principle does or does not apply to it? and how far, and under what circumstances or stages of the appeal, this principle applies? As a matter of fact, the present motion is made after pertinent evidence has been put in concerning the merits, and a decision had on it. But it was not put in before us, the appellate court, and of that evidence itself, as put in below, we have had no hearing so as to decide the merits on it. But though not hearing the evidence below, we have, as some guide to the merits, the judgment there rendered on it. This seems quite sufficient proof, at least prima facie, as to the merits after a full hearing, and after the appeal from it here is proposed to be abandoned. In reply to this it is said, that, in a technical appeal like this, where both the facts and law are open to re examination, the former judgment is vacated or annulled by the appeal itself. Penhallow v. Doane, 3 Dall. [3 U. S.] 54; Conk. Pr. 157; [Yeaton v. U. S.] 5 Cranch [9 U. S.] 281; Bank of U. S. v. Swan, 3 Pet. [28 U. S.] 68. Appeals in admiralty do suspend the sentence below. Hall, Adm. 101; Dunl. Adm. Pr. 317. And it is lawful to make new allegations and proofs on leave, in the appellate court. The San Pedro, 2 Wheat. [15 U. S.] 132, 141; The Venus, 1 Wheat. [14 U. S.] 113; The Edward, Id. 261; Yeaton v. U. S., 5 Cranch [9 U. S.] 281; The James Wells v. U. S., 7 Cranch [11 U. S.] 22; La Conception, 6 Wheat. [19 U. S.] 235. No matter what is the form of the appeal, whether as in England by claiming what are called "apostles or brief letters" of dismission of the case, and declaring that the record will be transmitted (2 Browne, Civ. & Adm. Law, 438); or as here, usually viva voce, though at times, in writing, the result must be the same. See, further, as to the mode of appeal in admiralty cases, The San Pedro, 2 Wheat. [15 U. S.] 132. Even the property follows the case to the circuit court, but not to the supreme court. The Collector, 6 Wheat. [19 U. S.] 194; The Grotius [Case No. 5,844]. After an appeal to the circuit court, no order about it can be made by the district court. The Collector, 6 Wheat. [19 U. S.] 194. But the original proceedings are all before the appellate court. The Santa Maria, 10 Wheat. [23 U. S.] 431. Generally the evidence below is reduced to writing, and forms a part of them, and is before us with them. But the decree below is not dead to all purposes, but rather suspended while the appeal is pending; and if the claim is founded on a statute, which is repealed before the decree below is affirmed, the claim must fail. U. S. v. Preston, 3 Pet. [28 U. S.] 57. And in cases which go to the supreme court on a division of opinion below, the court below retains the cause; and before a decision of the questions carried up. may allow a discontinuance of the cause, and the questions fall with the discontinuance. [Veazie v. Wadleigh] 11 Pet. [36 U. S.] 62. There had been no verdict or judgment either in the court below or above in this case, or the discontinuance would have been too late as a matter of right. Id. 61, semble. Where an appeal is by writ of error, and in cases at common law, whether in the United States courts or state courts, or in England, the proceedings are usually regulated specially by statutes, and rest on them and other principles peculiar to such cases, and not like appeals in admiralty, as the present case is. See, on them, Act Cong. Sept. 24. 1789 [1 Stat. 84], §§ 22, 24; The Antelope, 2 Wheat. [15 U. S.] 132. But those cases not being like this, need not be examined in detail. Supposing the appeal to operate here, as is contended, so as to supersede the judgment below, the case begins again in the appellate court on the old pleadings, evidence and preparation, unless leave is granted for new ones. La Conception, 6 Wheat. [19 U. S.] 235. And the decision is all which remains to be considered and announced in the appellate court, when no motion is made for new pleadings or new proof.

Now it does not seem to me to be consistent with principle, that a case, standing here with pleadings completed, evidence taken, and all things ready for argument and final decision, should, undecided on the merits, be abandoned by the payment of costs, without the consent of the defendant, when, after so much expense and delay, he asks a final judgment upon the merits. In such case, the merits are likewise susceptible of being ascertained and settled, which is not the situation of things before pleadings are finished and evidence put in. In my view, then, a defendant, under such facts and in such a stage of the cause, has a right to object to a dismissal of the cause, or a discontinuance, unless by the judgment of the court on the merits, or perhaps a leave granted by it for a discontinuance for strong reasons. Nor can the plaintiff complain justly of this, when he has, without asking a discontinuance, advanced so far as to spread the merits of his claim before the appellate as well as the inferior court. It follows, therefore, that if an ap-

peal like this be entered, and then refused to be proceeded in, the pleadings and evidence being all completed below and brought up here, or if not so, being all completed here, the judgment must generally be in chief, when the respondent insists on one upon the merits.

There are ample means for deciding on the merits then, and by analogy to the practice at common law, judgment cannot, in that advanced stage of the proceedings, be allowed as a nonsuit, dismissal, or any mere discontinuance, so as to enable the plaintiff again, as a matter of right, to harass or vex the respondent with new pleadings, new evidence, and new preparations throughout, with a prospect of such imperfect remuneration as exists in an ordinary bill of costs. I speak now of the right on general principles. But for strong reasons shown, this can be departed from, of course, by leave of the court. If the court see that they have no jurisdiction over the appeal, or the original cause, then they would not, in fact, promote mere litigation, by allowing the plaintiff to dismiss the cause, so that a new action can be brought where the proceedings would be valid. 1 Lil. Abr. 473. They would of course allow it in such a case in any stage. But there is no such reason assigned here for asking leave to have this cause dismissed without prejudice. It is important to discriminate what may be done as a discontinuance for special reasons and by leave of the court, from what can be so done as a matter of right. The former will be allowed, when the latter does not exist; and in very advanced stages of the case, if the reasons be strong. Cro. Jac. 35. Thus in such cases it was once customary to grant it after demurrer joined, or a verdict on a writ of inquiry. Sid. 84; 1 Salk. 178; Carth. 81; Boucher v. Lawson, Cas. t. Hardw. 200; 3 Lev. 440; Henderson v. Williamson, 1 Strange, 116. If granted after a special verdict, it is "a great favor," unless the defendant consents. Price v. Parker, 1 Salk. 178. What will constitute good reasons in chancery for leave to dismiss a bill without prejudice, may be seen in Mayor, etc., of Gloucester v. Wood, 3 Hare, 148. They may be surprise, absence of witnesses, or accidental absence of counsel. Haskell v. Whitney, 12 Mass. 49.

Supposing, then, that the evidence had come up in this case, as is usual in courts of appeal, in questions in admiralty as well as in chancery (and perhaps in appeals by writ of error also, when operating as a supersedeas, and the necessary matter appears on the record to enable the appellate court to decide on the merits), I entertain no doubt, that a nonsuit should not be permitted without judgment on those merits in bar to another suit, unless the defendant consent, or the court for some good reason, not yet assigned in this case, grant leave to do it. There may be something in the organization of some appellate courts, which may vary the mode of carrying such judgment into effect, but still it ought to be rendered, and the nonsuit not be otherwise allowed at so late a period unless on the merits. The general current of the precedents in such courts accords with this view. Thus in appeals by way of writ of error, but when not operating as a supersedeas, and not prosecuted in the court above to a decision, they are treated as new proceedings, and a party may be nonsuit, before the assignment of error, and costs are all that the respondent can ask or expect, as the former judgment stands in full force, unimpaired and unsuspended. 1 Sid. 255; 2 Rolle, Abr. 130; Dunl. Adm. Pr. 324; The Neptune, 3 Wheat. [16 U. S.] 609; 5 Bac. Abr. "Nonsuit," C. So, if after an appeal is entered in the house of lords, neither party appears, all which the court can do, generally, is to dismiss the case for want of prosecution, and here it was without costs. The defendant claimed nothing else. Sherburne v. Middletown, 9 Clark & F. 72. So, if the respondent appear and not the appellant, and ask a dismissal of the appeal and costs for want of prosecution, it will be granted. In such case he asks nothing else, and virtually waives all beside that. Sherburne v. Middletown, 9 Clark & F. 72: Scanlan v. Usher, 8 Clark & F. 561. This practice arises probably from the fact, that the house of lords does not issue executions, and the judgment below is not superseded. But in some cases, where the affirmance did not appear to require an execution, the affirmance took place on motion, in the manner asked by the defendant here. Fraser v. Gordon, 3 Clark & F. 720. In like manner in this court, on an appeal in admiralty, though suspending the judgment below, if after duly entered, it is not prosecuted, and the defendant only asks costs, it might be proper only to give costs, and to enter no judgment on the merits when none is asked. 1 Hagg. Adm. 267. But if the defendant objects and asks judgment on the merits, after the case has gone so far as to be ready for a decision on them, it is very questionable whether the court will not give such a judgment. We can issue execution if necessary; and there are some proofs, grounds and data, on which to render judgment on the merits. The proceedings, which suspended or vacated the judgment below being abandoned, there ought to be judgment in chief renewed there or here. Certainly the court will not then allow leave to withdraw the case by dismission without prejudice; and lose all which has been done, except upon the strongest reasons assigned, showing the justice or necessity of it to effect what is right and legal. I regret that more cases in point, or strongly analogous, have not been presented nor found in the short time this cause has been under examination. But as I understand, that much property and the adjustment of accounts with several parties and insurance offices are tied up until this question is dis-

posed of, I have given to it the best consideration in my power consistent with the emergency. My conclusion on the whole is, that the appeal here having been entered by the plaintiff, it could not be dismissed as if the original libel was nonsuited on payment of costs merely, provided the evidence in the court below had come up, as is usual, or been taken down in writing there, and presented here, so that the merits of the case could be decided in this stage of the proceedings in this particular cause. For then we should have full means of settling the merits before us, at the time of the proposed nonsuit. The defendant also asks it, and no good cause has been assigned for granting special leave to discontinue the original bill in this late stage of the cause. But it is now said, that none of the evidence in the court below was in writing, or filed either there or here before this motion, though it has been done since. Conceding this to be the true state of the case, we had no means, when this motion was made, to decide understandingly on the merits, looking only to the evidence; none had yet been placed before the appellate court. 2 Tidd, Pr. 996.

But there is another aspect of the case, standing thus, which may enable the appellate court to enforce the merits, and which has been merely glanced at before. It is, that the merits have been fully examined in the court below on the evidence and law; and though the judgment there rendered is appealed from, yet it is prima facie right until shown to be wrong. See Fuller v. Colby—Mass. Dist.; to be printed in next volume—[Case No. 5,149]. Hence by abandoning the attempt to have that judgment altered in this court, the presumption is, without other cause shown, that the judgment below is correct. The cause being in an appellate court by regular entry, we may be bound in such case to take the judgment below as our guide for the merits, when nothing else is shown as to them, and render one for the same party and sum as there, if the case be not prosecuted here by the appellant. I see no objection to this on principle, if the defendant does not object, it being as to the plaintiff all which he has recovered after one full hearing and trial, and more than he now chooses to attempt further to recover in this appellate tribunal, after putting the respondents to greater delay and costs. In the supreme court of the United States, if one party does not appear to argue a cause, the other has a right to proceed and ask for judgment on the record, and the court will hear him and give it. Siglar v. Haywood, 8 Wheat. [21 U. S.] 677. And by several rules of that court when one party, after an entry of an appeal or writ of error, does not pursue it, the other side is entitled either to have the case dismissed, or to ask an affirmance of the judgment below. Rules 19, 30, 43; 1 How. pref. There is no difficulty as to forms any more than principle, in this appellate court pursuing such a course. Thus, where a cause is carried to the higher court by a writ of error, and where the latter has operated as a supersedeas, the judgment is sometimes rendered in a like way in the appellate court, as a judgment in chief, to carry into effect the decision before made in the court below. At other times the judgment is to reverse and amend or reform that given below. The Amiable Nancy, 3 Wheat. [16 U. S.] 562; Craig v. Radford, Id. 600. Again, frequently the case has to be remanded to be further tried below, according to the principles laid down in the appellate tribunal. [U. S. v. Robeson] 9 Pet. [34 U. S.] 328; [Harrison v. Nixon] Id. 539. This last is where a jury is used below, and not in the court above. But that causes no embarrassment in this case here, this being an admiralty case, and of course triable in neither by a jury. If the judgments in such cases are reversed, the higher court, as before shown, can often render the judgment, which ought to have been rendered by the inferior tribunal; and in such case it does. See Choteau's Heirs v. U. S., 9 Pet. [34 U. S.] 146; Yel. 117, 118; 2 Durn. & E. [2 Term R.] 657; 1 Bos. & P. 30; Carth. 181. And if it reverses the decision below, it will give to the successful party the costs he was entitled to there. 9 Clark & F. 818. If it affirm that decision, it will render judgment in chief to that effect, and enforce it with additional costs and interest.

Here the judgment can, therefore, be one affirming the decree below, because the appeal from it, though entered here, is not prosecuted. This principle was laid down in The San Juan Nepomuceno, 1 Hagg. Adm. 267; The Elizabeth, Id. 226. To be sure, there, no affirmance of the decree below was asked; but judgment was given that the appeal was deserted and for costs; and the operation of such a judgment, whether a bar of another action or not, does not seem to have been agitated. So in all the cases of appeals from the judgments of justices of the peace, and formerly from county courts to the supreme courts in New England, where, as in admiralty cases here, both the law and fact were tried over again, if the parties pleased and a discontinuance of the appeal, or failure to enter it, as well as a neglect to prosecute it after entered, were followed by a judgment in chief, if the opposite side desired it, taking the judgment below as the guide. The case was very common, when the appeal was not entered to file a complaint and a copy of the judgment below, and have that affirmed, with costs.

In cases in admiralty, where such an appeal is made and not entered, the judgment or decree in the appellate court is, as just shown in other appeals, against the libellant in chief for having deserted his appeal. Dunl. Pr. 323; The Montgomery v. The Betsey [Case No. 9,734]; 1 Hagg. Adm. 226. Or the case

may be remitted to the court below for further proceedings there. And it surely can be and should be in chief, if desired by the respondent, and if rendered in chief, the judgment below is the only and the true guide. It would be very extraordinary that such a judgment in chief can be rendered here, when the appeal is not entered, which seems to be well settled, and cannot be, after it is entered and not prosecuted.

If the original libellant then declines to prosecute his appeal further in this court, the judgment below will be affirmed; as no reason appears why the libel should be allowed to be discontinued without a decision on the merits, merely on the payment of costs, in this advanced stage of the proceedings.

FOLLEN (DAWSON v.). See Case No. 3,670.

Case No. 4,900.

FOLLETT v. ROSE.

[3 McLean, 332.] [1]

Circuit Court, D. Indiana. May Term, 1844.

DEED—PROOF OF SEAL—ACKNOWLEDGMENT—ACTION OF DISSEISIN—INADEQUACY OF CONSIDERATION.

1. An action of disseisin is authorized and regulated by the statute of Indiana.

2. Where there is doubt whether an instrument has been sealed, the fact is properly referable to the jury.

[Cited in Re Phillips, Case No. 11,098.]

3. Persons acquainted with parchment patents may be examined as to the traces of a seal. If it was the intention of the grantor to seal the instrument, any forcible indentation on the parchment, though it be not wax, wafer or a scrawl, may be a seal.

4. The person who took the acknowledgment was permitted to state, from his uniform practice in taking acknowledgments, he could not have taken it, in the case under consideration, had no seal been attached to the instrument.

5. Unless the inadequacy of consideration be so gross as to strike every person with a presumption of fraud, it is not evidence of unfairness.

[At law. Action by Follett's heirs against C. Rose.]

OPINION OF THE COURT. This is an action of disseisin, given and regulated by the statute of Indiana, and is brought to recover a tract of land adjoining to the town of Terrehaute. The claim originated under the act of congress of the 5th of March, 1816, which granted bounties in land to certain Canadian volunteers. A military warrant which was issued to Follett, the ancestor of the plaintiffs, was laid upon the land in controversy, on which a patent was issued to him the 26th of October, 1816. Proof was made that the plaintiffs were the heirs at law of the patentee. The possession of the defendant was admitted. The defendant offered an instrument written on the back of the patent, which purports to be a confirmation of a previous deed, as well as a conveyance of the land patented, to ——, under whom the defendant claims. To this paper the plaintiffs object, because it has no seal, which is essential to the validity of a conveyance. On the part of the defendant it is insisted, that a seal was attached to the instrument when it was executed, and that by some accident it has been removed. Several witnesses were examined on this point, after inspecting the parchment, in the presence of the jury. One of the witnesses states, that, on a close examination, he finds some trace of a wafer seal on the parchment. That the place where he thinks this seal was attached, opposite the signature of the grantor, is different from any other place on the back of the patent, as it has the appearance of having had attached to it a wafer. Other witnesses, on examination, cannot see any evidence of a seal ever having been attached.

Ebenezer Hoskiss, before whom Follett and wife made the acknowledgment of the deed, among other things in his deposition says, "that he has not the least possible doubt, from his manner of doing business, and from his actual knowledge of what was necessary to constitute a deed, he being an attorney of the supreme court of the state of New York at the time, and for three years previously, that at the time of acknowledging and proving said deed by Follett and wife, the seals were duly attached to their names on said deed, and that since that time they have been lost off by time and accident; and further, this deponent is confident and thinks it morally impossible that said deed should have been thus acknowledged and sworn to by said Follett and wife without the seals being duly attached to the same. That had the seals not been on when said deed was presented he would, beyond doubt, have affixed them to it." A motion was made to overrule the above statement in the deposition as incompetent. But the court refused the motion, on the ground that the fact whether the instrument was sealed or not, was a matter for the jury. That the statements of the witness in regard to the seals were founded on his official action, from which his inferences were drawn, and that the jury must judge from the whole relation. The witness gives his reason for saying, with great confidence, why the instrument was sealed. A witness to the execution of an instrument may not be able to recollect the signing and delivery of the deed, but from his uniform practice in such cases he is enabled to say, that he could not have signed the instrument as a witness until it was executed by the obligor. Hoskiss was not a subscribing witness, but in regard to the sealing of the instrument he is within the rule. From his uniform practice in such

[1] [Reported by Hon. John McLean, Circuit Justice.]

cases, he is confident the seals were on the parchment when he took the acknowledgment. This evidence is fit to go to the jury, that they may give it, and the circumstances with which it stands connected, that weight which it should have.

To rebut this evidence, the plaintiffs introduced a certified copy of said instrument from the record of deeds of the proper county, from which it does not appear, that when recorded, which was the same year of its date, there were seals attached to it. There seems to be no controversy as to the execution of the other instruments under which the defendant claims; nor that the defendant is invested with the fee, if the above deed be valid. The principal point, as you will observe, gentlemen of the jury, turns on the fact, whether the instrument which purports upon its face to be a deed of conveyance, was a sealed instrument at the time it was executed. If it was not, the fee remains in the plaintiffs as the heirs of the patentee. You will examine the parchment to see if you can perceive any traces of a seal. The patent, as you perceive, is of an oily substance, to which a wafer, though made wet and pressed, would not strongly adhere. And this would especially be the case, where the pressure was made only by the hand.

From the words used on the face of this instrument, it purports to be a deed; and where this is the case, the solemnities required by law, such as signing, sealing, delivery, &c., in the absence of proof of the omission, is presumed. 17 Mass. 488; 3 Mass. 399; 10 Mass. 105; 11 Mass. 227. To suppose that the party, in such instances, complies with the rules of law, is merely to suppose he acts reasonably. The fact of sealing will be presumed, where no mark or impression on the parchment or paper appears, if the attestation notice the solemnity to have been complied with. But, there is no such fact stated in the attestation of this instrument. Wax or wafer is not essential, or a scrawl, to make a seal. An impression on the parchment or paper, with an intent to make a seal, is sufficient. If the witness saw the obligor sign, coupled with the circumstance of a declaration incorporated in the instrument, stating it to be sealed by him, it was held sufficient to warrant the jury in presuming that the deed had been regularly sealed and delivered. 7 Taunt. 521; Matth. Pres. Ev. 39.

The deed, it seems, was recorded the same year it bears date, and no seal appears upon the record. This is relied on by the plaintiffs as rebutting evidence. The jury will consider it as such, and give to it the weight that shall be proper. If, upon the whole, you shall come to the conclusion that the instrument was not sealed, you will find for the plaintiffs. Such an instrument is essential to pass the legal title out of the ancestor of the plaintiffs. The consideration paid was one hundred and forty dollars. This, it is insisted, is inadequate. But inadequacy of consideration does not invalidate a contract, unless it be so gross as to strike every one with a presumption of fraud. In this case there are no circumstances which authorise the inference of fraud. Under the occupying claimant law of Indiana, the occupant, should your decision be against him, will be entitled to compensation for his improvements, and must account for the rents.

The jury found the defendant not guilty.

FOLLETT (WILCOX & GIBBS SEWING MACH. Co. v.). See Cases Nos. 17,642 and 17,643.

Case No. 4,901.

FOLSOM et al. v. MARSH et al.

[2 Story, 100;[1] 6 Hunt, Mer. Mag. 175.]

Circuit Court, D. Massachusetts. Oct. Term, 1841.

COPYRIGHT—ABRIDGMENT—LITERARY PROPERTY—OFFICIAL LETTERS—PIRACY—DEFINITION OF "BOOK."

1. An abridgment, in which there is a substantial condensation of the materials of the original work, and which requires intellectual labor and judgment, does not constitute a piracy of copyright; but an abridgment consisting of extracts of the essential or most valuable portions of the original work is a piracy.

[Applied in Lawrence v. Dana, Case No. 8,136. Quoted in Story v. Holcombe, Id. 13,497.]

2. An author of letters or papers of whatever kind, whether they be letters of business, or private letters, or literary compositions, has a property and an exclusive copyright therein, unless he unequivocally dedicate them to the public, or to some private person; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character.

[Cited in Bartlett v. Crittenden, Case No. 1,076; Stephens v. Cady, 14 How. (55 U. S.) 531; Richardson v. Miller, Case No. 11,791. Followed in Rice v. Williams, 32 Fed. 440.]

3. The government has, perhaps, a right to publish official letters addressed to it, or to any of its departments, by public officers; but no private person has such a right, without the sanction of the government.

4. To constitute a piracy of an original work, it is not necessary that the whole or the larger part of it should be taken; but it is only necessary that so much should be taken as sensibly to diminish the value of the original work, or substantially to appropriate the labors of the author.

[Cited in Story v. Holcombe, Case No. 13,497; Webb v. Powers, Id. 17,323; Greene v. Bishop, Id. 5,763; Drury v. Ewing, Id. 4,095; Banks v. McDivitt, Id. 961; Chapman v. Ferry, 18 Fed. 541; Reed v. Holliday, 19 Fed. 326; Falk v. Donaldson, 57 Fed. 35. Approved in Lawrence v. Dana, Case No. 8,136.]

5. Where A. published a "Life of Washington," containing 866 pages, of which 353 pages were copied from Sparks's "Life and Writings

[1] [Reported by William W. Story, Esq.]

of Washington," 64 pages being official letters and documents, and 255 pages being private letters of Washington, originally published by Mr. Sparks, under a contract with the owners of the original papers of Washington,—it was *held*, that the work by A. was an invasion of the copyright of Mr. Sparks.

[Cited in Little v. Gould, Case No. 8,394.]

[6. Cited in Harper v. Shoppell, 26 Fed. 519, to the point that a "book," within the meaning of the copyright statute, is not necessarily a book in the ordinary and common acceptation of the word, but may consist of a single sheet, as well as of a number of sheets bound together.]

Bill in equity for piracy of the copyright of the writings of Washington. The bill in substance stated, that Jared Sparks was the author of a work entitled, "The Writings of George Washington, being his correspondence, addresses, messages, and other papers, official and private, selected and published from the original manuscripts, with a life of the author, notes, and illustrations, by Jared Sparks," consisting of 12 volumes, of all of which the copyright was duly taken out, the term of which copyright has still more than eight years to run. That the plaintiffs, Charles Folsom, Thomas G. Wells and Lyman Thurston, printers and publishers, under the style of Folsom, Wells and Thurston, had assumed a part of the risk and responsibility of publishing the said work, and that being in the receipt of large sums, the proceeds of the sale of the said work, Bela Marsh, Nahum Capen, Thomas B. Webb, and Gardner P. Lyon, booksellers, under the firm of Marsh, Capen and Lyon, and Charles W. Upham, all well knowing that the said Sparks held such copyright, and that the said Fulsom, Wells and Thurston, were interested as aforesaid, and deliberately, after due notice, intending to infringe upon the said copyright, at Boston, on August 5th, 1840, and at divers times before and since, without the allowance or consent of the orators, or either of them, published, and exposed to sale, and sold, a book in two volumes, entitled "The Life of Washington in the Form of an Autobiography, the narrative being to a great extent conducted by himself, in extracts and selections from his own writings, with portraits and other engravings," consisting of 866 pages, which they still continue to expose to sale, having had due notice, and well knowing, that the same is a copy from, and an infringement and piracy of, the said Life and Writings of George Washington so published by the plaintiffs. That 388 pages of the said piratical book are copied verbatim et literatim from the said work compiled by the said Sparks, consisting of matter published originally by the said Sparks, under his copyright, and which had never before been published or printed, and which the said Sparks had the exclusive right and privilege to print, publish, and sell. And that many other parts of the piratical work are infringements of the said Sparks's said copyright, whereby the plaintiffs have sustained great damage, and that the said Marsh, Capen and Lyon still threaten to continue to print, publish and sell, copies of the said piratical work. In consideration whereof, the plaintiffs pray that the defendants be decreed to render an account of the copies of the said piratical work, which they have sold, and to pay over the profits thereof to the plaintiffs; to surrender and deliver up all the copies on hand, and the stereotype plates of the said work, to an officer of the court, to be cancelled and destroyed; to pay the plaintiffs their costs, and that they be restrained by injunction from selling or exposing to sale, or causing to be exposed to sale or sold, or otherwise of disposing of any copies of the said piratical work, and for such other relief as shall seem meet, or as equity shall require.

The answer stated as follows: That the defendants, not confessing or acknowledging any of the matters and things alleged in the bill, are informed and believe that the said complainants are the publishers of the said Life and Writings of Washington, as alleged by the complainants, and that the said Sparks is author thereof. But that they totally deny that the said Sparks has, or has heretofore had, any copyright, whereby he is entitled to any exclusive publication of the said writings, correspondence, addresses, messages, and other papers. That the defendants did, on August the 5th, 1840, publish and sell, and before and since have, without the allowance and consent of the plaintiffs, published and sold copies of the said work, in two volumes, entitled a "Life of Washington, in the Form of an Autobiography," but that the said work is not a copy from, nor a piracy of the said work, by the said Sparks. The defendants deny that any part of the said work, published by the defendants, is copied verbatim et literatim from any portion of the said work by the said Sparks, to which he has any exclusive right and privilege to print, or publish, or sell. But they aver, that they have, in the work published by them, made such use as they might lawfully do, of the writings, correspondence, messages, addresses, and other papers, by George Washington, printed in the work compiled by the said Sparks, and that they have copied many pages of the said writings, from the original manuscript thereof, and from printed works, printed and published before the publication of the said work by the said Sparks, and that they have made such use thereof, as they might do in a work entirely distinct from and independent of the said work by the said Sparks, and they allege, that the said work published by them, is entirely a distinct and independent work from the work by the said Sparks.

The general replication being filed, the cause was referred to George Hillard, Esq., master in chancery, to ascertain and report the facts to the court. His report in sub-

stance stated as follows: The work, of which the plaintiffs are the proprietors, is comprised in twelve octavo volumes, varying in length from five hundred and forty to five hundred and ninety-two pages, and containing in the whole six thousand seven hundred and sixty-three pages, including one hundred and fifty-eight pages of index in the twelfth volume. The first volume consists of an original life of Washington by Mr. Sparks, one of the plaintiffs, and the remaining eleven, of the writings and correspondence of Washington, with editorial notes and illustrations by Mr. Sparks. The work, of which the defendants are the proprietors, is in two volumes, duodecimo. The first volume consists of four hundred and forty-three pages, including forty-one pages of glossary and index. The second volume consists of four hundred and twenty-three pages, including thirty-five pages of glossary and index. The whole amount of pages of the two volumes, is, therefore, eight hundred and sixty-six, including seventy-six pages of glossary and index. I find the whole number of pages in the two volumes of the defendants' work, which correspond with the passages in the plaintiffs' work, and are identical with them, to be (discarding fractions) three hundred and fifty-three. Of these pages, three hundred and nineteen have never appeared in print before the publication of the plaintiffs' work, and I accordingly report them to have been copied by the defendants from the work of the plaintiffs. The remaining thirty-four pages have appeared before, in various other publications, with the variations hereinbefore stated. In view of these variations, and also in consideration of the fact, that these passages in the defendants' work, generally speaking, differ in punctuation and other typographical peculiarities from the same passages as contained in works, other than that of the plaintiffs, I find that these thirty-nine pages were taken by the defendants from the plaintiffs' work, and none other. The whole of these three hundred and fifty-three pages, in the two volumes of the defendants' work, are taken from the last eleven volumes of the work of the plaintiffs. Of the three hundred and nineteen pages, above mentioned, which are in the work of the defendants, and which have not been published in any other work than that of the plaintiffs, I report sixty-four pages to be official letters and documents, and two hundred and fifty-five pages to be private. Of the remaining thirty-four pages, I report fifteen pages to be private, and nineteen pages to be official. Under the head of "official" letters and papers, I class the following: Letters addressed by Washington, as commander-in-chief, to the president of congress. Official letters to governors of states and speakers of legislative bodies. Circular letters. General orders. Communications (official) addressed as president to his cabinet. Letter accepting the command of the army, on our expected war with France. All others I class as "private."

The cause was argued upon the master's report, (no exception having been filed thereto,) by Mr. Robbins and Willard Phillips for the plaintiffs, and by R. Rantoul for the defendants.

The points made by the defendants were as follows:

I. The papers of George Washington are not subjects of copyright. 1. They are manuscripts of a deceased person, not injured by publication of them. 2. They are not literary, and, therefore, are not literary property. 3. They are public in their nature, and, therefore, are not private property. 4. They were meant by the author for public use.

II. Mr. Sparks is not the owner of these papers, but they belong to the United States, and may be published by any one.

III. An author has a right to quote, select, extract or abridge from another, in the composition of a work essentially new.

STORY, Circuit Justice. This is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases. Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtile and refined, and, sometimes, almost evanescent. In many cases, indeed, what constitutes an infringement of a patented invention, is sufficiently clear and obvious, and stands upon broad and general agreements and differences; but, in other cases, the lines approach very near to each other, and, sometimes, become almost evanescent, or melt into each other. So, in cases of copyright, it is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions; whereas, in other cases, the identity of the two works in substance, and the question of piracy, often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials. Thus, for example, no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the

most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy. A wide interval might, of course, exist between these two extremes, calling for great caution and involving great difficulty, where the court is approaching the dividing middle line which separates the one from the other. So, it has been decided that a fair and bonâ fide abridgment of an original work, is not a piracy of the copyright of the author. See Dodsley v. Kinnersley, 1 Amb. 403; Whittingham v. Wooler, 2 Swanst. 428, 430, 431, note; Tonson v. Walker, 3 Swanst. 672–679, 681. But, then, what constitutes a fair and bonâ fide abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work. See Gyles v. Wilcox, 2 Atk. 141.

In the present case, the work alleged to be pirated, is the Writings of President Washington, in twelve volumes, royal octavo, containing nearly seven thousand pages, of which the first volume contains a life of Washington, by the learned editor, Mr. Sparks, in respect to which no piracy is asserted or proved. The other eleven volumes consist of the letters of Washington, private and official, and his messages and other public acts, with explanatory notes and occasional illustrations by the editor. That the original work is of very great, and, I may almost say, of inestimable value, as the repository of the thoughts and opinions of that great man, no one pretends to doubt. The work of the defendants is in two volumes, duodecimo, containing eight hundred and sixty-six pages. It consists of a Life of Washington, written by the learned defendant, (the Rev. Charles W. Upham), which is formed upon a plan different from that of Mr. Sparks, and in which Washington is made mainly to tell the story of his own life, by inserting therein his letters and his messages, and other written documents, with such connecting lines in the narrative, as may illustrate and explain the times and circumstances, and occasions of writing them. Now, as I have already said, there is no complaint, that Mr. Upham has taken his narrative part, substantially, from the Life by Mr. Sparks. The gravamen is, that he has used the letters of Washington, and inserted, verbatim, copies thereof from the collection of Mr. Sparks. The master finds, by his report, that the whole number of pages in Mr. Upham's work, corresponding and identical with the passages in Mr. Sparks's work, are three hundred and fifty-three pages out of eight hundred and sixty-six, a fraction more than one third of the two volumes of the defendants. Of these three hundred and fifty-three pages, the report finds that three hundred and nineteen pages consist of letters of Washington, which have been taken from Mr. Sparks's work, and have never been published before; namely, sixty-four pages are official letters and documents, and two hundred and fifty-five pages are private letters of Washington. The question, therefore, upon this admitted state of the facts, resolves itself into the point, whether such a use, in the defendants' work, of the letters of Washington, constitutes a piracy of the work of Mr. Sparks.

It is objected, in the first place, on behalf of the defendants, that the letters of Washington are not, in the sense of the law, proper subjects of copyright, for several reasons: (1) Because they are the manuscripts of a deceased person, not injured by the publication thereof; (2) because they are not literary compositions, and, therefore, not susceptible of being literary property, nor esteemed of value by the author; (3) because they are, in their nature and character, either public or official letters, or private letters of business; and (4) because they were designed by the author for public use, and not for copyright, or private property. Now, in relation to the last objection, it is most manifest, that President Washington deemed them his own private property, and bequeathed them to his nephew, the late Mr. Justice Washington, through whom the late Mr. Chief Justice Marshall and Mr. Sparks acquired an interest therein; and, as appears from the contract between these gentlemen, annexed to the report, the publication of these writings was undertaken by Mr. Sparks, as editor, for their joint benefit; and the work itself has been accomplished at great expense and labor, and after great intellectual efforts, and very patient and comprehensive researches, both at home and abroad. The publication of the defendants, therefore, to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington. Indeed, as we shall presently see, congress have actually purchased these very letters and manuscripts, at a great price, for the benefit of the nation, from their owner and possessor under the will of Mr. Justice Washington, as private and most valuable property. That President Washington, therefore, intended them exclusively for public use, as a donation to the public, or did not esteem them of value as his own private property, appears to me to be a proposition, completely disproved by the evidence. Unless, indeed, there be a most unequivocal dedication of private letters and papers by the

author, either to the public, or to some private person, I hold, that the author has a property therein, and that the copyright thereof exclusively belongs to him. Then as to the supposed distinction between letters of business, or of a mere private or domestic character, and letters, which, from their character and contents, are to be treated as literary compositions, I am not prepared to admit its soundness or propriety. It is extremely difficult to say, what letters are or are not literary compositions. In one sense, all letters are literary, for they consist of the thoughts and language of the writer reduced to written characters, and show his style and his mode of constructing sentences, and his habits of composition. Many letters of business also embrace critical remarks and expressions of opinion on various subjects, moral, religious, political and literary. What is to be done in such cases? Even in compositions confessedly literary, the author may not intend, nay, often does not intend them for publication; and yet, no one on that account doubts his right of property therein, as a subject of value to himself and to his posterity. If subsequently published by his representatives, would they not have a copyright therein? It is highly probable, that neither Lord Chesterfield, nor Lord Orford, nor the poet Gray, nor Cowper, nor Lady Russell, nor Lady Montague, ever intended their letters for publication as literary compositions, although they abound with striking remarks, and elegant sketches, and sometimes with the most profound, as well as affecting, exhibitions of close reflection, and various knowledge and experience, mixed up with matters of business, personal anecdote, and family gossip.

There is no small confusion in the books, in reference to the question of copyright in letters. Some of the dicta seem to suppose that no copyright can exist, except in letters which are professedly literary; while others again recognize a much more enlarged and liberal doctrine. See Gods. Pat. (Ed. 1840, London) pp. 327–332; Gee v. Pritchard, 2 Swanst. 403, 405, 426, 427; Perceval v. Phipps, 2 Ves. & B. 19, 24, 25, 28. Without attempting to reconcile, or even to comment upon the language of the authorities on this head, I wish to state what I conceive to be the true doctrine upon the whole subject. In the first place, I hold, that the author of any letter or letters, (and his representatives,) whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and that no persons, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account, or for their own benefit. But, consistently with this right, the persons to whom they are addressed, may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them; but this right is strictly limited to such occasions. Gee v. Pritchard, 2 Swanst. 415, 419. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach. If he attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and a fortiori, if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. In short, the person, to whom letters are addressed, has but a limited right, or special property, (if I may so call it), in such letters, as a trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character. The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. A fortiori, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion. If the case of Perceval v. Phipps, 2 Ves. & B. 21, 28, before the then vice chancellor (Sir Thomas Plumer), contains a different doctrine, all I can say is, that I do not accede to its authority; and I fall back upon the more intelligible and reasonable doctrine of Lord Hardwicke, in Pope v. Curl, 2 Atk. 342, and Lord Apsley, in the case of Thompson v. Stanhope, Amb. 737, and of Lord Keeper Henley, in the case of Duke of Queensberry v. Sheffeare, 2 Eden, 329 (cited 4 Burrows, 2329), which Lord Eldon has not scrupled to hold to be binding authorities upon the point in Gee v. Pritchard, 2 Swanst. 403, 414, 415, 419, 426, 427. But I do not understand that Sir Thomas Plumer did, in Perceval v. Phipps, deny the right of property of the writer in his own letters; and so he was understood by Lord Eldon in Gee v. Pritchard; who, however, said, that that case admitted of much remark. Indeed, if the doctrine were otherwise, that no person, or his representatives, could have a copyright in his own private or familiar letters, written to friends, upon interesting political and other occasions.

or containing details of facts and occurrences, passing before the writer, it would operate as a great discouragement upon the collection and preservation thereof; and the materials of history would become far more scanty, than they otherwise would be. What descendant, or representative of the deceased author, would undertake to publish, at his own risk and expense, any such papers; and what editor would be willing to employ his own learning, and judgment, and researches, in illustrating such works, if, the moment they were successful, and possessed the substantial patronage of the public, a rival bookseller might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits? It is the supposed exclusive copyright in such writings, which now encourages their publication thereof, from time to time, after the author has passed to the grave. To this we owe, not merely, the publication of the writings of Washington, but of Franklin, and Jay, and Jefferson and Madison, and other distinguished statesmen of our own country. It appears to me, that the copyright act of 1831, c. 16, § 9, [4 Stat. 436], fully recognizes the doctrine for which I contend. It gives by implication to the author, or legal proprietor of any manuscript whatever, the sole right to print and publish the same, and expressly authorizes the courts of equity of the United States to grant injunctions to restrain the publication thereof, by any person or persons, without his consent.

In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. But this is an exception in favor of the government, and stands upon principles allied to, or nearly similar to, the rights of private individuals, to whom letters are addressed by their agents, to use them, and publish them, upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers, under its own sanction, and for public purposes, I am not prepared to admit, that any private persons have a right to publish the same letters and papers, without the sanction of the government, for their own private profit and advantage. Recently the Duke of Wellington's despatches have (I believe) been published, by an able editor, with the consent of the noble duke, and under the sanction of the government. It would be a strange thing to say, that a compilation involving so much expense, and so much labor to the editor, in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher and editor. Before my mind arrives at such a conclusion, I must have clear and positive lights to guide my judgment, or to bind me in point of authority. However, it is not necessary, in this case, to dispose of this point, because, of the letters and documents published by the defendants, not more than one fifth part are of an official character.

Another and distinct objection urged on behalf of the defendants, is, that congress have purchased the manuscripts of these letters and documents, and they have become public property, and may be published by any one. An answer, in part, has been already given to this objection. Congress have, indeed, authorized the purchase of these manuscripts from the owner and possessor thereof, and paid the liberal price of 25,000 dollars therefor; and they have thus become national property. But it is an entirely inadmissible conclusion that, therefore, every private person has a right to use them, and publish them. It might be contended, with as much force and correctness, that every private person had an equal right to use any other national property at his pleasure, such as the arms, the ammunition, the ships, or the custom houses, belonging to the government. But a reason, which is entirely conclusive upon this point, is, that the government purchased the manuscripts, subject to the copyright already acquired by the plaintiffs in the publication thereof. The vendor took them subject to that copyright, and could convey no title which he did not himself possess, or beyond what he possessed. Nor is there any pretence to say that he either did convey, or intended to convey, to the government, the property in these manuscripts, except subject to the copyright already acquired.

The next and leading objection is, that the defendants had a right to abridge and select, and use the materials which they have taken for their work, which, though it embraces the number of letters above stated, is an original and new work, and that it constitutes, in no just sense, a piracy of the work of the plaintiffs. This, in truth, is the real hinge of the whole controversy, and involves the entire merits of the suit. It is certainly true, that the defendants' work cannot properly be treated as an abridgment of that of the plaintiffs; neither is it strictly and wholly a mere compilation from the latter. So far as the narrative goes, it is either original, or derived (at least as far as the matter has been brought before the court) from common sources of information, open to all au-

thors. It is not even of the nature of a collection of beauties of an author; for it does not profess to give fugitive extracts, or brilliant passages from particular letters. It is a selection of the entire contents of particular letters, from the whole collection or mass of letters of the work of the plaintiffs. From the known taste and ability of Mr. Upham, it cannot be doubted, that these letters are the most instructive, useful and interesting to be found in that large collection.

The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs. It is said, that the defendant has selected only such materials, as suited his own limited purpose as a biographer. That is, doubtless, true; and he has produced an exceedingly valuable book. But that is no answer to the difficulty. It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. The entirety of the copyright is the property of the author; and it is no defence, that another person has appropriated a part, and not the whole, of any property. Neither does it necessarily depend upon the quantity taken, whether it is an infringement of the copyright or not. It is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work. Lord Cottenham, in the recent cases of Bramwell v. Halcomb, 3 Mylne & C. 737, 738, and Saunders v. Smith, Id. 711, 736, 737, adverting to this point, said: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases, as to quantity." In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under color of publishing "Elegant Extracts" of poetry, include all the best pieces at large of a favorite poet, whose volume was secured by a copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume. The case of Mawman v. Tegg, 2 Russ. 385, is to this purpose. There was no pretence in that case, that all the articles of the encyclopedia of the plaintiffs had been copied into that of the defendants; but large portions of the materials of the plaintiffs' work had been copied. Lord Eldon, upon that occasion, held, that there might be a piracy of part of a work, which would entitle the plaintiffs to a full remedy and relief in equity. In prior cases, he had affirmed the like doctrine. In Wilkins v. Aikin, 17 Ves. 422, 424, he said: "There is no doubt, that a man cannot, under the pretence of quotation, publish either the whole or a part of another's book, though he may use, what in all cases it is difficult to define, fair quotation." In Roworth v. Wilkes, 1 Camp. 94, Lord Ellenborough said: "A review will not, in general, serve as a substitute for the book reviewed; and even there, if so much is extracted, that it communicates the same knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not necessary in an action of this sort; it is enough, that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced. A compilation of this kind (an encyclopedia) may differ from a treatise published by itself; but there must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works, or an encyclopedia would be a recipe for completely breaking down literary property." The vice chancellor (Sir L. Shadwell), in Sweet v. Shaw, 1 Jur. (London) 212 [3 Jur. 217], referring to the remarks of Lord Ellenborough, cited by counsel, said: "That does not mean a substitute for the whole work. From what you state, suppose a book to contain one hundred articles, and ninety-nine were taken, still it would not be a substitute." And in this very case he granted an injunction, being of opinion, that there was primâ facie, at law, an invasion of the plaintiffs' right; not only an injury, but also a damage to the plaintiffs, in copying from several volumes of Reports, published by the plaintiffs, although eleven only had been copied verbatim, but a considerable number of what were called "abridged cases," were, in truth, copies of the plaintiffs' volumes, with little, or trifling, alterations. It is manifest, also, from what fell from Lord Chancellor Cottenham, in Saunders v. Smith, 3 Mylne & C. 711, that he entertained no doubt, (although he did not decide the point,) that there might be a violation of the copyright of volumes of Reports, by copying

verbatim a part only of the cases reported. Much must, in such cases, depend upon the nature of the new work, the value and extent of the copies, and the degree in which the original authors may be injured thereby. In Lewis v. Fullarton, 2 Jur. (London) 127 [3 Jur. 669], 2 Beav. 6, Lord Langdale, in the case of a topographical dictionary, held, that largely copying from the work in another book having a similar object, was a violation of that copyright, although the same information might have been (but, in fact, was not) obtained from common sources, open to all persons. On that occasion, he said: "None are entitled to save themselves trouble and expense, by availing themselves, for their own profit, of other men's works, still entitled to the protection of copyright;" and, accordingly, in that case, he granted an injunction as to the parts pirated, although it was admitted, on all hands, that there was much which was original in the new work.

In the present case, I have no doubt whatever, that there is an invasion of the plaintiffs' copyright; I do not say designedly, or from bad intentions; on the contrary, I entertain no doubt, that it was deemed a perfectly lawful and justifiable use of the plaintiffs' work. But if the defendants may take three hundred and nineteen letters, included in the plaintiffs' copyright, and exclusively belonging to them, there is no reason why another bookseller may not take other five hundred letters, and a third, one thousand letters, and so on, and thereby the plaintiffs' copyright be totally destroyed. Besides; every one must see, that the work of the defendants is mainly founded upon these letters, constituting more than one third of their work, and imparting to it its greatest, nay, its essential value. Without those letters, in its present form the work must fall to the ground. It is not a case, where abbreviated or select passages are taken from particular letters; but the entire letters are taken, and those of most interest and value to the public, as illustrating the life, the acts, and the character of Washington. It seems to me, therefore, that it is a clear invasion of the right of property of the plaintiffs, if the copying of parts of a work, not constituting a major part, can ever be a violation thereof; as upon principle and authority, I have no doubt it may be. If it had been the case of a fair and bona fide abridgment of the work of the plaintiffs, it might have admitted of a very different consideration.

I have come to this conclusion, not without some regret, that it may interfere, in some measure, with the very meritorious labors of the defendants, in their great undertaking of a series of works adapted to school libraries. But a judge is entitled in this case, as in others, only to know and to act upon his duty. I hope, however, that some means may be found, to produce an amicable settlement of this unhappy controversy. The report of the master must stand confirmed, and a perpetual injunction be awarded, restraining the defendants, their agents, servants and salesmen, from farther printing, publishing, selling, or disposing of any copy or copies of the work complained of; the "Life of Washington," by the Rev. Charles W. Upham, containing any of the three hundred and nineteen letters of Washington, stated in the report of the master, and never before published; and that it be referred to a master, to take an account of the profits made by the defendants, in the premises; with leave for either party to apply to the court for farther directions.

Case No. 4,902.

FOLSOM v. MERCANTILE MUT. INS. CO.

[8 Blatchf. 170.] [1]

Circuit Court, S. D. New York. Feb. 1, 1871.[2]

MARINE INSURANCE — RETROACTIVE POLICIES — "LOST OR NOT LOST"—DEFENSES—CONCEALMENT.

1. A policy of marine insurance on a vessel was issued March 1st, 1869, insuring her from January 1st, 1869, to January 1st, 1870. The policy did not contain the words, "lost or not lost." The vessel was lost by the perils of the sea, February 2d, 1869, neither insurer nor insured knowing of the loss when the policy was issued: *Held*, that the loss was covered by the policy.

[See note at end of case.]

2. Where, as a defence to a policy of marine insurance, it is alleged that the insured concealed from the insurer material facts within his knowledge when he applied for the insurance, the defence is one that must be made out affirmatively by the insurer.

[See note at end of case.]

3. A party applying for insurance is not bound to communicate to the insurer intelligence known to the insurer, nor the expectations, opinions or speculations of such party, based upon facts known to the insurer.

4. In this case, although it appeared that intelligence of the loss of the vessel could have reached the insured before the policy was issued, if her master had sent such intelligence by telegraph, it was *held* that the omission of the master to do so did not vitiate the policy.

[At law. Assumpsit by Benjamin F. Folsom against the Mercantile Mutual Insurance Company.]

Charles M. Da Costa, for plaintiff.
Townsend Scudder, for defendants.

BLATCHFORD, District Judge. This is an action, tried before the court without a jury, to recover the sum of $3,000, on a policy of marine insurance. The policy was issued to the plaintiff, March 1st, 1869, on the schooner B. F. Folsom, for the sum of $3,000, from January 1st, 1869, to January 1st, 1870. The policy valued the vessel at $35,000. It did not state who the master of the vessel was.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirmed in 18 Wall. (85 U. S.) 237.]

or what voyage she was upon. The rate of premium was expressed to be 12 per cent, net. The policy contained this written clause: "Privileged to cancel at the expiration of six months; pro rata premium to be returned for time not used, no loss being claimed." The words "lost or not lost" were not contained in the policy.

The vessel had sailed from Boston for Montevideo and Buenos Ayres, on the 6th of January, 1869, with John Orlando as her master. She was a three masted schooner. She was disabled at sea on the 13th of January, losing two of her masts, and her entire hull, except a part of her bow, going under water. Her crew remained on her for 20 days and nights, the vessel being kept from sinking by the buoyancy of some lumber which formed part of her cargo. Her crew were taken off from her by a Bremen vessel, bound to Bremen, and were landed at Bremerhaven on the 18th of February. The schooner was totally lost through the perils of the sea. On the 20th of February, John Orlando, the master of the schooner, wrote and mailed, at Bremerhaven, a letter to the plaintiff, (who was one of the owners of the schooner,) at Philadelphia, announcing the loss of the schooner. This letter reached the plaintiff in due course of mail, after March 9th, bearing, when it reached him, a Bremerhaven postmark of February 20th and a New York postmark of March 9th. The master wrote a second letter, from Bremerhaven, to the plaintiff, at Philadelphia, on the 26th of February, giving fuller particulars of the loss. This letter reached the plaintiff in due course of mail, after March 14th, bearing, when it reached him, a Bremerhaven postmark of February 27th, a New York postmark of March 14th, and a Philadelphia postmark of March 14th. The master had no money with which to prepay for his passage to the United States or for a telegraphic despatch to his owners, and was a stranger in Bremerhaven. His owners had no friends or credit there. Prepayment of a telegraphic despatch to the United States was required. The master obtained a passage from Bremerhaven to the United States, on an American steamer, by giving an order on the plaintiff for the passage money. He noted his protest against the loss of the schooner, before the United States consular agent at Bremerhaven, on the 18th of February, informed that officer of the loss of the vessel and of the arrival of the crew, and applied to him for assistance. He and his crew were furnished with a boarding place by the consular agent. He did not communicate with the plaintiff or with any of the owners of the schooner by telegraph.

On the 22d of February, there was published in the daily public newspapers in the city of New York and in the city of Philadelphia, (the defendants being located in New York and the plaintiff residing in Philadelphia,) a telegraphic despatch in these words: "Liverpool, Feb. 21. Orlando, from Balt. for Buenos Ayres, lost at sea; crew saved and landed at Bremerhaven." This despatch, as so published in Philadelphia, was seen by the plaintiff before he applied to the defendants to effect the insurance in question. The despatch, as published in New York, was cut out from one of the newspapers by a clerk in the employ of the defendants, at their office in New York, and pasted, on the 22d of February, in a scrap book, with 17 other items of marine disasters which were pasted therein on the same day, such scrap book being regularly kept by such clerk, as a record of disasters. Over the despatch in question, in the book, was written, in large letters, the word "Orlando." The plaintiff made application in person to the defendants to effect the insurance in question, and did not call their attention to the despatch or to its publication. At the time he so made application he knew that John Orlando had sailed in the schooner as her master, and also from what port and on what voyage she had sailed. In the shipping register used by the defendants at the time of issuing the policy, the existence of a bark called the Orlando, a whaler, was noted, but no schooner Orlando was noted. Such bark had in fact been owned, within two or three years before the date of the policy, by a person who was the partner of the plaintiff, but the plaintiff did not, at the time the policy was issued, know in what trade such bark was. Such shipping register contained the name of the schooner B. F. Folsom and her rating and the name of J. Orlando as her master.

The proper proofs of loss were duly furnished, and, if the plaintiff is entitled to recover, his proper claim is $3,000, with interest from May 7th, 1869.

The defendants contend, that, as the vessel was lost when the contract was made, March 1st, and the words "lost or not lost" are not found in the policy, the insurance never took effect, and the plaintiff cannot recover. This view would be sound if the vessel had been lost before January 1st, 1869. But, by the policy, the risk expressly taken is from January 1st, 1869, to January 1st, 1870. It is a risk for the whole of that period. It covers a loss during any part of that time. The premium paid was for the whole time. If the vessel was safe and in being on the 1st of January, 1869, the defendants guaranteed her safety from that time. The inception of the contract in this case was not the 1st of March, 1869, but the 1st of January, 1869. As the vessel was safe on the 1st of January, 1869, she was within the terms of the contract, so that the defendants took the risk upon her. If this were not so, the defendants would be enjoying the premium for the two months from January 1st to March 1st, and yet be running no risk for that time. 1 Phil. Ins. § 925; 1 Arnould, Ins. § 20; Hammond v. Allen [Case No. 6,000]. In the present case, it is not shown that either party knew

of the loss when the policy was issued, and I am of opinion that the policy must be construed as covering any loss which occurred after January 1st, 1869, although before March 1st, 1869.

It is urged, as a defence, that the plaintiff concealed from the defendants material facts known to him. The concealment alleged is, that he did not inform the defendants, before the policy was issued, that the name of the master of the schooner was John Orlando, and that she had sailed for Montevideo and Buenos Ayres, and that he, the plaintiff, had seen in the newspapers the published despatch as to the loss of the Orlando. Conceding that the facts thus alleged to have been concealed were material, yet the defence of concealment is one that must be made out affirmatively by the underwriters. The defendants have not shown that the plaintiff did not, before the policy was issued, communicate to them the fact that the name of the master of the schooner was John Orlando, and that she had sailed for Montevideo and Buenos Ayres. In the absence of such evidence, it must be assumed that the defendants were advised of these facts. As to the despatch about the Orlando and its publication, the defendants knew of it and had a copy of it in their disaster book. In view of this fact, and of the knowledge the defendants had as to who was the master of the schooner and as to what voyage she was upon, it cannot be regarded as a concealment of a fact material to the risk, that the plaintiff did not call the attention of the defendants to the despatch or to its publication. They had already seen it, and the fact that he had seen it cannot be regarded as a material fact. With the despatch, the fact of what voyage the schooner was on, and the name of her master, the defendants had all the information of material facts which the plaintiff had. He was not bound to communicate to the defendants intelligence known to them, or his expectations, opinions or speculations based upon facts known to them. 1 Phil. Ins. §§ 574, 575, 603; 1 Arnould, Ins. §§ 207, 211.

No evidence is given to show that the premium stated in the policy was fixed without reference to any of the three facts so alleged to have been concealed, nor can the court say, in the absence of all evidence, that it is reasonably probable that, with a knowledge of such three facts, the defendants would have declined the risk, or asked a higher premium than that at which the policy was effected. No evidence is given to show whether the rate of premium stated in the policy was a high rate or a low rate,—a rate indicating a great risk, or a rate indicating an ordinary risk. There is nothing to raise the legal presumption that the name of the master and the voyage were not communicated, so as to relieve the defendants from the necessity of giving direct negative evidence to establish that such two facts were not communicated, and to throw on the plaintiff the necessity of giving affirmative evidence that such facts were communicated. Arnould, Ins. § 213.

The plaintiff had no information tending to show any disaster to the schooner, except what was contained in the despatch relative to the Orlando, if that can be regarded as such information. But, it is urged, on the part of the defendants, that the plaintiff must be presumed to have had knowledge, on the 1st of March, of the actual loss of the schooner before that day, because information of the fact could have been communicated to him by telegraph, by the master, from Bremerhaven, before the policy was issued. It is claimed that it was the duty of the master to communicate intelligence of the loss, by telegraph, to the plaintiff, as soon as he arrived at Bremerhaven; and that it is shown that such information by telegraph could have reached the plaintiff at Philadelphia as early as the 22d of February. But this view is contrary to the decision of the supreme court in the case of General Interest Ins. Co. v. Ruggles, 12 Wheat. [25 U. S.] 408. In that case, the vessel was in fact wholly lost and destroyed at the time the insurance was effected, but the fact of the loss was not known to her owner, and such ignorance arose from the designed omission of the master to advise the owner of the loss, in order that the insurance might be effected, and the result of such conduct of the master was, that intelligence of the loss had not reached either the owner or the insurers at the time of the underwriting. But the court held, that, as the loss did not occur through any misconduct of the master's before the happening of the loss, and as, at the time of the misconduct of the master, in suppressing intelligence of the loss, he was not the agent of the owner for any purposes connected with procuring the insurance, and as the agency of the master ceased with the loss of the vessel, so that there was no legal obligation resting on him to communicate information of her loss to her owner, the policy was not vitiated. The decision in that case fully covers the present case.

The absence of any evidence, on the part of the defendants, to show any concealment by the plaintiff of any fact material to the risk, joined with the fact that ordinary prudence on the part of the defendants, in insuring by a time policy running back for two months, would naturally lead them to enquire what voyage the vessel was upon, imposing the necessity of a truthful answer, leads to the conclusion that nothing is shown to impeach the good faith of the plaintiff. Underwriters, in assuming the risk of a loss that may have happened before the date of the policy, assume a hazardous undertaking, and charge a proportionate premium, and must be presumed to inquire as to all obvious matters which may affect the taking of the

risk at all or the rate of premium. Their protection is in their own hands, by rejecting such risks or charging adequate premiums therefor.

I find for the plaintiff, for the sum of $3,000, with interest from May 7th, 1869.

[NOTE. This cause was afterwards heard on motion of defendants for a new trial, which motion was denied (Case No. 4,903), and on writ of error the case was taken to the supreme court, where the judgment of the circuit court was duly affirmed, Mr. Justice Clifford delivering the opinion, in the course of which it was held that the omission of the words "lost or not lost" from the policy of insurance sued upon does not affect the plaintiff's right of recovery, it being sufficient to make a policy retroactive if it appeared by the description of the risk and the subject-matter of the contract that the policy was in fact intended to cover a previous loss. In reference to the attempt made at the trial to set up the defense that plaintiff concealed material facts from the defendants at the time the policy was issued, the learned justice remarked that the circuit court found that the charge was not sustained by the evidence, "which is all that need be said upon the subject, as it is quite clear that the trial by the circuit court, where the trial by jury is waived as in this case, is not the proper subject of review in the supreme court." Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. (85 U. S.) 237.]

Case No. 4,903.

FOLSOM v. MERCANTILE MUT. INS. CO.

[9 Blatchf. 201.] [1]

Circuit Court, S. D. New York. Nov. 9, 1871.[2]

MARINE INSURANCE — APPLICATION AS EVIDENCE FOR DEFENDANTS—CONCEALMENT—TRIAL BY COURT—SPECIAL FINDINGS.

1. In an action at law on a time policy of marine insurance on a vessel, tried before the court, without a jury, after the plaintiff had rested his case at the trial, the defendants offered in evidence a paper purporting to be an application presented to the defendants, requesting them to effect the insurance covered by the policy. The court excluded the paper, on the ground that the application was merged in the policy, and that there was no plea in the case that the policy was obtained by any fraud or by any misrepresentation, and that the offer of the paper was not preceded, or accompanied, or followed, by any offer to put in evidence, or by any putting in evidence of, any such misrepresentation: *Held*, that the exclusion was proper.

[See note at end of case.]

2. The absence from the application of any statement as to where the vessel was when the application was made, or as to the port from which she had sailed, or as to the voyage on which she was bound, or as to who was her master, had no tendency to show that the plaintiff did not, when he made the application, communicate to the defendants the facts referred to, or answer truly all questions put to him in regard thereto.

[See note at end of case.]

3. Where this court, after the waiver of a trial by jury, tries a case without a jury, it is not required to make a special finding upon the facts.

[This was an action of assumpsit by Benjamin F. Folsom against the Mercantile Mutual Insurance Company on a policy of marine insurance on the schooner B. F. Folsom, issued to the plaintiff March 1, 1869. A jury was waived, and the cause tried by the court, resulting in a verdict for plaintiff for the sum of $3,000 (Case No. 4,902), and is now heard on defendant's motion for a new trial.]

Charles M. Da Costa, for plaintiff.

Townsend Scudder, for defendants.

BLATCHFORD, District Judge. This is an action on a time policy of marine insurance, on a vessel, tried before the court, without a jury. After the plaintiff had rested his case, at the trial, the defendants offered in evidence a paper purporting to be an application presented to the defendants, requesting them to effect the insurance covered by the policy. The plaintiff objected to the introduction in evidence of the paper, on the ground that the application was merged in the policy, and that there was no plea in the case that the policy was obtained by any fraud, or by any misrepresentation. The court rejected the paper, on the ground that the evidence was inadmissible at that stage of the case. The defendants excepted to the ruling. At the close of the testimony on the part of the defendants, they renewed their offer to put the application in evidence. The objection on the part of the plaintiff to its introduction was renewed, and the court rejected it as inadmissible, and the defendants excepted. They now move for a new trial, on the ground of an alleged error committed by the court, in excluding the application as evidence.

It is urged, for the defendants, that the application was the written contract, by which the defendants agreed to issue for a certain premium, and the plaintiff agreed to take, a policy of insurance, on the terms and conditions agreed upon therein. Such contract, however, must be evidenced by the policy itself. The policy must control, in this action, in case of any difference between its provisions and those of the application. In point of fact, however, a comparison of the application with the policy shows that the provisions of the two do not differ. As to any terms or conditions contained in the application, which might be in the nature of warranties or representations, it is not contended, on the part of the defendants, that there was any misrepresentation, on the part of the plaintiff, by setting out untruly any fact contained in the application. The offer of the application in evidence was not preceded, or accompanied, or followed, by any offer to put in evidence, or by any putting in evidence of, any such misrepresentation.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirmed in 18 Wall. (85 U. S.) 237.]

It is further urged, that the application was admissible, because it did not show, on its face, where the vessel was when the application was made, or from what port she had sailed, or on what voyage she was bound, or who was her master. But the policy itself contains none of these things. The absence of them from the application has no tendency to show that the plaintiff did not, when he made the application, communicate to the defendants the facts referred to, or answer truly all questions put to him in regard thereto. As I held, in my opinion deciding the cause,—Folsom v. Mercantile Ins. Co. [Case No. 4,902],—it was for the defendants to show, affirmatively, that the facts referred to were concealed by the plaintiff, and were material to the risk; and they gave no such proof. Moreover, the application, which was in form one for a time policy, contains no blanks for any information as to the voyage of the vessel, or her whereabouts at the time of the application. It contains, as does the policy, a blank, not filled, for the name of her master, but it appeared, on the trial, that the defendants knew the name of her master at the time the application was made. Moreover, the policy, being a time policy, contains, as does the application, a warranty as to the ports and places the vessel should not visit or use. It was not claimed that she was lost while in a forbidden place, or on a forbidden voyage; and, therefore, any statement of her voyage or whereabouts was immaterial.

I am satisfied, for these reasons, that the application was properly excluded, as being entirely irrelevant to the case.

It is also urged, as a ground for a new trial, that it appeared that, in fact, the plaintiff concealed from the defendants, when he applied for the insurance, and at all times before the policy was issued, facts known to him, which were material to the risk; and that the court erred in refusing to rule, as requested by the defendants, in accordance with certain propositions of law made to the court by the defendants. In regard to the question of concealment, and the requests to rule, proposed by the defendants, I carefully considered the views urged on the part of the defendants, in giving my decision in the case, after it was tried,—Folsom v. Mercantile Ins. Co. [Case No. 4,902],—and no new views on the subject are now presented. The conclusions I arrived at are fully stated, with the reasons therefor, in such decision, and I have not been able to satisfy myself that they are erroneous.

A new trial is also asked for, on the ground that the court erred in refusing to make, on the request of the defendants, a special finding of facts in the case. The reasons which governed the court, in so refusing, were those which are set forth in the opinion in the case of Clement v. Phoenix Ins. Co. [Case No. 2,882]. I understand the views which I there took of the effect of the provisions of the 4th section of the act of March 3, 1865 (13 Stat. 501), to be sustained by the supreme court, in the case of Norris v. Jackson, 9 Wall. [76 U. S.] 125. The court which, after the waiver of a trial by jury, tries a case without a jury, is not required to make a special finding upon the facts. It may make a general finding, and it may rightfully decline to make a special finding. There is nothing in the case of Generes v. Campbell, 11 Wall. [78 U. S.] 193, or in any other decision of the supreme court, inconsistent with this view. In this case, I think it was a proper exercise of the discretion of the court, not to make a special finding, and that a new trial ought not to be granted because of the refusal of the court to make a special finding.

In regard to the objection, that the policy does not contain the words "lost or not lost," and that the vessel had, in fact, been lost before the policy was issued, I fully considered the question, in my opinion given on deciding the cause, and adhere to the views then expressed.

The motion for a new trial is denied.

[NOTE. On writ of error sued out by the defendant, the judgment of the circuit court in this case, which was for the plaintiff (Case No. 4,902), was duly affirmed, Mr. Justice Clifford delivering the opinion. It was held there was no error in the refusal of the circuit court to admit as evidence the application for insurance when tendered by the defendants in support of the defense of concealment, inasmuch as the instrument contained no statement in respect to any one of those matters; and, as its terms were exactly the same as those of the policy, the contents were immaterial to the issue, as they could have no tendency to show that the plaintiff, when he made the application, did not communicate to the defendants all the material facts and circumstances within his knowledge. The opinions of the circuit court (Case No. 4,902), and on motion for new trial, as given in the principal case, were specially referred to and approved by the supreme court. Insurance Co. v. Folsom, 18 Wall. (85 U. S.) 237.]

FOLSOM (TARR v.). See Case No. 13,756.

FOLSOM (UNITED STATES v.). See Cases Nos. 15,125–15,127.

Case No. 4,904.

FONDA v. BRITISH-AMERICAN ASSUR. CO.

[6 Cent. Law J. 305; 6 Reporter, 71; 7 Ins. Law J. 468; 10 Chi. Leg. News, 309.] [1]

Circuit Court, E. D. Michigan. April 1, 1878.

FOREIGN CORPORATIONS—SERVICE OF PROCESS UPON AGENTS.

A resolution of a foreign corporation, filed pursuant to a state statute, authorizing its agent "to acknowledge service of process for and in behalf of such company, and consenting that service of process upon any agent shall be taken and held to be as valid as if served upon the company or association," amounts to an agree-

[1] [Reprinted from 6 Cent. Law J. 305, by permission. 6 Reporter, 71, contains only a partial report.]

ment for a constructive presence within such state; and a federal court may obtain jurisdiction over such corporation by service upon its agent.

[Cited in Maxwell v. Atchison, T. & S. F. R. Co., 34 Fed. 288.]

At law. On motion to set aside the summons, upon the ground that defendant was a foreign corporation organized under the laws of the province of Ontario, and, therefore, not suable in this court.

C. E. Warner, for motion.

H. E. Windsor, contra.

BROWN, District Judge. This is an action brought by a writ of summons, in which the defendant is described "as a body corporate, organized and existing under the laws of Ontario, in the dominion of Canada, and an alien and a subject of the queen of Great Britain and Ireland." The motion raises the question of the jurisdiction of this court over the defendant, and is based upon the fact that it is not an inhabitant of, or found within this district.

The first section of the act of 1875, following in this respect the language of the judiciary act, provides "that no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of the serving of such process, or of commencing such proceeding, except as hereinafter provided." A series of decisions of the supreme court has settled the law that a corporation is only a citizen of the state by which it is created; that it is a mere creature of local law, and has not even an absolute right of recognition in other states, but depends for that, and for the enforcements of its contracts, upon the assent of those states, which may be given upon such terms as they please. Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519; Paul v. Virginia, 8 Wall. [75 U. S.] 168; Ohio & M. R. Co. v. Wheeler, 1 Black. [66 U. S.] 286; Baltimore & O. R. Co. v. Harris, 12 Wall. [79 U. S.] 81. Accordingly, it has always been held that a foreign corporation was not an inhabitant of any district except that within which it was incorporated, and that service upon its officers in another district was not a finding of the corporation in that district, within the meaning of the judiciary act. Day v. Newark India Rubber Manuf'g Co. [Case No. 3,685]; Main v. Second Nat. Bank [Id. 8,976].

If the service of the summons in this case is supported at all, it must be by virtue of the statute of this state, which provides that every foreign insurance company shall file with the secretary of state a resolution, authorizing any agent, duly appointed by resolution, under the seal of the company, to acknowledge service of process for, and in behalf of such company, "consenting that service of process upon any agent shall be taken and held to be as valid as if served upon the company or association, according to the laws of this state or any other state, and waiving all claim of error by reason of such service." That such service is valid and regular, has not only been repeatedly recognized by the supreme court of this state, but was held to be valid as applied to process from the state courts in the case of Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 404. It is true the question was not discussed whether such service would be valid as applied to process of the federal court, but there is no intimation that it would not be so considered. In the case of Railroad Co. v. Harris, 12 Wall. [79 U. S.] 81, the supreme court observed in speaking of a foreign corporation: "It can not migrate, but may exercise its authority in a foreign territory, upon such conditions as may be prescribed by the laws of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly." The question at issue here, however, was not directly passed upon in that case. In Pomeroy v. New York & N. H. R. Co. [Case No. 11,261], it was held that the provision in the judiciary act above quoted could not be altered or modified by any state law, and that the law of New York in regard to a Connecticut corporation, declaring it liable to be sued in the same manner as corporations created by the laws of New York, and that process might be served on the officers or agent of the corporation, would not have the effect to give the federal court jurisdiction of a suit against such corporation by service within the district on an officer or agent.

I am better satisfied, however, with the opinion in the case of Knott v. Southern Life Ins. Co. [Id. 7,894], in which jurisdiction in a similar case was sustained. It seems to me the very object of the state law was to provide that no insurance company should do business within the state that was not capable of being sued there, and that the constructive presence of a corporation in the person of its agent should be recognized as well by us as by the state courts. The cases holding that a corporation is a citizen only of the state in which it is organized, are quite as applicable to state courts as to federal courts, and would be as effectual to prevent a foreign corporation being sued in the state courts of another state as in the federal courts. Now, if statutes like this may be held to constitute a constructive presence of the corporation in another state for the purpose of the service of process from the state court, I see no reason why it should not operate equally in favor of process from this court. And if a foreign corporation may appear after the issuing of process and defend a suit, (of which no doubt was ever entertained) it is difficult to see why it may not agree beforehand that it will accept ser-

vice of all process that may be served upon it. In this particular the case of Day v. Newark India Rubber Co., above cited, differs from the one under consideration—there was no express agreement on the part of the corporation to accept service—the jurisdiction could only be sustained upon the theory that the acceptance of the franchise implied an agreement to be bound by the conditions of the statute. With deference to conflicting opinions, the reasoning of Judge Woods in the case cited from his reports seems to me unanswerable, and for the present I shall act upon it as the law in these cases.

FOND DU LAC COUNTY (OLCOTT v.). See Case No. 10,479.

FONGERES (SARDO v.). See Case No. 12,358.

FONTAIN (GUILLOU v.). See Case No. 5,861.

Case No. 4,905.

FONTAINE v. ARESTA.

[2 McLean, 127.] [1]

Circuit Court, D. Illinois. June Term, 1840.

ACTION OF DEBT—BOND PAYABLE IN INSTALMENTS—PENALTY—COVENANT.

1. On a bond, payable by instalments, debt cannot be sustained until they shall all become due.

2. But if the payment be secured by a penalty, debt may be brought.

3. Where there is no penalty covenant is the proper action for the instalments on a bond; or assumpsit, if the instalments be due by a simple contract.

[This was an action at law by Andrew Fontaine, assignee, against Francis Aresta.]

Mr. Logan, for plaintiff.

Mr. Thomas, for defendant.

OPINION OF THE COURT. This action of debt was brought on an instrument, under seal, for the payment of a certain sum, as principal, not yet due; and the payment of the interest annually. The defendant filed a special demurrer, which raises the question, whether an action of debt for the interest can be sustained before the principal becomes due. The rule seems to be well settled that debt will not lie for money, payable by instalments, until they shall all become due, unless the payment be secured by a penalty. 1 Chit. Pl. 129; Rudder v. Price, 1 H. Bl. 547; 2 Saund. 303, note 6; 3 Coke, 22a; Selw. N. P. 531, note; Bac. Abr. 669; 3 Black. 168. Where a sum of money is payable by instalments, and the payment is secured by a penalty, debt may be brought for the penalty. Bac. Abr. 699, "Debt" B.; Com. Dig. F. In 1 Bin. 152, the court held, that where the condition of a bond was for the payment of interest annually, and the principal at a distant day, the interest might be recovered, before the principal was due, by an action of debt on the bond. In this case the payment of the principal and interest was secured by a penalty. Where there is no penalty in the bond, payable by instalments, covenant is the proper action to recover the instalments as they shall become due. If the instalment be due on a simple contract, assumpsit is the proper action. This is a technical rule, as applied to the action of debt, but it seems to be too well established to be disregarded. The demurrer must be sustained.

[1] [Reported by Hon. John McLean, Circuit Justice.]

Case No. 4,906.

In re FOOT et al.

[8 Ben. 228; [1] 12 N. B. R. 337; 1 N. Y. Wkly. Dig. 76.]

District Court, N. D. New York. July, 1875.

APPROPRIATION OF FUND—SUBROGATION—JOINT AND SEPARATE ESTATE.

1. F., one of the firm of F. D. & Co., endorsed paper of the firm to raise money for the firm, and pledged securities belonging to himself, as security for its payment. The firm afterwards became bankrupt. After the adjudication in bankruptcy, the holders of the paper sold the securities then pledged, and realized on the sale $18,281, being $104 more than the amount due on the notes. The individual estate of F. proved insufficient to pay his individual debts, and the individual creditors insisted that the amount realized from the securities thus sold should be appropriated from the fund belonging to the joint estate, to that of the separate estate: *Held*, that, where there are two classes of creditors having a common debtor, who has several funds, and one class of creditors can resort to all of them, while the other can resort to only part of them, the former shall take payment out of the fund to which they can resort exclusively, so that both classes may be protected; and if the former resort to the fund common to both classes, to the loss of the latter, the latter are entitled to be substituted in place of the former, to the extent of the deprivation to which they have been subjected.

2. Under this principle, the holders of the notes in question might have surrendered the securities and resorted to either the joint estate or the separate estate.

3. The rights of the parties were not changed, because the holders of the notes satisfied them by a sale of the securities instead of resorting to the joint estate in bankruptcy; and the separate creditors were to be substituted to the right of the holders of the notes, to enforce payment from the joint estate.

4. Payment will not be permitted in equity to operate as an extinguishment, as against those equitably entitled to substitution in place of the party receiving payment.

5. The assignee, therefore, must appropriate to the separate estate of F. the $104 of surplus moneys arising on the sale of the securities, and such further sum as might arise from the dividends of the joint estate, as upon a debt proved against the joint estate of $18,177, the amount of the notes, accruing as of the date of the sale of the securities.

In bankruptcy.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

W. & J. D. Kernan, for petitioners.
Dennison & Everett, for assignee.

WALLACE, District Judge. For the purpose of raising money for the firm of Foot, Doud & Co., the above named bankrupts, [Norman B.] Foot, one of the firm, endorsed their paper, and pledged securities belonging to himself individually as collateral for payment of the paper. After the adjudication of bankruptcy herein, the holders of the notes sold the securities thus pledged, and realized upon the sale the sum of $18,281, being $104 in excess of the amount due upon the notes. The separate creditors of Foot now represent that his separate estate is insufficient to pay his individual debts, and insist that the amount realized from the securities thus sold, be appropriated from the fund belonging to the joint estate to that of the separate estate of Foot. They maintain, that it was the duty of the assignee in bankruptcy to have exonerated the separate estate from the lien of the pledgees out of the funds of the joint estate; and they urge that, in any event, Foot, as surety for the firm, when the notes were paid by the sale of his property, became subrogated to the claims of the holders of the notes, and entitled to prove the amount of the notes against the joint estate; and that this demand enures to the benefit of his separate estate, which should be credited by the assignee with ratable dividends on the amount.

There are technical difficulties in the way of obtaining relief upon either of these theories. The assignee would not have been justified in applying the moneys of the joint estate to discharge a lien upon the property of the separate estate, even where the lien was created for the benefit of the firm; and if Foot as surety became subrogated to the rights of the holders of the notes, and therefore entitled to prove their amount, the rule which precludes a partner from proving his individual debt in competition with the joint creditors, would defeat the separate estate from deriving any benefit through the claim of Foot. But it seems clear, that the equities of the separate creditors can be worked out upon familiar principles, and a result attained, which, in view of the condition of the two estates, is highly desirable.

Where there are two classes of creditors, having a common debtor who has several funds, and one class of the creditors can resort to all the funds, while the other can resort only to part of them, the former shall take payment out of the fund to which they can resort exclusively, so that both classes may be protected; and if the former resort to the fund common to both classes, to the loss of the latter, the latter are entitled to be substituted to the extent of the deprivation to which they have been subjected, in the place of the former. This principle has been frequently applied where specific liens exist in favor of different creditors upon property of the same debtor; and the rule is the same, where the parties are creditors of different debtors, where, as between the debtors, equity demands that one of them should discharge the debt in exoneration of the other. Dorr v. Shaw, 4 Johns. Ch. 17; Story, Eq. Jur. §§ 642, 643; Ex parte Kendall, 17 Ves. 521; Neff v. Miller, 8 Barr. [8 Pa. St.] 347; Sterling v. Brightbill, 5 Watts, 229. The doctrine applies in all cases of marshalling equitable assets; and its application to assets in bankruptcy, which are to be administered upon equitable principles, is peculiarly appropriate.

In the present case, after the adjudication of bankruptcy, the holders of the notes might have surrendered the collaterals, and resorted to either of two funds to obtain payment; as creditors of the firm, they could have proved against, and shared in, the joint estate; and as creditors of Foot, they could have proved against, and shared in, his separate estate; and, if they had surrendered, the collaterals would have enured to the benefit of the separate estate, because the firm were the primary debtors and Foot was a surety. The holders of the notes could not have been compelled to elect as to which fund they should pursue;—the rule in England, which requires creditors of both the joint and separate estate in bankruptcy to elect, not obtaining here. Ex parte Farnum [Case No. 4,674]; Meade v. National Bank of Fayetteville [Id. 9,366]; Emery v. Canal Nat. Bank [Id. 4,446]. The joint creditors, therefore, could not have been heard to complain if the holders of the notes had chosen to obtain satisfaction out of the joint estate; and no equities exist on their part, to countervail those of the separate creditors of Foot. On the other hand, if the nolders of the notes had surrendered their collaterals, and resorted to the separate estate of Foot by proving their claims in bankruptcy, the creditors of his separate estate would have been entitled to be substituted in the place of the holders of the notes, and allowed to prove the notes against the joint estate.

The rights of the parties are not changed because the holders of the notes satisfied them by a sale of the securities, instead of resorting to the joint estate in bankruptcy. By the course taken, the separate estate has been diminished to the extent that satisfaction might have been obtained from the joint estate; and to that extent the separate creditors have been deprived of a fund, in which they were entitled to equitable priority as against a class of creditors who had resort to another fund, which, as between the debtors, was the primary fund for payment. Upon the principles referred to, the separate creditors are to be substituted to the rights of the holders of the notes to enforce payment from the joint estate in bankruptcy. The technical satisfaction of the notes by the proceeds of the securities, does not stand in the way; for payment will not be permitted in equity to operate as an extinguishment as against

those equitably entitled to substitution in the place of the party receiving payment. Eddy v. Traver, 6 Paige, 521; Morris v. Oakford, 9 Barr [9 Pa. St.] 498; Richardson v. Washington Bank, 3 Metc. [Mass.] 536.

Applying these principles to the present case, a result is reached which does no injustice to either class of creditors; and which affords a signal illustration of the benign vigor of the rules of equity. The assets of the primary debtors will be appropriated to the ratable payment of all their creditors, and those of the separate partner to his creditors; while the holders of the notes, protected in the exercise of their rights, will have so enforced them as not needlessly to prejudice the rights of other creditors.

A decree is ordered that the assignee appropriate to the separate estate of Foot the surplus arising upon the sales of the securities, and such further sum as may arise from the dividends of the joint estate, as upon a debt proved against such joint estate of $18,177, accruing as of the date of the sale of the securities.

[See In re Foot, Case No. 4,907.]

Case No. 4,907.

In re FOOT et al.

[11 Blatchf. 530;[1] 11 N. B. R. 153.]

Circuit Court, N. D. New York. March 17, 1874.

SALE—STOPPAGE IN TRANSITU—BANKRUPTCY—PROOF OF DEBT.

1. A. sold goods to B. for cash, to be paid on the receipt by B. of the invoice for the goods. They were placed on board of a canal-boat, to be transported to B., and the invoice was sent to B. The goods were not paid for, and B. became insolvent. The canal-boat was stopped by ice. The master landed the goods, and placed them in warehouse. B. gave to the warehouseman authority to sell the goods if he could obtain a specified price for them. Afterwards B. gave to A. an order for the goods, and A. took possession of all of them, except some which the warehouseman had sold, and gave credit therefor, at the sale price to B., in extinguishment of an equal amount of B.'s indebtedness to A. in general account. B. being adjudged a bankrupt, A. made proof of a debt against B., for the balance of such general account. It was objected by the assignee in bankruptcy, that A. had received an illegal preference, in payment, in part, of such account, by receiving the salt on the order of B., when B. was insolvent, and when A. had reasonable cause to believe that B. was insolvent, that such preference was a fraud on the bankruptcy act, and that A. must be excluded from a share in the distribution of the assets of B.: *Held*, that the goods had not come to the possession of B., or of his agent, for disposal, so as to cut off the right of A. to stop them in transitu.

2. The non-payment of the price of the goods warranted a rescission of the sale.

3. A. had a right to appropriate the goods, on crediting the same, so as practically to extinguish the charge of the price of the sale to that extent.

4. The proof of debt must stand.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[Appeal from the district court of the United States for the northern district of New York.

[In bankruptcy. In the matter of Norman B. Foot and others.]

Scott Lord, for assignee in bankruptcy.
George F. Comstock, for creditor.

WOODRUFF, Circuit Judge. The assignee of the bankrupts appeals from a decision of the district court in bankruptcy [case unreported], allowing, or refusing to strike out, the proof of debt against the bankrupts' estate, made by the Onondaga Salt Company, for a balance of account. The ground of objection to the allowance of such debt is, that the salt company have received an illegal preference, in payment, in part, of their account, which excludes them from any participation in the distribution of the assets. The salt company had, from time to time, sold to the bankrupts salt, on credit; but the proof here sufficiently shows that their last sales were upon the express terms of payment in cash on the receipt of the invoice by the bankrupts, to whom the salt was forwarded by canal, by the company. On the sale, the goods were placed on board a canal-boat, for transportation, and the invoice or bill thereof was forwarded to the bankrupts. The bankrupts did not remit the money in payment for the salt; on the contrary, the purchasers failed and became insolvent. But, the canal-boat containing the salt was stopped by ice on the canal, which interrupted navigation for the season, and the master of the canal-boat landed the salt and placed it in warehouse, and the warehouseman notified the purchasers of that fact, whereupon the purchasers gave to the warehouseman a conditional authority to sell the salt, i. e., if he could obtain a price which was specified. After the failure and insolvency of the purchasers, an interview was had by one of them with the officers or agents of the company, and he suggested the propriety of a resumption of the possession and ownership of the salt by the company, and, they acquiescing, he gave to the company an order therefor. The company then took possession of the salt, (excepting about fifty bushels thereof, which the warehouseman had in some manner disposed of,) and gave a credit therefor, at the price of the original sale, in extinguishment of an equal amount of charge in the general account, though without any other or special application of the payment. This resumption of possession and credit of the price, and the order given by the purchasers of the salt, in a state of insolvency, and when the company had reasonable cause to believe the purchasers were insolvent, is insisted upon as a giving and receiving part payment, in general account, by way of illegal preference, in fraud of the provisions of the

bankrupt law, which bars the company from any share in the assets of the bankrupts. The district court held otherwise, and, I think, correctly.

Although the purchasers had given authority to the warehouseman to sell, that order was conditional only. It had not changed his relation to the goods, except conditionally. He was not their general agent to receive and dispose of the salt. The salt was in course of transmission to the buyers, and so remained until it should, perchance, happen that another purchaser was found to whom, under the conditional authority, the warehouseman might make a sale. The general purpose was to forward the salt to the buyers. A special and subordinate intent arose from the unexpected detention of the goods, which gave rise to a conditional authority to sell the salt. I am, therefore, of opinion, that the goods had not come to the possession of the purchasers, or their agent, for disposal, so as to cut off the right of stoppage in transitu. See the subject largely discussed, and cases cited, in Harris v. Hart, 6 Duer, 606, affirmed 17 N. Y. 249. The salt company had the right, therefore, to stop the goods. This right they could exercise, and the assent of the purchasers to their resumption of the possession gave them no greater right in that respect. If such resumption of possession operated to give them an advantage over other creditors, it was vested in them by law, and independently of the consent of the purchasers. The voluntary assent of the purchasers did not make their taking possession illegal under the bankrupt law, because, however, in form, they acted under the order, they had, in fact and in law, all the right of preference, in this respect, independently of such assent. It is not giving a preference to a creditor, when a debtor, peaceably and for convenience, assents to the doing by the creditor of what the creditor, if objection and collision arose, could lawfully do in spite of objection.

Again, the non-payment of the price warranted a rescission of the sale; and, as to that, like observations are pertinent. The company, therefore, on the stoppage of the goods, and on obtaining possession thereof, had a right to appropriate the salt, on crediting the same, so as practically to extinguish the charge of the price of the sale to that extent. While the bankrupt law should be enforced so to give effect to its provisions as fairly and fully to effect its beneficial design and purpose, the court should not be astute to discover technical grounds on which to defeat the just and equitable rights of one creditor, in order to benefit the rest, by enlarging the fund for equal distribution, or by inequitably cutting off the one from a participation therein.

The order must be affirmed.

[See In re Foot, Case No. 4,906.]

Case No. 4,908.

FOOT et al. v. EDWARDS.

[3 Blatchf. 310.] [1]

Circuit Court, D. Connecticut. Sept., 1855.

JURISDICTION—DIVERSION OF A WATER COURSE—WHERE THE CAUSE OF ACTION ARISES.

Where A. diverted, in Connecticut, a stream of water which had its rise in Connecticut, and flowed into Massachusetts, so that it ceased to flow to B.'s mill, situated on the same stream in Massachusetts: *Held*, that the circuit court of the United States for Connecticut had jurisdiction of an action by B. against A., for the damage caused by the diversion.

[Cited in Mannville Co. v. Worcester, 138 Mass. 90.]

This was an action for damages for an injury to the mill property of the plaintiffs [Foot & Gilbert], situate in Massachusetts, by the diversion of the stream of water upon which the same stood, the act which caused the diversion having been committed in Connecticut. The defendant [Arnold Edwards] demurred to the declaration.

Thomas C. Perkins and C. W. Philleo, for plaintiffs.

William Hungerford and William D. Shipman, for defendant.

INGERSOLL, District Judge. It appears, by the plaintiffs' declaration, that they are the owners of mill property in the state of Massachusetts, situate not far from the dividing line between that state and the state of Connecticut, on a stream of water which is accustomed to flow from, and has its rise in, the latter state; that, in Connecticut, the defendant diverted the water of the stream, by which diversion it ceased to flow to the plaintiffs' mill; and that, in consequence thereof, the value of the plaintiffs' mill, so situate in Massachusetts, was greatly impaired.

The right of recovery depends upon establishing three facts. These three facts are—the right of the plaintiffs to have the water of the stream flow to their mill—the diversion of that water by the defendant—and damage to the plaintiffs' mill in consequence of such diversion. The plaintiffs' mill was in Massachusetts. Their right to have the water of the river flow to it was in that state. They have been deprived of that right by the act of the defendant. The damage which they have sustained was to their mill in Massachusetts. But the act committed by the defendant, by which the plaintiffs have been deprived of that right, and by which their mill in Massachusetts has been damaged, was committed by the defendant in Connecticut; and that act was the diversion in Connecticut, above the plaintiffs' mill, of the water of the stream on which that mill stood. For this damage, from such a cause, it is insisted by the defendant, that no remedy can be had

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

in this court, and that no court can afford any remedy except a court in Massachusetts.

The defendant claims that, as the damage which the plaintiffs seek to recover was to their real estate situate in Massachusetts, no court can give them redress therefor, except a state court in the county, or a federal court in the state and district, where the real estate is situate. If this claim is well founded, the plaintiffs may have no redress for the injury complained of, as, when the wrong act complained of, which produced the injury, was committed, the defendant was in Connecticut, and he may never be in Massachusetts, to be served with process.

The rule is well settled, that an action on the case for diverting a water course must be tried, if the cause is brought before a state court, in the county where the cause of action arose. Watts v. Kinney, 23 Wend. 485; Id., 6 Hill, 82. If the action is brought in the federal court, it must be tried in the state and district where the cause of action arose. Usually, in actions brought to recover damages to real estate by the diversion of a stream of water, the act which causes the injury is committed in the county where the real estate damaged is situated. In such a case, it is very clear, where the action is brought before a state court, that there is only one county where the suit can be maintained; and that county is the county in which the land is situated which received the injury, and in which the act which produced it was committed. In such a case, it is very clear, also, that the cause of action arose entirely in the county where the land is situate, and that no court out of such county can take jurisdiction of the case. Where land situated in one district is injured by a tortious act committed in the same district, it is very clear that the action for the recovery of the damage to such land, if brought before a federal court, must be brought before the court of the district in which the land is situate, and in which the act which caused the damage was committed. In such a case, the cause of action arose entirely in the district where the land is situate, and no federal court of any other district can take jurisdiction of the action. Livingston v. Jefferson [Case No. 8,411]. If real estate situate in one county is injured by the diverting of a stream of water in another county, and the suit is brought before a state court, such suit is properly brought, if brought in a court in the county where such real estate is situate. Thompson v. Crocker, 9 Pick. 59; Barden v. Crocker, 10 Pick. 383. If a mill situate in one state is injured by the diversion, in another state, of the stream upon which it is situate, and a suit for such diversion should be brought before the federal court in the state where the mill is situate, such suit would be properly brought, and such court would have jurisdiction of the case. Per Woodbury, J., in Stillman v. White Rock Manuf'g Co. [Case No. 13,446]. But it is denied by the defendant that a state court in the county where the diversion took place, the land injured not being in such county, or that a federal court in the state where the diversion took place, the land injured not being in such state, can take jurisdiction of such a case.

It being well settled that, in a case of this kind, the suit must be brought where the cause of action arose, it becomes essential, in order to determine whether this suit has been brought before the proper court, to determine what is the cause of action. An action is "the lawful demand of one's right." The cause of this lawful demand, or the reason why the plaintiff can make such demand, is some wrong act committed by the defendant, and some damage sustained by the plaintiff in consequence thereof. The commission or omission of an act by the defendant, and damage to the plaintiff in consequence thereof, must unite to give him a good cause of action. No one of these facts by itself is a cause of action against the defendant. The wrongful diversion, then, of the water of the stream, in Connecticut, by the defendant, and the consequent damage which the plaintiffs' mill in Massachusetts has sustained, constitute the cause of action. A part of that which is essential to the plaintiffs' right to recover took place in Connecticut. Without the commision of the act of diversion in Connecticut, there would have been no good cause of action. With it, there is a sufficient cause of action. The act of diversion, which arose in Connecticut, and the other facts existing, give to the plaintiffs a cause of action. That which is essential, therefore, to the plaintiffs' right of recovery against any one, or their cause of action, arose where the suit has been brought.

This conclusion from the principle stated would be quite satisfactory without the authority of adjudged cases to support it. Where two material facts are necessary to give a good cause of action, and they take place in different counties, the cause of action may be said to arise in either county. Various authorities state the rule as follows: "When an action is founded upon two things in different counties, both material to the maintenance of the action, it may be brought in the one county or the other." Com. Dig. "Action," N., 11. "Where an injury has been committed in one county to real property situate in another, or wherever the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either." 1 Saund. Pl. & Ev. 413. In the case of Scott v. Brest, 2 Term R. 238, Ashurst, J., in speaking on this subject, says: "Supposing the foundation of the action to have arisen in two counties, I think that, where there are two facts which are necessary to constitute the offence, the plaintiff may, ex necessitate, lay the venue in either." In Bulwer's Case, 7 Coke, 1, it is thus laid down: "When matter in one

county is depending upon the matter in the other county, there the plaintiff may choose in which county he will bring his action;" and: "If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default; or I may bring it in Middlesex, for there I have the damage." In this case, the default was in Connecticut.

In the case of Thompson v. Crocker, 9 Pick. 59, which was an action brought in the county of Plymouth, to recover damages to mills situate in that county, caused by the diversion of water in the county of Bristol, Judge Parker, upon exceptions taken to the jurisdiction, remarked, in giving the opinion of the court in favor of the jurisdiction: "The place where the injury was done, to wit, at the mills, gives the locality to the action, and not the source from which the mischief came." But, in the case of Barden v. Crocker, 10 Pick. 383, which was a case of the like kind, where the damage was in one county, and the diversion which caused it was in another, and where the action was brought in the county where the property was damaged, the court repudiated the limited doctrine on the subject of jurisdiction, laid down by Judge Parker in Thompson v. Crocker, and expressed the opinion that the action could be maintained in either county. This subject was discussed in the case of Stillman v. White Rock Manuf'g Co. [Case No. 13,446]. The plaintiff in that case was the owner of a mill in Connecticut, on the stream of water which is the dividing line between Connecticut and Rhode Island. The defendant, on the opposite side of the stream, in Rhode Island, dug a trench, by which the water of the stream was diverted from the plaintiff's mill. The plaintiff brought his bill of complaint, in the circuit court in Rhode Island, to restrain the defendant from thus diverting the water of the stream. The injunction was granted. Judge Woodbury decided that case upon a principle not involved in this one. But, in giving his opinion, he says: "If this view," (the view which he took), "of the rights of the parties were not shown to be entirely sound, it might be reasonable, in a case like this, to hold a wrong-doer liable, either where the direct act is done, or where the consequential injury is felt." And the cases which he puts clearly show that he so considered the law to be.

The doctrine contended for by the defendant is, that where the plaintiff has been damaged in his real estate, and in that only, the suit must be brought where the real estate is situated. A plaintiff may suffer damage to his real estate by various wrong acts committed by a defendant. In this case, the wrong act complained of is the diversion of the water of the stream. A plaintiff may suffer damage to his real estate by a slander of his title. And if, in this case, a court in Connecticut, where the wrong act was committed, has no right to give redress to the plaintiffs for the injury which their real estate in Massachusetts has sustained, in consequence of such wrong act, then, if the plaintiffs had owned a dwelling-house in Massachusetts, which they were accustomed to rent, and the defendant, in Connecticut, had published a malicious libel in regard to such dwelling-house, in consequence of which it had been greatly impaired in value, the plaintiffs would have no redress for such injury in Connecticut, where the publication of the libel was made, and would be without redress, unless they could find the defendant in Massachusetts, so that he could be served with process.

With this view of the case, this court has jurisdiction, and the plaintiffs' declaration must be adjudged to be sufficient.

Case No. 4,909.

FOOTE et al. v. BROWN et al.

[2 McLean, 369.] [1]

Circuit Court, D. Indiana. May Term, 1841.

BILLS AND NOTES — NOTICE OF DEMAND TO CHARGE GUARANTOR—DILIGENCE OF TRANSFEREE TO ENFORCE COLLECTION.

1. To charge the guarantor of a note or bill, he must have notice of demand and nonpayment. And this, whether the name of the guarantor be upon the bill or not.

2. Where his name is on the bill strict notice is required, but where it is not, reasonable notice is sufficient.

3. Where a note is received, the proceeds to be collected and applied by the creditor to the discharge of his debt, he is bound to use due diligence to collect the note, and to give notice of nonpayment.

[See Allen v. King, Case No. 226.]

[At law. Action by Foote and Bowler against E. and O. Brown and others.]

Fletcher, Butler & Yandis, for plaintiffs.

Mr. Price, for defendants.

OPINION OF THE COURT. This action is brought on a guaranty by the defendants, of a note given to the plaintiffs, by Daniel Brown. The declaration contained three counts: First: On a promissory note. Second: On an agreement to pay on condition. Third: A general count for money had and received, &c. To the first and third counts nonassumpsit was pleaded. To the second the defendants demurred, on the ground that it contains no allegation of notice to defendants of demand and nonpayment of the note by Daniel Brown. The defendants, also, filed two pleas of setoff in the form of "special payments," under the practice act of Indiana, of 1838. The pleas were, that certain drafts for money had been given defendants, on a house in New Orleans; that defendants left the same with H. and H.,

[1] [Reported by Hon. John McLean, Circuit Justice.]

of that city, for collection, and took their receipt for them. That afterwards defendants assigned the receipt to the plaintiffs, who receipted for it, agreeing to collect and apply the money to defendants' account. That the plaintiffs had given no notice that the house, who held the drafts, had refused to deliver them to the plaintiffs, or, that the drafts had not been paid, &c. Demurrers were filed to these pleas.

On the part of the plaintiffs it is contended that, as the names of the defendants were not on the note guarantied, they were not entitled to notice. That to avoid their guaranty they must show that they have sustained damage for want of notice. That the principal had property when the note became due, so that they could have secured themselves from loss, if notice had been given. Mr. Chitty, in his Treatise on Bills (page 324), says: "In these cases of collateral guaranties, where the parties' names are not on the bill, they are not entitled to the strict and immediate notice of dishonor, as a party is who has drawn and indorsed the bill, and unless he has really sustained loss by the want of notice, he continues liable on his guaranty." Warrantington v. Furbor, 8 East, 242; 6 Esp. 89; Chit. Bills, 365: "A person who has guarantied the due payment of a bill, may, in some cases, be released from the responsibility by the neglect of the holder duly to present it for payment, if he can show that he was thereby prejudiced." And, again, page 441: "In general, if the bill or note be given as a collateral security, and the party delivering it were no party to it, either by indorsing or transferring it by delivery, when payable to bearer, but merely cause it to be drawn or indorsed, or, delivered over by a third person as a security, or, has guarantied the payment, it has been considered that he is not, within the custom of merchants, an indorser or party to it, so as to be absolutely entitled to strict regular notice, nor discharged from his liability by the neglect of the holder to give him such notice, unless he can show, by express evidence, or by inference, that he has actually sustained loss or damage by the omission." Philips v. Astling, 2 Taunt. 206; Swinyard v. Bowes, 5 Maule & S. 62; Holbrow v. Wilkins, 1 Barn. & C. 10; 2 Dowl. & R. 59; Van Wart v. Woolley, 3 Barn. & C. 439. These authorities are somewhat questioned in the case of Camidge v. Allenby, 6 Barn. & C. 373. 9 Dowl. & R. 391. In page 497, Mr. Chitty says: "It is expedient, though not in general absolutely necessary, to give notice to a person who has guarantied the payment of the bill." Whatever doubt may exist in England, under their decisions, whether notice is necessary to charge a guarantor, whose name does not appear on the note, there can be none under the decisions of the supreme court. In the case of Douglass v. Reynolds, 7 Pet. [32 U. S.] 126, the doctrine is clearly laid down. That was a continuing guaranty to Reynolds & Co., as indorser, &c., for one Haring. And the court say: "The fourth instruction insists that a demand of payment should have been made of Haring, and in case of nonpayment by him, that notice of such demand and nonpayment should have been given in a reasonable time to the defendants, otherwise the defendants would be discharged from their guaranty." "And we are of opinion that this instruction ought to have been given. By the very terms of this guaranty, as well as by the general principles of the law, the guarantors are only collaterally liable on the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part, to perform his engagements, are indispensable to constitute a casus foederis." This notice need not be given with as much strictness as to charge a party whose name is on the bill, but it must be given in a reasonable time. See the case of Lewis v. Brewster [Case No. 8,318]. The principle may be laid down as generally applicable to commercial paper, that where the undertaking is collateral to pay the debt of another, on his default, a notice of demand and nonpayment is necessary. And this whether the name of the party be on the dishonored note or not. The only difference in principle seems to be that where the individual is a party to the note strict notice is required, but where he is not a party reasonable notice is sufficient. This view is decisive of this case, as there is in the declaration no averment of a demand of payment and notice to the defendants; but a remark or two may be made on the pleas which are demurred to.

These pleas are filed under a special statute of Indiana. Where negotiable paper is given as conditional payment, the proceeds to be collected by the holder, and applied in payment of the debt, it is incumbent on the holder to use due diligence in collecting the money, by making a demand when it becomes due, and in giving notice of nonpayment to those whose names are on the paper. If, in this respect, the holder is guilty of laches, so as to release the parties on the bill, he makes the paper his own, and must sustain the loss. In Camidge v. Allenby, 6 Barn. & C. 373, above cited, where, in payment for goods sold, certain notes on a country bank were delivered, which bank, unknown to the parties, had stopped payment at an earlier hour on the same day, and no notice for one week was given to the person who paid the notes, it was held that there were laches which released him from responsibility. Mr. Justice Bailey remarked: "The rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them." An agent to save himself from responsibility must observe the usual course of transact-

ing the business in which he is engaged. If he procure an insurance, and neglect to have inserted in the policy the common and usual clauses in the like policies, and a loss should occur, which would have been covered by such clauses, the agent would be responsible for the loss. Mallough v. Barber, 4 Camp. 150; 6 Taunt. 495. If the agent deposit the money of the principal in his own name, and on his own account, and the bank fail, the agent would be responsible. Massey v. Banner, 1 Jac. & W. 245, 248. And so if an agent sell the goods of his principal on credit contrary to usage, or fail to demand the money when the credit had expired; or, if he should sell to persons of doubtful credit, or actually insolvent, he is responsible. Story, Ag. 189. And if he give time for payment after the money became due, or should omit to use the common diligence to collect it, the loss would be his own. Caffrey v. Darby, 6 Ves. 494, 495.

In the case under consideration, if the plaintiffs, having possession of the drafts, neglected to make the proper demand when they became due, or to give notice, so as to hold liable the parties to the drafts, in case of nonpayment, through which the recourse of the defendants was cut off, the loss must fall on the plaintiffs. Under the circumstances the plaintiffs were bound to do what the law required, to collect the money on the drafts, and, in case of failure, to notify all persons concerned. But, as the case turns upon the demurrer to the second count, the question arising on the pleas need not be decided. Demurrer to the second count is sustained. The plaintiffs abandoned their claim under the other counts.

Case No. 4,910.

FOOTE v. FROST et al.

[3 Ban. & A. 607; [1] 14 O. G. 860.]

Circuit Court, D. Massachusetts. Oct. 9, 1878.

OFFICE AND OFFICERS — PATENT TO EX-COMMISSIONER OF PATENTS FOR INVENTION MADE WHILE IN OFFICE — ANTICIPATION — VALIDITY.

1. The law does not disqualify a commissioner of patents from obtaining a patent after his term of office has expired, for an invention made by him while holding such office, and in such case the invention will date back to the time when it was actually made, although he could not then have obtained a patent for it.

2. Where the complainant's patent was for a wire bag fastener, and a prior patent was for a device of a similar structural plan, but made of a slotted metal plate instead of wire, and was intended as a fastener for the lacings of shoes and corsets, and there was no evidence that the prior invention would answer the purpose for which it was intended: *Held*, that under the circumstances, it would not be an anticipation of the complainant's invention.

[Cited in Foote v. Stein, 35 Fed. 205.]

3. Letters patent No. 135,899, granted to Elisha Foote, February 18th, 1873, for a bag tie, *held* valid.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

[This was a bill in equity by Elisha Foote against George Frost and others for the alleged infringement of complainant's patent.]

Elisha Foote, pro se.

James E. Maynadier, for defendants.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

LOWELL, District Judge. The complainant holds a patent, No. 135,899, for an "improvement in grain-bands, bag-ties," etc. The claim is for a holder substantially as described in the specification, which is a piece of annealed iron wire, bent into the shape shown in the drawings; the upper part is oblong, and makes a loop to which the band or cord is permanently attached; the free end of the cord is then passed round the grain-bag or other thing to be held, and brought between the straight or converging sides of the lower end of the holder, where it is held by the strain, which tends to tighten the wire, but can be at once released by a pull on the free end of the cord.

The patent is dated in 1873, but the evidence is clear and uncontradicted that the invention was made in 1867, or early in 1868. At the time the complainant was commissioner of patents, and the respondent argues that he was prohibited by law from taking out a patent, after his commission had expired, for an invention that he made while he was in office. The words of the statute and its intent alike prove that the prohibition upon the commissioner was not intended to fetter his inventive faculties, or deprive him of the fruits of his skill or ingenuity, but merely to prevent bias and interest in his public capacity; when that ceases, the interdict is removed. The law in 1867 was, that the commissioner should be disqualified and interdicted from acquiring or taking, except by inheritance, during the period for which he should hold his appointment, any right or interest, directly or indirectly, in any patent "which has been," that is, before the date of the statute, "or may hereafter be granted." St. July 4, 1836; 5 Stat. 118. This provision is now found in Rev. St. § 480, somewhat simplified, but with the same meaning, that the commissioner shall not voluntarily acquire any interest in any patent during his term; but, he no more loses his right to take out a patent after he becomes a private citizen, than he forfeits one which he already held before his appointment; and there is no more objection to giving his invention its true date, in his case, than in any other.

The only question of fact which has been made is, whether either of the four patents exhibited by the defendants anticipates the plaintiff's invention. Two of them are dated in 1870, after the time at which, as is now admitted, the plaintiff had completed his discovery. The third, that of Cook, is for a device entirely different in its mode of operation from that of the complainant, and is not

much relied on by the defendants. The fourth is that of Butterfield, No. 57,247, granted in August, 1866, for an improved fastening for shoe-lacings, which the inventor says will hold the lacings of a shoe, corset, or other article, so as to prevent the lacing from working loose in the eyelets. It describes a thin plate of metal, to be inserted in the upper part of the shoe where the lacing ends; it is to be of elliptical or other suitable form, with a slot with converging sides, and an eye through which the lacing may enter, and the patentee says, that, as the lacing is drawn toward the point or angle of the slot, it becomes pinched by the opposite converging sides, so as effectually to hold the lacing. He says in another passage, that the friction of the sides of the slot will suffice to hold the lacing firmly, and prevent it from getting loose. Here is, undoubtedly, a device very closely resembling the plaintiff's holder. The doubt insisted on by the plaintiff in his argument seems to us to have much force. It is that, though the patentee is described as living in Boston, no evidence is produced that his mode of fastening proved to be practicable, as applied to the lacing of a shoe, and that the absence of such evidence, in a place where the trade in shoes is so largely carried on, is noticeable. Upon inspection of Butterfield's specification and drawings, and of a specimen shoe introduced in argument, we are led to doubt whether this mode of fastening would answer the purpose. The strain is quite differently applied in a shoe from what it is in a grain bag, and it is not clear to us that the friction of the sides of the slot would hold the lacing firmly. It may be that the difficulty, if it be a real one, arises from the plate being made of sheet metal instead of wire. If the result is attained by the plate, a mere change of material would be unimportant; but, when the question is: Who first completed a working device?—a change of material by which the result is for the first time obtained is very important.

The point is a narrow one, but on the whole we think it well taken, and that the defendant has failed to prove that Butterfield's invention did, in fact, anticipate the holder of the plaintiff in the sense of the patent law.

Interlocutory decree for the complainant.

Case No. 4,911.

FOOTE v. HANCOCK.

[15 Blatchf. 343.] [1]

Circuit Court, N. D. New York. Nov. 12, 1878.

RAILROAD AID BONDS — AUTHORITY OF COMMISSIONERS TO ISSUE—BONA FIDE PURCHASER—DELIVERY TO CONTRACTOR FOR WORK DONE — RECITALS—ACTION ON COUPONS BY PURCHASERS.

1. In this case it was *held*, that the commissioners who issued the bonds of a town, in aid of the building of a railroad, were the officers to determine whether the conditions precedent to the exercise of their authority had been fulfilled; that they did so decide by issuing the bonds; and that the recital in the bonds, that they were issued by virtue of the several acts mentioned, was a declaration of their decision, which entitled a bona fide purchaser of the bonds to recover, without proving that the precedent conditions had been, in fact, fulfilled.

2. A person who has succeeded to the title of a bona fide purchaser of the bonds, is entitled to stand on such title, though not a bona fide holder of them himself.

[Cited in McCall v. Hancock, 10 Fed. 8.]

3. The delivery of the bonds by the commissioners to a contractor for building the railroad, in payment for work thereon, made such contractor a purchaser of the bonds for value, though he took them for an antecedent debt, if he took them bona fide.

4. Such delivery of the bonds to the contractor, in payment for work on the road, and the crediting of the bonds on the subscription of the town to the stock of the railroad company, was proper.

5. It is not the duty of a purchaser of the bonds to look behind the recitals in the bonds, where the bonds, on their face, do not put him on inquiry, by the nature of their recitals.

6. A person can recover on coupons on the bonds, although his sole purpose, in buying them, was to bring suit on them in this court.

7. In such suit, the defendant was not allowed to show that the application on which the county judge appointed the commissioners was not made by twelve freeholders and residents of the town, as required by statute, because the order of the county judge recited that the application was so made.

[This was an action at law by J. Crocker Foote against the town of Hancock to recover the value of certain coupons attached to bonds issued by the defendant.]

E. B. Thomas and Isaac S. Newton, for plaintiff.

A. Taylor and William Gleason, for defendant.

WALLACE, District Judge. Upon the authority of Town of Venice v. Murdock, 92 U. S. 494, it must be held, that the commissioners who issued the bonds in question were the officers to determine whether the conditions precedent to the exercise of their authority had been fulfilled; that they did so decide by issuing the bonds; and that the recital in the bonds, that they were issued by virtue of the several acts mentioned, was a declaration of their decision, which entitles a bona fide purchaser of the bonds to recover, without proving that the precedent conditions had been, in fact, fulfilled. It follows, that the plaintiff in this action should recover, if he has succeeded to the title of a bona fide purchaser, because, even if the plaintiff were not a bona fide holder of the coupons, he is entitled to stand upon the title of any predecessor who was such a holder. Cromwell v. Sac Co., 96 U. S., 51.

The whole issue of bonds, $100 000 in all, was delivered to Delos E. Culver, by the commissioners. Culver was one of the contractors with the railroad company, for build-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

ing the road, and the bonds were delivered to him upon the direction of the railroad company, towards payment for work in building the road. Culver was, therefore, a purchaser for value (Swift v. Tyson, 16 Pet. [41 U. S.] 1), even though he received the bonds in payment of an antecedent debt. He was, also, a purchaser bona fide. It is not shown that he had ever been informed of any infirmity in the origin of the bonds. It is not shown, even, that he was aware that any question had been raised by any one respecting the validity of the bonds. It does appear, that a body of the inhabitants of the town were opposed to the issuing of the bonds, and it may be inferred that they questioned the right of the commissioners to issue them; while it also appears that another body of the inhabitants entertained the contrary view. It may well be conjectured that Culver was aware of this state of local opinion. It is not shown that any definite omission of duty on the part of the commissioners, or any definite non-compliance with the conditions prerequisite to issuing the bonds, was pointed out by any person. This is the whole case, so far as it bears on the question of the bona fides of Culver when he took the bonds. The commissioners were men of respectability and intelligence, and believed themselves justified in issuing the bonds. Upon such a state of facts, it would be unwarrantable to say that Culver was a purchaser mala fide. Such a conclusion cannot be reached upon conjecture. Suspicion, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on his part, will not suffice to impugn his position as a bona fide purchaser. Actual bad faith must be shown. Murray v. Lardner, 2 Wall. [69 U. S.] 110, 121; Cromwell v. Sac Co., 96 U. S. 51.

It is urged, that the bonds were delivered to the railroad company in payment for the stock subscribed for by the commissioners; that this was unauthorized by the statute under which the commissioners derived their authority; and that Culver must have known of this, and, for that reason, was not a bona fide purchaser of the bonds. The answer to this argument is, that the commissioners did just what the statute required. They were authorized to dispose of the bonds on such terms as they might deem most advantageous to the town, and invest the money in the stock of the railroad company, and they were required to see that the money derived from the bonds was applied and used in the construction of the road. While they did not sell the bonds and pay over the money to the railroad company, and see that the company applied it to the payment of the contractors, they did what was equivalent—they delivered bonds at par, as money, directly to the contractors, in payment for work; they saw to the proper application of the bonds, and, by an arrangement with the railroad company, were credited with the amount of the bonds upon the subscription for stock. This was entirely in conformity with the act of April 5, 1866 (Laws N. Y. 1866, p. 874, c. 398), but, if any question could be seriously debated, as to the proper exercise of the authority of the commissioners under that act, it is set at rest by section 7 of the act of May 15, 1867 (Laws N. Y. 1867, p. 2290, c. 917).

If it were necessary for a purchaser to look behind the recitals in the bonds, to ascertain whether or not the commissioners were acting in conformity with the conditions precedent to the exercise of their authority in issuing the bonds, serious questions would be presented in this case. It is, however, no longer open to discussion, in this court; that such is not the duty of a purchaser, where the bonds, upon their face, do not put him upon inquiry, by the nature of their recitals. Miller v. Town of Berlin [Case No. 9,562].

As to the other matters of defence sought to be maintained, it is sufficient to say, that the plaintiff is the owner of the coupons, and is, therefore, entitled to maintain this suit, although his sole purpose, in buying them, was to bring an action and collect them in this court. McDonald v. Smalley, 1 Pet. [26 U. S.] 620; Osborne v. Brooklyn City R. Co. [Case No. 10,597]; Barney v. Baltimore City, 6 Wall. [73 U. S.] 280, 288.

Upon the trial, evidence was offered by the defendant to show that the application upon which the county judge appointed the commissioners, was not made by twelve freeholders and residents of the town, as the statute requires, because some of the petitioners were not residents or freeholders. This evidence was excluded, for the reason that the recital in the order of the county judge, that the appointment was made upon the petition of twelve freeholders and residents of the town, cannot be contradicted in a collateral proceeding. Whether or not the petitioners were freeholders and residents were matters in pais, to be ascertained by the county judge, and his order was an adjudication, which can only be assailed in a direct proceeding for its review. Betts v. Bagley, 12 Pick. 572; Porter v. Purdy, 29 N. Y. 106.

The plaintiff is entitled to recover, and judgment is ordered in his favor, accordingly.

Case No. 4,912.

FOOTE v. JOHNSON COUNTY.

[5 Dill. 281;[1] 24 Int. Rev. Rec. 165; 6 Cent. Law J. 345.]

Circuit Court, W. D. Missouri. April 20, 1878.

MUNICIPAL BONDS—MISSOURI TOWNSHIP RAILROAD AID ACT— CONFLICTING DECISIONS OF STATE AND FEDERAL COURTS.

1. The supreme court of the United States having held the "Township Railroad Aid Act" of Missouri constitutional (Cass Co. v. Johnson

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[95 U. S. 373]), it is the duty of the circuit court to follow that judgment, notwithstanding the later decision of the supreme court of Missouri in State v. Brassfield [81 Mo. 151].

2. Where negotiable commercial securities are issued and negotiated before there is any decision by the courts of the state against the validity of the act authorizing their issue, the supreme court of the United States does not consider itself bound to follow a subsequent decision of the local courts invalidating such securities, but will decide for itself whether, under the constitution and laws of the state, such securities are valid or void.

[Followed in Westermann v. Cape Girardeau Co., Case No. 17,432.]

This is an action [by Elisha Foote] against the county of Johnson upon bonds of the county, dated February 1st, 1871, issued in the name of the county, in behalf of Warrensburg township, under the "Township Aid Act" of March 23, 1868 (Laws 1868, p. 92; Wag. St. p. 313). The defendant demurs to the petition on the ground that the said act is unconstitutional, null, and void.

John B. Henderson, for plaintiff.

Thomas C. Reynolds, for defendant.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. This is an action against the county on what are known as "township bonds," issued under the "Township Aid Act" of March 23, 1868. A demurrer to the petition presents the question whether that act is in conflict with section 14, art. 11, of the state constitution of 1865.

The ground of alleged conflict is that the act authorizes the issue of bonds in aid of a railroad when the proposition is sanctioned by "two-thirds of the qualified voters of the township voting at the election," whereas the constitution requires such a proposition to be assented to by "two-thirds of the qualified voters of the township."

In Harshman v. Bates Co., 92 U. S. 569, Same Case below [Case No. 6,148], the supreme court of the United States held that the act was in conflict with the constitution, on the ground above mentioned. But, subsequently, after a thorough argument and the most deliberate consideration, the supreme court of the United States, in Cass Co. v. Johnson [95 U. S. 373], overruled its judgment in Harshman v. Bates Co., on the point in question, and, upon a full examination of all the decisions of the supreme court of Missouri touching the township aid act, declared, in respect of bonds already issued, that those decisions settled the question of the constitutionality of that act in favor of its validity. Particular stress was laid upon the Linn Co. Case (A. D. 1869) 44 Mo. 504, in which the supreme court of Missouri, by mandamus, compelled a reluctant and opposing county court to issue bonds upon a subscription made pursuant to a vote under the very statute here in question. Mr. Chief Justice Waite, after referring to the Missouri decisions, says: "It is true that the objection now made to the law was in no case presented or considered (by the supreme court of Missouri), but this is sufficiently explained by the fact that in other cases a construction had been given to language similar to that employed in the constitutional prohibition adverse to such a position;" and the chief justice refers to State v. Winkelmeier (1864) 35 Mo. 103; State v. City of St. Joseph (1866) 37 Mo. 270; State v. Binder (1866) 38 Mo. 450; and State v. Sutterfield, 54 Mo. 391.

This line of decisions in Missouri, in our judgment, fully justifies the chief justice in stating that they sufficiently explain why the specific objection now urged to the act of 1868 was not presented in any court until it was presented to the supreme court of the United States in the Harshman Case, at the October term, 1875. The report shows that it was not made in the circuit court. Harshman v. Bates Co. [Case No. 6,148].

Suits in great numbers on these township bonds have been brought in the circuit court of the United States for this district, and they have been defended by the ablest lawyers in the state, upon every ground that they conceived open to them. Jordan v. Cass Co. [Id. 7,517]. But this difference between the phraseology of the constitution and the act, so patent that it could not escape attention, was never presented or urged in any case, so far as either of us recollect, as invalidating the act. The only explanation for this silence on the point in the state and federal courts is to be found in the Missouri decisions referred to by the chief justice.

But it is urged that whatever doubt there might heretofore have been touching the validity of the township bond act, the question of its unconstitutionality is now settled adversely to the act by the case of State v. Brassfield [81 Mo. 151], decided by the supreme court of Missouri on the 16th day of the present month (April, 1878).

We have been furnished with the opinions of the judges in the case referred to, and have read them with attention. Only three judges took part in the decision. Two of them (Henry and Sherwood, JJ.) hold the act unconstitutional, and one (Hough, J.) was of the opinion that the objectionable words, "voting at such election," could be eliminated from the act, and thus relieve it of the constitutional objection. Napton, J., though not sitting in the case, filed a brief opinion, stating his concurrence in the opinion of Chief Justice Waite in the case of Cass Co. v. Johnson [supra]. Norton, J., having been of counsel, did not sit.

There is, therefore, no judgment of the majority of the judges of that learned court that the act of 1868 is unconstitutional. It is the duty of this court, then, to follow the judgment of the supreme court of the United States. But even if the supreme court of Missouri had, in its recent judgment, for the first time pronounced the act of 1868 unconstitutional, it is our judgment that in

this class of cases the supreme court of the United States, as to bonds antecedently issued, would not, under the circumstances, feel itself bound to change its decision to conform to the decision of the supreme court of the state.

The supreme court of the United States considers questions arising upon negotiable municipal bonds issued under state authority to relate to commercial securities, and not to present questions of mere local law; and where such securities have been issued before any decision of the state tribunals denying the validity of the act authorizing the issue, the supreme court has declared that in protecting the constitutional rights of creditors it will decide for itself whether, under the constitution and laws of the state, such securities are valid or void. Pine Grove v. Talcott, 19 Wall. [86 U. S.] 666; Olcott v. Supervisors, 16 Wall. [83 U. S.] 678. The cases last cited related to bonds which had been issued under acts which had been declared unconstitutional by the supreme court of Michigan in the one case, and by the supreme court of Wisconsin in the other, after the bonds in question had been issued. The duty of the supreme court of the United States to follow the judgment of the supreme court of the state was strongly urged by counsel. But the supreme court was of a different opinion, and in the case first cited Mr. Justice Swayne expresses the views of the court on the subject in language so emphatic and decisive as not to be mistaken. He says: "The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration; and during the period covered by their enactment neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The national constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery." See, also, Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175, 205, 206; Butz v. Muscatine, 8 Wall. [75 U. S.] 575.

This court must, therefore, hold the act of March 23, 1868, to be constitutional, in conformity to the opinion of the supreme court of the United States. The demurrer to the petition is accordingly overruled.

Judgment accordingly.

[NOTE. For further proceedings, see U. S. v. Johnson County, Case No. 15,489, where the validity of the act of 1868 was sustained.]

FOOTE v. JOHNSON COUNTY. See Case No. 15,489.

Case No. 4,913.

FOOTE v. LINCK et al.

[5 McLean, 616.] [1]

Circuit Court, D. Ohio. Oct. Term, 1853.

EQUITY—STOCKHOLDER'S BILL TO ENJOIN COLLECTION OF BANK TAX—CITIZENSHIP OF PARTIES—ACTION AT LAW—INJUNCTION — DEMURRER TO BILL.

1. An injunction was granted against the collection of a tax from the trust company, alleged to be unconstitutional.

2. This was done, on the application of a stockholder, a citizen of Connecticut, who filed a bill against the auditor of state, and the trust company.

3. In such a case, the parties being before the court, it can give the same relief, as if the trustees of the company were complainants.

4. The court will give relief to parties on the record, as their respective rights may require.

5. A suit at law is not necessary to authorize the injunction, where the mischief complained of, would be irremediable at law.

6. The allegations of the bill were admitted by the demurrer.

[This was a bill in equity by Samuel E. Foote against Morgan Linck and the trustees of the Life Insurance & Trust Company.]

Worthington & Stanbery, for plaintiff.

Atty. Gen. Pugh, for defendants.

OPINION OF THE COURT. During the late term a bill was filed by the complainant, a citizen of Connecticut, against the defendants, in which was set out the charter of the trust company, showing that there was a provision in it declaring, that the capital stock should be taxed no higher than the stock of other banks of the state. Also, that a proposition being made by the legislature to the banks of the state, if they should cease to circulate notes of a less denomination than five dollars, they should not be taxed more than at the rate of 5 per cent. on their dividends. That the trust company bank accepted the proposition, called in its small notes, and filed the evidence of the fact in the au-

[1] [Reported by Hon. John McLean, Circuit Justice.]

ditor's office, as required by the act; and that for many years the tax was on the dividends as proposed; that by a late law the tax was imposed more than ten times greater than the tax before assessed on the capital of the company; that under the law for the collection of such tax on banks, the auditor was required to appoint a commissioner for the collection of such tax, to whom he issued his warrant as the law authorizes, requiring him to make a demand of the tax, which, if not paid in five days, the commissioner is authorized to enter the bank by force, open its vault, and take therefrom the amount of the tax and penalties, in gold and silver, &c. The tax demanded by the commissioner under the above act for the years 1851 and 1852, with the penalties thereon, amounting to the sum of ninety-six thousand dollars, to which was to be added five per cent. for poundage to the commissioner, and an additional penalty of five per cent.

The complainant alleges that he holds fifty shares of stock in said company, which is now at par or above it; that the said law impairs the obligations of the contracts before stated, and is consequently void under the constitution of the United States; that he has applied to the trustees of the bank, who have taken no step to arrest the collection of the tax above stated; and represents that if the money shall be collected and paid over to the state treasury, the injury to himself and the bank will be irremediable, and he prays an injunction against the commissioner, the auditor of state, and the trustees of the company. Notice having been given to the commissioner, that an application would be made to the circuit court at its late term, at Columbus, for an injunction, which application being made, in pursuance of the notice, there being no opposition, the circuit court, on the face of the bill, ordered the injunction to issue, but, at the same time, the court said, a motion would be heard to dissolve the injunction during the term. A motion to dissolve being made, it was agreed that it should be argued before the circuit judge at Cincinnati, at chambers. On the 18th day of November, at Cincinnati, the above motion came up for argument. And it was argued by the attorney general for the state, Mr. Pugh, in favor of the motion, and by Messrs. Worthington and Stanbery for the complainants.

The attorney general distinguished this case from that of Osborne v. Bank of U. S. [9 Wheat. (22 U. S.) 738]. The tax in that case was one hundred thousand dollars, when the whole amount of the capital in both the branches of the United States Bank, in this state, amounted only to the sum of one hundred and fifty thousand dollars. The tax, therefore, it was said by the supreme court, would be destructive of the branch of the bank in Ohio. And this was one of the grounds on which the opinion of the supreme court was founded. It was also an interference with one of the fiscal agents of the government, and was not within the taxing power of the state. It was also objected that all the directors were not made parties. The attorney general mainly contended, that the complainant, as a stockholder, could not sue the directors; that the bill was filed for himself, and not in behalf of others; that it might be the wish of the trustees to pay the tax; that the bill asked the court to take the power from the trustees, as given to them by the charter, which would, in effect, wind up the concerns of the bank, and a number of authorities were cited as sustaining the positions taken. The attorney general also contended that the tax was not ruinous to the bank, and that if the money were collected, provision was made for the re-payment of it, should the law under which it was assessed, be decided by the supreme court of the United States, to be unconstitutional.

The above is a very general statement of the argument of Mr. Pugh—nothing more than an outline of it is attempted to be given. Mr. Worthington opposed the positions of Mr. Pugh, observing that he appeared as well for the trustees as for the complainant. Mr. Stanbery also considered the argument of the attorney general, and submitted his views as to the merits of the case.

It cannot be considered as any disparagement to the state court, that a citizen of another state sues in the federal court. The constitution and the act of congress, give him this right. In the exercise of it, he does no more than every suitor in the state court, who brings his action in one of the courts of the state, which may be a matter of choice or accident. No reason is ever assigned by a citizen of another state, that he cannot obtain justice in the state courts. Such a suggestion would not be tolerated, and the bill would be dismissed for impertinence, if the objectionable part were not stricken out.

The complainant being a citizen of Connecticut, has a right to sue in this court, if he has made a case for the exercise of jurisdiction by the circuit court. He has stated an interest in the trust company, which the law will protect, against the threatened injury complained of, if that injury be irremediable, and the mode of relief be within the powers of a court of chancery. It does not follow that the right asserted, is hostile to the powers of the trustees, because they are made defendants. From the facts stated in the bill, it appears the right of the claimant and the relief asked, in no respect interfere with the powers of the trustees. It is true, the complainant asks that the trustees may be enjoined from paying over the tax to the state; but there is enough on the face of the bill to show, that the suit of the complainant was brought to protect the rights of the trust company, and consequently the rights of the trustees. That this may be done, is a familiar principle of chancery.

The court will decree as between the parties on the record, whether they be complainants or defendants. The court having jurisdiction under the bill filed by the complainant, can protect the rights of the trustees, though defendants, the same as if they were complainants. And chancery often, in such a case, decrees between conflicting rights of defendants. This doctrine is laid down in both the volumes of Story's Equity. It has been often acted upon by the supreme court. In the case of Piatt v. Oliver [Case No. 11,115], and a great many other defendants who were citizens of Ohio, and therefore could not be made complainants in the case, but their interest was the same as that asserted by the complainant, the court gave relief to the defendants, the same as the plaintiff, according to their respective rights. This case was appealed to the supreme court, and the decree of the circuit court was affirmed. Id. [3 How. (44 U. S.) 333]. The case of Chiles v. Boon, 10 Pet. [35 U. S.] 177, is to the same effect. The trustees being citizens of Ohio, could not be made complainants, but being made defendants, they are before the court, and the court having jurisdiction from the citizenship of the complainant, can act upon the right, and for the protection of the parties, the same as if the trustees were complainants.

The injunction was allowed upon the face of the bill; the demurrer now filed, admits the statements of the bill, as far as they are correctly pleaded. If no contract has been impaired, the demurrer filed raises the question for the decision of the court. That question has not been argued, and I am glad that it has not. The principal reliance seems to be a want of jurisdiction in the court, in the form in which the suit has been brought. The supreme court of the state has decided that the tax has been imposed under a constitutional law, and that the mode of collecting it is legal. But this decision, I understand, has been taken to the supreme court of the United States, by a writ of error. A case thus situated, cannot be considered as one of authority, as it is still pending in the supreme court, and may be reversed. If the supreme court shall affirm the judgment of the state court, it being the same question as involved in this case, the circuit court will, as a matter of course, dissolve this injunction without argument. I can entertain no doubt of the jurisdiction on the points made. It is fit that the supreme court should act upon this great question; and, as it is before the court, and will be acted on in the course of two or three months, I deem it, therefore, inexpedient to dissolve the present injunction. It has been argued that until the right be established at law, an injunction should not be granted. The lord chancellor,—if my memory serves me,—Eldon, once decided, so I think, in an application for an injunction on a patent right. But his lordship was mistaken, as is shown by the action of a court of chancery, before and since his decision. In this country, an injunction has been usually granted against a threatened wrong, for which, if done, the law can give no adequate redress. In answer to this, it is said, a remedy by mandamus is provided for by law, where a tax is illegally assessed and collected. But it might become a question, whether the circuit court, under the state law, could issue the mandamus provided for; and if it could, it would be in the power of the legislature to repeal the law giving the remedy. The money collected being paid over into the state treasury, could not be recovered by suit, as the state cannot be sued. The remedy against the auditor and the commissioner might be attended with insurmountable difficulties. The poundage at five per cent., amounting to five thousand dollars, which the commissioner will receive as his compensation for the service, could not be recovered from the state.

The attorney general moved that the money be brought into court, which the judge refused, as, in his judgment, there could be no safer depository than that of the vaults of the trust company. Complaint being made of the insufficiency of the security given by the complainant, the judge observed that he supposed there could be no objection to any amount of security which, in reason, might be required; he, therefore, ordered that a bond in two hundred thousand dollars be given, conditioned to pay the whole amount of tax claimed by the state, if this bill shall be dismissed, and the injunction be dissolved. If, however, the injunction shall be dissolved, the auditor and commissioner may proceed in the summary mode authorized by the statute, to enter the bank and seize the money, if it shall not be paid within the five days after demanded. The bond has been given, as required, and has been transmitted to the clerk of the circuit court.

Case No. 4,914.

FOOTE v. MT. PLEASANT.

[1 McCrary, 101.] [1]

Circuit Court, D. Iowa. Oct., 1878.

MUNICIPAL CORPORATION — CORPORATE BONDS — FORECLOSURE OF MORTGAGE UPON A RAILROAD — RIGHTS OF PURCHASER — DECISIONS OF HIGHEST STATE COURT AS TO VALIDITY OF MUNICIPAL BONDS.

1. Where a city has power to subscribe to the stock of a railroad company and to issue bonds in payment of the subscription, the proceeds of such bonds in all cases to be expended within the limits of the county in which such city is situate, *held*, that as between the city and the railroad company, or its assignee with notice, such bonds cannot be enforced where no part of the proceeds of the subscription has been expended in the county, and no part of the railroad subscribed to has been constructed therein.

2. The owner of certain first mortgage bonds upon the K., Mt. P. & M. Railroad, includ-

[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

ing all its "property, real and personal, and all rights and interests therein now owned or hereafter to be acquired," proceeded to foreclose the mortgage, and obtained decree under which he purchased the property. The mortgage provided that the bonds secured by it should in no case be issued or disposed of except at the rate of $8,500 for every mile of road as completed. *Held*, that as to the bonds issued by the city of Mt. Pleasant, under the circumstances named above, the purchaser at sale under the decree did not become a bona fide holder, with right to sue and recover.

3. The supreme court of the United States has held that bonds issued while a decision of the supreme court of Iowa holding in favor of the power of the corporation to issue the same, remained in force, will be upheld as valid, notwithstanding a later decision the other way; but as to bonds issued after the promulgation of the later decision, the supreme court of the United States will accept and follow the decision of the supreme court of this state.

At Law.

H. Scott Howell and J. G. Anderson, for plaintiff.

Woolson & Babb, for defendant.

DILLON, Circuit Judge. This is an action by Chas. B. Foote against the city of Mt. Pleasant, involving the validity of $50,000 of bonds issued by the defendant city to what was known as the Keokuk, Mt. Pleasant and Muscatine Railroad Company, and the right of the plaintiff to recover on these bonds. The defenses to the suit are fourfold: First. Denying that the plaintiff is the owner and holder of the coupons sued upon, or any part of the same, or that he has any interest therein. Second. That the bonds were issued without authority of law and are illegal and void. Third. That the bonds were issued upon the express condition that the proceeds should be used solely for work on the railroad to be done in Henry county, Iowa, and that the plaintiff had full knowledge of that fact; and that they were never so issued as to entitle the plaintiff to the rights of an innocent holder of the bonds or coupons for value; and if he ever held the same, he has parted with all interest therein. Fourth. That the said bonds and coupons have been fully settled and satisfied by the defendant city, and have been paid and cancelled.

The case is submitted on an agreed statement of facts, from which it appears briefly as follows: In 1857, under a provision in the charter of the city of Mt. Pleasant, the question was submitted to the legal voters, whether they would authorize a subscription by the city of Mt. Pleasant of $50,000 to the capital stock of the Keokuk, Mt. Pleasant and Muscatine Railroad Company. This submission was pursuant to section 28 of the charter, which is as follows: "The said city shall have power to subscribe to the capital stock in any railroad company, and may pay the same with the bonds of the city, and shall be empowered and required to levy and collect all the necessary taxes to pay the principle and interest on such bonds; provided such subscription shall be authorized by a majority of the legal voters of said city cast at an election ordered for that purpose." At the time when this vote was taken, in August, 1857, the general law of the state had authorized counties, cities and incorporated towns to aid railroad companies by subscription to their stock, and to issue bonds. This act contained a provision as follows: "And the proceeds of such bonds shall in all cases be expended within the limits of the county in which the said city may be situated." In the proposition submitted to the voters was this provision: "Such bonds shall be issued only on the guaranty that the money shall be expended in the county of Henry, in the construction of said road." So that the general law of the state, and the specific submission to the voters, alike provided that the proceeds of the bonds were to be expended in the construction of the road in Henry county. That vote was taken in August, 1857, and it resulted in favor of the proposition. in November, 1857, the city council authorized the issue of the bonds of the city, pursuant to that vote, for the sum of $50,000, to aid this railroad company, on receiving the guaranty of the railroad company that they would expend the money (the proceeds of these bonds) in Henry county. The city accepted the unsecured obligation of the railroad company that they would do so. The city bonds were accordingly issued and delivered to the railroad company. In September, 1860, the railroad company resolved on the execution of a deed of trust or mortgage of the railway (a mortgage, in short, we may call it), on their entire line of road and property, present and future, to secure a large amount of bonds of two classes, one called the "First Mortgage Sinking Fund Bonds," and the other the "First Mortgage Bonds." The mortgage contained this provision, which it is important to notice, viz.: That in no case shall the bonds of the first class (that is, the first mortgage sinking fund bonds) be issued and disposed of except at the rate of $8,500 for every mile of road as completed, nor the bonds of the second class, except at the rate of $7,000 per mile of road as completed.

Now, the plaintiff's claim to the ownership of city bonds rests on two fundamental propositions. One is, that they were embraced in this mortgage. The other is, that being so embraced in the mortgage, they passed to him by virtue of the subsequent decree of foreclosure of the mortgage, and that he thereby has obtained title to them. This mortgage was made in 1860, and the language in respect to what it covers is in this wise: "Locomotives, tenders, rolling-stock, fuel, machinery," etc., and it proceeds thus: "and all other property, real and personal, and all rights and interests therein now owned or hereafter to be acquired by the said parties," etc.; and it concluded with

this reservation, among others: "and reserving also to the said railroad company full power to sell, convert and dispose of any city, county or other bonds or securities received in the payment of stock, or donated to the construction of the said railroad, and to collect subscription of stock: provided no default shall occur in the payment of interest on said bonds and to the sinking fund herein provided and required," etc. That mortgage was recorded, as it appears, only in the county of Lee, in the records of land mortgages. Afterwards the company went on and built eighteen miles of road in Lee county, and had completed only that amount of road at the time the war of the Rebellion broke out, at which time the company ceased its operations and became insolvent. The county of Henry had voted $100,000 of their bonds, concerning which the stipulation reads as follows: "Said company (the railroad company) has also received a subscription from Henry county of $100,000 in bonds, and it had agreed with Henry county to expend that amount in Henry county, which said bonds had been sold by the company." It is agreed that no road was ever built in Henry county; that only eighteen miles was completed in Lee county; and that the railroad company had done work in Henry county only to the amount of $34,000. In other words, very much less than the amount of work which they were required to do, in respect to the $100,000 of bonds which they had received from the county of Henry; so that we may say that no part of the $50,000 here in controversy was ever expended in Henry county, as required by the law of the state and by the specific vote that was taken. This $50,000 of bonds were delivered to the railroad company prior to the execution of the mortgage, and after the mortgage they were left in the possession of the railroad company, which afterwards delivered these bonds to Mr. J. Edgar Thompson, one of the trustees in the mortgage; but it is stipulated that Thompson received these bonds not in his capacity as trustee, but as a bailee of the railroad company; so that, in short, these bonds remained always with the railroad company, as well after the mortgage as before.

I have stated that the railroad ceased to do work and became insolvent in 1861, and this was the condition of affairs: The city had these bonds for $50,000 outstanding and in the hands of the railroad company; the company was insolvent, and all work had been suspended; there was no road completed in Henry county, and no prospect of any being completed. In 1862 the supreme court of the state of Iowa decided, in the case of State v. Wapello Co., 13 Iowa, 388, which was followed in the next year by the cases of Myers v. County of Johnston, 14 Iowa, 49; McMillan v. Boyles, Id. 107; Ten Eyck v. Mayor of Keokuk, 15 Iowa, 486; and Smith v. Henry Co., Id. 385,—that under the constitution of the state it was beyond legislative competency to authorize municipalities to aid railroad companies by subscription to their stock and the issuing of bonds, and that was accepted in the state of Iowa as the settled law on that subject. In 1865 the city of Mt. Pleasant instituted a suit in one of the local courts, making the railroad company, Mr. Foote, the plaintiff here, and others defendants, and praying that the bonds be ordered to be surrendered to the city and cancelled. That was in September, 1865. In October, 1865, a new element was introduced: A Mr. Lash, who had been vice president of the railroad company, went before the city council and made the proposition that if they would appoint him as agent, he would take up and procure to be surrendered to the city the $50,000 of bonds, which, with interest, then amounted to about $70,000; and they appointed him agent for that purpose. Here comes the controversy between Lash and the city, as to his relations to the city and to the railroad company, and the supreme court of the state decided that Lash was the agent of the city to procure these bonds. The city issued to Lash warrants to the amount of $6,000, with which he was to pay $1,000 of the old debts of the railroad company, and was to use the others in forwarding the affairs of the railroad company. The supreme court decided that Lash was the agent of the city to procure these bonds. He had procured them in October, 1865, and brought them into the city council and surrendered them, whereupon (and which is, I think, the most sensible thing I have seen in the whole controversy) some gentleman moved that having got the wolf they ought to kill him on the spot, and the council proceeded to burn the bonds.

In the following April, 1866, Mr Foote, the plaintiff in this suit, having and being the owner of 244 of the first mortgage sinking bonds, and 202 of the first mortgage bonds, which it is stipulated were issued as this road was built mile by mile for the eighteen miles completed in Lee county, brought his bill to foreclose this railway mortgage, making defendant to that bill, the trustees, Mr. Thompson and Mr. Hooper, and all the other bondholders; and such proceedings were had as that Foote obtained a decree in his favor for $318,000, in May, 1866, and the other bondholders for $38,000, and Edward Kilbourn, the lessee of the company, a decree for $364,000; and one question is, whether under that decree the bonds of the city are included in the property ordered to be sold. I will read the decree so far as it relates to the description of the property ordered to be sold. (The city of Mt. Pleasant, I may remark, was not a party to that foreclosure.) "The superstructure, iron rails, water tanks, rolling stock, fuel, material, track, and all franchises, rights and privileges, and all rights of way over lands belonging to the said

railroad company;" and the following clause is the one on which the plaintiff relies for title: "or in any of which things said railroad (or said railroad company) have any interest or claim, and in all other property of the said railroad company, whether real, personal or mixed, or in which they have any interest or claim, being as well for the payment of the bonds issued by the said railroad company, and the other claims against the said property." Under that decree there was a statutory appraisement of the specific property, locomotives, cars, etc., owned by the railroad company, amounting to $91,000, and an omnibus valuation of the railroad track, and all other property, real, personal and mixed, in which the company had any claim, amounting to $459,000. In other words, the bonds here in controversy, issued by the city of Mt. Pleasant, are not mentioned in terms as being conveyed by the mortgage, nor are they mentioned in the decree, or in the appraisement, or in the deed, but they are claimed to be covered by the general language, "any and all other property, real, personal or mixed, belonging to the corporation."

Now the question is whether on this state of facts, Mr. Foote has a claim to these bonds, as a bona fide holder thereof without notice of the rights and equities of the city. We are of opinion that he is not such a holder, for several reasons. In the first place, it would be very improbable that a railroad company, having received bonds issued by a municipality for the express purpose of sale and negotiation by it, to aid it in the construction of its road, would embrace those bonds in a railway mortgage, and thus sink that much of the ready means intended to enable them to build the road, by putting them in an omnibus mortgage of this kind. The most natural course would be that these bonds should be sold. They were made for that purpose—made to be negotiated in the usual way. There ought, therefore, to be very clear language to justify a court in holding that the railway company intended to include these bonds in a mortgage. The language here is general, and in one view it is broad enough to cover these bonds. In a more narrow view these bonds would not be held not to be embraced in it. What is best to guide the court as to the intention of the parties, for that should govern. To guide us, let us look at the practical construction the parties put upon this transaction. Now, if the bonds were intended to be included in the mortgage, it would seem to be very natural that they should be delivered to the trustee, but they were not. On the contrary, as I have stated, they always remained in the possession of the railroad company. Not only so, but the trustee, Mr. Thompson, an experienced business man, undoubtedly faithful to his trust, and, in 1865, when the president of the railroad company sent an order, on him, to surrender these bonds to the city, he set up no claim to them. He did not say that these bonds belonged to this trust property, but he surrendered them to the agent of the city, thereby recognizing the fact, as he understood it, that they were not embraced in the mortgage.

Then again, here is a property which at the time of this foreclosure amounted to seventy or seventy-five thousand dollars, and while the decree mentions everything else, down to "spikes," in infinite detail, these bonds are never mentioned anywhere in the proceedings.

But the plaintiff relies upon an implication arising out of the reservation in the deed of trust that the city might sell these bonds until default in the payment of interest. Now whatever effect that might have, one thing is manifest, namely, that it appears from that very reservation that there was no intention here to pass to the mortgagees, or to the trustee representing the bondholders in this mortgage, an absolute and full title to these bonds. That is not the negotiation of a security in a commercial sense, so as to cut off any equity, leaving it in the possession of the owner with power to sell; so that, in our judgment, Mr. Foote never obtained any title to these bonds in a commercial sense, so as to defeat defenses, even admitting the language of the mortgage is broad enough to embrace them. That is one ground on which we think the suit must fail, but there are others that seem to our mind equally conclusive.

We have already adverted to the fact that the statute required the proceeds of these bonds to be expended in the county of Henry, and not only so, but the specific proposition submitted to the people of the city of Mt. Pleasant was that these bonds should be thus expended; and the railroad company executed its obligation agreeing to thus expend them; so that we have the statute of the state, and the specific proposition voted on by the people of the city, and also the obligation of the railroad company, all concurring that the money arising from the sale of these bonds, "the proceeds of these bonds," in the language of the law, should be expended in Henry county. Now what does this contemplate? It contemplates the negotiation of these bonds in the ordinary and usual way, and the keeping of the proceeds separate from the other assets of the company, and that the proceeds when obtained shall be expended in the county of Henry. Fundamentally this was the inducement to make the vote. What did the railroad company do? They received these bonds (and on the plaintiff's theory, for I am now discussing it in the view that he may be right and that this broad language is sufficient to include these bonds in the mortgage), and commenced their work in Lee county. They make a mortgage, and include these city bonds in it to raise money in gross. If that

transaction can be sustained, then it is very evident you can never tell how much money was obtained specifically on these bonds. It is very evident that the mortgagee made no specific advance on the faith of this security; and therefore to allow a recovery here would be to subvert the law, and the obvious intention of the law, and the express contract of these parties. The utmost effect, it seems to us, that can be given, would be that the right of the mortgagees would be dependent on the railroad company getting a perfect and complete title to these bonds. If the railroad should expend any amount of money equal to this amount of bonds specifically in Henry county, perhaps there would then be an equity on their part to hold these bonds and recover on them; and if they, before that time, had pledged them to the mortgagees, when the railroad company's right became perfect, the pledge would enure to the benefit of the mortgagee. But in that view of it, the mortgagees have taken them subject to all the equities of the city and railroad company. It is obvious that the railroad company never obtained any rights to these bonds, because the money was never expended in the county of Henry, or any part of it.

But suppose we are mistaken in this view, there is another ground which seems to us equally fatal to plaintiff's right. The language of this decree, ordering the sale, is in presenti. It did not include these bonds, for the reason that at that time the bonds had been surrendered to the city, and were no longer in existence. They had been destroyed. It cannot be held, under a sweeping provision of the mortgage, mortgaging all property, real, personal and mixed, not in possession, and thereafter to be acquired, that seven or eight years afterwards, when the railroad company has parted with a large amount of personal property under a jus disponendi reserved to it, that this decree in presenti, ordering the sale of all the personal property of the railroad, can relate back and divest titles acquired under the railroad company when they had the power of sale and disposition. Our judgment is, this decree is not broad enough to cover these bonds, they being no longer in existence at the time the decree passed, and it being known to the plaintiff that such was the fact; for Mr. Kilbourn concurred in the surrender of these city bonds, and he, as the agent of Foote, obtained a foreclosure, and knew that the bonds had been surrendered. He made no effort to impeach that transaction at the time of the foreclosure.

But suppose we are mistaken in this view, there is another equally fatal to the plaintiff's right, namely: That under the circumstances of this case, the surrender of these bonds is binding on all parties. How does the case stand? The city had made a subscription of $50,000 to this railroad in violation of the law of the state, as expounded by the supreme court of the state. The bonds had never been executed to the railroad. The city had subscribed to the stock in the books of the company, but the city still held the stock of the company. The company still held the bonds of the city, and the railroad company had become insolvent; had ceased to do any work. Seeing they were unable to carry out their contract to expend the proceeds of those bonds in the county, the city filed its bill to cancel this subscription and to have the bonds returned to it. It is plain that the city was entitled to have that done. Mr. Howell in his argument mistakes the decision of the supreme court of the United States. He says: "It is unnecessary to argue to this court that these subscriptions to railroad corporations are valid," etc. Such is not the effect of the decisions. The supreme court of the United States simply hold that since the supreme court of the state of Iowa had, in 4 G. Greene, decided that such bonds might be constitutionally issued while such decision remained in force, they would be sustained in the hands of bona fide holders, but as to bonds issued, after that decision was overruled, the supreme court of the United States will accept the decision of the supreme court of the state on that subject. Now, there were no bona fide holders of these bonds at the time the surrender was made. The railroad company was not such. The city held the stock, and the supreme court of the state meanwhile had decided such bonds to be unconstitutional, and it is stipulated that these bonds were considered to be valueless. Under those circumstances, the transaction whereby the bonds were surrendered was valid. There can be no doubt about that. It is a misconception to suppose that the supreme court of the United States hold that the railroad subscription, as a subscription, is valid, contrary to adjudication of the state supreme court. All it holds is that commercial securities in the hands of bona fide holders must be protected. Hence the argument here made by Mr. Howell, that the surrender of the stock was a fraud upon the company's creditors, has no application. The city's liability as a stockholder could not be enforced. That is not a commercial security. Here is the decision of the supreme court of the state that the city had no right to become a stockholder, and the obligation of a stockholder cannot be enforced against it. So I say, it is clear that the surrender of these bonds was effectual and binding upon the city and the railroad company. The result is, that upon all these grounds Mr. Foote, as it appears to us, has no case. Judgment for defendant.

Case No. 4,915.

FOOTE v. NOLAND.

[5 Cranch, C. C. 399.] [3]

Circuit Court. District of Columbia. March Term, 1838.

EXECUTORS—ACTION ON NOTE—PARTIES.

If a sealed note be given to R. H. F., one of the executors of Thomas Whittington, it is not necessary that all the executors should join in the action.

Debt on a sealed note for $60, payable to R. H. Foote, one of the executors of Thomas Whittington.

R. J. Brent, for defendant [William Noland], contended that it is to be presumed from the face of the note, that the money belonged to the estate of the testator; and that there were other executors who ought to be joined as plaintiffs; and prayed the court to instruct the jury that the plaintiffs alone cannot recover; but that all the executors ought to join whether they proved the will or not.

Mr. Bradley, contra, cited Biddle v. Wilkins, 1 Pet. [26 U. S.] 686, 692.

THE COURT (THRUSTON, Circuit Judge, absent), refused.

Verdict for plaintiff. New trial granted, because the verdict was against the evidence.

Case No. 4,916.

FOOTE v. SILSBY et al.

[1 Blatchf. 445; [1] Merw. Pat. Inv. 564; 1 Fish. Pat. Rep. 268.]

Circuit Court, N. D. New York. Oct. Term, 1849.[2]

PATENTS—DISCLAIMER—EVIDENCE—ACT OF MARCH 3, 1837 — SCIENTIFIC WORKS AS EVIDENCE OF WANT OF NOVELTY—JURY—NONSUIT—COMBINATION.

1. While the plaintiff's counsel in a civil action was opening the case to the jury, one of the jurymen empannelled was taken ill, so as to be unable to serve: *Held*, that it was proper for the court to discharge him, and to direct another juryman to be drawn from the panel in his stead.

[See note at end of case.]

2. On the trial of a patent suit, the patent on which the action was founded had endorsed upon it what purported to be a disclaimer under section 7 of the act of March 3, 1837 (5 Stat. 193). The plaintiff, after putting the patent in evidence, offered a certified copy of the disclaimer, which was excluded on the ground that the patentee did not state in the disclaimer the extent of his interest in the patent, as required by section 7. Afterwards, the defendant offered in evidence the disclaimer endorsed on the patent, (it being, however, only a copy, not in the patentee's hand-writing,) not as a disclaimer, but as a confession by the patentee, of the want of novelty of a part of what he had claimed: *Held*, that the paper was inadmissible, for want of proof that it had been executed by the patentee, and that, if admitted at all, the full effect of a disclaimer must be given to it.

[See note at end of case.]

3. The sufficiency of the disclaimer, as to whether or not the patentee stated in it "the extent of his interest" in the patent, as required by section 7, considered.

4. A disclaimer must be properly proved, before it can be admitted in evidence, either as an original paper or by a certified copy.

5. On the trial of a cause before a jury, this court has no power to grant a non-suit against the will of the plaintiff.

[See note at end of case.]

6. A notice of defence in a patent suit, under section 15 of the act of July 4, 1836 (5 Stat. 123), specified as a public work to be given in evidence, "Dr. Ure's Dictionary of Arts, Manufactures, and Mines." The book contained 1334 pages, and its subjects were arranged alphabetically. The notice did not specify any particular page or heading in the work: *Held*, that no part of the book could be read in evidence.

[See note at end of case.]

7. Nor is the book admissible under a notice stating that the patentee's invention was previously known to Dr. Ure.

8. In the case of such a defective notice, it is not competent, with a view to read in evidence parts of the "Dictionary," to prove by scientific mechanics or experts, that they could without difficulty, if seeking information concerning the subject matter of the plaintiff's patent, find in the "Dictionary" named, certain parts relating to that subject matter, without having any specific reference to them.

[See note at end of case.]

9. A public work cannot be read in evidence on the trial of a patent suit, with a view of showing a want of novelty in the patentee's invention, where the only notice given of it was in a special plea, which had, before the trial, been stricken out by the court.

10. On the trial of a patent suit, a juror will not be withdrawn on the defendant's motion, on the ground of surprise, arising out of the exclusion by the court of evidence offered by him under a defective notice of special matter. The granting of such a motion, under any circumstances, is a matter of discretion.

11. The application of a well-known principle to a new and useful purpose, such as the application of the principle of the expansion and contraction of a metallic rod by different degrees of heat, to the regulation of the heat of a common cast or sheet-iron stove, is the subject of a patent.

12. Although the principle has before been applied to the regulation of heat, and although the idea of applying it to the regulation of the heat of a stove has before been suggested, the person who first practically applies it, by mechanical contrivances, to that purpose, is entitled to a patent for the application.

13. Where the question as to what constituted a combination as patented was, at the trial, treated by the defendant as a question of fact, and was submitted as such by the court to the jury, the defendant cannot afterwards insist that the court should have determined the extent of the combination, as matter of law, upon the specification.

14. When the effect and operation of mechanical contrivances enter into the question of the extent of a patented combination, it is a mixed question of law and fact, and, therefore, a proper one for the jury to determine under the instruction of the court.

[Cited in New Process Fermentation Co. v. Maus, 20 Fed. 731.]

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[3] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

[2] [Affirmed in 14 How. (55 U. S.) 218.]

15. Proper instructions to the jury on the questions of infringement and of damages, considered.

16. Reasons for denying a motion for a new trial on the grounds of surprise and newly discovered evidence.

17. Facts stated which warrant a jury in giving liberal damages in a patent suit, within the rule of the statute as to actual damages.

This was an action on the case for the infringement of a patent, tried before Conkling, District Judge, at Canandaigua, in June, 1848. [Case unreported.] The letters patent [No. 2,636] were granted to the plaintiff, [Elisha Foote], May 26th, 1842, "for an improvement in regulating the draft of stoves."[3]

On the letters patent were endorsed what purported to be a disclaimer and memorandum, as follows:

"To the Commissioner of Patents: The petition of Elisha Foote, of Seneca Falls, in the county of Seneca, and state of New-York, respectfully represents, that your petitioner obtained letters patent of the United States for an improvement in regulating the draft of stoves, which letters patent are dated on 26th day of May, 1842; that he has reason to believe that, through inadvertence and mistake, the claim made in the specification of said letters patent, in the following words, to wit: 'What I claim as my invention and desire to secure by letters patent, is the application of the expansive and contracting

[3] The specification was as follows:

"To all whom it may concern: Be it known, that I, Elisha Foote, Jun'r, of Seneca Falls, in the county of Seneca, and state of New-York, have invented a new and useful mode of regulating the heat of stoves and other structures for fires, and I do hereby declare that the following is a full and exact description.

"My plan makes the stove or other structure in which it may be used, regulate its own heat, and this is effected by applying the expansive and contracting power of a metallic rod by different degrees of heat, to the damper of a stove, by which the admission of air thereto is governed; so that, when the heat shall rise above any required degree the expansion shall close such damper, and when it shall fall below such degree, the contraction shall open it, and thus keep a uniform heat of the requisite intensity.

"Considerable variety may exist in the mode of application, and it may be varied to suit particular circumstances. I have constructed two stoves, and applied the regulator as follows.

"Figure 5 represents a common box stove, the front side of which is supposed to be removed. A B is a brass rod, attached firmly, at A, to the front of the stove by a shoulder on the inside, and a nut and screw on the outside. It is not necessarily of brass, but the use of that metal will probably be found the most practicable. It is best made by rolling sheet brass into a rod, so that it shall have two or three thicknesses, and be from one to three inches in diameter. The end at B is made flat, and rivetted to the short arm of the lever B C, so as to make a close joint therewith. B. C. is made of iron, and of sufficient strength to be inflexible. It turns on its fulcrum at D, which is made fast to the back of the stove by a nut and screw, and rivetted to B C. C L is another brass rod, similar in its construction to A B, and attached to the long arm of B C in the same manner. The end at L projects through the front of the stove, and is attached by a rivet to another lever E F. G K is the damper by which the admission of air to the stove is governed. It is bent so that the hinge at G may stand out a little in front of the stove, and give room for the play of the stem F G. The hinge is made in the common form, and the stem is merely a projection or extension of the damper. The end of the stem at F is made round, and fits into a hole made in the lever E F, so as to move easily therein. The lever E F should be of sufficient size and strength to be inflexible, and is attached to its fulcrum at E by a rivet, so as to make a joint therewith. H E is an iron rod. It is attached at H to the stove in any manner that will make it firm, and should either have a joint at H, or should be flexible at that point, so that the end E which constitutes the fulcrum to E F may be raised or depressed. At I is a screw, the head of which is made fast to, but turns in the front plate of the stove; the thread of the screw passes through the rod H E, and, by turning the screw, the end of the rod E may be raised or depressed at pleasure. It is manifest that the expansion of the brass rods, pressing against the lever E F, will close the damper, and their contraction will open it. If the fulcrum E be raised, it will require a greater degree of expansion, or in other words a higher degree of heat, to close the damper. If it be depressed, a lower degree will close it. A pointer, I O, is made fast to the head of the screw, so as to turn when the screw turns, and show how much the fulcrum E has been raised or depressed in a half revolution of the screw. And, it having been found by experiment, with a common thermometer, how much the heat of the stove is raised or depressed by moving the pointer a given distance, a scale is made and marked upon the front plate of the stove, as at X O Z, with as many different degrees of heat as it may be desired to vary the temperature of the stove, and the pointer being placed at any particular degree of heat, the stove will maintain the same with great accuracy; for, should the heat arise above the point, the expansion of the brass rods will close the damper and check it, or, should it fall below the point, their contraction will open the damper and let in the full draft of air. It is desirable to make the stove as nearly air-tight as possible, and the door and damper should both closely fit. I usually put into the stove more fuel than would be necessary in an open stove, and have the same constantly held in check by the damper.

"The other and more perfect, although more expensive mode of applying the regulator, is represented by figure 4, which is an external view of the stove, showing the face or scale on which the different degrees of heat are marked, and the pointer at A, and the damper at B, and the door at C. Figures 1, 2 and 3 are different views of the machinery, in which the same letters represent the same parts in each. Fig. 1 is a sectional view, made through the front of the stove. Fig. 2 is a perspective view from the back, and fig. 3 a perspective view from the front of the stove. A B C D E is a frame of cast iron, made to support the brass rods and other machinery, and to which they are attached. This stove is made of sheet iron, and a more substantial support than that would make for the rods becomes necessary In a cast iron stove the frame could probably be dispensed with, suitable projections being cast upon the plate to which to attach the machinery. The frame is made fast to the inside of the top of the stove, by screws passing through the top of the stove and entering the frame. The part A B, figs. 2 and 3, is attached to the back part of the stove, immediately under the flue, B C at one of the ends and C D at the front, the whole of sufficient strength to be inflexible. At A a little projection or extra thickness is made, to which the brass rod F G is firmly rivetted; at K another projection is made, which constitutes the fulcrum to the lever G H. A hole is made or left in the projection through which the lever passes, and is held by a rivet, so as

power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove or other structure in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue,' is too broad, including that of which your petitioner was not the first inventor. Your petitioner, therefore, hereby enters his disclaimer to so much of said claim as extends the application of the expansive and contracting power of a metallic rod by different degrees of heat, to any other use or purpose than that of regulating the heat of a stove, in which such rod shall be acted upon directly by the heat of the stove or the fire which it contains; such disclaimer is to operate to the extent of the interest in said letters patent vested in your petitioner, who has paid ten dollars into the treasury of the United States, agreeably to the requirements of the act of congress in that case made and provided. Elisha Foote. Witnesses, Morris Newton, Edwin L. Buttrick. (Endorsed on back of patent, the 9th March, 1847.)"

After the letters patent and specification had been read in evidence, the plaintiff's counsel proposed to read in evidence a duly certified copy from the patent office, of the alleged disclaimer and memorandum, to which the defendants' counsel objected, on the ground that the disclaimer was void as a disclaimer, because the patentee did not state in it the extent of his interest in the patent, as required by section 7 of the act of March 3, 1837 (5 Stat. 193). The court sustained the objection, and excluded the disclaimer. Afterwards, and after the plaintiff had gone through with his evidence and rested his case, the defendants [Horace C. Silsby and others], offered to read in evidence the alleged disclaimer so endorsed on the patent, not as a disclaimer, but as a

to turn easily and yet be perfectly firm. D E, figs. 1, 2 and 3, is a projection of the frame, extending down within one or two inches of the front of the rtove. It is bored at L^2, and holds one end of the shaft L N^1 2, the other of which passes through and is held by the front of the stove, as seen in fig. 1. On L N, and at about the middle of it, is a projection I P, fig. 1, from one to three inches in length, with two prongs at the top, within which the brass rod I H is held by a pivot, so as to make a close joint with it. The brass rods and the lever G H are made in the same way, and are attached to each other in the same manner as is described in the stove first mentioned. The effect of the expansion and contraction of the brass rods is to move the shaft L N back and forth, by operating on the projection I P, and the ends in which it rests in the frame and in front of the stove are turned, so as to permit it to move easily therein. Attached to the shaft on the outside of the stove is the face Q R, on which the different degrees of heat are marked, seen also in fig. 4 at A. It is made solid with the shaft, or is firmly attached to and turns with it. The shaft is made or bored hollow, as represented in fig. 1, so as to admit to pass through the centre of it the pivot O S, which is turned and made to fit and move easily within the shaft. At the end S is firmly attached the pointer T U, and at the end O is firmly attached the rod O a, which, passing down the front side of the stove and within the same, moves the damper when variations of heat change the lengths of the brass rods. The face may be made of brass or other material to suit the taste of the maker. It is usually made circular, having on the upper side the different degrees of heat found and marked as first described; and on the lower, corresponding with the different degrees, small holes, into which a pin on the pointer at U may be inserted and connect the two. The pointer may be made of steel and polished. Passing through the lower end is a screw at U in fig. 1, on the end of which is the small pin fitted to enter the holes on the face. On the other end of the screw is a knob, which serves as a handle to turn the pointer or to unscrew and detach the pointer from the face. If attached, the brass rods affect and move the damper below; if detached, they have no effect upon it.

"The damper is made in the common form of two plates moving one upon the other, with orifices in each, so that in one position both shall be closed and in another both opened. The inside plate is represented by b c, seen wholly in fig. 2, and partly in fig. 3. It is made thicker near the centre, and is bored through, as is represented in fig. 1, to admit and hold the stem to the outside plate; d e represents the outside plate, seen wholly in fig. 3, partly closed. At f g is its stem, attached to its centre and passing through the inside plate. The faces to both should be ground or turned, as well as the stem, so as to move easily and closely one on the other. On the end of the stem, at g, is made or firmly attached the projection g a, which ends in two prongs, as is shown in fig. 2. The end of the rod O a terminates, as is seen at a in figs. 1 and 2, in a circular plate of from one to two inches in diameter, and fitted to move easily and closely within the two prongs to the stem of the damper. The object of this arrangement is, that if for instance the closing of the damper should fail to check the heat, the rod would be disconnected from the damper and pass on without injury to the machinery, and when it returns it would catch the upper prong, and connect itself again with the damper; or, should a high heat be desired, the damper may be set open, and the rod at some distance from it, so that it shall require a great degree of expansion before the rod would reach the damper to close it; or, should it be desired to change from a high to a low degree of heat, the damper may be closed, and the rod set so that a great contraction will have to take place before it will reach the damper to open it. The rod O a should have sufficient width and strength to be inflexible. The stove governs its heat the same as the one first described.

"What I claim as my invention, and desire to secure by letters patent, is the application of the expansive and contracting power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove or other structure in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue.

"I also claim as my invention the mode above described of setting the heat of a stove at any requisite degree, by which different degrees of expansion are requisite to open or close the damper.

"I also claim the combination above described by which the regulation of the heat of a stove or other structure in which it may be used is effected.

"And I also claim as my invention the mode above described of connecting the action of the metallic rods with the damper, so that the same may be disconnected when the damper shall have closed and the heat shall continue to rise, &c."

confession that the plaintiff's invention was not new, and that he was not the original inventor of all that was claimed in his specification. The plaintiff's counsel objected to this, on the grounds that the defendants had caused the alleged disclaimer to be rejected when offered as evidence on the part of the plaintiff, that it must be read as a valid disclaimer if read at all, and that it purported to be only a copy, not in the patentee's handwriting, and was not proved to have been executed by him. The court refused to admit the paper in evidence.

After the plaintiff had concluded his evidence, the defendants moved for a nonsuit on various grounds, but, the plaintiff not consenting, the court overruled the motion.

The defendants had given a notice of special matter in the action, under section 15 of the act of July 4, 1836 (5 Stat. 123), the material parts of which that came in question on the trial were as follows: "That the patentee was not the original inventor or discoverer of the thing patented; that he was not the original and first inventor or discoverer of a substantial and material part thereof claimed as new; that it had been described in a public work called 'Ure's Dictionary of Arts, Manufactures and Mines,' anterior to the supposed discovery thereof by the patentee, and also had been in public use and known before that time, and used by Andrew Ure of London." In the course of the trial, the defendants offered to read in evidence two articles, one headed "Heat-Regulator,"[4] on page 643, and the other headed "Thermostat,"[4] on page 1237, from a public work entitled "A Dictionary of Arts, Manufactures, &c., by Andrew Ure, M. D., &c., London, &c.. 1840," and labelled on the back "Dr. Ure's Dictionary of Arts, Manufactures, &c." The plaintiff objected to the reading of any part of the volume, on the ground that its title was not correctly indicated in the notice of defence, but the court decided that the notice was sufficient in that respect. The plaintiff further objected to the reading of any part of the volume, because the notice of defence did not specify on what page, or under what title or head in the dictionary, the material part of the invention was described, and did not specify what part was described. The court decided that the notice was insufficient, and excluded the volume. They then offered to read the same articles in evidence from the same book, under that part of the notice of defence which stated that a material part of the invention was known to Andrew Ure, of London. but, under the plaintiff's objection, the court excluded the evidence. They then offered to prove by scientific mechanics and by experts in mechanical science and art, that they knew the terms "heat-regulator," and "thermostat," that they were terms in common use among mechanics and experts in mechanical science and art, and that they could, without difficulty, if seeking information concerning heat-regulators, find in the said dictionary the portions so proposed to be read, without having any specific reference to them. This evidence was offered by the defendants for the purpose of renewing their motion to read the said articles in evidence,

[4] These articles were as follows:

"Heat-Regulator. The name given by M. Bonnemain to an ingenious apparatus for regulating the temperature of his incubating stove rooms. (See 'Incubation, Artificial,' for the manner of applying the heat-regulator.)

"The construction of the regulator is founded upon the unequal dilatation of different metals by the same degree of heat. A rod of iron x, fig. 549, is tapped at its lower end into a brass nut y, enclosed in a leaden box or tube, terminated above by a brass collet z. This tube is plunged into the water of the boiler, alongside of the smokepipe. (Fig. 549* is a bird's-eye view of the dial, &c.) The expansion of the lead being more than the iron for a like degree of temperature, and the rod enclosed within the tube being less easily warmed, whenever the heat rises to the desired pitch, the elongation of the tube puts the collet z, in contact with the heel a, of the bent lever a, b, d; thence the slightest increase of heat lengthens the tube anew, and the collet lifting the heel of the lever depresses its other end d through a much greater space, on account of the relative length of its legs. This movement operates near the axis of a balance-bar e, sinks one end of this, and thereby increases the extent of the movement which is transmitted directly to the iron skewer y. This pushing down a swing register diminishes or cuts off the access of air to the fireplace. The combustion is thereby obstructed, and the temperature falling by degrees, the tube shrinks and disengages the heel of the lever. The counterpoise g, fixed to the balance beam e, raises the other extremity of this beam, by raising the end d of the lever as much as is necessary to make the heel bear upon the collet of the tube. The swing register acted upon by this means, presents a greater section to the passage of the air; whence the combustion is increased. To counterbalance the effect of atmospheric changes, the iron stem which supports the regulator is terminated by a dial disc, round the shaft of the needle above h, fig. 549*; on turning this needle the stem below it turns, as well as a screw at its under end, which raises or lowers the leaden tube. In the first case, the heel falls, and opens the swing register, whence a higher temperature is required to shut it, by the expansion of the tube. We may thus obtain a regularly higher temperature. If, on the contrary, we raise the tube by turning the needle in the other direction, the register presents a smaller opening, and shuts at a lower temperature; in this case, we obtain a regularly lower temperature. It is therefore easy, says M. Bonnemain, to determine a priori the degree of temperature to be given to the water circulating in the stove pipes. In order to facilitate the regulation of the apparatus, he graduated the disc dial, and inscribed upon its top and bottom the words, Strong and Weak heat. See 'Thermostat,' for another heat-regulator." Pages 643 and 644.

"Thermostat, is the name of an apparatus for regulating temperature, in vaporization, distillation, heating baths or hot-houses, and ventilating apartments, &c.; for which I obtained a patent in the year 1831. It operates upon the physical principle, that when two thin metallic bars of different expansibilities are riveted or soldered facewise together, any change of temperature in them will cause a sensible movement of flexure in the compound bar, to one side or other; which movement may be made to operate, by the intervention of levers, &c., in any desired degree, upon valves, stop-cocks,

but the court excluded the evidence. The defendants then offered to read in evidence several articles from pages 93, 130, 283, and 406 of "The Journal of the Franklin Institute, vol. IX, for 1832," insisting that they were entitled to do so, on the ground that notice thereof had been given in a special plea which was put in in the action, but had been stricken out by the court on the plaintiff's motion. The plea averred, that the plaintiff's invention was not new at the date of the patent, but "substantial parts thereof" had been known and used in divers places, naming them, "and were described in divers public works, to wit, 'The Journal of the Franklin Institute,' &c." The plaintiff objected to the evidence, and the court excluded it, on the ground that no sufficient legal notice of it had been given.

The defendants then offered to read in evidence an affidavit, to be made by themselves, by their attorney, and by the only counsel who had charge of their case, showing that they had confidingly relied on the said notice of matters to be given in evidence, as a fulfillment of the law, and sufficient in all respects to entitle the defendants to read the said portions of said "Dictionary" and of said "Journal" in evidence, that they were taken by surprise, and that the said evidence was material to their defence, and without it they could not safely proceed in the trial of the cause; and, on that state of facts, they moved the court to withdraw a juror, and offered to pay the costs of the trial, and go to trial at the next term. The plaintiff waived the necessity of the affidavits, but insisted that, assuming them to be made to the extent offered, the motion ought not to be granted. It being consented that the motion should be considered as if the affidavits proposed were actually submitted, the court examined the portions proposed to be read from the volumes in question, and refused to grant the motion on the grounds, that if such a power could be exercised by the court at all at the instance of a defendant, it would only be done where it was clear that he must otherwise suffer gross injustice, and that, even if the portions of the volumes offered to be read in evidence were read, it was by no means clear they would constitute a defence.

The stove-regulator manufactured and sold by the defendants, and claimed to be an infringement, was known as "Race's Regulator," and was alleged to be embraced in the claim of letters patent granted to Washburn Race, April 4th, 1846, for an "improvement in registers for stoves." It was attached, in a perpendicular position, to the outside of the stove, but in contact with it or so near to it as to be readily affected by its heat. An iron sustaining plate, in length equal to the height of the stove, was enlarged in width at the bottom, so as to surround the air-hole of the stove, by a curb, on which the register, when closed, rested. This plate was about an inch and a half wide and a quarter of an inch thick. In the side of this plate next the stove was a longitudinal groove, extending down from within about a quarter of an inch from the top of the sustaining plate to the upper end of a vertical lever. In this groove an expansion slip or rod of brass was sus-

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stove-registers, air-ventilators, &c.; so as to regulate the temperature of the media in which the said compound bars are placed. Two long rulers, one of steel, and one of hard hammered brass, rivetted together, answer very well; the object being not simply to indicate, but to control or modify temperature. The following diagrams will illustrate a few out of the numerous applications of this instrument.

"Fig. 1130, a b, is a single thermostatic bar, consisting of two or more bars or rulers of differently expansible solids (of which, in certain cases, wood may be one): these bars or rulers are firmly riveted or soldered together, face to face. One end of the compound bar is fixed by bolts at a, to the interior of the containing cistern, boiler, or apartment, a, l, m, b, whereof the temperature has to be regulated, and the other end of the compound bar at b, is left free to move down towards c, by the flexure which will take place when its temperature is raised.

"The end b, is connected by a link, b, d, with a lever d, e, which is moved by the flexure into the dotted position b, g, causing the turning-valve, air-ventilator, or register, o, n, to revolve with a corresponding angular motion, whereby the lever will raise the equiposed slide-damper k, i, which is suspended by a link from the end e, of the lever e, d, into the position k, h. Thus a hot-house or a water-bath may have its temperature regulated by the contemporaneous admission of warm, and discharge of cold air, or water.

"Fig. 1131, a, b, c, is a thermostatic hoop, immersed horizontally beneath the surface of the water-bath of a still. The hoop is fixed at a, and the two ends b, c, are connected by two links b, d, c, d, with a straight sliding rod d, h, to which the hoop will give an endwise motion, when its temperature is altered; e, is an adjusting screw-nut on the rod d, h, for setting the lever f, g, which is fixed on the axis of the turning-valve or cock f, at any desired position, so that the valve may be opened or shut at any desired temperature, corresponding to the widening of the points b, c, and the consentaneous retraction of the point d, towards the circumference a, b, c, of the hoop. g, h, is an arc graduated by a thermometer, after the screw piece e has been adjusted. Through a hole at h, the guide-rod passes. i, is the cold-water cistern; i, f, k, the pipe to admit cold water; l, the overflow pipe, at which the excess of hot water runs off.

"Fig. 1132 shows a pair of thermostatic bars, bolted fast together at the ends a. The free ends b, c, are of unequal length, so as to act by the cross links d, f, on the stop-cock e. The links are jointed to the handle of the turning plug of the cock, on opposite sides of its centre; whereby that plug will be turned round in proportion to the widening of the points b, c. h, g, is the pipe communicating with the stop-cock.

"Suppose that, for certain purposes in pharmacy, dyeing or any other chemical art, a water bath is required to be maintained steadily at a temperature of 150° F.; let the combined thermostatic bars hinged together at e f, fig. 1133, be placed in the bath, between the outer and the inner vessels a, b, c, d, being bolted fast to the inner vessel at g, and have their sliding rod k, connected by a link with a lever fixed upon the turning plug of the stop-cock i, which introduces cold water from a cistern m, through a pipe m i n, into the bottom part of the bath. The length of the link must be so adjusted that the flexure of the bars, when they are at a temperature of 150°, will open

pended by a regulating screw, which passed through the upper end of the sustaining plate into the groove, and was tapped into the upper end of the brass rod, the head of the screw resting on the top of the sustaining plate. To the lower end of the expansion rod was firmly fastened a piece of iron, about an inch and a half long and half an inch wide and thick, near the lower end of which, on the front side, a sharp hook or barb was made, pointing outward and upward, and falling into the bottom of a niche cut in the upper end of a vertical lever about two inches long, the bottom of the niche being about one-eighth of an inch wide from the fulcrum of the lever, and in a line horizontal with the fulcrum, which was a small pin passing through the lever and through two ears on the sustaining plate. The lever was in effect a lever bent at right angles, the longer end being vertical and the shorter end horizontal, and the fulcrum being in the angle. The lever moved in a slot made through the sustaining plate. The register was a piece of metal made plane and smooth on its lower surface, and when it closed it laid at an angle sufficiently inclined to make it close by its own weight. From the upper part of the register a tail-piece or short lever projected upwards, and behind the lower end of the vertical lever. In the back side of this tail-piece, a niche was cut, which fitted on an edge formed at the lower end of the slot before mentioned, so that the register was sustained by the edge, and turned on it as a fulcrum. A small projection on the inner side of the vertical lever, near its lower end, struck the tail-piece about one-eighth of an inch above the edge, so that when the expansion rod was contracted by cooling, the vertical lever pressed on the tail-piece of the register and opened it, and, when the rod became dilated by heat, the vertical lever permitted the register to close more or less by its own weight, according to the degree of heat. To the screw in the upper end of the sustaining plate was attached an index, under which, and attached to the stove, was a circular plate, marked with numbers, so that, by turning the screw, the register might be caused to open and close at any desired temperature. The sustaining plate had an opening in it along nearly the whole length of the expansion rod, thus exposing the

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the said stop-cock, and admit cold water to pass into the bottom of the bath through the pipe i n, whereby hot water will be displaced at the top of the bath through an open overflow pipe at q. An oil bath may be regulated on the same plan, the hot oil overflowing from q into a refrigeratory worm, from which it may be restored to the cistern m. When a water bath is heated by the distribution of a tortuous steam pipe through it, as i n o p, it will be necessary to connect the link of the thermostatic bars with the lever of the turning plug of the steam-cock or of the throttle valve i, in order that the bars by their flexure may shut or open the steam passage more or less, according as the temperature of the water in the bath shall tend more or less to deviate from the pitch to which the apparatus has been adjusted. The water of the condensed steam will pass off from the sloping winding pipe i n o p, through the sloping orifice p. A saline, acid or alkaline bath has a boiling temperature proportional to its degree of concentration, and may, therefore, have its heat regulated by immersing a thermostat in it, and connecting the working part of the instrument with a stop-cock i, which will admit water to dilute the bath, whenever by evaporation it has become concentrated and has acquired a higher boiling point. The space for the bath between the outer and inner pans should communicate by one pipe with the water cistern m, and by another pipe with a safety cistern r, into which the bath may be allowed to overflow during any sudden excess of ebullition.

"Fig. 1136 is a thermostatic apparatus, composed of three pairs of bars d d d, which are represented in a state of flexure by heat, but they become nearly straight and parallel when cold; a b c is a guide rod, fixed at one end, by an adjusting screw e, in the strong frame f e, having deep guide grooves at the sides. f g is the working rod, which moves endways, when the bars d d d operate by heat or cold. A square register plate h g, may be affixed to the rod f g, so as to be moved backwards and forwards thereby, according to the variations of temperature; or, the rod f g may cause the circular turning air register i to revolve by rack and wheel-work, or by a chain and pulley. The register plate h g, or turning register i, is situated at the ceiling or upper part of the chamber, and serves to let out hot air; k is a pulley, over which a cord runs, to raise or lower a hot air register l, which may be situated near the floor of the apartment or hot house, to admit hot air into the room; c is a milled head for adjusting the thermostat by means of the screw at e, in order that it may regulate the temperature to any degree.

"Fig. 1137 represents a chimney, furnished with a pyrostat a b c, acting by the links b d, e c, on a damper f h g. The more expansible metal is in the present example supposed to be on the outside. The plane of the damper-plate will in this case be turned more directly into the passage of the draught through the chimney by increase of temperature.

"Fig. 1135 represents a circular turning register, such as is used for a stove or stove grate, or for ventilating apartments; it is furnished with a series of spiral thermostatic bars, each bar being fixed fast at the circumference of the circle b c of the fixed plate of the air register, and all the bars act in concert at the centre a of the twining part of the register, by their ends being inserted between the teeth of a small pinion, or by being jointed to the centre part of the turning plate by small pins.

"Fig. 1134 represents another arrangement of my thermostatic apparatus, applied to a circular turning register, like the preceding, for ventilating apartments. Two pairs of compound bars are applied, so as to act in concert, by means of the links a c, b c, on the opposite ends of a short lever, which is fixed in the central part of the turning plate of the air register. The two pairs of compound bars a, b, are fastened to the circumference of the fixed plate of the turning register, by two sliding rods, a d, b e, which are furnished with adjusting screws. Their motion or flexure is transmitted by the links a c and b c to the turning plate, about its centre, for the purpose of shutting or opening the ventilating sectorial apertures more or less, according to the temperature of the air which surrounds the thermostatic turning register. By adjusting the screws a d and b c, the turning register is made to close all its apertures at any desired degree of temperature; but, whenever the air is above that temperature, the flexure of the compound bars will open the apertures." Pages 1237, 1238, 1239.

rod to the air in the room. The whole apparatus was fastened to the stove, so that the air-hole in the sustaining plate coincided with a similar hole in the stove.

After the evidence of the trial had closed, the defendants prayed the court to charge the jury: (1) That the plaintiff's patent was for a combination only, and that, if the defendants did not use all the constituent parts of the combination, the plaintiff could not recover. (2) That it was erroneous to consider as constituent parts of that combination, only those parts which were requisite to the operation of opening or closing the damper of a stove, but that the jury must consider as constituent parts, all the parts of the machine, as described in the specification, by which the regulation of the heat of a stove was effected. (3) That the index was a constituent part of the combination. (4) That the mode of detaching the pendulum, or rod O a, from the damper, was a constituent part. (5) That the pendulum was a constituent part. (6) That, as it was admitted that the defendants did not use the index, they were entitled to a verdict. (7) That, as it was admitted they did not use the mode of detaching the pendulum from the damper, they were entitled to a verdict. (8) That if the defendants' apparatus was different in its mechanical action, producing its results in a different way from the plaintiff's, that was a difference in principle, which entitled the defendants to a verdict. (9) That the use by them of self-detaching levers, instead of fixed levers, was a difference in mechanical principle. (10) That the use by them of an elastic slip of brass, which operated upon the damper only by contraction, instead of a rigid rod of brass, which operated by pushing and pulling, was a difference in mechanical principle. (11) That the difference in the modes of setting the two regulators was a difference in mechanical principle. (12) That the placing by the defendants of their regulator, and especially of its expanding rod, outside of the stove, made it different in principle from the apparatus of the plaintiff, which was inside of the stove. (13) That the damages which the plaintiff could recover were only so much as he had lost by the action of the defendants.

The court charged the jury, that the claim set forth by the plaintiff in the first article of the summary at the close of his specification, being for the application of a natural property of metals to the purpose therein mentioned, was not the fit subject of a patent. As to the 1st, 2d, 3d, 4th, and 5th of the instructions prayed, the court charged that it was true that the third article of the summary of the specification, on which alone the plaintiff was entitled to recover, if at all, was for a combination, and that, unless it appeared by the evidence that the defendants had used all the parts of the plaintiff's stove embraced in such combination, he was not entitled to recover; that the combination claimed in said third article was of such parts of the mechanism described in the specification as were necessary to regulate the heat of the stove, and that, unless it appeared by the evidence that some parts of the mechanism not shown to have been used by the defendants were necessary to perform that office, or that, according to the just construction of the specification, such parts were intended to be claimed by the plaintiff as a part of such combination, they were not to be considered as embraced within it; that, inasmuch as, by the fourth article of the plaintiff's summary, he made a distinct and separate claim to what had been called the detaching apparatus, there seemed to be good reason to infer that it was not his intention to claim that in the third article, as a part of the combination therein mentioned; that the question relative to the extent of that combination had been treated by the defendants as a question of fact, and the court had no disposition to withdraw it from the consideration of the jury, and therefore submitted it to them to decide from the evidence, whether the parts of the mechanism described in the specification, which were not shown to have been used by the defendants, were necessary to regulate the heat of the stove, and instructed the jury, that if they should so find, the defendants would be entitled to a verdict. As to the 6th and 7th propositions of the defendants, the court refused to charge any otherwise than as they had charged in regard to the 1st proposition. As to the 8th, 9th, 10th, 11th, and 12th of the instructions prayed, the court charged that it was a question for the jury to decide upon the evidence, whether the machinery used by the defendants for their regulator was the same in principle as that of the plaintiff; that a mere difference in form or size was not a difference in principle, but that a new application of known mechanical power was, in regard to invention, a new principle. As to the 13th of the instructions prayed, the court charged substantially as therein requested, and instructed the jury that the question of damages was exclusively with them, and that, if they were of opinion that the defendants had unlawfully infringed the plaintiff's patent, they ought to award him such sum as, in their judgment founded upon the evidence, would fully indemnify him for the actual damages he had suffered by reason of such infringement, beyond the taxable costs.

The jury found a verdict of $1500 for the plaintiff, and the defendants now moved for a new trial, on a case, and also on affidavits, on the grounds of surprise and newly discovered evidence. The surprise alleged was the exclusion of the said articles in "Ure's Dictionary," when so offered in evidence. The newly discovered evidence consisted of the said articles in the "Journal of the Franklin Institute," (whose existence was stated not to have been known by the defendants until within thirty days prior to the said trial, and

after their notice of special matter in this action was given,) and of articles in the London Journal of Arts and Sciences for 1832, page 307, and for 1837, pages 94 and 133, and in the London Repertory of Arts for 1803, page 279, whose existence was averred to have become known to them after said trial. These several articles showed the application, by machinery, of the principle of the unequal expansion and contraction of two different metals under the same given degree of heat, to various purposes, such as, in Dr. Ure's "thermostat," regulating the temperature of an apartment, or of a hot-house, or of a water, oil, acid or alkaline bath, by the contemporaneous admission of warm and discharge of cold air or fluid, effected through the action of the regulator, placed in the medium whose temperature was to be regulated; or as, in Bonnemain's "heat regulator," regulating the temperature of rooms in which eggs were artificially hatched, and in Cadwallader Evans' steam boiler apparatus, regulating the opening of the safety valve, by governing the admission of air to the fire which heated the water of the boiler in which the regulating apparatus was placed; or as, in Ward's ventilator, regulating the ventilation of a room, by governing the admission of air into it.

Samuel Stevens, for plaintiff.

William H. Seward and Samuel Blatchford, for defendants.

NELSON, Circuit Justice. This is an action for the infringement of a patent for an improvement in regulating the draft of stoves, in which a verdict was rendered for the plaintiff for $1500. A motion is now made by the defendants for a new trial.

I. One of the jurymen empannelled was taken ill, while the counsel for the plaintiff was opening the case, so as to be unable further to serve upon the jury, whereupon the court discharged him, and directed another juryman to be drawn from the panel, in his stead, which was done. This direction of the court was proper and unexceptionable. The propriety of it is too obvious to require remark.

II. The disclaimer endorsed on the back of the patent was properly rejected, when offered in evidence by the defendants, for want of proof that it had been executed by the patentee. And besides, if it had been admitted, the court would have been bound to give to it the full effect of a disclaimer under the seventh section of the act of March 3, 1837 (5 Stat. 193), upon which view of the effect of the instrument the defendants did not propose or desire to give it in evidence. I am also inclined to think the court erred in excluding the disclaimer when it was offered in evidence by the plaintiff, as it fairly enough imported on its face, as it seems to me, that the patentee was the owner of the entire interest in the patent, and, if so, there was a substantial compliance with the statute in this respect. This error, however, being against the plaintiff, is of no importance in the case. The rejection of the paper, when it was offered by the defendants, raises the only material question, and as to that I think the court was correct for the reason stated. The disclaimer should have been properly proved before it could be admitted in evidence either as an original paper or by a certified copy.

III. It is a sufficient answer to the objection that the motion for a nonsuit was erroneously refused, that the court had no power to grant it.[5]

IV. Dr. Ure's Dictionary of Arts, Manufactures, &c., was properly rejected for the reasons given at the trial. The book contains 1334 pages, and treats of a great variety of subjects extending through the alphabet. The reference to the work, as given in the notice, was too general and indefinite, within a reasonable construction of the act of congress (5 Stat. 123, § 15). The notice should have specified the page or heading in the public work in which the invention had been previously described, so as to enable the patentee to turn to the article without searching through the entire volume. There can be no difficuly in giving a particular reference to the part of the book intended to be relied on, as the defendant is presumed to have examined the article, and to be familiar with it and with the page or heading where it may be found. A general reference to the work is calculated to mislead and embarrass the party, and ought not to be sanctioned, especially as there can be no difficulty in giving a more specific one. These remarks apply also to the offer to read passages in the work, for the purpose of showing that the invention was previously known to Dr. Ure, if there were no other ground for its rejection. The offer to prove, by experts and scientific men, that the terms "thermostat" and "heat-regulator" were well known in mechanical science, with a view to show that the notice was sufficiently explicit and specific, was properly rejected. The question was one for the court; and, besides, the notice should have pointed to the page or heading of the article. The rejection of the volume of "The Journal of the Franklin Institute," which was offered in evidence under the idea that notice of it was contained in a special plea which had been previously stricken out by the court, is so obviously correct as to require no remark.

V. The proposition on the part of the defendants to withdraw a juror, on the ground of surprise arising out of the rulings of the court in respect to the notice and the evidence offered under it, was properly over-

[5] The courts of the United States have no authority to order a peremptory nonsuit against the will of the plaintiff, on the trial of a cause before a jury. Doe v. Grymes, 1 Pet. [26 U. S.] 469; D'Wolf v. Rabaud, Id. 476; Crane v. Morris, 6 Pet. [31 U. S.] 598.

ruled. The defective notice afforded no foundation for such a proceeding on the part of the defendants; and, under any circumstances, it was a matter resting altogether in the discretion of the court.

VI. The invention of the plaintiff, as stated in his patent, is "a new and useful improvement in regulating the draft of stoves;" and, after particularly describing in his specification the mechanical contrivances, and the application of the same to stoves in common use, he sets forth what is claimed as his discovery and not before known, or in public use:

(1) "The application of the expansive and contracting power of a metallic rod, by different degrees of heat, to open and close a damper which governs the admission of air into a stove or other structure in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue."

(2) "The mode above described," (in the specification,) "of setting the heat of a stove at any requisite degree, by which different degrees of expansion are requisite, to open or close the damper."

(3) "The combination above described, by which the regulation of the heat of a stove or other structure in which it may be used is effected."

(4) "The mode above described, of connect ing the action of the metallic rods with the damper, so that the same may be disconnected when the damper shall have closed, and the heat shall continue to rise, &c."

The substance of the discovery, as claimed by the plaintiff and secured to him by the patent. is the application of the principle of the contraction and expansion of a metallic rod, by the use of certain mechanical contrivances particularly described and set forth, to the cast or sheet-iron stove in common use, by which means he produces a self-regulating power over the heat of the same, at any given degree of heat that may be desired within the capacity of the stove. This is the thing invented. It is, in a word, the application of a well known principle to a new and useful purpose, and the question is, whether or not the patentee was the first and original inventor, or whether it was before known and in public use. Now, although it is shown, (assuming for the present that we may look into the books not in evidence,) that the principle had before been applied to the regulation of heat, as in the instance of Dr. Ure's "thermostat." and Bonnemain's "heat-regulator," and some others, yet, for aught that appears from the testimony or from any book that has been produced, the plaintiff was the first person who applied the principle to the regulation of the heat of stoves; and for this he was entitled to a patent, and to be protected in its enjoyment. Phil. Pat. p. 101, c. 7, § 6. It is not a new use of the principle as previously applied to the regulation of heat, which would not be patentable; but a new application of it, by new mechanical contrivances and apparatus, by means of which a new and beneficial result is produced in the use of the article to which it has been thus applied, namely, the common cast or sheet-iron stove. It is true, that the idea of an application of the principle to the regulation of stoves had been before suggested, but no such application had ever been made prior to that of the patentee; and the person who first reduces the idea to practical application and use is entitled to the patent. Looking, then, at the claim of the plaintiff to a discovery in the regulation of the heat of stoves, in the light of the views above stated, I can perceive no well founded objection to the charge of the court under which the verdict was given.

The charge in respect to the first claim was more favorable to the defendants than in my judgment was warranted. The claim is not for a discovery of a natural property of the metallic rod, which, of itself, is not a patentable subject. but for a new application of it by means of mechanical contrivances, which is one of the commonest subjects of a patent. The only criticism to which the claim is liable is that it is too broad, inasmuch as there is an attempt to extend the improvement to other structures besides stoves. This has been corrected by a disclaimer, and properly so, from abundant caution, though I entertain no doubt that the claim beyond the stove, in the summary, is too general and indefinite to be valid or effectual, and should have been regarded as surplusage.

The court further charged, that the third claim, on which the plaintiff was entitled to recover, if at all, was for a combination, and that unless it appeared by the evidence that the defendants had used all the parts of the plaintiff's stove embraced in the combination. the verdict must be for the defendants. This instruction covered a great many points made by the defendants at the trial, and very unnecessarily multiplied, by breaking a single proposition, embodying a general principle, into numerous subdivisions, which tended only to embarrassment and confusion. It virtually covered the first seven points, and all of them, so far as any principle of law was involved, were ruled in favor of the defendants. As to the facts, they were questions for the jury.

The court also charged, that unless it appeared by the evidence that some parts of the mechanism not shown to have been used by the defendants were necessary to perform the office of regulating the heat of the stove, or that, according to the proper construction of the specification, such parts were intended to be claimed by the plaintiff as a part of the combination. they were not to be considered as embraced within it; and the court further remarked, that the question as to the extent of the combination had been treat-

ed by the counsel for the defendants as a question of fact, and the court had no disposition to withdraw it from the consideration of the jury. If the court conceded too much to the jury in the view thus submitted, and should have taken upon itself to determine the combination, upon an interpretation of the claim in the summary as matter of law, it is not for the defendants to complain, as their counsel chose to carry the question to the jury. They should have asked the court to settle the combination upon a construction of the specification, and have tried their case upon that assumption, instead of putting the question to the jury. They cannot take advantage of their own error, even conceding that the court acquiesced in it. Besides, the extent of the combination was perhaps, in one aspect, a mixed question of law and fact; the effect and operation of the mechanical contrivances, which were matters of skill, and to be determined by experts, entering into the question. It does not follow as matter of law, that every part of the machinery used constitutes an element of the combination. This may depend on the use and effect of it, and the purpose for which it is employed in the plan devised to complete the improvement.

The instruction as to the similarity or substantial identity of the two contrivances or machinery for regulating the heat, was obviously too correct to require any observation, and so was the instruction in respect to the damages. If the defendants desired any further instruction upon the latter point, they should have called the attention of the court to the subject. As far as given, the ruling was unexceptionable, and conformed to the statute.

VII. As respects the motion for a new trial on the grounds of surprise and newly discovered evidence, the views already presented concerning the improvement and discovery of the plaintiff, afford a complete answer. If all the evidence had been admitted, that was offered under the notice, or that has since been discovered, it would not, in my judgment, have constituted a defence or varied the result. It fell entirely short of proof that the plaintiff was not the first and original inventor of the improvement claimed by him, or that it was before known and in public use. Notwithstanding all the evidence offered at the trial, and all produced before me on this motion, from books or otherwise, the plaintiff was the first person who applied the expanding and contracting property of the metallic rod to the regulation of heat in the use of the stove, by means of mechanical contrivances. It was his invention and discovery, and was first brought by him into practical use, producing, as it respects the stove, a new and useful result.

The jury have found that the contrivances of the defendants in the construction of their regulator, are substantially the same as those of the plaintiff, and that they have, therefore, been guilty of an infringement. I am not sure that the plaintiff was bound to go to this length in making out a case of infringement. There is some ground for the position that the new application of the principle, by means of mechanical contrivances, constitutes, of itself, a part of his invention; and that any different or improved mode of application is but an improvement upon his discovery, and not available without his consent. It is not, however, necessary to determine this question, as it is not material to the decision of the motion.

It was suggested that the damages in the case were excessive, and that a new trial should be granted on that ground. I think not. The jury were warranted in giving liberal damages, within the limit laid down by the court. The defendants do not stand in a position to entitle themselves to a very favorable consideration, as they entered upon the violation of the plaintiff's patent, after having been warned of the consequences, and went on, with their eyes open, disregarding the claims of the patentee, and showing a willingness to avail themselves of the profits of his discovery, and to deprive him of the fruits of his genius, time, and expense, in striking out and bringing to perfection a new and most valuable improvement in the use of an article of the first necessity for the ordinary purposes of life. In my judgment the damages were not excessive or unreasonable.

New trial denied.

[NOTE. For subsequent proceedings, see Foote v. Silsby, Cases Nos. 4,917–4,920; Id., 14 How. (55 U. S.) 218, 20 How. (61 U. S.) 290, 378.

[On writ of error this case was taken to the supreme court, where the judgment of the circuit court was affirmed, Mr. Justice Curtis delivering the opinion. It was held:

[1. Upon a trial in New York a juror became ill, and was discharged before any evidence was given, and before the plaintiff's counsel had concluded his opening address. The court ordered another juror to be sworn, and proceeded with the trial. The defendant cannot object to this. It is the practice in New York, and the circuit court had a right to follow it.

[2. The court having erroneously refused to allow the plaintiff to offer a paper in evidence as a disclaimer of part of a patent, afterwards refused to allow the defendants to offer the same paper in evidence for the purpose of prejudicing the plaintiff's rights. This last refusal was correct. The reason given was erroneous, but this is not a sufficient cause for reversing the judgment.

[3. The courts of the United States have not the power to order a nonsuit against the wishes of the plaintiff.

[4. Under a notice given by the defendant that the invention claimed by the plaintiff was described in Ure's Dictionary of Arts, Manufactures and Mines, and had been used by Andrew Ure, of London, it was not competent to give in evidence a very large book. The place in the book should have been specified.

[5. Nor, under the notice, was the book competent evidence that Andrew Ure, of London, had a prior knowledge of the thing patented. The notice does not state the place where the same was used.

[6. One of the specifications of the patent being for a combination of certain parts of mechanism necessary to produce the desired result, it was proper for the court to instruct the jury that the defendants had not infringed the patent, unless they had used all the parts embraced in the plaintiff's combination; and the jury were to find what those parts were, and whether the defendants had used them.

[7. When a claim does not point out and designate the particular elements which compose a combination, but only declares, as it properly may, that the combination is made up of so much of the described machinery as effects a particular result, it is a question of fact which of the described parts are essential to produce that result; and to this extent, not the construction of the claim, strictly speaking, "but the application of the claim, should be left to the jury."

[Mr. Justice McLean dissents. 14 How. (35 U. S.) 218.]

Case No. 4,917.

FOOTE v. SILSBY et al.

[1 Blatchf. 542;[1] 1 Fish. Pat. Rep. 391.]

Circuit Court, N. D. New York. June Term, 1850.

WRIT OF ERROR—ALLOWANCE BY JUDGE AT CHAMBERS—ACT OF JULY 4, 1836.

1. A judge of this court sitting at chambers has power to allow a writ of error under section 17 of the patent act of July 4, 1836 (5 Stat. 124), which declares that in patent cases writs of error shall lie as in other cases and "in all other cases in which the court shall deem it reasonable to allow the same."

2. There might be some ground for saying that in allowing such writ the judge must be sitting at a stated term of the court, if a court at chambers and one at a stated term fixed by statute were held by a different body.

3. On the allowance of such a writ of error, an order was made by the judge at chambers giving the party suing out the writ leave to make a bill of exceptions. He had made a case after the trial, which took place two years before, and had moved on the case for a new trial, which was denied. The case contained no stipulation that it might be turned into a bill of exceptions. On a motion to set aside the order: *Held*, that as the case was made, instead of a bill, by direction of the judge before whom the trial was had, and without prejudice to the right of the party to make up a bill with a view to a writ of error, and, as it appeared that the points were made and the exceptions taken at the trial in the required form to entitle the party to the benefit of them on a writ of error, the order must stand.

[Cited in Re Kaine, Case No. 7,598.]

After the decision in this case, refusing a new trial,—Foote v. Silsby [Case No. 4,916],—the plaintiff [Elisha Foote] having perfected judgment for less than $2,000, the defendants [Horace C. Silsby and others] sued out a writ of error from the supreme court, which was allowed specially under the 17th section of the patent act of July 4, 1836 (5 Stat. 124), by Mr. Justice Nelson, at chambers, ex parte, on the 15th of June, 1850. He at the same time made an order giving leave to the defendants to make up a proposed bill of exceptions and serve a copy of it, with a view to the settlement of a bill to be attached to and carried up with the record. The plaintiff now moved to set aside the writ of error, and the order allowing it, and also the order for leave to make a bill of exceptions. It appeared that no bill of exceptions had been settled in form before the allowance of the writ of error, but that a case had been made and settled after the trial, on which the motion for a new trial was made. The case contained no reservation of a right to turn the same into a bill of exceptions; but it appeared that it had been at first drawn up in the form of a bill of exceptions, and was changed into a case by direction of Judge Conkling before whom the case was tried, on the ground that the defendants would not be entitled to a writ of error as of course, and that it would be time enough for them to make a bill of exceptions when a writ of error should be specially allowed. The trial was in June, 1848. [Case unreported.]

Samuel Stevens, for plaintiff, contended that the allowance of the writ of error was irregular and ought to be set aside, it having been made not by "the court," as the law required, but by a judge out of court; and that the defendants, having made a case, without reserving a right to turn it into a bill of exceptions, could not now have leave to do so. Stewart v. Hawley, 22 Wend. 561.

Samuel Blatchford, for defendants, insisted: 1. That a judge of this court at chambers was "the court," within the meaning of the patent act; that one judge was a quorum of the circuit court for this district by express statute (Act March 3, 1837, § 3; 5 Stat. 177), and that a judge, who alone composed a court, was a court whenever he transacted judicial business. U. S. v. The Little Charles [Case No. 15,613]. 2. That the practice pursued in this case as to the bill of exceptions was the same pursued in Hogg v. Emerson, 6 How. [47 U. S.] 437, 447, 457, a case in all respects analogous to this; that a case could not be made in this court with a stipulation to turn the same into a bill of exceptions (Conk. Tr. 273–275), and that, under the facts shown, the defendants were entitled now to put their bill of exceptions into form, if their writ of error was allowed to stand, as their exceptions were taken in proper form at the trial.

NELSON, Circuit Justice. The allowance of the writ of error in this case was granted by me at chambers, and the question is, whether or not a judge at chambers has the power to allow the writ, under the seventeenth section of the patent act of 1836, where the judgment is under the sum of $2000.

That section provides for writs of error and appeals from judgments and decrees in patent cases, the same as in other cases in the federal courts, and adds, that they shall also lie "in all other cases in which the court shall deem it reasonable to allow the same."

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

This applies to the case of a judgment for the plaintiff for less than $2000, which is the amount required to authorize a writ of error or appeal under the general law on the subject.

The argument on the part of the plaintiff is, that the judge must be sitting at a stated term of the court, and not at chambers, to satisfy the language of the act providing for this special writ of error. There might be some reason for this distinction in a case where a court at chambers and one at a stated term fixed by statute were held by a different body. But when they are held by the same individual, as in this case, I doubt if the distinction is well founded. The nature of the subject here seems to indicate chamber business, and the matter may as well be attended to at chambers, as in court in term time. A judge sitting at chambers is a court, in the proper and usual sense of the term, and in a sense which may satisfy the words as well as the import of the statute. Although there may be some doubt in the matter I am inclined to hold that the writ was properly allowed.

As to the order in regard to a bill of exceptions, there is no doubt that the points must be made and the exceptions taken in the usual way at the trial, in order to entitle the party to the benefit of them on the writ of error. And, as well as I recollect this case when it was before me, the points in it were taken in the required form, although the paper book itself, on which the motion for a new trial was made, was in the form of a case. That fact is explained, however, in the opposing affidavit, and the paper appears to have taken that particular form under the direction of the judge before whom the trial took place, without prejudice to the right of the defendants to make up a bill of exceptions with a view ultimately to a writ of error.

Upon the whole, I think the motion must be denied in both aspects in which it is presented.

Motion denied, without costs.

[NOTE. For other cases involved in this litigation, see note to Foote v. Silsby, Case No. 4,916.]

Case No. 4,918.

FOOTE v. SILSBY et al.

[1 Blatchf. 545;[1] 1 Fish. Pat. Rep. 357.]

Circuit Court, N. D. New York. June Term, 1850.

EQUITY—FEIGNED ISSUE.

1. An action at law for the infringement of a patent was tried and a verdict found for the plaintiff, and a motion for a new trial, on the grounds of errors in law at the trial, and of surprise in the exclusion of evidence, and of newly discovered evidence, was made and denied. After the verdict the plaintiff filed a bill against the defendants for a perpetual injunction, founded on the verdict. An answer was put in, setting up in defence the matters urged as grounds for a new trial. After the refusal of a new trial in the action at law, and after replication in the suit in equity, the defendants moved in the latter suit for a feigned issue, on the ground that they had just discovered new evidence which went to show a want of novelty in the plaintiff's invention, and was of a different character from any before presented: *Held*, that it was a proper case for a feigned issue.

2. The defendants were entitled to amend their answer, on payment of costs, by inserting the newly discovered matter.

In equity. After the verdict for the plaintiff [Elisha Foote] in Foote v. Silsby [Case No. 4,916], a bill in equity was filed by the plaintiff against the defendants [Horace C. Silsby and others], founded upon the verdict, and praying for a perpetual injunction, and an account of profits since the commencement of the suit at law. The defendants answered the bill, setting up the pendency of the motion for a new trial in the suit at law, and the alleged errors in the trial at law, and also all the evidence excluded on the trial, and the matters which were urged as reasons for a new trial on the grounds of surprise and newly discovered evidence. There was a replication to the answer. The defendants now moved, in the equity suit, for leave to amend their answer, or to file a supplemental answer, on the ground that they had just discovered important testimony tending to show that the principle of the unequal dilatation of different metals under a given degree of heat had been actually applied to the regulation of the heat of stoves prior to the plaintiff's invention. The substance of this testimony was set forth in affidavits, and in extracts from books. They also moved on the same papers, for a feigned issue to try the question of the novelty of the plaintiff's invention. It appeared that on the trial in the suit at law the only question litigated was that of infringement, the question of novelty resting on the plaintiff's patent alone.

Samuel Blatchford, for defendants.

1. The defendants are entitled to amend their answer, or to file a supplemental answer. They have brought themselves within the rules and practice on that subject. Rule 60 in Equity; 1 Barb. Ch. Pr. 164, 165; Wells v. Wood, 10 Ves. 401; Alpha v. Payman, Dick. 33; Patterson v. Slaughter, Id. 285, Amb. 292:. Jackson v. Parish, 1 Sim. 505; Tidswell v. Bowyer, 7 Sim. 64; Wharton v. Wharton, 2 Atk. 294; Smith v. Babcock [Case No. 13,008].

2. There ought to be a trial by jury on the important question of the novelty of the plaintiff's invention. That has never been tried, and, as the evidence just discovered goes to that very point, even under the ruling heretofore made in the case, it is proper a jury should pass upon the question. Orr v. Merrill [Id. 10,591]; Allen v. Blunt, [Id. 216].

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Samuel Stevens, for plaintiff.

NELSON, Circuit Justice. The case has heretofore been before me on a motion on the part of the defendants in the action at law for a new trial. The grounds on which a new trial was asked were, errors in law committed at the trial, surprise, and newly discovered evidence. On a full consideration of the case I came to the conclusion that no error was committed in point of law; and that, under all the circumstances presented upon the questions of surprise and newly discovered evidence, a case was not made out entitling the defendants to a new trial on those grounds.

In coming to that conclusion on the latter branch of the case I was somewhat influenced by the consideration, that the defendants would have an opportunity to present any new grounds of defence, whether omitted, or excluded on account of defective pleadings, in the case then pending in equity, either upon the hearing on pleadings and proofs, by a feigned issue, or by ordering a suit at law. This consideration afforded an answer to the equitable ground urged in favor of the new trial; as the defendants would have an opportunity to supply any omissions or oversights that occurred in the preparation of the suit at law for trial, or to produce any newly discovered evidence material to the issues, and at the same time the verdict, to which I thought the plaintiff entitled upon the case as presented, would be left undisturbed.

There can be no doubt that the newly discovered evidence, as now disclosed in the affidavits, and which is in addition to that shown on the motion for a new trial, may become very material on the question of the originality of the plaintiff's improvements; and that the defendants should have an opportunity to avail themselves of it in their defence to this suit in equity. It is claimed that this evidence will show that the application of the principle of the contraction and expansion of the metallic rod to the regulation of the heat of stoves, as used by the plaintiff, was not new, but on the contrary had been in successful use long before, both in England and in this country.

If the case stood now on the same footing as on the motion for a new trial on the ground of newly discovered evidence or of the exclusion of evidence from defect of pleadings, though I should still have clearly thought that the defendants ought to have an opportunity for a full defence in the equity case, before the granting of an injunction, yet I might have doubted as to the propriety of granting a feigned issue, or of ordering a trial at law; for, as the case then stood, upon all the evidence, whether received at the trial or furnished on the motion, it appeared that the plaintiff's improvement was the first that applied the principle above stated to the regulation of the heat of stoves. That being so, and no error in law having been committed at the trial, although the defendants were taken by surprise by the exclusion of their evidence, that evidence did not seem so material as to justify any interference with the verdict, especially as they would have an opportunity to produce it and discuss it more at large, if deemed material, in the equity case.

But the case now made is different. It is now denied that the improvement is original in the plaintiff, but on the contrary has been long known and in use; and a feigned issue is asked to try this question. I think it should be granted, and therefore direct a rule to be entered allowing a feigned issue to be made up between the parties to try the question of the originality of the plaintiff's improvement.

As to the other branch of this motion, namely, to amend the answer, I think the defendants have brought themselves within the usual practice of the court, and that the motion should be granted; but this must be on payment of the costs of opposing the motion.

[NOTE. See Foote v. Silsby, Cases Nos. 4,919 and 4,920.]

Case No. 4,919.

FOOTE v. SILSBY et al.

[2 Blatchf. 260.] [1]

Circuit Court, N. D. New York. July 10, 1851.

PATENTS—PATENTABILITY—NEW AND USEFUL RESULT—HEAT REGULATOR FOR STOVES—NOVELTY—EXPANSION AND CONTRACTION OF METALLIC ROD—COMBINATION.

1. In Foote's patent for an "improvement in regulating the draft of stoves," the first claim, being a claim to "the application of the expansive and contracting power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue," is a claim independent of any particular arrangement or combination of machinery or contrivance for the purpose of applying the principle to the regulation of the heat of stoves.

2. Where a party has discovered a new application of some property in nature, never before known or in use, by which he has produced a new and useful result, the discovery is the subject of a patent, independently of any peculiar or new arrangement of machinery for the purpose of applying the new property.

3. Hence, the inventor has a right to use any means, old or new, in the application of the new property to produce the new and useful result, to the exclusion of all other means. The case of Neilson v. Harford, Webst. Pat. Cas. 295, cited and approved.

[Cited in Bridge v. Brown, Case No. 1,857; Andrews v. Carman, Id. 371; Mitchell v. Tilghman, 19 Wall. (86 U. S.) 287.]

4. A mere abstract conception cannot be the subject of a patent; but, when it is reduced to practice, by any means, old or new, resulting usefully, it is the subject of a patent, in-

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dependently of the machinery by which the application is made.

5. In the case of such a patent, although old means be used by the patentee for giving application to the new conception, yet the patent excludes all persons other than the patentee from the use of those means, and of all other means, in a similar application.

6. The novelty of the invention covered by said first claim, can be defeated only by showing the prior application of the principle of the expansion and contraction of the metallic rod to regulate the heat of a stove, by means of the heat produced by the stove itself. It is not defeated by showing a prior application of the expansion and contraction of a metallic rod to open and close a damper, where the metallic rod was heated indirectly by the heat of a furnace, by being immersed in hot water.

7. But the prior application, in order to defeat the novelty of the said first claim, need not have been made by the very best apparatus that could be devised. The question does not depend upon the degree of usefulness, but upon the practically useful and successful prior application of the principle.

8. Where, prior to the plaintiff's invention of the application covered by the said first claim, the principle of the expansion and contraction of a metallic rod heated by the stove itself, had been applied to regulate its heat, the rod being, however, a compound rod, composed of a slip of brass and a slip of iron, firmly fastened together, and the motion of the damper being produced through a deflection of the rod resulting from its curvature, caused by the unequal dilatation, under a given degree of heat, of the two metals composing it, that of brass being greater than that of iron, whereas, in the plaintiff's invention, the motion was produced by the direct linear expansion of a brass rod used in connection with an iron stove: *Held*, that the principle of the application of the expansion and contraction of the metallic rod to regulate the damper, by causing it to open and close according to the degrees of heat in the stove itself, as covered by the said first claim, was the same in the two applications.

9. The said first claim does not involve any mode or method of application, or any question of difference in degree—as that an apparatus having the linear expansion as distinguished from curvature, possesses greater power or can perform what the other cannot.

10. The third claim of the patent, being a claim to "the combination, above described, by which the regulation of the heat of a stove in which it may be used is effected," *held* to be a claim for a combination, consisting of four parts, specifically defined.

11. Though the parts separately may all be old, yet, if the plaintiff was the first to combine all four of them, for the particular purpose of regulating the heat of a stove by means of its own heat, he is entitled to be protected in that improvement.

12. The novelty of the said third claim is not defeated by showing a prior combination of the same four parts, in which the expansion and contraction of the metallic rod were produced by its immersion in hot water, and not directly by the heat of the stove itself whose heat was to be regulated.

13. The prior combination, to defeat the novelty of said third claim, must have been an apparatus of practical utility, and must have embraced all the elements embraced in the plaintiff's combination.

In equity. This was the trial, before Mr. Justice Nelson, of a feigned issue ordered in this case,—Foote v. Silsby [Case No. 4,918],—to try the questions, whether the plaintiff [Elisha Foote] was the original and first inventor of the first and third improvements claimed in letters patent granted to him May 26th, 1842, for an "improvement in regulating the draft of stoves." The specification of the plaintiff's patent, and, also, descriptions of the apparatus of Dr. Ure and of the egg-hatcher of Bonnemain, put in evidence by the defendants [Horace C. Silsby and others], and referred to in the charge of the court, are set forth at length in Id. [Case No. 4,916]. All other facts necessary to an understanding of the case sufficiently appear in the charge of the court.

Samuel Stevens and Henry B. Stanton, for plaintiff.

Alvah Worden, Charles M. Keller, and Samuel Blatchford, for defendants.

NELSON, Circuit Justice (charging jury). The patentee in this case describes particularly, and with great fulness, two modes of applying the improvement which he claims to have made. They differ, I believe, only in one respect, and that consists in the method of detaching the connecting-rod, which is operated by the brass rods, from the damper, so as to prevent all difficulty in extreme heat, and give to the brass rods full operation in any degree of heat that may be applied to them. After giving these two descriptions of the machinery used to carry out the improvement, the patentee then specifies the several improvements which he claims to have invented, as follows: (The judge here read the four claims in the specification.)

The second claim, which is the adjusting process, and the fourth claim, which is the detaching process, are not in controversy between the parties to this suit, as individual claims, and may be laid out of view; leaving the first and the third as improvements claimed by the plaintiff which are controverted by the defendants, and which present the two questions for your examination and decision. These questions are presented in the form of a feigned issue sent from a court of equity to be tried in a court of law before a jury, and it will, therefore, be necessary for you to take them up separately, and examine them, and return a special verdict on each issue, expressing either affirmatively or negatively your answer to each of the questions.

The first question arises on the first claim set forth in the patent of the plaintiff. You are to examine the evidence which has been furnished by the respective parties, subject to the rules of law which will be given to you, and to determine whether or not the plaintiff was the first and original inventor of the improvement covered by the first claim. If he was, you will respond in the affirmative. If he was not, you will respond in the negative.

There has been some difference of opinion

between the counsel for the respective parties, as regards the true construction to be given to the first claim, and it will, therefore, be necessary for the court to call your attention particularly to this branch of the case. It will be seen that the patentee, after he has set forth, in general terms, that he has made a new and useful improvement in regulating the heat of stoves, has set forth, with great particularity, two modes by which he adapts this improvement to use, through the arrangement of various machinery; and that then, in this first claim, he claims the application of the expansive and contracting power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue. Now, it is the application of the expansive and contracting power of the metallic rod to regulate the heat of the stove by opening and closing the damper, the whole being self-acting in the admission or exclusion of air, that is specifically claimed in this part of the patent; and, according to the construction that I give to it and have always given to it, it is a claim independent of any particular arrangement or combination of machinery or contrivance for the purpose of applying the principle to the regulation of the heat of stoves. I have always supposed, therefore, that the peculiar arrangement or construction of the machinery used did not enter into this branch of the claim. Where a party has discovered a new application of some property in nature, never before known or in use, by which he has produced a new and useful result, the discovery is the subject of a patent, independently of any peculiar or new arrangement of machinery for the purpose of applying the new property in nature; and, hence, the inventor has a right to use any means, old or new, in the application of the new property to produce the new and useful result, to the exclusion of all other means. Otherwise, a patent would afford no protection to an inventor in cases of this description; because, if the means used by him for applying his new idea must necessarily be new, then, in all such cases, the novelty of the arrangement used for the purpose of effecting the application would be involved in every instance of infringement, and the patentee would be bound to make out, not only the novelty in the new application, but also the novelty in the machinery employed by him in making the application.

To illustrate my view, I will call your attention to a decision upon this point. It is a principle established in the case of Neilson v. Harford, Webst. Pat. Cas. 295, 310, 328, and is quoted in Curtis on Patents (section 80): "Where the invention consisted in the application of heated air as a blast for fires, forges and furnaces, but the patentee claimed no particular form of apparatus for heating the air, but described an apparatus by which it might be heated, and the defendant had employed an apparatus confessedly superior in its effects to that described in the plaintiff's specification, and such an improvement as would have supported a patent; but, as it involved the principle of the plaintiff's invention, it was held an infringement." Although the defendant in that case had got up an apparatus which was superior to the apparatus of the patentee, yet, inasmuch as, in his apparatus, he was applying heated air as a blast for furnaces, he was an infringer, because he availed himself of the new idea of the patentee. In section 81 it is further laid down: "In cases of this class, where the most important part and merit of the invention consists in the conception of the original idea, rather than in the manner in which it is to be carried out or applied in practice, it is clear that a principle carried into practice by some means constitutes the subject-matter of the patent. Inventions of this class may have a character totally independent of the particular means by which they are applied, although the patentee must have applied the invention by some means; and, when he has done so, the imitating that character may be a piracy of that invention, although the means may be very different, and such as in themselves might constitute a distinct or substantial invention. The machinery employed is not of the essence of the invention, but incidental to it."

Now, in this case, as I understand the claim of the patentee, he claims the application of the principle of expansion and contraction in a metallic rod to the purpose of regulating the heat of a stove. That is the new conception which he claims to have struck out; and, although the mere abstract conception would not have constituted the subject-matter of a patent, yet, when it is reduced to practice by any means, old or new, resulting usefully, it is the subject of a patent, independently of the machinery by which the application is made. I think, therefore, that in examining the first question presented to you, you may lay altogether out of view the contrivance by which the application of the principle is made, and confine yourselves to the original conception of the idea carried into practice by some means; but, whether the means be old or new is immaterial, for, although old means be used for giving application to the new conception, yet the patent excludes all persons other than the patentee from the use of those means and of all other means in a similar application.

The question, then, is whether, anterior to the patent of the plaintiff, any person had discovered the application of the principle in question to regulate the heat of a stove, and applied it by some apparatus which operated usefully to effect that object. On this branch of the case you have the description of the use of this principle by Dr. Ure, for

regulating heat in a stove or furnace. Two illustrations and descriptions of Ure's apparatus are furnished by the defendants. You have also the description and model of the application of the principle by Bonnemain, called the "egg-hatcher"; also the description of the application by Ward, in his ventilator; and the description and model of Evans' contrivance to regulate the admission of cold water into a boiler, with a view to regulate the temperature of the water. You have also the Saxton stove, made in 1838, and produced in court, and the description of Dr. Arnott's stove improved, and the various models of it furnished by the respective parties. In all these cases, the principle of the contraction and expansion of a metallic rod has been adapted to the regulation of heat for what is claimed to have been a beneficial purpose.

As respects the various contrivances of Ure, Bonnemain and Evans, it does not appear that any one of those persons ever applied the principle of the expansion and contraction of the metallic rod to regulate the heat of a stove, by means of the heat produced by the stove itself, thereby producing a self-regulator; and it is, therefore, quite obvious that no one of them had reached the idea. In all these contrivances, with the exception of Ward's, the metallic rod used to produce the motion by which the damper was opened and closed, was not heated by the air of the furnace, but was heated indirectly by the heat of the furnace, by being immersed in hot water. They all, therefore, fell short of the whole idea embraced in the first claim of the patent. Ward's application was applied to the ventilation of a room, and, so far as regards the conception of the idea of regulating the heat of a stove by the use of an expanding and contracting metal, was altogether different from the plaintiff's. It was a use of the principle to regulate a damper, but it was not adapted to regulate the heated air of a stove, which is the application in question here. In this respect, therefore, it was the same as Ure's, Bonnemain's and Evans'.

But, in the Saxton stove, you have the application of the principle in question directly to the regulation of the heated air of the stove, by the opening and closing of a damper to admit or exclude the air for the supply of combustion, by the use of a metallic rod heated by the heated air of the stove itself. The same remark may be made in relation to Dr. Arnott's stove improved, if the counsel for the defendants are right in their version of the description of that stove, and if the model they have produced of it be correct. It is of no great moment, however, on this branch of the case, whether they be right or wrong, as the question will turn on the Saxton stove, made in 1838.

Now, it is insisted by the counsel for the plaintiff, that although there is in the Saxton stove an application of the principle of the expansion and contraction of a metallic rod heated by the stove itself, to regulate its heat, yet the rod is a compound rod, composed of a slip of brass and a slip of iron, firmly fastened together, and the motion of the damper is produced through a deflection of the rod resulting from its curvature, caused by the unequal dilatation, under a given degree of heat, of the two metals composing it, that of brass being greater than that of iron; that such an application is distinguishable from an application of the principle made by the direct linear expansion of a brass rod used in connection with an iron stove; and that, in that respect, the improvement of the plaintiff is distinguishable from the principle or conception applied in the Saxton stove. I lay entirely out of view the machinery, and speak only of the idea of applying the principle to regulate the heat of stoves. Such is the distinction relied on to take the plaintiff's improvement specified in his first claim out of the conception found in the application of the metallic rod in the Saxton stove.

It must be remembered, however, that in the patent the broad claim is made to "the application of the expansive and contracting power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue." And one thing must be admitted, that in the Saxton stove the principle of the expansion and contraction of the metallic rod was applied in the regulation of the damper, by causing it to open and close according to the degrees of heat in the stove itself. The means by which Saxton produced this adaptation were indeed different from the means used by the plaintiff, but the principle was the same. This is obvious from the testimony, and so say all the witnesses who have been examined on the question. Saxton's conception of the idea was anterior to that of the plaintiff. He applied the principle by means of a double bar, which produced a curvature. Still, that curvature was produced by the expansion and contraction of the brass rod, which, being greater under the same temperature than the expansion and contraction of the iron rod, resulted in the curvature, giving a motion which was applied to the regulation of the damper.

The plaintiff is presumed, in judgment of law, although I suppose the fact was otherwise, to have had a knowledge of the Saxton stove, and of the application of the metallic rod to regulate its heat, when he applied the rod to the regulation of the stove described in his patent, and he there saw the principle applied by means of the deflection produced by the two compound bars, and of the motion resulting from the curvature.

The difficulty in this branch of the case, on the part of the plaintiff, lies in his claim to

the original conception of the adaptation of the principle to the purpose. Saxton's stove having been anterior in time to the plaintiff's, the principle existed there, and was only applied by the plaintiff in a different mode to the same object. The plaintiff used the direct action of expansion and contraction to regulate the stove, whereas the combination of the iron rod with the brass rod had been before used. That would seem to be a different mode of applying the principle, rather than an original conception of the idea of adapting the expansion and contraction of the rod to the regulation of a stove. The idea had been before conceived and applied in the Saxton stove.

I have very little more to say on this branch of the case. All that I desire is, to impress your minds distinctly with the thing that is claimed by the patentee, so that you may not confound with something else the actual claim that is made in the first clause of the patent. That claim is not for any mode or method of applying the expansion and contraction of the metallic rod to regulate the heat of the stove, but it is for the conception of the idea itself. It is for you, bearing that in mind, and weighing the evidence in the case, to say, whether the plaintiff was the original discoverer of this conception or not. If he was not, you will answer the first question in the negative. If he was, you will answer it in the affirmative.

I will now call your attention very briefly to the second question. It arises on the third claim, which is in these words: "I also claim the combination, above described, by which the regulation of the heat of a stove in which it may be used is effected." This claim applies to the apparatus used by the patentee in applying the principle. He has given two descriptions of his mode of application. He claims that he is the inventor of the apparatus thus described, and the claim embraces the whole of the apparatus he has set forth in his first description, and also the whole of the apparatus in his second description, the latter differing from the former only in including the detaching process as a part of the combination. This combination consists of—First, the brass rod, which is used, as it expands and contracts from the action of the heat of the stove, to give the power to open and close the valve; second, the apparatus by which the motion obtained by the expansion of the rod is increased, in order to operate more effectually, which is a combination of levers; third, the adjusting screw, which is used to set the brass rod, with the combination of levers and the connecting rod attached to the damper, at a given degree of temperature, by which different degrees of heat are obtained in the operation of the stove; thus, if, when the stove is cold, you were to set the brass rod with its connections so that the damper should be but just open, a very slight degree of heat would close it; consequently, the stove and the room it was designed to heat would be kept at a low temperature; but, if the apparatus was set with the damper wide open, it would require an extreme degree of heat to produce a sufficient expansion of the metallic rod to close it; fourth, the detaching process, by which the connecting rod is made to act or cease acting on the damper. In the apparatus of the plaintiff, the connecting rod operates directly and positively both to open and close the damper. The damper is not closed by its own gravity, by being released at the extreme of expansion.

This is the combination. There are four elements in it, which I have named. The claim is for the combination of all of them, not for any one of them. It is immaterial whether or not the plaintiff was the inventor of any one or two of them, or of any less than the combination of the whole. They may all be old; and yet, if the plaintiff was the first to combine all four of them, for the particular purpose of regulating the heat of a stove by means of its own heat, he is entitled to be protected in that improvement.

Now, I am inclined to think, although the question has embarrassed me, and I may possibly after all have fallen into an error in regard to it, that the combinations of Dr. Ure in the two instances before alluded to, and the models of which have been produced on the trial, the egg-hatcher of Bonnemain and the contrivances of Evans and of Ward, do not come up to the idea of the combination described and claimed by the patentee and embraced in this second question. I mean, aside from the parts composing the apparatus used by these different persons. As I have before said, when speaking of the first question submitted to you, the contrivances devised by those persons were not constructed to regulate the damper of a stove to be operated on by the heat of the stove. In all the cases mentioned, except that of Ward, the metallic rod was heated, so as to produce the contraction and expansion, by immersion in hot water. The apparatus was made with a view to the heating of the metallic rods in hot water, and not by the heat of the stove, except through the medium of the water which was heated by the stove or furnace. It is quite obvious, that an apparatus to be operated on by the application of hot water, is necessarily different from an apparatus to be acted on by the heat of the stove itself, which is often an extreme heat. This is a view altogether independent of the peculiar arrangement of the apparatus.

It is your duty, however, to look into the arrangement of the machinery used by Ure, Bonnemain, Evans and Ward, to see whether all the elements composing the combination of the plaintiff are found in either of those contrivances—that is, whether you find, in either of them, the brass rod operated on by the heated air of the stove, with

a system of leverage to increase motion, the adjusting screw to set the apparatus at a given degree of temperature, and the detaching apparatus constructed in the mode described by the patentee. It is necessary that you should find all these; not only the parts in their peculiar arrangement, but the combination of all the parts of the same peculiar arrangement in one or another of these prior contrivances, in order to make out, in judgment of law, the identity essential to overthrow the claim of novelty involved in the second question.

In addition to those other contrivances, you have again the apparatus used in Saxton's stove. There, there is a direct application of the principle to the regulation of the heat of a stove, and so there is, also, in the case of Dr. Arnott's stove improved, provided you are satisfied with the description of it, and with the accuracy of the model furnished by the defendants. You will, therefore, examine the machinery used in Saxton's stove, which was made in 1838, and see whether the arrangement and combination are or are not substantially the same with those described in the plaintiff's patent.

There is one consideration which it is proper you should take into view, because it may have some weight on this branch of the case, as respects the comparison of the apparatus in Saxton's stove with the apparatus described by the plaintiff. It is this: In the Saxton stove, the compound-bar is used, and the motion is obtained from the curvature which results from the difference of expansion between the brass rod and the iron rod. In the plaintiff's stove, the motion is produced by the direct linear expansion of the rod. It is, therefore, proper for you to keep this in view, when you are examining the means used by each for the purpose of giving application to this expansive and contracting principle of metals, to see whether the means are the same or not, and whether the principle can be adapted and used by the same apparatus when the metal is acting by curvature and when it is acting longitudinally. This is a question of fact, and it has been so long before you and so frequently referred to and explained by the witnesses and by the learned counsel, in the course of the trial and in summing up, that it is unnecessary for me to call your attention more particularly to this branch of the subject. All that I desire is, to present the point so that you may comprehend it. The question is, whether the combination of the different parts of the machinery used by the patentee for regulating the heat of a stove by means of this principle of the expansion and contraction of a metallic rod was new and not before known, or whether the whole of it is to be found in any of the models, stoves or descriptions which have been given in evidence on the trial. If the combination was new with the patentee, then, so far as regards the second question, your response ought to be in the affirmative. If it was not new but was known before, either in a full description or in any of the models or stoves which have been produced, your response should be in the negative.

Mr. Stevens, for the plaintiff, requested the court to charge as follows: 1st. In regard to the first branch of the case, that if an apparatus having the linear expansion, as distinguished from curvature, possessed greater power, and if Saxton's stove was incapable of performing what could be performed by the plaintiff's, then the application of the principle in the plaintiff's stove was a new application.

In reply to this request the court remarked: The objection to that proposition is, that it involves a method or mode of application and the question of a difference in degree, which is not an ingredient in and does not belong to the first question.

Mr. Stevens, for the plaintiff, further requested the court to charge as follows: 2d. That if the apparatus by which Saxton applied the principle contained within itself the elements of its own destruction, it could not interfere with the plaintiff's rights under his third claim.

In reply to this request the court remarked: Although the person who first conceived the idea of applying the principle to the regulation of the heat of a stove by the action of its own heat, is entitled to the merit, yet, if that application was made in a way that was useless, and if it was a failure, it is no impediment in the way of the claim of the patentee; because, as I before stated, a person, in order to entitle himself to a patent for a new application of a property of nature to a useful purpose in the business affairs of life, must not only have conceived the idea, but must by some means have successfully given application to the new property. In other words, the person who first conceived of the application of the expansion and contraction of a metallic rod acted on by the heat of a stove, to regulate the heat of that stove, must, in order to have entitled himself to a patent, have applied the principle usefully by some apparatus or machinery. But then it is not necessary, in any improvement, that the application to the new and useful purpose should be made by the very best apparatus that can be devised. The question does not depend on the degree of usefulness. If the application that was made of the principle operated successfully, so as to be practically useful, although it might not have been the very best, yet it was not a failure.

The jury went out at 12 m. At 6 p. m. the jury came into court, and put to the court the following question in writing: "Shall the jury consider the greater utility of either apparatus, in making up their verdict?"

In reply to this question, the court remarked: The degree of utility is not involved in the issues. There must have been some practical utility in the apparatus set up by the defendants as previously known, to show a want of novelty in the plaintiff's apparatus, but the degree of utility is not in question. One may be better than the other, but that fact is not to be taken into account. The one that is alleged to be prior must, however, have been an apparatus of some practical utility; but, whether it was better or inferior in degree is not a question.

The jury then retired again. But the court immediately sent for them again, and, on their coming into court, the court remarked: I have sent for you, again, gentlemen, for fear that the answer I gave to the question you propounded might lead to confusion as respects the two issues. I want to inquire if the question you put was put with reference to the first issue or the second issue. Foreman: The second issue. We have agreed as to the first issue.

The court then remarked: The second issue turns on the combination and apparatus of the plaintiff to regulate the heat of the stove, that is, the claim of the plaintiff for a combination of four elements. He alleges that that combination was new with him. In order to overthrow the claim involved in the second issue, you must be satisfied that the arrangement set up by the defendants, tending to disprove the novelty of the plaintiff's combination, was an apparatus of practical utility. No matter whether it was superior or inferior to the plaintiff's. It must have been an apparatus of practical utility, and must have embraced in its combination all the elements embraced in the plaintiff's combination; in other words, you must find that it contained an identity of combination.

At 12 m. the next day, the jury rendered a verdict in the negative on both issues.

NOTE. Afterwards, on a final hearing on pleadings and proofs, the court entered an interlocutory decree for the plaintiff, notwithstanding the verdict on the feigned issues. The case went to a master, who took an account. On exceptions, his report was modified, and a final decree was entered for the plaintiff. [Case No. 4,920.] The defendants appealed to the supreme court, where the case is reported as Silsby v. Foote, 20 How. [61 U. S.] 378. That court modified the decree below in some particulars.

Case No. 4,920.

FOOTE v. SILSBY et al.

[3 Blatchf. 507.] [1]

Circuit Court, N. D. New York. Aug. 28, 1856.

PRACTICE IN EQUITY — EXAMINATION OF DEFENDANT IN HIS OWN BEHALF BEFORE MASTER.

1. On a reference to a master, in an equity suit for the infringement of a patent, to take an account, a defendant cannot be examined as a witness in his own favor, if objection be made by the plaintiff.

2. Nor can a defendant be so examined, on his own behalf, by his own counsel, even though he was first called and examined as a party by the plaintiff, or was sworn by the master upon the plaintiff's application.

3. The practice of courts of equity as to the examination of parties on a reference to a master, stated.

This was a bill in equity, praying for an injunction and account for the infringement of letters patent [No. 2,636] issued to the plaintiff [May 26, 1842]. An interlocutory decree was entered in the cause in August, 1853, by which it was adjudged and decreed that the defendants had infringed the plaintiff's patent, and by which it was referred to the clerk of the court, as master, to take the account. The master made his report, and both parties excepted to it on various grounds. One of the exceptions taken by the plaintiff was to the action of the master in permitting some of the defendants to testify as witnesses in their own behalf on the reference, after objection thereto by the plaintiff.

Elisha Foote, plaintiff, in person.

William H. Seward, Samuel Blatchford, and William A. Sackett, for defendants.

Before NELSON, Circuit Justice, and HALL, District Judge.

HALL, District Judge. One of the exceptions taken by the plaintiff relates to the examination of some of the defendants as witnesses in their own behalf, after an objection made thereto by the plaintiff. In my opinion, the exception is well taken.

Under the 77th rule prescribed by the supreme court for the observance of the circuit courts in equity cases, the plaintiff had a right, without special order, to call and examine the defendants, and each of them, as parties, and to obtain from them, in that mode, evidence in support of the claims made by the plaintiff upon the reference. The object of the rule was to obviate the necessity of providing specially, in each case, by the order of reference, for the examination of the parties before the master, upon the application of the adverse party. It was under this rule that some of the defendants were called and examined by the plaintiff, and it was under this rule that the defendants insisted that they had a right to examine each other as general witnesses upon the reference, after the defendant proposed to be examined in behalf of himself and his co-defendants had been called and examined as a party by the plaintiff, or had been sworn by the master upon the plaintiff's application.

I cannot think that the defendants had the right claimed, and which was allowed by the master. It certainly could not have been intended, by the general language of the rule

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

referred to, to give to defendants a right to be sworn and examined as witnesses in the cause, upon their own application, and to give testimony in their own behalf, against the objections of the opposing party; nor could it have been intended to give to the master an unlimited discretion to make parties witnesses in their own favor, unless such right and discretion had previously existed in the cases in which similar language had been used in the special orders of the court directing similar references. If it had been intended to change the settled practice of courts of equity in respect to a question of great importance, and of such frequent occurrence, it may be safely assumed that the intention to make such change would have been distinctly and explicitly declared.

It is, therefore, proper, if not necessary, to ascertain the practice of courts of equity in cases where this right to examine parties was expressly given by the order under which the reference proceeded in the particular case in which the question was raised. It is, I think, entirely clear that, under such an order of reference, the right to examine the parties to the proceeding is given for the purpose of enabling a party to obtain the admissions and evidence of an adverse party in the cause, or to authorize the master to obtain such evidence and admissions in favor of parties having adverse interests, and who are prevented from attending before him upon the reference by reason of absence from the country, or other cause, the examination of the party being allowed for the purpose of compelling him to make admissions, or give testimony, against his own interest. It was intended thereby to probe the conscience of the defendant, in the exercise of the right to discovery by the oath of the adverse party, which is conceded to suitors in equity, and which right of discovery is one of the original and essential heads of equity jurisdiction. And, although the exhibition of interrogatories duly settled was the original, and, perhaps, in the early judicial history of this state, the most usual form of such examination before the master, the practice gradually became less formal and stringent, and oral examinations have been frequent, if they have not most generally prevailed. It was declared by Chancellor Kent, as early as 1817, that this change was one of convenience merely, and involved no principle of policy or of right. The same view was taken of this question by Chancellor Walworth, in 1828; and he declared, that when a party is examined before a master in relation to his rights in the cause, the examination is in the nature of a bill of discovery. There can be no cross-examination by his own counsel, and he cannot give testimony in his own favor, except so far as his answers may be responsive to the questions put by the opposite party. Remsen v. Remsen, 2 Johns. Ch. 495, 499; Hart v. Ten Eyck, Id. 513; Benson v. Le Roy, 1 Paige, 122; Daniell, Ch. Pr. 1367, 1368; 1 Barb. Ch. Pr. 492. The 105th rule of the court of chancery of this state, which took effect January 1st, 1830, declared that the master should be at liberty to examine any party, creditor, or other person coming in to claim before him, either upon interrogatories, or viva voce, or in both modes; and this provision was continued in force until the court of chancery was abolished. But I have been unable to find any case in which it was ever held that, under this rule, a party could be called by the master for the purpose of giving testimony in his own behalf, or could volunteer testimony in his own behalf when called by the opposing party. It is unnecessary to discuss the question of fact, whether the defendant Henion, or the other defendants, were called by their own counsel, or by the master. If by the latter, they testified in their own behalf, on an examination by their own counsel, notwithstanding the objections of the plaintiff; and this is quite as objectionable as an examination under the call of their own counsel, without the intervention of the master. Even if properly called as a witness against another party in the cause, and liable to be cross-examined by the party against whom he is called, a defendant cannot give testimony to be used in his own favor. Benson v. Le Roy, ubi supra. And, in every possible view of this case, the testimony of the defendants, volunteered in their own favor, and elicited by questions put by their own counsel, was improperly admitted. The exception must, therefore, be allowed.[2]

[NOTE. For other cases involved in this litigation, see note to Foote v. Silsby, Case No. 4,916.]

FOOTE (UNITED STATES v.). See Case No. 15,128.

Case No. 4,921.

Ex parte FORBES et al.

[1 Dill. 363.][1]

Circuit Court, D. Kansas. 1870.

NATIONAL AND STATE COURTS — JURISDICTION — HABEAS CORPUS—PARTITION—INDIAN LANDS.

1. Federal courts or judges cannot discharge persons from custody under process for contempt, issued by a state court in the course of a suit pending therein, even though it relates to property of Indians, over which, under special treaties and acts of congress, such state court has no jurisdiction.

[Cited in U. S. v. Van Fossen, Case No. 16,607; U. S. v. McClay, Id. 15,660; Ex parte Young, 50 Fed. 528.]

2. A state court has no jurisdiction over a partition suit in relation to lands of the Shaw-

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[2] On appeal to the supreme court of the United States, the decree of this court was affirmed (Silsby v. Foote, 20 How. [61 U. S.] 378), so far as respects the point covered by this decision. [See, also, 20 How. (61 U. S.) 290.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

nee Indians, which have never been conveyed with the approval of the secretary of the interior.

This was an application to the district judge of the United States for the district of Kansas, for the discharge, from the custody of the sheriff of Wyandotte county, of the abovenamed petitioners [Forbes and Pucket]. A writ was allowed, directing the persons named to be brought before him, which was returned with the bodies of the relators. The material facts are these: In November, 1854, a treaty was made between the Shawnee Indians and the United States, wherein it was stipulated that two hundred acres of the "Shawnee reservation" of lands, should be allotted to each member of the tribe; and where the allottees were minors, the shares of such minors were to be patented to the head of the family, for their benefit. The treaty also provided that the patents should be issued with such restrictions, for the benefit of the Indians, as congress might provide. In pursuance of this provision, in 1859, congress enacted that the restriction referred to should be such as might be prescribed by the secretary of the interior; and, as such restriction, that officer directed that the patents should contain a clause providing that the Indians or their heirs should never alienate lands so allotted and patented to them, without the consent of the secretary of the interior. Under this treaty, certain of said Shawnee lands were allotted to Mary McLane, and patented to Sophia McLane, as the head of the family of which said Mary was a member. The petitioners were in possession of portions of said lands, under supposed conveyances from said Mary, which were executed in the presence of the agent of the United States for the Shawnees, and were paid for to his satisfaction. The conveyances were forwarded to the secretary of the interior for his approval, but it does not appear that they ever have been approved by that officer. One of the heirs of Sophia McLane, claiming to own an undivided half of the lands patented to her, commenced a proceeding in the district court of Wyandotte county, for the partition thereof, denying that the petitioners herein had any rights therein, and alleging that the petitioners were committing waste thereon. Upon that petition the said court made an order restraining the petitioners herein from committing waste upon said lands, pending the suit for partition. For an alleged violation of that order, the petitioners were, by order of that court, committed to the custody of the sheriff of Wyandotte county, as for contempt; which is the imprisonment from which they seek to be discharged.

Glick & Todd, for petitioners.

Scroggs & Sharp, opposed.

DELAHAY, District Judge. If it were necessary to a decision in this proceeding, that the jurisdiction of the state court of the subject matter in controversy, in the proceedings before it, should be inquired into, it would be sufficient, in my opinion, to refer to the case of the Kansas Indians, 5 Wall. [72 U. S.] 737, in which the supreme court of the United States, speaking of the Shawnees, says: "As long as the United States recognize their national character, they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws." There can be no question of the applicability of this language to the suit in Wyandotte county, as it is made clearly to appear that the Shawnees still maintain their tribal relation to the United States, and are still recognized by the government as an Indian tribe or nation; and that the secretary of the interior never has approved the conveyances under which the petitioners claim. The deeds are entirely void until approved by that officer; and, until they are so approved, the lands of the Shawnees are as wholly beyond the jurisdiction of the state courts as if they were situated without its geographical limits, as will be seen by reference to the peculiar provisions of the act admitting Kansas as a state. See, also, U. S. v. Ward [Case No. 16,639].

But that is not a question to be inquired into in this proceeding. The first question that it is necessary to consider, is whether a judge of a federal court has jurisdiction in the premises; and the legislation of congress, happily, has left no room for doubt upon that subject. The judiciary act of 1789 (1 Stat. 81, § 14) gave the general power to issue the writ, but, in a proviso, declared "that it in no case shall extend to prisoners in jail, unless when they are in custody under, or by color of, the authority of the United States; or are committed for trial before some court of the same; or are necessary to be brought into court to testify." The act of 1833 (4 Stat. 634, § 7) provides that the federal judges shall have the power to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined, on or by any authority or law, for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof. The act of 1842 (5 Stat. 539) extended the power to courts where aliens were confined, under state authority. The act of February 5, 1867 (14 Stat. 385), gave power to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."

To be unmistakably explicit, it will be observed that congress did not stop with providing in what cases the writ might be issued by federal courts and magistrates. Certain cases are mentioned in which it shall not be allowed, conspicuous among which is the case where the applicant is in confinement under the laws of a state, by order of a court

thereof. If he be confined contrary to the constitution and laws of the United States, the federal authorities may issue the writ. But the proofs in this case show distinctly and clearly that the petitioners were not in that category. They are in confinement, illegally perhaps, under the order of a state court, in a matter, it may be, over which it had no jurisdiction; but that does not necessarily give them access to the federal judiciary, since they can administer no relief unless the case is provided for by federal legislation. Very manifestly, this case is not such an one; I am, therefore, obliged to set aside the writ heretofore allowed, and leave the petitioners in the custody of the sheriff of Wyandotte county.

Ordered accordingly.

NOTE. As to jurisdiction over Indians, see Karrahoo v. Adams [Case No. 7,614]; U. S. v. Yellow Sun [Id. 16,780]; U. S. v. Tobacco Factory [Id. 16,528]. Respecting non-interference of state and national courts with the process and operations of each other, see Ex parte Holman, 28 Iowa, 88.

Case No. 4,922.

In re FORBES.

[5 Biss. 510.] [1]

District Court, N. D. Illinois. Jan., 1874.

CHATTEL MORTGAGE—WHEN VOID—POSSESSION—A BILL OF SALE—PROOF OF DEBT—PRACTICE.

1. A chattel mortgage authorizing the mortgagor to sell the property mortgaged is void as against creditors, and delay on the part of the mortgagee in taking possession after maturity is fatal to his rights as against creditors or purchasers. The same rules apply as against the assignee in bankruptcy.

2. When the mortgagee took possession some time after the maturity of his mortgage, and sold part of the goods mortgaged, he has no right to apply the proceeds on his indebtedness, but if he has not acted in bad faith he may be allowed to retain sufficient to cover his actual expenses in making the sales.

3. A bill of sale made after possession so taken is a preference, and cannot be used to help out the defects in the mortgage.

4. If, before the maturity of the mortgage, the mortgagor had taken in a partner, the mortgagee can only prove against the estate of the mortgagor—not against the partnership.

5. On motion to expunge a proof of debt and claim to establish a set-off, personal judgment cannot be rendered against the creditor for money in his hands—that must be by suit against him.

In bankruptcy.

D. S. Pride, for assignee.

Dent & Black, for mortgagee.

BLODGETT, District Judge. A question is raised in this case by way of appeal from the finding of J. A. Crain, register, in regard to a claim made by Joseph A. Hodges. It appears from the proof in the case that on the 2d of December, 1871, said bankrupt, William D. Forbes, was engaged in business as a merchant in Lee county, in this state, having in his store a small stock of goods; that he borrowed of one Little $1,000, for which he gave his note, due in 90 days, with said Hodges as security. And to indemnify him against loss on said note, Forbes gave Hodges a chattel mortgage on his said stock of goods, said mortgage containing the following clause: "Provided, also, that said William D. Forbes may retain the possession of and have the use of said goods and chattels until the day of payment aforesaid, rendering a true account of all sales, having the privilege of continuing the trade and sales and applying the proceeds to payment of said note according to the direction of said party of the second part and understanding of the parties hereto." And Forbes continued to sell goods from his said stock and purchasing others until about the 15th of March, 1872, when Anderson became a partner to the extent of a quarter interest in said business with Forbes, after which Forbes and Anderson purchased goods, used in their said business, for which they contracted debts to an amount exceeding $3,300, which were unpaid at the time they were adjudicated bankrupts. Default was made by Forbes in the payment of the note to Little, and on the 23d of May, 1872, Hodges paid said note, and on that or the next day he took possession of the stock of goods in the store of Forbes & Anderson by virtue, as he claimed, of his said chattel mortgage. Within a day or two after so taking possession, Forbes & Anderson gave to Hodges and Hiram Anderson a bill of sale of said stock of goods with the agreement that they were to sell the same and out of the net proceeds pay the debt due from Forbes to Hodges and a debt of about the same amount due from Andrew J. Anderson to said Hiram Anderson. In pursuance of said agreement Hodges proceeded to keep open the store and sell said goods in the due course of business until about the time the bankruptcy proceedings were commenced against Forbes & Anderson, when he closed the store and subsequently delivered the unsold goods to the assignee of Forbes & Anderson. The money received by Hodges for goods sold by him and outstanding accounts collected amounted to $723.72, and he sold goods on credit to the amount of $119.73, which is still due and unpaid to him. Hodges claims that his expenses in making said sales amounted to $283.50, leaving in his hands $440.23, and yet to be collected $119.73. He now seeks to prove his debt against the estate of Forbes & Anderson for the amount paid on the Little note, and offers to set off and apply the amount so received for the goods sold by him. And the question is, can he be permitted to do so?

Chattel mortgages containing clauses authorizing the mortgagor to sell the property mortgaged have been held void by the supreme court of this state in numerous cases.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Davis v. Ranson, 18 Ill. 396; Barnet v. Fergus, 51 Ill. 352.

So, too, it has been repeatedly held that delay on the part of the mortgagee in taking possession after condition broken is fatal to his rights as against creditors or purchasers. Reed v. Eames, 19 Ill. 594; Buckley v. Lampett, 24 Ill. 604; Barbour v. White, 37 Ill. 164.

The note which Hodges signed fell due on the 2d of March, 1872, and no attempt was made to take possession under the mortgage until about the 23d of May, although the condition was that the mortgagor should pay it at maturity.

This chattel mortgage was then void as against the creditors of Forbes & Anderson for the two reasons above assigned at the time Hodges took possession, and he can claim no rights under it as against the creditors of the firm. The goods mortgaged cannot be identified or separated from the goods of the firm, and the large indebtedness of the firm has been contracted upon the credit given by the possession of these goods. The bill of sale given to Hodges and Hiram Anderson, after Hodges took possession of the stock, cannot be held to supplement or help out the defects of the mortgage because it was manifestly fraudulent as against the creditors of the firm, it being clearly an attempt to prefer Hodges and Hiram Anderson, who were creditors of the individual members of the firm.

The register refused to allow the claim of Hodges as a debt against the firm and also refused to allow the retention of the $440.23 by Hodges.

I think the register was clearly right on both points; and the order of the court should be that the claim of Hodges against the estate of the firm should be expunged, and leave given him to prove it against the individual estate of Forbes.

So far as the money in his hands is concerned it is sufficient to say that this court can render no judgment or decree directing its payment to the assignee, but such payment must be enforced by suit if not paid voluntarily.

As the parties may, however, wish some instruction from the court as to the basis of a settlement of this claim, I will say that I think the assignee may properly allow a reasonable sum to Hodges for the care and selling of said goods, to be determined by inquiring into the facts. So far there is no allegation of bad faith against Hodges in the management of the goods or any charge that he failed to account for those he did not sell. Some expenditures by some one would be necessary to sell the goods, and if those charged by Hodges are reasonable they should be allowed if he has properly accounted for all the goods had by him.

NOTE. See further that chattel mortgages, providing that the mortgagor may retain possession, sell and replenish the mortgaged property, are void as against creditors. In re Manly [Case No. 9,031]; Steinart v. Deuster, 23 Wis. 136; In re Kahley [Case No. 7,593]; Harvey v. Crane [Id. 6,178].

But the mortgage is only invalidated as to the portion of goods permitted to be sold. Barnet v. Fergus, 51 Ill. 352. A clause in the mortgage allowing the mortgagors to retain possession and sell the goods for the mortgagee as their agents, and to account to them for the proceeds, is valid. Hawkins v. Hastings Bank [Case No. 6,244].

Independent of any statute a mortgage is void as to creditors if the mortgagor is allowed to retain possession and sell the property as his own, and a mortgage fraudulent and void as to creditors is equally so as to the assignee in bankruptcy. In re Morrill [Case No. 9,821].

Case No. 4,923.

FORBES et al. v. BARSTOW STOVE CO.

[2 Cliff. 379.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1864.

PATENTS—SURRENDER—WITHDRAWAL—REISSUE—ANTICIPATION—COFFINS—INFRINGEMENT—IMPROVEMENT AS A DEFENSE—SPECIFICATION.

1. Although a surrender of an original patent is the act of the party making the application, still the application may be withdrawn, under leave of the commissioner, for good cause shown, at any time before the proceedings are fully completed and duly recorded.

[Cited in Burrell v. Hackley, 35 Fed. 834.]

2. Reissued letters-patent supersede the original, but a pending application for the purpose of reissue, does not have that effect, no matter how nearly the proceedings may have approached a consummation, so long as they are not fully completed.

3. Prior to the issue of the new patent, the surrender, so called, is nothing but a preliminary offer, which is a necessary means of obtaining a reissue, and may be so treated by the commissioner, at the request of the party applying for the reissue, in the absence of fraud.

4. In this case it was *held* that the evidence showed the application to have been withdrawn and the duty refunded for good and sufficient reasons.

5. The patent in this case was for an air-tight coffin, corresponding nearly with the human form, composed of two parts, or shells, united by a flanch, each shell being made of cast or raised metal, so as to resist great external pressure, and require less weight of metal than ordinary metal coffins, and each forming a part of the receptacle for the body, and having the line of their juncture nearly at the line of the greatest diameter of the body; *held*, that the subject of the patent was not the same as the ancient mummy cases of Egypt, and that those mummy cases were not of a character to supersede the invention because they are of wood; they are not impervious to air; they are not composed of two shells united at the line of the greatest diameter of the body; only one of their parts was employed as the enclosure of the body; the two parts were not united by a flanch, and did not both conform to the shape of the human body.

6. Where a defendant did not set out in his answer to a bill for the infringement of a pat-

[1] Reported by William Henry Clifford, Esq., and here reprinted by permission.]

ent, an invention upon which a caveat had been filed, and when subsequently, with leave of court, testimony concerning the invention was taken and filed in the case, but no corresponding amendment was made in the answer, doubts are entertained whether the testimony was properly in the case.

7. A caveat describing a cast-iron case, without any bottom, to let down over an ordinary coffin, after the latter was deposited in the grave, to serve for a covering and protection thereto, was *held* not to be of a nature to supersede the invention patented, in this case, although the caveator had specified that the metal case might be used for a coffin.

8. Such expression must, in construing the caveat, be taken in connection with the statement that the invention was intended to supply the place of a rough coffin, or a brick or stone vault, and to contain and enclose a common coffin.

9. The patent granted to Amos C. Barstow, April 19, 1859, was *held* to be an infringement of the reissued patent on which the suit in this case was founded.

10. Where the patentee is the original and first inventor of that which is described in his patent as his invention, he has a right to treat as infringers all who make and sell substantially the same thing, even though the infringing machine or structure may be an improvement on the patented one.

11. Whenever it is set up in defence, that the respondent has substantially departed from an existing patented machine or structure, he must show, or it must appear, that the departure or difference is such as involves inventive genius, and that the change is not within the scope of mere mechanical skill.

12. Improvement of a patented invention is not in general an answer to the charge of infringement; and the defence that the article produced by the respondent is not as good as that of the complainant, is untenable and inadmissible, especially if it is shown to embody all the characteristics which distinguish the article alleged to be infringed.

13. The prima facie presumption is, that a reissued patent has been properly surrendered and reissued; and that presumption will prevail in the absence of any controlling evidence to the contrary.

14. Non-joinder of licensees in a bill for an infringement of a patent, constitutes no defence after the cause has been set down for final hearing.

15. The two principal purposes of the specification of a patent are, to enable the public to know of what the patentee claims to be the inventor, and to enable the public to practise the invention when the patent has expired.

16. The patentee in his specification, does not address himself to the uninformed, but to persons of skill in the art to which the invention appertains, and he is only required to use such full, clear, and exact terms in his description as will enable persons of this class to produce the thing he describes.

[Cited in Flint v. Roberts, Case No. 4,875.]

This was a bill in equity [by John G. Forbes, Robert Squiers, William M. Raymond, William H. Forbes, and Burnett Forbes], praying for an account and for an injunction against the corporation respondents, for an alleged infringement of certain letters-patent belonging to the complainants. Letters-patent were granted to one Almond D. Fish, of New York, for a new and useful improvement in coffins. Title to the patent was subsequently acquired by John G. Forbes and Robert Squires, as assignees, and on the 6th of March, 1860, the same was surrendered and reissued to them as such assignees, for the term of fourteen years from the date of the original patent. The patentees were parties to the bill of complaint, and the other parties were made such because they claimed to hold certain local rights to make and vend the thing patented, either as assignees or exclusive licensees, under the reissued patent. The answer denied, in the first place, that the assignor of the last patentees was the original and first inventor of the improvement; and, secondly, that the respondents were in any way guilty of any infringement of the supposed invention. Several other defences were also set up by the respondents, which it becomes necessary to mention, as appertaining to the merits of the controversy. They contended that the original patent was not lawfully surrendered, and therefore that the reissued patent was illegal and void; also that the surrender of the original patent was made, and the reissue procured, by the false and fraudulent representations of the last patentees; also that the commissioner of patents, under the circumstances disclosed in the pleadings and evidence, exceeded his authority in granting the reissue, because, as defendants contended, it appeared that all of the assignees did not apply for the same; and also because it appeared on the face of the patent, that the reissue was not for the same invention as the original. It was also insisted that the description of the invention was not in such full, clear, and exact terms as would enable any person skilled in the art to which it appertained to construct the patented article. Pending the suit, on the 17th of November, 1862, the defendants filed a motion that the bill of complaint should be dismissed, alleging for cause, that the letters-patent on which the suit was founded had been surrendered since the suit was commenced. The bill of complaint was filed on the 1st of October, 1860; and the allegation of the motion was, that the complainants, on the 13th of November, 1862, surrendered the reissued patent described in the bill of complaint, and that the same was under that date again reissued. Leave was accordingly granted to both parties to take further testimony, not only as to the alleged surrender of the patent as specified in the motion to dismiss, but also in respect to the questions growing out of the prior surrender and reissue; and also in respect to the novelty of the invention. The motion to dismiss was argued at the same time with the merits of the controversy, but inasmuch as the question involved in it was preliminary in its nature, it was first considered by the court.

The claims of complainants' patent were as follows:—

1st. The manufacturing of coffins of cast or raised metal, when made substantially in the form and manner above described, that is to say, corresponding nearly with the human form, and making the coffin in two parts, or shells, united by a flanch, substantially as above set forth.

2d. The manufacture of coffins of raised or cast metal, in two shells, each formed with recesses of greater or less depth, which shall respectively constitute a portion of the receptacle of the corpse, thus approximating the coffin more nearly in shape to that of the human body than could otherwise be done.

The respondents claimed the right to manufacture under a patent of which the following is a portion of the description of the specification and the claims:—

"The object of the present invention is to obtain all the advantages of a metallic burial-case, without the objections of excessive weight, or expense, and at the same time combine the desiderata of beauty of form and additional strength. I effect these results by forming the burial-case at its ends, i. e. at the ends corresponding to the head and feet of the corpse, in ogee forms, or nearly so, and the main body, or lower portion thereof, with overlapping ribs, for giving additional strength, by which means, as the ogee terminates, in its widest point, at the place occupied by the shoulders, the most room is obtained where the most room is required, without adding to the weight of the casket, or its expense, and this taken in connection with the strength imparted by the overlapping ribs, diminishes the weight at least twenty-five per cent from the square metallic burial-cases now commonly used."

"A. A. in the drawing, represents the main body, or lower portion of the burial-case, with overlapping ribs b. b., &c., as clearly shown in figure 3; by which construction it will be evident that both lightness and strength are secured. Both ends of the burial-case are constructed in ogee or cyma reversa curves cc-cc, the ogee terminating at its widest point where the shoulders demand the most room."

"What I claim in my invention, and desire to have secured to me by letters-patent, is, constructing a metallic burial-case with the ogee-shaped ends as described, whereby great reduction in weight, and economy in the manufacture is secured, and at the same time all the space required, afforded."

"Second, I also claim forming the metallic case, with the overlapping strengthening ribs, as described."

This patent was granted to one A. C. Barstow, April 19, 1859.

T. A. Jenckes, for complainants.

The fact that the reissued patent of March, 1860, is now in the possession of the complainants, and produced in court, is conclusive against the assertion that any surrender and further reissue of it was made during the pendency of this suit. The presumption in favor of the regularity of the manner of procuring the original and reissued patents, is sufficient to sustain them in the absence of proof against them. As to the legality of the surrender the reissued patent is sufficient evidence. Stimpson v. West Chester R. Co., 4 How. [45 U. S.] 380; Battin v. Taggert, 17 How. [58 U. S.] 74. The questions in this case are novelty of the invention and infringement. Except in mere external resemblance, the mummy cases have no similarity whatever to the Fisk burial-case. The body is entirely in the part which corresponds to the common coffin; and the carved work representing a relief of the human body is entirely upon the lid. They are not made in two shells, but as a box with a lid, or rather with two lids or coverings. They are of wood, and not of metal. They are in many pieces, and not in two. They are pervious to air. They are affected by heat and moisture. They furnish no suggestion of the mode of manufacturing a metallic coffin. The Fahnestock caveat cannot be set up against an independent original inventor, who perfected his invention and obtained his patent, while his unsuccessful experiments were being made. Curt. Pat. §§ 44, 45; Jones v. Pearse, Webst. Pat. Cas. 124; Galloway v. Bleaden, Id. 521-526; Gayler v. Wilder, 10 How. [51 U. S.] 477. Besides, the idea of Fahnestock did not conflict with Fisk's invention.

W. Hayes and B. T. Eames, for respondents.

A patent in order to be the foundation of a judgment in an action at law, or of a decree in a suit in equity, must be in existence at the time of such judgment or decree. Moffitt v. Garr, 1 Black. [66 U. S.] 273. The surrender of a patent pursuant to the act of congress of July 4, 1836 [5 Stat. 122], is, in judgment of law, a legal cancellation of the patent. Moffitt v. Garr, 1 Black. [66 U. S.] 273. The complainants, Raymond & Co., have no interest in the patent of March 6, 1860; the original patent of November 14, 1848, having been surrendered with their consent. Gibson v. Richards [Case No. 5,399]. The effect of a surrender of a patent is not dependent upon the fact of a subsequent reissue of the patent. The act of congress authorizes a reissue only upon a surrender. The surrender must precede in point of time the reissue. Act Cong. July 4, 1836, § 13 [5 Stat. 122]. There was nothing new in the idea of coffins being made of metal. This is admitted in the original and reissued patent. The substitution of one material for another is not the subject of a patent. Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248. There was nothing new in dividing the coffin horizontally, in such a way that each part or shell should hold a portion of the human body. Coffins were so made by the Egyptians. A coffin of curvilinear form,

having the least possible weight of metal (which must correspond in shape to the human form), could not be used if divided elsewhere than in the widest diameter. In other words, a human body could not be put in a case having an opening smaller than the body. But it is a practical necessity of the art of moulding, and practised as long as the art itself, to divide curvilinear cast, or raised metallic bodies, longitudinally, in the widest part, or diameter. A patent cannot be granted merely for a change of form. Sargent v. Larned [Case No. 12,364]; Winans v. Denmead, 15 How. [56 U. S.] 341. Nor is there anything new in the combination or manufacture consisting of a cast or raised air-tight metallic case having a flanged joint in a plane, and having the least amount of metal requisite to contain the thing enclosed. Defendants' invention is not an infringement of complainants' patent. The Barstow casket cannot be made by following the specifications, claim, and drawings of the reissued patent, nor can the Fisk coffin be made by following the specifications, claim, and drawings of the Barstow patent.

CLIFFORD, Circuit Justice. The evidence disclosed in the record does not show that the patent on which the suit was founded ever was surrendered and reissued after the bill of complaint was filed in the case. On the contrary, the proofs are full to the point that the application for surrender and reissue, bearing date on the 13th of November, 1862, never was carried into full effect, but that the application was duly cancelled, and the papers relating to the same were accordingly returned to the applicants. The application for surrender and reissue was unquestionably made by the patentees at the time alleged in the motion; and it is also fully proved that the application was favorably received by the proper officers of the bureau, but it is equally clear that the proceedings were never entirely completed. Authority is given to the commissioner, upon the surrender to him of a patent, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new, to cause a new patent to be issued to the inventor, if the error arose by inadvertence or mistake, and without any fraudulent or deceptive intention. [Act July 4, 1836]; 5 Stat. 122.

The surrender is, undoubtedly, as is contended by the respondents, the act of the party making the application; but it is a mistake to suppose that the application may not be withdrawn, under leave of the commissioner, for good cause shown, at any time before the proceedings are fully completed and duly recorded. The reissued letters-patent, as a general rule, have the effect to supersede the original patent, but a pending application for that purpose cannot receive any such construction, no matter how nearly the proceedings may have approached to a consummation, so long as they are not finally completed. Prior to the issuing of the new patent, what is called a surrender in the case, is in general nothing more than a preliminary offer to that effect, as the necessary means of obtaining a reissue; and even when not so intended in the outset, it may be subsequently so treated by the commissioner, at the request of the party applying for the reissue. Where bad faith is shown as an element of the case, a different conclusion would doubtless follow; but the withdrawal of the application may be allowed by the commissioner for any reasonable cause, where there is no fraud practised to procure it, and where there is no prejudicial interference with the rights of third persons. Nothing of the kind appears in this case; but the proofs are full and satisfactory that the application was withdrawn and the surrender cancelled, and the money paid as duty, refunded, for good and sufficient reasons, and with the knowledge and consent of the commissioner. The result is, that the motion to dismiss must be overruled.

The record shows that the complainants introduced the reissued letters-patent on which the suit is founded; and the universal rule is, that the letters-patent when in regular form are prima facie evidence that the person therein designated as the inventer was the original and first inventor of what is there described as his invention. The statement of the specification is, that metallic coffins have heretofore been made of shapes corresponding to those which are usually constructed of wood, and the representation is, that in consequence of their great weight, and the difficulty of rendering them air-tight, and other objections, they have not been generally used. The principal purpose of the present invention, it is said, is to obviate those objections. The structure of the coffin, as represented in the specification, is made to conform, as nearly as may be, to that of the human body. The preferred mode of accomplishing this object is by constructing the coffin of two shells, an upper and a lower one, of nearly the same depth, which are joined together in a horizontal line at or near the middle point in the height of the coffin. The intimation is given, however, that the place of juncture may be varied to suit the views of the manufacturer, but it is evident that no very considerable departure from the centre line can be made, without making it necessary to enlarge the the size, and consequently to increase the weight of the structure, which, instead of promoting, would defeat one of the purposes of the inventor, as represented in the specification. The object of the inventor in that behalf is to dispense with all unnecessary weight of metal. His statement is, that the two shells are more or less curvilinear in all their parts, and that they may be made as thin as the running of the metal will allow,

and still leave them sufficient strength to resist any pressure to which they may be subjected.

Granting that to be so, still, unless the two shells are of nearly equal depth, the receptacle must be larger than the corpse, else there will be difficulty either in depositing the body in the lower shell, or in joining the two shells together, as the one or the other contains the greater portion of the depth. Some variation undoubtedly may be made without any departure from the other conditions of the specification, but the better opinion is that the juncture was, as represented, intended to be substantially at or near the middle line of the structure. The claims of the patent are two, and their true construction leads to the same conclusion in regard to the form and structure of the patented invention. (Here the court recited the claims above given.)

The upper as well as lower shell constitutes a portion of the receptacle, and in that manner the coffin is approximated more nearly to the human body than could otherwise be done, which also shows that the juncture of the two shells must not vary so much from the centre line of the structure as to render it inconvenient to place the corpse in the intended receptacle, or to create the necessity for enlarging the structure.

The complainants having introduced the reissued patent, the burden of proof is upon the respondents to show that the assignor of the complainants was not the original and first inventor of the improvement. Stimpson v. West Chester R. Co., 4 How. [45 U. S.] 380; Battin v. Taggert, 17 How. [58 U. S.] 74. The respondents admit that the burden is upon them, on this branch of the case, and refer to the evidence in the record to overcome the prima facie case of the complainants. They refer to the mummy-cases in evidence, proved to have come from the catacombs of Egypt, and insist that those models, if such they may be called, are of a character to supersede the invention described in the bill of complaint. But it is manifest that the proposition cannot be sustained for several reasons, some of which will be mentioned and briefly explained.

First, the structure is of sycamore wood, and not of cast or raised metal, as described in the complainants' patent.

Secondly, the testimony clearly shows that the ancient structure, although it has two parts, corresponds much more nearly to the ordinary wood coffin of the present day than to the patented invention under consideration. The lower part is obviously the receptacle for the corpse, and the upper part is nothing more than an elaborately carved lid or cover. The depth of the lower part is nine or ten inches, whereas the depth of the upper part, even including the carved or raised work, is at most not more than four inches, and at some points is much less. Although the structure has an upper and a lower part, still it is hardly correct to say that it is formed of two shells, for the reason that the lid or cover is in several parts; and also for the reason already given, that the upper part is much more fitly designated as a carved lid or cover than as a shell, to which it bears little or no resemblance. All of the carved work is upon the upper part, which is made to represent a relief of the human body, and it is quite evident that the unusual depth of the part was designed as the foundation for the carved work which it contains, and not as having any necessary connection with the ordinary purpose of a burial-case beyond that of a lid or cover of usual depth. The burial-case exhibited as a sample of those taken from the catacombs is not only made of wood, and not of metal, but it is not in two parts only, as is the invention of the complainants, but in many parts, and unlike that of the complainants, is pervious to air, and is liable to be affected both by heat and moisture. The characteristics of the invention of the complainants are widely different. They may be stated as follows: First, that the structure is composed of two shells, which, when joined together in the manner described, form a receptacle for the human body; second, that each of the shells encloses a part of the body; third, that the shells are united by a flange and screws, making the seam air-tight the whole length; fourth, that the two shells as a whole approximate to the form of the human body, and that the line of their juncture is nearly at the line of the greatest diameter of the body; fifth, that the structure will have sufficient strength to resist any pressure to which it may be subjected, and yet require less weight of metal than metallic coffins heretofore known and used; sixth, that it is perfectly air-tight, and not affected by changes of heat or moisture, and consequently is capable of preserving the human body from decomposition for a long time. Such are the principal characteristics claimed for the invention; and if it be true that they are not all fully realized by it, still it may well be affirmed that, when properly constructed, the invention tends strongly to their accomplishment.

The caveat and application for a patent of A. K. Fahnestock, offered in evidence by the respondents, were not set up in the answer as corresponding inventions to supersede the patent of complainants; but on the 24th of November, 1862, leave was granted by the court to take testimony upon that subject. Doubts are entertained whether the evidence is properly in the case, as no corresponding amendment has been made in the answer; but it is unnecessary to place the decision upon that ground, as it is clear that that evidence, if admissible, is wholly insufficient to establish any such defence, because it shows that the caveator and applicant never made any such invention. He, in fact, made no invention, and what he attempted to make was substan-

tially unlike that of the complainants. What he attempted to make was a cast-iron case without any bottom, to be let down over an ordinary coffin after the latter was deposited in the grave. Stress is laid upon the fact that the caveator said that it might be used for a common coffin; but that expression must be taken in connection with the statement that it was to contain and enclose a common coffin, and to supply the place of a rough coffin, and become a substitute for a brick or stone vault. The applicant himself states in his deposition, that the invention was to take the place of a rough coffin or brick vault, for the preservation of the remains of human bodies; and although there are some statements in the deposition indicating an intention to give the supposed invention a wider range, still it is evident that it cannot in any point of view be regarded as of a character to support this branch of the defence.

A particular examination of the other device introduced by the respondents, as evidence to supersede the patent of the complainants is unnecessary, as it is quite obvious that it cannot have any such effect. The conclusion is, that the assignor of the complainants is the original and first inventor of the improvement described in the reissued patent.

The next issue in the pleadings is that of infringement; and upon that question the burden of proof is upon the complainants. The respondents admit, that they have been and are manufacturing and selling burial-caskets, constructed according to letters-patent granted to Amos C. Barstow, bearing date on the 19th of April, 1859; but they deny that the burial-caskets so manufactured and sold by them constitute any infringement of the reissued patent of the complainants, which is one of the most important questions in the case. The opinion is expressed by experts of skill and experience, that the structure of the respondents is substantially the same manufacture as that described and claimed in the reissued patent on which the suit is founded. The reasons assigned for this opinion are in substance and effect as follows: that the one as much as the other is made of metal; that in both the coffin is composed of two shells, an upper and a lower one, which meet at a longitudinal point; that in the one as well as in the other the respective shells constitute a portion of the receptacle of the body which is or is to be contained partly in one shell and partly in the other, and that in both, the adjacent edges or rims of the respective shells have flanges upon them, which are connected together by screws, so that a tight joint can be made at the seam. They also testify, that in both the structures, the two shells are smaller as they recede from their line of juncture, and that they are rounded at the angles, so as to approximate more or less to the form of the cross-section of the body they are designed to contain, and are also made smaller at the ends than towards the middle, so as also to approximate more or less to the longitudinal form of the body, and to be of less weight than they would be without such approximation. The witnesses show, undoubtedly, that the coffin particularly described and represented in the reissued patent of the complainants, approximates more nearly to the form of the human body than the structure manufactured and sold by the respondents, but the weight of the testimony clearly shows that the difference between the two in that behalf is not a substantial one, but only a matter of degree. Where the patentee is the original inventor of that which is described in his patent as his invention, he has the right to treat as infringers all who make and sell substantially the same thing, even though the infringing machine or structure may be an improvement on the one patented. McCormick v. Talcott, 20 How. [61 U. S.] 405. Whenever the defence set up is that respondent has substantially departed from an existing machine or structure, so as to avoid the consequences of an infringement, he must show or it must appear that the departure is such as involves invention, and not mere mechanical skill. There must be mind and inventive genius involved in it, and not the mere skill of the workman. An improvement of the patented invention of another is not in general a sufficient answer to such a charge; and the defence that the article produced is not as good as the patented article is equally untenable and inadmissible, especially if it appear that it embodies all the peculiarities or characteristics which distinguish the article alleged to be infringed. The article manufactured and sold by the respondents, it is said, is stronger, more spacious, more cumbrous, and more expensive than that produced by the complainants; but the weight of the evidence shows that it embraces all of the principal characteristics claimed in the complainants' patent, and is, therefore, an infringement. The attempt is also made by the respondents to maintain the proposition that the original patent was improperly surrendered, and that the reissued patent on which the suit is founded was procured by the false and fraudulent representations of the present patentees; but the proposition is not supported by the evidence, and therefore cannot be sustained. The prima facie presumption is against the proposition, and of course that presumption must prevail in the absence of any controlling evidence in the case.

The validity of the reissued patent is also assailed upon the ground that the commissioner exceeded his jurisdiction in accepting the surrender and granting the reissue. The suggestions in support of the proposition are, that all of the assignees did not apply for the new patent, and that it appears on the face of the specification and claim that it is not for the same invention as that described in

the original patent. The first suggestion is entitled to no weight, as the whole title, as shown in the pleadings, was in the applicants. Nonjoinder of licensees constitutes no defence for an infringer at this stage of the litigation. The assignees may tender a surrender and apply for a reissue of the patent; and there is nothing in the pleadings in this case to show that there was any irregularity in the proceedings.

The second suggestion is also untenable, because wholly unfounded in law and fact. The reissued patent is for the same invention as that described in the original specification. An extended examination of this proposition is unnecessary, as it appears, upon a comparison of the specifications in question, that the essential parts of the description in each are substantially in the same language.

The remaining objection is that the description of the invention is not set forth in the patent, in such full, clear, and exact terms, as to enable any one skilled in the art to which it appertains, to construct the patented invention. The settled rule of construction in this country is, that the patent and specification are to be construed together in order to ascertain the subject-matter of the invention. Curt. Pat. §§ 121, 155; Whittemore v. Cutter [Case No. 17,600]; Hogg v. Emerson, 6 How. [47 U. S.] 479. The drawings also annexed to a specification, in compliance with the statute, are held to form a part of it, and are in like manner to be regarded in the construction of the whole instrument. Earle v. Sawyer [Case No. 4,247].

The specifications are required for two principal purposes: First, to inform the public what the thing is, of which the patentee claims to be the inventor; and, secondly, to enable the public, after the expiration of the patent, to practise the invention from the specification, as therein described. Whether the patentee has described the subject-matter, or what he claims to have invented, so as to enable the public to know what his claim is, is in general a question of law for the court on the construction of the patent. Curt. Pat. § 130, p. 130.

But whether he has described the invention in such full, clear and exact terms as to enable the public to practise it from the specification, is in general a question of fact to be determined in common-law cases by a jury. The act of congress does not require the patentee to address himself to the uninformed upon the particular subject, but allows him to speak to persons of competent skill in the art; and it only requires him to use such full, clear, and exact terms, as will enable that class of persons to reproduce the thing described, from the description given in the specification. Testing the case by that rule, it is clear that the objection under consideration cannot be sustained, and it is accordingly overruled.

The complainants are entitled to an account.

Case No. 4,924.

FORBES v. GRACEY et al.

[Trans. Rec. U. S. Sup. Ct. Oct. Term, 1876, p. 11,967.]

Circuit Court, D. Nevada. April 26, 1877.[1]

TAXATION — RIGHT OF STATE TO TAX ORES EXTRACTED FROM MINING CLAIMS—INJUNCTION BY STOCKHOLDER IN CORPORATION—PARTIES.

[1. One stockholder in a corporation can maintain a suit, for the benefit of all, to enjoin the collection of illegal taxes, when the board of trustees refuse to do so.]

[2. It is unnecessary, in such a suit, to make all the stockholders, or even the directors, parties. It is proper, however, to join as defendants, with the taxing officers, the superintendents of the corporation, who, it is alleged, will pay the tax unless restrained.]

[3. The stockholder has no adequate remedy at law in such a case for, although the corporation itself might maintain an action to recover the tax after it is paid, or to replevin property distrained by the tax collector, the stockholder has no such title as would enable him to do so, and the very gist of his complaint is that the corporation refuses to use its legal remedies.]

[4. Ores extracted from mining claims immediately become subject to state taxation, for, although the legal title to the land is still in the United States, the property in the ore is in the miner, and the tax is in no sense a tax upon property of the United States.]

[See note at end of case.]

[5. Ores extracted from mines within a state, and there reduced, have a situs in the state for the purpose of taxation, although they are mined by a corporation of another state; and where the rate of annual taxation is fixed, and the tax levied at the beginning of the fiscal year, it is immaterial that, under the tax laws (Act Nev. Feb. 1871), the assessment or valuation for taxation of the ores mined in each quarter is made at the end of the quarter, and after the proceeds of the ore have been carried out of the state.]

[See note at end of case.]

HILLYER, District Judge. This is a motion made on behalf of the complainant [Charles Forbes] for an interlocutory injunction restraining the defendant [Thomas] Gracey from collecting and the other defendants [the California Mining Company, John W. Mackay, and James G. Fair] from paying the tax laid upon the proceeds of the California mine for the quarter ending June 30, 1876. The motion was made upon the bill, and the defendant Gracey shows cause against it by a demurrer and an affidavit touching the equities of the bill. The bill alleges that the complainant is an alien and a stockholder in the California Company; that that company is a corporation organized under the laws of California, and that Mackay and Fair are citizens of Nevada; that said corporation is in possession of the "California Mine," but has never purchased it, and the title is still in the United States. It then refers to the compact in the Nevada enabling act not to tax or interfere with the disposition of the public lands, and quotes at length the law of Nevada taxing the net

[1] [Affirmed in 94 U. S. 762.]

proceeds of mines. It states that the defendant Gracey is assessor of Storey county, and has assessed the ores taken from said mine against the said company for the second quarter of 1876 and a tax upon them of $72,852.03; that he has demanded and still is demanding from the defendants, Mackay & Fair, superintendents of said company and its agents at Virginia City, the said tax, and that said Gracey "has" threatened and still threatens and is about and will, unless restrained, seize property of said company and sell it to satisfy the tax; that the tax is one collected every three months, and is a continuing grievance; that the defendant Gracey is irresponsible for the amount of any one quarterly tax, and his bond is for only $40,000; that the Nevada tax law unjustly discriminates against the mines; that the tax and assessment are invalid and illegal, because at the time the assessment was made the yield of the mine had not then become "proceeds" and because the yield for that quarter, at the time the assessment was made was not within the state of Nevada, but had been exported therefrom; that Mackay and Fair are about to and will pay the said tax unless restrained. The bill next alleges the notice given by complainant to the corporation of his interest as a stockholder of the tax and its illegality, and his demand that the corporation institute suit to test its validity, and his protest against the payment of the tax, and the refusal of the corporation to comply; that he sues for other stockholders who shall, in due time, come in, and he is entirely remediless, except in a court of equity.

The demurrer is upon several grounds; those urged being that the complainant has a complete and adequate remedy at law, and there is a total want of equity in the bill; that there is a nonjoinder of necessary parties plaintiff, because all the stockholders should have been joined; that there is a defect of parties defendant, because the directors should have been made defendants and Mackay and Fair should not have been.

Upon the argument the point was made that a stockholder cannot maintain a suit of this kind, although the rights of the corporation are involved and the board of trustees refuse or decline to take the proper steps to assert them. But this point is settled authoritatively in favor of the right of the stockholder to sue, under the circumstances mentioned, by our supreme court. Dodge v. Woolsey, 18 How. [59 U. S.] 331; Davenport v. Dows, 18 Wall. [85 U. S.] 626. And see Huntington v. Central Pac. R. Co. [Case No. 6,911]. And, while the corporation must be made a party to the bill, it is held unnecessary to make the directors parties in such suit when no relief is prayed against them. Heath v. Erie Ry. Co. [Id. 6,306], and cases there cited; Davenport v. Dows, supra. So it seems equally well settled that the suit can be maintained without making all the other stockholders parties, at least if the suit is brought by one for the benefit of all. It is no longer doubted, says our supreme court, in Dodge v. Woolsey, "either in England or the United States, that courts of equity have a jurisdiction over corporations at the instance of one or more of their members." Winch v. Birkenhead, L. & C. J. Ry. Co., 13 Eng. Law & Eq. 506. Mackay and Fair are alleged to be the agents of the corporation of whom payment of the tax has been demanded, and about to pay the alleged illegal tax, unless restrained. Under these circumstances they seem to me to be proper, though, perhaps, not indispensable parties to the bill. I consider none of the objections made to the parties in the bill well taken.

The next point raised by the demurrer is that the complainant has an adequate remedy at law, and that there is no fact stated in the bill authorizing the interposition of a court of equity. It is admitted that the illegality of the tax and the threatened sale of property for its payment constitute, of themselves alone, no ground for such interposition. The rule is that "there must be some special circumstances attending a threatened injury of this kind distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked." Dows v. Chicago, 11 Wall. [78 U. S.] 108. The "special circumstances," which give a court of equity jurisdiction, may be such as require the aid of the court by injunction to prevent or remove a cloud on complainant's title, to prevent a multiplicity of suits, "or to prevent any injurious act by a public officer for which the law gives no adequate redress." Carroll v. Safford, 3 How. [44 U. S.] 459; Dow v. Chicago, supra; Huntington v. Central Pac. R. Co., supra. Does the law furnish this complainant with adequate redress for the injury which he sets out in his bill? As this case is now presented upon bill and demurrer, it appears, for the purposes of a decision on this point, that the defendant corporation is about to pay, and will pay unless restrained, an illegal tax, and that the corporation refuses to bring any suit or take any steps to test the validity of the tax or resist its collection. It may, then, be granted that the corporation itself, in case it saw fit to proceed, would have complete legal redress, either by paying the tax under protest and suing to recover it, or by an action of trespass or replevin against the officer seizing property to satisfy it without granting that this complainant has any such legal redress within his reach. For the very gist of his complaint and the main ground upon which he stands in a court of equity is that the corporation is about to pay the illegal tax, and refuses to use its legal remedies; and nothing can be clearer than that the stockholder has no such direct legal interest in or right to the property of his corporation as enables

him to sue in a court of law for an injury to that property. The legal right to the property taxed is in the corporation, and according to all legal rules an action for an injury to that right must be brought by the corporation. Where, then, is the stockholder's legal redress? He himself cannot sue to enforce the rights of the corporation without making it a party defendant, so that it may be bound by the judgment. Davenport v. Dows, supra. So, too, ordinarily in a suit like this, all the other stockholders must be made defendants, or the suit be brought, as in this case, for their benefit. The case is one of equitable cognizance in every aspect. It has been held that where the state laws made no provision for suit against the state, and a portion of the tax, when collected, was paid into the state treasury, the plaintiff was left without any adequate relief at law, and might enjoin the illegal tax. First Nat. Bank v. Douglas Co. [Case No. 4,799]. The state of Nevada has no law authorizing suits against it, and its portion of the taxes when collected is paid into the county treasury for the use and benefit of the state, and is paid over to the state treasurer whenever that officer and the comptroller order it to be done. 2 Comp. Laws Nev. pp. 209, 218, 219. If it should be admitted that the stockholder can sue either the trustees or the corporation at law for the misappropriation of the corporate funds to the payment of an illegal tax, then every other stockholder can sue, and this leads directly to a multiplicity of suits.

Upon this question I am of opinion that the bill in this case does state the special circumstances which bring the complainant's case within the recognized heads of equity jurisdiction, taking it for granted that the tax is illegal, as the bill states.

The remaining points are to the merits of the case made by the bill. The first one is, whether the tax upon the proceeds of the mine—the mine being a part of the public domain—is a tax upon the mine itself, so far as to be a violation of the compact contained in section 4 of the Nevada enabling act, "that no taxes shall be imposed by said state on lands or property therein belonging to the United States," or an interference with the power of congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. Numerous authorities were cited by the complainants, establishing beyond all question that congress has the entire control of the public lands; that it may sell or give them away; that so long as the United States remains the owner they cannot be taxed by the state; that when the lands have been sold or donated, and the certificate of entry of the land officer has been given, the government holds the naked legal fee in trust for the purchaser, who then has the equitable title, and the lands are then, and not before, subject to state taxation, although the patent has not issued. Witherspoon v. Duncan, 4 Wall. [71 U. S.] 210. A very forcible argument has been made by complainant's counsel against the power of a state to tax—as is done in California and Nevada—the value of improvements on or of possessory rights to the public lands within the state. In the view I have taken of this case, however, I do not find it necessary to decide that question. The tax complained of in this case is not nominally a tax on the improvements or possessory right, but a tax on the proceeds of the mine, or, in the language of the statute, "on the ores and mineral-bearing material of whatever character" extracted from the mine. These ores are assessed quarterly, in the mode provided by statute. Such a tax, it is agreed, is in effect a tax on the mine, which is the property of the United States, just as a license tax on the importer was held to be a tax on imports. Brown v. Maryland, 12 Wheat. [25 U. S.] 419. Courts, it is said, should and will look through names and forms to the substance and reality; and hence, if this burden does really fall upon the mine, it is none the less illegal because levied in the name of a tax on the ores extracted. All this must be conceded. But the state is only prohibited from taxing the lands or other property of the United States, so that if it be found that the United States has in fact parted with all its interest in the ores taxed, this case is taken out of the rule laid down in Brown v. Maryland.

The policy of congress touching the public mineral lands as found in its legislation, is, in some important respects, different from that touching other public lands, and to my mind has an important bearing on the main questions involved in this case. This difference in policy springs from the diversity in the two species of property. The beneficial occupation and enjoyment of mineral land requires the destruction of the estate—the taking away of all there is in it of value. Agricultural land, on the contrary, in the course of proper husbandry, increases in value with time and its profitable use and enjoyment. A moment's inspection of the mining laws will show that congress, while retaining the naked legal title in the United States, has in fact parted with all that is valuable in the mines. By section 2322 of the Revised Statutes of the United States, it is provided that "the locators of all mining locations * * * on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, * * * so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines," etc. And by

section 2324, upon the failure of any one of several co-owners to contribute his proportion of the required expenditures, after notice published, "his interest in the claim shall become the property of his co-owners." And in section 2332, liens which have attached to a placer claim before patent are not to be impaired by the issue of the patent. The practical effect of this legislation is to confer on the mining locator and his assigns something more than a pre-emption right. The locator acquires under it an exclusive right of possession, which he can transmit to his heirs and assigns, and this possession continues so long as the laws are complied with. His "possessory title" is recognized, and the state laws regulating it also, if not in conflict with the laws of the United States. In short, under this law the locator has a valuable possession of and property in the mine, and may lawfully take out and appropriate all the valuable ores and mineral therein; that is to say, all there is of value in the estate. What more would a patent secure to him? Practically nothing. Indeed, it is common knowledge in this state that the right secured by the locator under this law is regarded as of about equal dignity with a patent, and, in some instances, as the preferable title to a mine. It seems to me indubitable that the ore extracted by a locator or his assigns is his property, as absolutely as if the government had clothed him with a perfect legal title to the mine; and it is impossible for me to see how a tax on this ore so granted to the miner is a tax on the lands or property of the United States. In McCullough v. Maryland, 4 Wheat. [17 U. S.] 415–436, the supreme court, while holding a tax on the operations of the bank unconstitutional, said that the opinion did "not extend to a tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland held in the institution." I cannot perceive that a tax upon the real property of the bank would not as nearly be a tax on its operations as a tax on the proceeds of a mine. The proceeds, being the property of the miner, is a tax on the mine. So in the Railway Tax Cases, 15 Wall. [82 U. S.] 232, although it was held that a tax of so much per ton on freight carried from one state to another was a tax upon transportation, and therefore a regulation of commerce forbidden by the constitution, yet it was laid down "that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from the transportation of freight between states," had become subject to legitimate taxation. It was submitted, too, that this tax would ultimately increase the cost of transportation. Is this tax on the proceeds of the mine any more a tax on the mine than a tax on a railroad car or on the gross receipts is a tax on transportation? I think not. Yet both, in some degree, perhaps, approach taxation admitted to be unlawful. If, then, I have rightly conceived the import and effect of the mining law, and it does operate as a virtual transfer to the locator of the entire property in the ores extracted, it must follow that a tax on those ores is neither a tax on the property or lands of the United States nor any interference unwarrantably with the disposition of the public lands, and that the complainant's objection to it is not a valid one.

It is next to be determined whether the property taxed was within the jurisdiction of the state when it was taxed. The bill states "that at the time said tax assessment was made, the yield of said California mine for the said second tax quarter of the year 1876 was not within the state of Nevada, but had been exported therefrom, nor was the owner of such yield, to wit, the California Mining Company, then within the state of Nevada, or then or ever a citizen thereof, or a resident therein. This is not denied, but the answer to it is that the property taxed, though out of the state at the time of the assessment, was within it when the tax was levied. The course of taxation of this species of property is as follows: By the general revenue law an annual ad valorem tax of 125 cents upon each 100 dollars value of taxable property is levied for state purposes upon the "assessed value" of all "taxable property in this state," including the proceeds of mines and mining claims. 2 Comp. Laws, § 3125. The manner of assessing the proceeds of mines is as follows: It is the duty of county assessors to compare and complete quarterly, on or before the second Monday in February, May, August, and November in each year, a tax list or assessment roll of the proceeds of mines "in their respective counties for the preceding quarter." The assessment is made upon ores extracted and reduced or sold during the quarter preceding the assessment. The value of the ore is ascertained by deducting from the gross yield or value of the total number of tons extracted and reduced or sold during the quarter the cost of extracting, transporting, and reducing or selling the ore. Act Feb., 1871; 2 Comp. Laws, p. 225. By section 6 of this act of 1871, it is provided that "every tax levied under the authority of the act shall be a lien on the mine from which the ores are extracted, which shall attach on the first days of January, April, July, and October of each year. The facts may be stated thus: During the quarter ending June 30, 1876, as shown by its own statement, the net yield or value of the ores extracted by the California Mining Company for that quarter was $3,736,000.46. The assessment was made upon this valuation, but made after the expiration of the quarter, and after the bullion obtained by the reduction of the ores had been exported beyond the state.

The ores taxed are taken out and reduced in this state during the quarter. The California Mining Company is a non-resident.

Under these circumstances, is the tax on the proceeds legal? Was the property taxed so, within the jurisdiction of the state during the fiscal year, as to be a proper subject of taxation? For if it was, the power of the state as to mode, form, and extent of taxation is unlimited unless restrained by provisions of the constitution of the United States. State Tax on Foreign-Held Bonds, 15 Wall. [82 U. S.] 300. State taxation may touch property within its jurisdiction in every shape—in its natural condition, in its manufactured form, and in its various transmutations. Id. "The protection of the government," says Mr. Cooley, "being the consideration for which taxes are demanded, all parties who receive or are entitled to that protection may be called upon to render the equivalent. But a personal tax cannot be assessed against a non-resident, neither can the property of a non-resident be taxed unless it has an actual situs within the state, so as to be under the protection of its laws." Cooley, Tax'n, 14. For some purposes personal property is said to have no situs, and, in the absence of positive law in the place of its location, its transfer is regulated by the law of the domicil of the owner. Story, Confl. Laws, § 383. But for the purpose of taxation it may have an actual situs district from the domicil of the owner. People v. Commissioners of Taxes, 23 N. Y. 224. In the case of ores extracted by the California Company it seems to me clear that there is a time during the quarter for which they are taxed when they have an actual situs in this state for the purpose of taxation. That is during the time, after they are taken out of the mine, that they are undergoing the process of reduction, and until, at least, the bullion produced by such reduction is carried out of the state. As a subject for taxation they have no other situation. During that period they are protected in Nevada, and may be taxed and regulated by that state. This being so, is it indispensable that the bullion obtained from the ores taxed should be within the state at the time the assessment roll was made up? The complainant insists that it is, but the defendant Gracey says that it is sufficient if the property taxed is within the jurisdiction of the state at the time of the levy of the tax. By the revenue law of Nevada it is provided that an annual tax "is hereby levied and directed to be collected and paid." Boards of county commissioners are authorized to levy a tax for county purposes each year. As the word is used in this revenue law, the levy of a tax seems to be nothing more than a declaration by the legislature or the board of commissioners of the amount of tax which shall be assessed and collected for a given year. Strictly, however, a levy is the raising of a tax, and includes its assessment, collection, and paying over. If the levy of the tax does bind property, it is immaterial, for the purposes of this case, whether it takes effect on the first day of January, which is the first day of the fiscal year, or on the first day of April, as seems to be the judgment of the supreme court of Nevada, because that is the day when the lien for taxes attaches each year (State v. Eastabrook, 3 Nev. 173), or on the first day of each quarter, as to the proceeds of mines; for, in either case, the levy of the tax now in question, in the sense of the Nevada revenue law, was made before the property taxed was removed from the state and county. But be this as it may, I am constrained to uphold the validity of the tax and of its assessment for the following among other considerations: The provision of the legislature levying and fixing the rate of the tax, the assessment of property on which the tax is imposed, its collection and payment over to the treasurer, are all a part of one thing, directed to the accomplishment of one object—which is raising revenue for each fiscal year. The property taxed must be within the jurisdiction of the state during the fiscal year, it is true; but it is not, it seems to me, essential that it should be so situate at every stage of raising the tax. The property once where the state has a right to tax it for any given year or quarter, I cannot see that the power of the state to tax necessarily depends upon the length of time it remains there. The right to tax having attached, the state must be the judge of the mode to be employed for its taxation; with that the courts have nothing to do. "It is not for us," says the supreme court of the United States, "to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." Delaware Railroad Tax, 18 Wall. [85 U. S.] 206–231.

The objections to this assessment seem to me to be to the mode rather than to the right of assessing. Whether the assessor shall attend each day at the mine and assess the ores as they reach the surface, or follow them to the reduction works and there assess their value, or shall wait, as prescribed by the existing law, until the expiration of the quarter, and then assess the value from sworn returns made to him by the officers of the company having the necessary knowledge of the facts, are but different modes of ascertaining the value of the property subject to taxation during the quarter for which it is so assessed. If the assessment were laying the tax it would be difficult, indeed, to sustain the present tax. But it is not so. The word assessment as used in the Nevada revenue law means determining the value of property subject to taxation, and is made after the tax is laid and the rate of it

fixed. It being true, as I think it is, that there was a time during the second quarter of this fiscal year when the state had jurisdiction to tax the proceeds of the California mine by reason of their actual situs here, it may take any mode consistent with its constitution for assessing the value and collecting the tax. The mode pursued in this case has been held by the supreme court of Nevada to be both "uniform" and "equal" in the sense of those words as used in the constitution of Nevada. This decision I am bound to accept as conclusive. The same is to be said of the uniformity and equality of the rate of the tax. State v. Kruttschnitt, 4 Nev. 178. The limitation on the power of the state to tax beyond that found in its constitution and laws is that the property shall be within its jurisdiction, and this I have found to be the fact here. The rule to show cause is discharged, and the temporary restraining order is dissolved.

The case of this same complainant against the Consolidated Virginia Mining Company, Thomas Gracey, John Mackey, and James G. Fair, is one involving the same questions as the foregoing, and was argued at the same time. A like order is to be entered in that case.

[NOTE. It seems the circuit court rendered a decree dismissing the bill of complaint on the demurrer. From this decree, complainant took an appeal to the supreme court where it was duly affirmed, Mr. Justice Miller delivering the opinion. It was held that, the moment ore becomes detached from the soil in which it is imbedded, it becomes personal property, the ownership of which is in the man whose labor, capital, and skill have discovered and developed the mine and extracted the ore or other mineral product. It is then free from any lien, claim, or title of the United States, and is rightfully subject to taxation by the state, as any other personal property is.

[In reference to section 6 of the statute which makes the tax a lien on mines or mining claims, it was held that the words "mines or mining claims" were evidently intended to distinguish between the cases in which the miner is the owner of the soil, and therefore has perfect title to the mine; the act giving a lien for the tax only upon a mine when owned by the miner, or upon his claim thereto when the title is in the United States, mining claims being property, and the subject of bargain and sale. Forbes v. Gracey, 94 U. S. 762.]

Case No. 4,925.

FORBES v. The HANNAH.

[Bee, 348; [1] Hopk. Rep.]

Admiralty Court, D. Pennsylvania. Aug., 1786.

BOTTOMRY—WANT OF PERSONAL CREDIT — WHEN IT MAY BE GIVEN.

1. The true grounds of a maritime hypothecation are the necessities of the case, and the want of personal credit.

[Cited in Bartlette v. The Viola, Case No. 1,083.]

2. Bottomry bonds may be given for security of mercantile or other debts, either in places where the owners dwell, or in foreign places by their order.

[Cited in The William & Emmeline, Case No. 17,687.]

HOPKINSON, District Judge.

Judgment. Edward Forbes of Dublin, in Ireland, has libelled against the brig Hannah for the amount of certain bonds of bottomry, which Francis Lewis, then captain and principal owner of the vessel, gave as security for moneys advanced by Forbes, in the port of Dublin, for necessaries, as it is said, for the said brig, and to enable her to complete her voyage. The circumstances of this case appear, from the testimony, to be as follows: Francis Lewis, principal owner of the brig Hannah, had chartered her to one Varlo, for a voyage from America to Dublin. Varlo himself went passenger, with his goods, and Lewis was captain for the voyage. After their arrival at Dublin, Lewis borrowed money of Forbes at three several times; for which he gave three bonds of bottomry on his vessel, amounting, with premium and charges, to £214. 0s. 8d. sterling money of Great Britain. Forbes then put a cargo on board the brig, in which it seems that Lewis was concerned; as he was to have one half of the net profits of the adventure, exclusive of freight, and to be answerable for one half of the loss, if any there should be, on the sales. Lewis left Dublin with this cargo, bound for the city of Boston, in America. But it does not appear by the exhibits, whether he ever arrived at Boston, or what he did with the cargo. It appears, however, that in April last he was with this brig in the port of Philadelphia, at which time his mariners sued in this court for wages due, and the brig was thereupon attached and condemned for payment of wages, amounting to £29., Lewis making no plea or defence against the libel. In consequence of this sentence, a writ issued to the marshal, in the usual form, directing him to sell the brig Hannah, with her tackle, apparel and furniture, or such parts thereof, as might be necessary to satisfy the decree in favour of the mariners, together with the costs and charges of suit. But Lewis requested the marshal to sell the whole of the vessel, with her tackle, &c. under the decree, and even indorsed this request upon the writ of sale: and to prove that he was the sole owner of the brig at that time, he exhibited to and lodged with the marshal, an assignment, or bill of sale, from one Simpson, who had been a part owner, of all his interest in the brig to Lewis. Andrew Hodge, the respondent in the present cause, purchased this vessel at the marshal's sale, and paid down the full consideration money, out of which the marshal deducted the mariner's wages and costs of suit, and paid the balance to Lewis, as sole owner. After this, Lewis went off without saying any thing of the bottomry bonds he had given to Forbes in Dublin. And now these bonds have come over,

[1] [Reported by Hon. Thomas Bee, District Judge.]

and Forbes has attached the brig in the hands of Hodge, the purchaser.

From these circumstances, two questions have arisen, viz. 1st. Whether these bottomry bonds have hypothecated the vessel, according to the rules of maritime law, so as to bring the cause within admiralty jurisdiction? 2d. Supposing it to be so, whether the sale and purchase, under the authority of this court, have not vested the property in the respondent, exonerated of all prior engagements?

To determine the first point, it will be necessary to consider the characteristic marks which distinguish an hypothecation according to the maritime law, from a common bottomry bond or mortgage on a ship, according to the custom of merchants, and cognizable by the common law. By the maritime law, "a master of a ship hath no power to take up money by bottomry, in places where his owners dwell: but when he is out of the country, and where he hath no owners, or any goods of theirs or his own, and cannot find means to take up by exchange or otherwise, and that for want of money the voyage might be retarded or overthrown, moneys may be taken up upon bottomry." Molloy, bk. 2, c. 11, § 11. From this it appears, that the true grounds of a maritime hypothecation are, the necessities of the case, and the want of personal credit. Wherever this doctrine occurs in the books, these two circumstances are strongly pointed out. Thus, in 3 Mod. 244., "The reason of the civil law, which allows the pawning of a ship for necessaries upon the high sea, seems to be plain; because there may be an extraordinary and invincible necessity, to which the admiralty jurisdiction is limited; for, if the law should be otherwise, the master might take as much money as he will." And so the court, in that case, ordered a trial on the necessity. So also in Bridgeman's Case, Hob. 12., a prohibition was granted, because the impawning was not shewn to be occasioned by necessity. In 1 Magens, there is a report of an admiralty suit on a bottomry bond: At the conclusion (page 329), the author says, "Persons living in seaports may learn from this case, not to believe or trust too easily a captain they do not know; and when they propose benefiting themselves by lending money to bottomry, to such whose distresses oblige them to seek it: the lenders, for their own satisfaction and security, ought to have proofs given that there was a necessity for such an advance, and that the money had actually been employed for the purposes alleged."

Further, the impawning must be in foreign parts; that is, where neither the owner, nor master, hath any personal credit. For, this constitutes an essential part of the necessity. "The master can have no credit abroad, but by hypothecation." Salk. 35. "Where a ship in distress is forced into any port where her owners have no correspondents to supply the master with the money necessary to enable him to prosecute his voyage, he may take it on bottomry from those who will advance it on the easiest terms." 1 Mag. 27. The reason is, the maritime law requires that the moneys should be lent solely on the credit of the ship; and that the security of the lender should depend altogether on her safety; and, therefore, if the ship be well engaged, that is, according to the principles stated, she shall be for ever obliged till redemption. Molloy, bk. 2, c. 2, § 15. And, therefore, also, because of the hazard, an unusual interest or premium is allowed on the moneys advanced.

Such are the principles which designate a maritime hypothecation within admiralty jurisdiction. But bottomry bonds may be given by owners for security of mercantile or other debts; and these may be executed either in the places where the owners dwell, or in foreign parts by their order. They may be formed under a variety of circumstances, and depend on many contingencies, according to the conditions or terms of the deed or contract. It should seem, by the necessity so frequently urged as the ground of a maritime hypothecation, that the ship should be driven by distress into some other port than that of her destination; or, at least, that some extraordinary casualty should occasion an unforeseen and inevitable expense in the port of her voyage. Because, it is hardly to be supposed that an owner would send his ship, much less that he would take her himself, to a place where he could not command either money or credit for ordinary repairs and supplies.

In the present case, it does not appear, nor has it ever been suggested, that any extraordinary circumstances occasioned an unforeseen necessity. The captain, Lewis, who was also principal owner, arrives after a prosperous voyage, at the port of destination, with his freighter on board. Here the voyage is completed, and it may be presumed that he then received his freight. If so, he could not be without money sufficient to refit his vessel for a new voyage. And that he was not without personal credit is manifest; because Forbes entrusted him with a new cargo, and agreed to allow him 35s., Irish money, per ton for freight, on all the goods he should deliver; and also, one half of the net profits arising from the sale of the cargo, he to run one half of the risk of loss. This mercantile connexion shews, at least, that Lewis was in some credit with Forbes. Besides, if we look into the accounts, we shall find that the first article charged is for £32. 5s. 6d. sterling paid to Mr. Varlo by Lewis's order, to take up and cancel a former bottomry bond. It seems strange that Lewis, after navigating Varlo and his goods across the sea, should fall in his debt. This circumstance is not at all accounted for; but, be it as it may, Forbes should certainly have forwarded this former bottomry bond, with

an account of the occasion and expenditures for which it was given, that a judgment might have been formed whether it was a proper hypothecation or not; or have shown that the brig was under condemnation of the admiralty at Dublin on account of that bond, and that the £32. 5s. 6d. was paid for her redemption. Upon a view of the circumstances of the present case, I do not find them such as the maritime law requires, to constitute a genuine hypothecation, within admiralty jurisdiction. This point being conclusive, it is unnecessary to determine on the second general question. I adjudge that the bill in this cause be dismissed, and that the libellants pay the costs of suit.

There was an appeal from this decree; but the high court of errors and appeals confirmed the sentence.

Case No. 4,926.

FORBES et al. v. MEMPHIS, E. P. & P. R. CO. et al.

[2 Woods, 323.] [1]

Circuit Court, W. D. Texas. May, 1872.

CORPORATIONS—RIGHTS OF STOCKHOLDERS—REMEDIES FOR INJURIES—SUIT IN EQUITY — REFERENCE—DECREE PRO CONFESSO—INTERVENTION.

1. A commercial or other business corporation is constituted so as to do business in a corporate name, and in a capacity totally distinct from that of any or all of its members considered as individuals.

2. Such a corporation is a person; its property is not the property of its stockholders, nor are its rights their rights.

3. The rights of a stockholder in such a corporation are to attend stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purposes, and if the company becomes insolvent, to have its property applied to the payment of its debts.

4. For the invasion of these rights by the officers of the company, a stockholder may sue at law or in equity, according to the nature of the case.

[Cited in Belmont Nail Co. v. Columbia Iron & Steel Co., 46 Fed. 337.]

5. All remedies for injuries to the property or rights of such a corporate body must be prosecuted in the name of the company; all demands against the company must be prosecuted against it by name.

6. But where the officers and managers of a company, by fraud and collusion with third persons, are sacrificing, or are about to betray or sacrifice the interests of the corporation, a stockholder may, for such breach of trust and conspiracy, call the guilty parties to an account in a court of equity.

7. After a decree pro confesso, taken in a cause in equity, it is often proper for the court to inform itself through its own officers, as by the report of a master, or by deposition, or other inquest or proceeding, more particularly as to the exact facts of the case.

8. Where a suit in equity was properly instituted against a railroad company by a stockholder, a bondholder, and the trustees for the bondholders named in the land grant mortgages of the company, in behalf of themselves as well as all other stockholders, creditors or bondholders who might desire, and be entitled to intervene, and the bill charged that the officers, agents and directors of the company were squandering and embezzling its property, and the purpose of the suit was that the assets of the company might be preserved and administered, and the relief prayed was proper to be granted, and a decree pro confesso had been regularly entered, a receiver properly appointed, an authentic report of the facts made to the court, and its judgment passed thereon; individual stockholders were not permitted to intervene in the suit as defendants, and file a cross bill on a general charge of fraud and collusion on the part of the receiver, and erroneous judgment on the part of the court in making the order referred to.

9. In such a suit, in which such proceedings had been taken, it is not the proper practice to allow individual stockholders to intervene to set aside the proceedings, or to interpose obstacles to the progress of the suit. Such stockholders may come in to take the benefit of the proceedings and decree, but not to oppose and nullify them.

10. In such a suit, rival creditors, by proceedings before the master, may fix the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object and purpose of the suit, to obtain an administration of the company's assets and property.

11. In such a suit, persons will not be allowed to intervene as general defendants and contestants, unless they show that they have an interest in the results as stockholders or otherwise, and are also able to show fraud and collusion between the plaintiffs in the suit and the officers of the company having charge of its interests.

[Cited in Osborn v. Michigan Air-Line R. Co., Case No. 10,594; Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 186. Quoted in Central Trust Co. of N. Y. v. Marietta & N. G. R. Co., 48 Fed. 17.]

[This was a bill in equity by Paul S. Forbes and others against the Memphis, El Paso & Pacific Railroad Company.] Heard upon motion to vacate an order allowing certain persons to intervene as defendants, and file answers and cross bills.

Courtlandt Parker, for complainants.
Gray & Davenport, for receiver.

BRADLEY, Circuit Justice. The bill in this case was filed against the Memphis, El Paso & Pacific Railroad Company, a corporation of Texas, by a stockholder, a bondholder and the trustees for the bondholders, under the land grant mortgages of said company, on behalf of themselves and all other stockholders, creditors and bondholders thereof, alleging various gross acts of fraudulent management and fraudulent contrivance and misrepresentation on the part of the directors, officers and agents of the company, whereby the said bondholders, mostly citizens of France, had been induced to

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

purchase its land grant bonds to the amount of over $5,000,000, under a representation and pledge that the money should be devoted to the construction of the road, so as to secure the grant of the lands which formed the basis of the mortgages and the only security for the payment of the bonds. The bill charges that the money thus procured constituted the only pecuniary means and resources of the company, and this money, instead of being used for the purpose to which it was pledged, was being utterly squandered, wasted and embezzled by the said officers and agents, with the assent and connivance of the directors, and that the bondholders, as well as the bona fide stockholders, were in danger of losing every cent of their money by the said fraud and embezzlement; that the company had been rendered utterly insolvent thereby, and that the lands would be entirely forfeited by nonperformance of the required conditions, and that there was no means of saving anything from the wreck for the bondholders and other creditors, unless the officers were prohibited from further meddling with the concerns of the company, and a receiver were appointed to take what property and rights remained, and either go on and construct the road, or sell the franchises and property, subject to the mortgages and debts, to some company or association that would go on and complete the work, and thus secure the benefits which formed the entire value and security of the bonds and obligations of the company. The bill prayed for an adjudication of the matters charged, for relief, and for an injunction and receiver.

If the allegations of the bill are true (and their truth seems to be strongly sustained by all the evidence which has been presented), the corporation, through its officers, directors and agents, and by means of pretended contracts, has carried on a vast scheme of fraud, by which millions of dollars have been abstracted from an unsuspecting community, reposing confidence in the character of American institutions and securities.

The interest and reputation of the country, as well as the direct injury sustained by the complainants, require that an adequate remedy, if such a remedy exists in our system of legal procedure, should be promptly and firmly applied to the case.

The bill, with the proper verifications and with due notice to the company, was presented to the court in July, 1870.

The injunction prayed for was granted, and a receiver was appointed to take charge of and administer all the assets, property and franchises of the company. The proper process being served, and no defense or appearance tendered, a decree pro confesso was entered, as of course, at the November rules, 1870.

On January 24, 1871, the receiver, by a memorial or petition duly verified by oath, reported his proceedings, and the state of facts which he found to exist, with reference to the company's affairs, fully sustaining all the allegations of the bill, and exhibiting in detail the various operations of the company, its condition and resources, the disposition that had been made of its stock, property and funds, and the liabilities which it had incurred, showing that it was hopelessly insolvent, that its property and assets, to a considerable amount, had been in part sequestered in Paris, in part attached in New York, and in part detained for duties in New Orleans; that its offices were closed, that it had done comparatively nothing towards the accomplishment of its objects, and that its operations had been entirely suspended for more than a year.

From this report it appeared, amongst other things, that prior to the late civil war, the company had surveyed a route from the eastern boundary of Texas to El Paso, and had made return of the same to the general land office of Texas, and that the commissioner of said office had officially recognized the said line, and that thereby the limits of the reservation of lands for the company's benefit had become defined; and it further appeared, that before the breaking out of the war, the company had graded about sixty-five miles of its road, and that what was done so far was by virtue of a contract with one Thomas C. Bates; it further appeared that, to secure the fulfillment of that contract on the company's part, it had, in 1860, executed bonds to the amount of $350,000, and a trust deed or mortgage to secure the same upon all the lands and property of the company, or any lands or property that might thereafter be acquired by it; it further appeared that none of these bonds or any interest thereon had ever been paid, but that they remained on deposit in a New Orleans bank, and that Bates was engaged in litigation with the company in regard to his claims for construction or upon his contract.

This appeared to be the result of all that was done prior to the war.

Since the war, about twenty or twenty-five miles of road had been graded, about three miles of track had been laid down, and loose rails had been dropped along the line for a few miles further. Ten locomotives, purchased in France, together with a lot of about one hundred and twenty tons of railroad iron, had been detained at New Orleans for nonpayment of duties, which, in the case of the locomotives, exceeded their value. The other railroad iron had been sold or attached in New York for claims against the company. This, from the report of the receiver, seemed to have been the whole extent of the real operations of the company in the construction of its vast work across the whole northern portion of Texas, an extent of nearly a thousand miles, and in the

accomplishment of this result, or at least so much of it as had been performed since the close of the war, there had been issued forty millions of stock and about thirteen millions of bonds and land certificates.

Nothing else remained, as the result of this vast issue of securities, which the receiver could lay his hands on, except a few thousand shares of stock in the Memphis & Little Rock Railroad Company and in the San Diego & Gila Railroad Company, and a residuum of less than three hundred thousand dollars of cash assets accruing from the land grant bonds sold in France. A more utterly fraudulent concern, a more empty bubble of speculation, is rarely to be met with in this highly speculating and fraudulent age.

And yet, as appeared from the report, there are franchises and rights to grants of land belonging to the organization, which, in the hands of an honest and energetic association, backed by sufficient capital, could probably be made available to pay off most of the real indebtedness of the company, and relieve it and the country of the odium which the present concern has brought upon both. In the struggle of capitalists for the establishment of rival trans-continental lines between the Atlantic and Pacific Oceans, the franchises of this company might be rendered available to supply a valuable link in one of them.

The disposal of these franchises, and the remnants of property left, to an association organized with sufficient capital and influence to accomplish such a purpose, the receiver thought, and so reported to the court, was the only means left of realizing from the property and franchises of the company the slightest security or hope of meeting its just obligations. In this view of the case the court was decidedly disposed to agree with the receiver.

It is true that such an arrangement would have the effect of leaving the entire stockholding interest without anything to show for their stock; but that result, if the company was really insolvent and really a bubble company, seemed to be inevitable in any event.

The course proposed might save the claims of honest creditors, and would really be the only means of doing so, whilst it could do no real injury to the stockholders.

A disposition of the franchises and property of the company, in the manner and on the basis suggested, the receiver reported, could be made. A company had been incorporated by the legislature of Texas, in July, 1870, entitled the Southern Trans-Continental Railroad Company, the capital stock of which had been subscribed by some of the most wealthy and responsible capitalists of New York City, and which was empowered to construct a railroad on or near the route of the Memphis, El Paso & Pacific Railroad Company, and to purchase the property and rights of said company, such charter being undoubtedly obtained in view of the insolvency and failure of the latter company. The receiver reported an agreement which could be effected with said new company, which would have the effect of securing the ultimate payment of the debts and obligations of record of the defendant company. The trustees of the two land grant mortgages (all of whom except James M. Pollock, a trustee in the second mortgage, are complainants in the suit) filed a petition at the same time with the receiver, concurring generally in the plan proposed, but insisting that such proceeds of the land grant bonds as had not been dissipated and yet remained should be held by him as a trust fund or guaranty for the construction of the road, according to the solemn pledges originally given, and should not be delivered to the purchasers until that object should be accomplished and the grants of land, on the basis of which the mortgages rested, should be finally secured and rendered complete.

The proposition thus made, after being taken under consideration by the court, and modified so as to require the purchasing company to take the property and franchises, subject to any balance which might remain due upon every valid debt of the defendant company, was approved, and the receiver was authorized to carry it out by the execution of the contracts, so modified, and the sale of the franchises and property of the defendants to the new company. Thus it will be seen that provision was made in the arrangement which was effected, for the ultimate payment of every valid debt of the company.

At this stage of the proceedings, after the passing of the last-mentioned order, and in the latter part of April, 1871, the present interveners appeared and desired to be allowed to become parties to the suit, and to intervene for their respective interests. Having, as the court thought, presented a prima facie case, orders were made in accordance with their request, and the order authorizing the receiver to effect the proposed sale was suspended until the interveners could formally present their case by petition or cross-bill, and be heard in reference thereto.

As soon as the counsel for the complainants and the receiver were informed of these orders for leave to intervene, they applied for a rule to show cause why such orders should not be vacated and set aside; and a rule to show cause was accordingly granted in such case.

The present argument is upon these rules to show cause, and the question to be decided is whether the applicants should have been allowed to intervene or not. The parties thus seeking to intervene are, first, James T. Sanford and John Van Nest, of New York, who allege that they are directors and stockholders of the defendant company, and they seek to intervene for the

protection of their own interest and that of the other stockholders and creditors, on the ground, as alleged in their petition, that in May, 1870, the parties to the suit (except the company) entered into a conspiracy to dispose of the property of the company and convert it to their own use, and that this suit is part of the means used to effect their object, in which they have procured counsel to represent the company; that they have procured a large quantity of the company's mortgage bonds at a small price, which they intend to use for the same purpose; and that the receiver is in collusion with them, and acting collusively for his own interest; that the proceedings in the suit were secretly managed, and the petitioners never heard of the receiver's appointment until long after it was made.

The other parties seeking to intervene are George W. Gerrish, Rogers Fowler and Abraham Rex. Gerrish is the assignee of Thomas C. McDowell, of his share in a certain contract for constructing the company's road, which was made on the 8th of August, 1866, between the company and said McDowell, Fowler and Rex. The petitioners claim that under that contract they are entitled to a large amount of the company's stock which was transferred to and subscribed by them; that they fully performed the agreement on their part, furnished and paid the sum of fifty thousand dollars guaranty or earnest money, as therein provided, and did proceed to and did build a portion of the railroad as required, and hence became entitled to their respective interests. They therefore claim to intervene, as stockholders, for their interest involved in the suit, on the grounds, as stated in their petition, that certain leading officers of the company (who, they admit, have received and converted to their own use, immense sums of money, as stated in the bill of complaint) have fraudulently combined with the receiver to dispose of the property of the company and convert it to their own use; that the suit is employed as part of the said scheme, including the other allegations in reference thereto, made by Sanford and Van Nest, and that the proposed sale to the new company will result in irretrievable loss to the creditors and stockholders, and is intended for the personal advantage of the confederates. Neither of the petitioners questions the main allegations of the bill, unless it be the company's insolvency, but on the contrary, corroborates them.

Testimony has been taken by the respective parties.

In order properly to understand the questions thus raised, it will be necessary to examine the general character of suits and proceedings in equity against corporations in their relation to the interests of the stockholders, and the general right of the latter to intervene therein, pro interesse suo.

A commercial, or other business corporation, is constituted for the specific purpose of suing and being sued, granting and receiving, buying and selling, and doing other business in a corporate name and capacity, totally distinct from that of any or all of its members considered as individuals. A corporation is a person. Its property is not the property of its stockholders. Its rights are not their rights. They have only an indirect interest therein. The rights of a stockholder are to meet at stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose. If the company become insolvent, it is the right of the stockholders to have the property applied to the payment of its debts. I do not know of any other rights except incidental ones, subsidiary or auxiliary to these. Of course, a stockholder has ordinarily a right to a certificate for his stock, to transfer it on the company's books, and to inspect these books. For the invasion of these rights by the officers of the company, he may sue at law or in equity, according to the nature of the case.

But all remedies for injuries to the property or rights of the company must be prosecuted in the name of the company, and all demands against the company must be prosecuted against the company, by name, unless its officers or agents, by fraud and misrepresentation, have rendered themselves personally liable. A stockholder, in his character of stockholder, cannot sue, nor, unless specially made liable by the charter, can he be sued for any of the company's transactions. There is one case, and one only, in which he can interpose, and that is where the officers and managers of the company, by fraud and collusion with third persons, are sacrificing, or are about to sacrifice and betray the interests of the corporation. For such breach of trust and conspiracy, he can call the guilty parties to an account in a court of equity.

In the case before the court, the complainants might possibly have held the officers and agents of the company personally liable for the frauds and misrepresentations charged against them. But the said officers and agents were clothed with all the authority and power of the corporation, and negotiated and operated in its name, and issued its obligations upon its corporate credit, and in every official way involved and pledged its corporate liability, and being the legal representatives of the corporation, placed before the world as such by the corporation, the parties injured had a perfect right to proceed against the corporation for redress. It cannot be, and is not seriously pretended, that the principal complainants in the case, the trustees of the land grant mortgages and bondholders, are acting in collusion with the officers of the company, or that they have any other object in view than the pro-

tection and security of the bondholders, who, it is admitted, have been most outrageously defrauded out of their money.

Here, then, we have a suit brought by grossly injured parties, against the proper defendant, for relief, which, according to the view of the court, it is competent to give. The petitioners were not proper parties, and could not have been made parties without rendering the bill obnoxious to a demurrer.

It is not alleged that the complainants are colluding with the officers of the company, or that they are guilty of any improper conduct. On the contrary, the institution of the suit and its general objects appear to be approved by the petitioners. They admit all the most serious charges made by the bill.

Nor can it be pretended that the suit was not properly instituted; process was served or duly acknowledged by the president of the company. The justice who granted the original injunction and appointed the receiver declined to proceed until that officer had been personally notified of the proceedings, and had waived all objections to a hearing of the motion out of the circuit limits. Besides this personal notice and waiver, the counsel of the company, who had been recognized as such in various proceedings in other courts, appeared and made no objection to the hearing, but acquiesced therein.

Service of process and notice upon an insolvent corporation, which has ceased to carry on business, and is fast undergoing the process of disintegration, is not always an easy matter; but it is believed that not only the president, but all the principal officers of the defendant corporation were apprised of the institution of the suit, and of the proceedings thereon.

Sanford and Van Nest, who claim to be directors, allege that they were not made aware of them until some time after the receiver had been appointed. But it was not essential that they should be notified, and it is not pretended that it was by reason of any fault or neglect of the plaintiffs that they were not notified.

It seems to me that the suit was regularly instituted against the proper party, and that there was no collusion or fraud in the institution thereof; so far, then, as the plaintiffs are concerned, the petitioners are not entitled to intervene in the suit, or to interpose any obstacle to its termination.

The receiver appointed by the court entered upon a vigorous prosecution of his duties, took possession of all assets of the company which he could find, inquired and examined into all its transactions, and ascertained, as near as possible, the exact state of its affairs, and amount of its stock and outstanding obligations. All this was duly reported to the court in the memorial before referred to, and went to establish and confirm all the allegations of the bill which had been taken pro confesso against the defendant corporation in regular course. After a decree pro confesso, it is often proper for a court to inform itself through its own officers, as by report of a master, or by deposition, or other inquest or proceeding, more particularly as to the exact facts of the case.

The report of the receiver in this case was regarded as a proper presentation and authentication of the facts upon which to base further proceedings.

An order was thereupon made in general accordance with the receiver's recommendation, but also in accordance with the best judgment of the court. The objection of the petitioners seems to be more particularly directed against this order, whereby the receiver was authorized to dispose of the assets, property and rights of the corporation defendant, upon the terms stated in the order and the contract referred to therein.

They made charges of fraud against the receiver; they say that he is in collusion with the officers of the company who were guilty of the frauds charged in the bill, and that he is combining with them to dispose of the property of the company and convert it to his and their own use.

The question, then, as a legal one, is reduced to this: The suit being properly instituted, the relief prayed being proper to grant, a receiver being properly appointed, a decree pro confesso being regularly entered, an authentic report of the facts being made to the court, and its judgment being passed thereon, can individual stockholders be now permitted to intervene in the suit and file a cross-bill in the cause on a general charge of fraud and collusion on the part of the receiver, and erroneous judgment on the part of the court in making the order referred to? It seems to me that this would be carrying the practice of intervention too far.

It is true that the complainants filed the bill in this case on behalf of themselves and of all others being stockholders, creditors or bondholders of the corporation defendant, who might desire or be entitled to intervene. But it was never contemplated, nor is it the proper practice, that the persons embraced in that category should intervene to set aside the proceedings, or to interpose obstacles to the progress of the suit. The complainants, by suing as representatives, open the door to all other parties named to come in and take the benefit of the proceedings and decree, not to oppose and nullify them. In a suit so instituted, parties may come in and prove their claims or status, and participate in all the dividends and benefits to be derived from the suit.

Rival creditors, by proceedings before a master, may control the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object and pur-

pose of the suit, to obtain an administration of the company's assets and property.

To be allowed to intervene as general defendants and contestants is another and different thing. This can be admitted only upon the ground before referred to, to wit: having an interest in the results as a stockholder or otherwise, and being able to show fraud and collusion between the plaintiffs in the suit and the officers of the company having charge of its interests. A suggestion, in the progress of the suit, that an officer of the court is disposed to act fraudulently, or that the court has made an injudicious or erroneous order, will not be a sufficient ground to allow such a party to intervene. Indeed, it is questionable whether, in any case where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as party to that suit, and seek to defend or control the proceedings. An original bill would rather seem to be the proper mode of proceeding.

In this case, however, the complainants deny that the petitioners are stockholders of the company, and to this question much of the evidence on both sides has been directed: An examination of this evidence convinces me that the right of the petitioners to any stock of the company is very doubtful. At all events, I see nothing in the case that should entitle them to interfere with the judicial administration of its assets for the security of its deceived and defrauded creditors.

The petitioners, if entitled to be regarded as stockholders, became such under circumstances that should have put them on their guard as to the irregularities and frauds of the company.

And it is in the discretion of the court, whether or not to permit a stockholder to become a party defendant in any case where he is not made such by the bill. And as it is held to be an extreme remedy, to be admitted by the court with hesitation and caution, I think I ought not to have allowed it in this case, and ought now to vacate the order for such allowance. "Generally speaking," says Calvert, "a stranger can take no part at all, and cannot even be heard by counsel in a claim of interest in the suit except by the consent of all parties." Calv. Parties, 58. Deviations from the rule are occasionally allowed in order to obviate delay and expense when there is no question as to the rights of the parties; but, on the whole, I do not deem it necessary to depart from the general rule in this case, when the interests of all parties, and especially of the bona fide creditors of the corporation in question, are so obviously coincident with the objects of the suit and the orders and arrangements which have been made.

From a careful examination of the whole testimony, I am also satisfied that the charges of fraud and conspiracy made against the receiver are entirely groundless. It is unnecessary for me to examine and comment upon it in detail.

The orders for leave to intervene and file answers or cross bills will be vacated, and the sale and agreement made by the receiver will be confirmed, subject to the following modification, to wit: that no sale of the property or franchises shall be made by the said receiver to any other party or company than the said Southern Trans-Continental Railroad Company, without the approval and confirmation of this court, and subject to the same obligations to pay all valid debts of the defendant corporation which were to be assumed by said Southern Trans-Continental Railroad Company, which obligation shall be a lien on the said property and franchises for the fulfillment thereof; and the said receiver is to discontinue any actions or proceedings against the said Sanford and Van Nest for the amount of stock claimed by them.

Case No. 4,927.

FORBES et al. v. The MERRIMAC.

[1 Ben. 68.] [1]

District Court, E. D. New York. July, 1866.

SALVAGE—PRACTICE—PLEADING — SUIT PENDING IN ANOTHER DISTRICT NO BAR TO SUIT HERE FOR SEPARATE SALVAGE SERVICES — LACHES — STALENESS—EXCESSIVE BAIL.

1. Where a libel was filed by passengers on the Merrimac, to recover for alleged salvage services, while on a voyage from New Orleans, to which port the vessel returned; and the answer set up that a suit was commenced in New Orleans against the steamship in behalf of another steamer, which towed her up to the bar, to recover a salvage compensation for such services, and that the claimants had bonded the vessel in New Orleans, and the suit was still pending; and the answer claimed that the libellants should have joined in that suit, or filed their libel in New Orleans. On exceptions by the libellants to this part of the answer, *held*, that the pendency of one action for salvage is no bar to another suit by other salvors, for other services during the same voyage; that the suit in behalf of the Morgan is no bar to this suit by the passengers.

2. The libellants cannot be held to have lost their claim by failing to file their libel in New Orleans, under the circumstances alleged in the answer. The practice of bringing such suits even for different services, in different courts, is disapproved.

3. As to the hardship of compelling the claimants to bond here, after they have bonded her in New Orleans, their remedy is by motion. The court will, on application, always reduce bail to such an amount as shall be reasonable security for the claim.

This case came before the court upon exceptions to the tenth article of the answer. The libel was for salvage, and it averred that in November, 1865, while the steamship Merrimac was on a voyage from New Orleans to this port, and when some two hundred miles

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

out, she sprung a leak, and made water so fast as to extinguish her fires, and rendered it necessary to resort to bailing as the only means of saving the ship; that accordingly, a colored regiment of United States soldiers, which was being transported in the steamer, having been divided into companies for the purpose, undertook to keep the ship free, and by constant bailing from the 11th until the 14th of November, enabled the vessel to return to a place of safety off the port of New Orleans. For this service the libellants [Joseph Forbes and others] who are officers of the colored regiment, in behalf of themselves and all others interested, claim salvage. The answer, in the article objected to, set forth the following facts: That the steamship, after being brought to the place of anchorage, was towed up to the bar by the steamship Morgan, and was thereupon arrested by virtue of process issued out of the district court of the United States for the Eastern district of Louisiana, upon a libel filed in that court by Charles Morgan, in behalf of himself and all other persons interested in the steamship Morgan, to recover of the Merrimac salvage for services performed by the Morgan, in lying by her on the night of the 14th of November, and afterward towing her up to the bar; that in said action, the claimants appeared and bonded their vessel, and said action is now pending, undetermined, in the said district court, of all which it is averred the libellants in this action had notice, being then present in New Orleans. These facts were pleaded in this article of the answer as a defense to the action, and it was claimed that the libellants were bound to have made themselves parties to the action brought in New Orleans, or to have filed their libel there, and that the pendency of that suit was a bar to their action commenced here after the release upon bail of the vessel in New Orleans.

Benedict and Emerson, Goodrich & Knowlton, for libellants.

Spencer, Hooes & Metcalf, for claimants.

BENEDICT, District Judge. The pendency of another action for salvage has never, to my knowledge, been held to bar a subsequent action by other salvors against the same vessel to recover salvage for other services performed during the same voyage; on the contrary, two, and sometimes more such actions have been maintained in the same court, where the circumstances warranted it. Such was the case of The Henry Ewbank [Case No. 6,376]. Such the late case of The Philadelphia, 1 Brown. & L. 28.

When there are several sets of salvors claiming to have performed separate and distinct services, and especially where the interests of the various salvors are somewhat antagonistic, as is often the case, it is not only proper but sometimes necessary that several libels be filed. In the present case, the libel filed by Charles Morgan was filed not for the benefit of all persons claiming to have been salvors of the Merrimac, but solely for the benefit of the owners and crew of the Morgan, and it set forth only the services performed by the Morgan after the termination of the principal labors by the libellants in this action. The pendency of such an action can be no ground for dismissing a second action in behalf of the passengers of the Merrimac, setting forth and claiming salvage for services performed in bailing the ship up to the time of her arrival at the bar. Neither can it be held upon the facts set forth in this article of the answer, that these libellants have lost their right of action, by failure to file their libel in New Orleans while the steamer was there. Cases undoubtedly arise where the omission to take proceedings to obtain an adjudication upon a claim for salvage at the time and place where other similar claims are being determined, would be held to amount to a waiver of the claim, and a subsequent libel would be dismissed upon the ground of staleness or laches. But the facts set out in the tenth article of the answer do not necessarily make this such a case. It cannot be certain that the hearing will not disclose circumstances perfectly consistent with all the facts set forth in the article, which will excuse the delay in prosecuting this action. Nor does it appear from the facts set out in this answer, that it is necessary in order to accomplish substantial justice, that the two claims for salvage should be presented to and passed on, by one and the same court. The services performed by the Morgan were apparently distinct from the service claimed to have been performed by the libellants, and it does not necessarily follow from the facts disclosed in the answer that the award to the libellants, if any, would be affected by the award made to the owners and crew of the Morgan. It is not intended, however, to approve of the practice of bringing such actions in different courts; on the contrary, such course is disapproved, and nothing more is intended to be decided here than that the facts set out in the tenth article of this answer are not sufficient to require a dismissal of the libel. The effect of the omission to file in New Orleans upon the question of costs, or upon the question of the amount to be awarded to the libellants, if any be awarded, as well as the question of laches and staleness, are matters left to be disposed of upon the hearing, when all the facts of the case are before the court. Upon the argument of the exceptions, the hardship of compelling the claimant to give bonds in $100,000 here, after they had bonded their steamer in the action in New Orleans, was greatly insisted on. But the way of relief from this inconvenience is by motion. This court will always promptly reduce the stipulation for value required in any case, to such sum as shall seem to be reasonable security for the claim as presented in the libel; and

if excessive bail has been demanded in New Orleans, like relief can there be obtained. The decree must accordingly be that the exception to the tenth article of the answer be allowed without costs, and with leave to reform the answer in accordance with the views expressed in this opinion.

[NOTE. For a subsequent hearing upon the merits, see The Merrimac, Case No. 9,473.]

Case No. 4,928.

FORBES et al. v. MURRAY et al.

[3 Ben. 497.] [1]

District Court, S. D. New York. Nov., 1869.

FREIGHT PAYABLE IN STERLING MONEY.

On a bill of lading, executed in Whampoa, for the transportation of cargo to New York, the freight in which was specified to be payable in sterling money: *Held*, that the shipowners were entitled to recover what it could be shown by evidence that the specified amount of British coin was worth in New York, in gold and silver coin of the United States, the recovery to be expressed in the decree to be in gold and silver coin of the United States.

[Cited in The Edith, Case No. 4,281. Distinguished in Hus v. Kempf, Id. 6,944.]

[This was a suit by Paul S. Forbes and others against Ellen M. Murray, executrix, etc., and others.]

Beebe, Dean & Donohue, for libellants.

H. W. Robinson, for respondents.

BLATCHFORD, District Judge. This is a libel in personam, filed to recover the amount of freight money claimed to be due for the transportation of one hundred and ninety cases of fans from Whampoa to New York, by the ship Resolute. The contract of transportation is expressed in a bill of lading given by the vessel, dated February 12th, 1864, and the amount of freight money specified therein as to be paid for the service is one hundred and sixty-three pounds, four shillings, and four pence, sterling. The only question presented in the case is, as to what amount, in money of the United States, the libellants are entitled to recover for the one hundred and sixty-three pounds, four shillings, and four pence, sterling, as being payable in New York, June 21st, 1864. It is not averred in the libel, in what money the amount specified in the bill of lading is expressed, nor is there any evidence in the case as to what was intended by the number of pounds, shillings, and pence, sterling, thus specified. Assuming that it can be proved, or will be stipulated, that the contract was for the payment of so many pounds, shillings, and pence, in the sterling money of Great Britain and Ireland, in coin, in New York, on the delivery of the property there, June 21st, 1864, the libellants are entitled to recover what it can be shown by evidence that the specified amount of British coin was worth in New York, in gold and silver coined money of the United States, on the 21st of June, 1864. For that amount, in such coined money of the United States, with interest thereon, at the rate of seven per cent. per annum, the libellants will be entitled to a decree, the recovery to be expressed to be in the gold and silver coin of the United States. Bronson v. Rodes, 7 Wall. [74 U. S.] 229; Butler v. Horwitz, Id. 258.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

Case No. 4,928a.

FORBES v. OVERBY et al.

[4 Hughes, 441.]

District Court, E. D. Virginia. Jan. 1881.

EQUITY—LACHES—PLEADING—BILL OF DISCOVERY.

[A bill, which in its main features was a bill of discovery, was filed by an assignee of a deceased bankrupt 10 to 12 years after the transactions complained of, alleging that the bankrupt, with defendants' aid, fraudulently concealed his assets, and soon after his discharge invested large sums in land in a distant state, that defendants successfully concealed the fraud, and that the fact of these investments only came to complainant's knowledge "within the past year," and prayed a discovery of the particulars thereof. *Held* that, on the facts alleged, complainant was not guilty of laches, nor was the bill defective in not setting forth more specifically the impediments to an earlier prosecution of the claim, and how he came to be so long ignorant of his rights, and what means were used to keep him in ignorance. Badger v. Badger, 2 Wall. (69 U. S.) 87, and Wood v. Carpenter, 101 U. S. 135, distinguished.]

[See Badger v. Badger, Case No. 718.]

In equity.

H. L. Lee, for complainant.

W. H. Mann and Thos. G. Watkins, for defendants.

HUGHES, District Judge. The bill here is brought by [P. A. Forbes] an assignee in bankruptcy of the late Robert Rash against Rash's heirs and distributees and administrator, charging fraud by Rash, and conspiracy in it by the defendants, and praying a discovery and full disclosure of all the facts of the alleged fraud. Rash, who was a citizen of Lunenburg county, Va., filed his petition on the bankruptcy side of this court in March, 1868; got his discharge in February, 1869; bought land in Kentucky with money charged to have been fraudulently concealed assets in bankruptcy, in December, 1870; and died in May, 1875. This bill was brought in May, 1880. Rash surrendered no assets in bankruptcy except a meagre outfit of clothing and house furniture worth $20; and certain choses in action thought then to be worthless, but which, several years subsequently, realized a net aggregate sum to the assignee in bankruptcy of probably $1,000. The principal debt proved against Rash was a bond on which he was surety for one Thomas Jefferson (who also became a bankrupt), the amount of which is $3,154.11 due 1st January, 1861, with interest, some portion of which has been paid. This bond is held by one

W. T. Blackwell, for whose benefit this suit is brought. Rash owed no individual debts. The bill charges that about a year before filing his petition in bankruptcy, Rash sold his farm in Lunenburg county, and other interests in real estate, for $4,600; and that he had the greater portion of this money in hand or under control, at the time of filing the petition; but that he did not enter it in his schedules in bankruptcy; that he swore falsely in his schedules; and that he fraudulently concealed and secreted this money. It charges that he was a money lender among his neighbors, and owed no debts of his own at the time of filing the petition. It charges that this bankrupt, in conspiracy with his family, and his present administrator, concealed and secreted his estate from the complainant and the said Blackwell, who had no knowledge of the disposition which he made of it "until within the past year," and that up to the present time they have been unable to obtain information as to Rash's disposition of large portions of the moneys received from the said sales. It charges that "within the past year" complainant and said Blackwell have been informed that soon after obtaining his discharge in bankruptcy the said Rash went to Kentucky with some $4,000 which he had concealed and secreted from his creditors in bankruptcy, and which he there invested in land; that he went there for that purpose and returned as soon as the land was purchased, and lived in Lunenburg county, Va., until his death, intestate. The bill charges that Robert Rash was old and paralyzed when he went into bankruptcy, and remained so until he died, aged about 70 years; and that he could not have earned any money after his bankruptcy. It charges that he could not have had money with which to make the Kentucky purchase except money concealed from his creditors in bankruptcy, and that the said purchase was made with money thus concealed. The bill calls upon the defendants J. W. Overby, administrator of Robert Rash, and the various members of his family which it names, to make full discovery of all facts connected with this purchase of land in Kentucky, and with the charges of the bill.

The answer of the defendants sets out the particulars of the purchase in Kentucky, giving date, amounts of purchase money, deed, and locality, and makes definite the facts which were unknown to the complainant and of which the bill called for a discovery. Since the hearing in November, affidavits have been filed showing receipts by Robert Rash of two sums of money in the year 1868, after the filing of his bill in bankruptcy in March of that year, one of them dated the 29th April, 1868, showing that one R. B. Brydie had on April 29th, 1868, paid him $400 on a bond for $1,000 due to Rash; the other dated the 21st day of July, 1868, showing that Rash had received $284.69, the balance due on a bond for $1,060 from the said Brydie; neither of which bonds was scheduled in the bankruptcy papers filed and sworn to in March, 1868. There was also filed, a few days after the hearing in November of the motion to dissolve the injunction, a letter dated November 3rd, 1880, received by the assignee from counsel of the Rash's in Kentucky, indicating a variety of transactions of Robert Rash, deceased, and his children, which, if proved, were fraudulent, and which show that the answer of defendants in this cause is not full or true, but is evasive and false. As already indicated, there was a motion for an injunction to restrain all persons and parties having legal rights in the property in bankruptcy from interfering with or disposing of same; which was granted ex parte. The first hearing of the case was on motion to dissolve this injunction. In support of this motion to dissolve, the defendants maintain that the bill is insufficient in form and substance and ought to be dismissed—First, because of complainant's laches in bringing his suit: and, second, because it fails to set forth specifically what were the impediments to an earlier prosecution of the complainant's claim; how he came to be so long ignorant of his rights, and of the means used by the defendants to fraudulently keep complainant in ignorance; and how and when complainant first came to a knowledge of the matters charged in the bill. Defendants rely chiefly on the cases of Badger v. Badger, 2 Wall. [69 U. S.] 87, and Wood v. Carpenter, 101 U. S. 135, in support of their objections to the bill.

There have been a great variety of decisions by the courts on the question of the lapse of time which should bar such cases as this; and it is a general rule that each case must be governed by its own peculiar circumstances. In Badger v. Badger [supra] suit was not brought until 39 years after the qualification of the administrator, and 22 years after the youngest distributee came of age. Certainly the rules of evidence and of pleading in such a case can furnish no just precedent for the present one, where the concealment of the fraud charged continued until the defendants filed their answer to the discovery sought by the bill. The complainant charges the fraud in general terms because he had no particular knowledge of it; he alleges a discovery of the leading fact within the past year, but gives no date, nor the county in which the land charged to have been fraudulently purchased lies, because ignorant of both, and calls upon defendants to disclose the particulars. A court will not compel a complainant who is ignorant of the particulars of a fraud to set them out in a bill which, as to these particulars, is a bill calling for a disclosure of them. The case of Wood v. Carpenter [supra] is no authority for so vain and impossible a requirement. That case

was an action at law, and turned chiefly upon an Indiana statute which in terms barred all suits and actions for fraud after six years from its perpetration; but contains a provision that if fraud is concealed, then the suit or action must be commenced within six years from the time it was discovered. Hence it was necessary for the complainant's pleading to aver a particular time for the discovery, in order to be good on demurrer; and this the more as the case was an action at law and not a proceeding in equity. The bill here is, in its main features, a bill of discovery. It charges a fraud, the particulars of which are unknown to the complainant, and one even yet not fully developed. It charges that the defendants were in conspiracy with the bankrupt to perpetrate fraud. It gives all the particulars which are known to the complainant, alleges that the fraud was successfully concealed from them until within a year past, having gone to a remote state and laid out money there in land, and immediately returned to his home and remained there until his death; and upon the basis of this general knowledge, which is all that he has been able to discover, he calls upon the defendants to answer and to disclose the particular facts in connection with the Kentucky purchase. This being in its principal features a bill for discovery, I think it includes, in substance, all the requirements decided by the court in the case of Badger v. Badger [supra], the bill in which case was not a bill of discovery. It was certainly very widely distinguished in this respect from Wood v. Carpenter [supra], which was an action at law wherein all the facts were known, before suit was brought, by plaintiff, and ought to have been properly charged in the declaration. The case must proceed, with leave to complainant to amend after obtaining the discovery he seeks, and with leave to all parties to take testimony in Kentucky. There is so much of allegation in the arguments of counsel, and so little proof in the pleadings and evidence, that I prefer to continue the case for a rehearing upon such additional proofs as parties may choose to put in at the April term.

The foregoing is a true copy of the opinion of the court filed in the above cause January, 1881.
Teste: Henry Flegenheimer,
(Seal.) Clk. U. S., Dist. Court,
Eastern Dist. of Va.

Case No. 4,929.

FORBES v. PARSONS.

[Crabbe, 283.] [1]

District Court, E. D. Pennsylvania. Oct. 4, 1839.

SEAMEN—INABILITY TO PERFORM DUTY—OBSTINACY—PUNISHMENT—WEAPONS.

1. Where a person ships as cook and steward, he thereby undertakes that he has experience and skill to enable him to perform the duties of those positions.

2. Where a party ships for a particular employment, and either will not or cannot perform its duties, if his deficiencies arise from wilfulness or obstinacy, he is a fit object for punishment; if from incapacity, he is entitled to no particular favor from the court.

3. The law which governs the deportment of men to each other on shore, cannot be applied to their habits and intercourse on board of a ship.

[Cited in The George Kingman, Case No. 5,335.]

4. A seaman is, in general, entitled to recover damages for an assault and battery from the officer of a ship—First, where personal violence is inflicted, not excessively, but wantonly and without provocation or cause; second, where there was provocation or cause, but the punishment was cruel or excessive; third, usually, when the punishment is inflicted with a deadly, or dangerous, weapon.

[Cited in Gabrielson v. Waydell, 135 N. Y. 13, 31 N. E. 969.]

5. A rope is the proper instrument of punishment on board of a ship.

6. A party who shipped as cook, and was unwilling or unable to do his duty, and who kept the galley in a filthy condition, was a fit subject for punishment.

7. A blow with a dirty frying-pan, or wiping a dirty knife on the face of the person whose duty it was to keep those articles clean, is not a very aggravated or cruel assault.

[Cited in The Guiding Star, 1 Fed. 349.]

This was a libel [against Stephen Parsons, master of the ship Suffolk] for assault and battery, with an additional article for wages. It appeared that the libellant [William Forbes] shipped on board the Suffolk, at Shields, on the 6th August, 1839, as cook and steward; that he could not, or did not, discharge his duty in a proper manner; and that he was several times chastised by the respondent, on that account.

Mr. Brooke, for libellant.
Mr. Bulkley, for respondent.

HOPKINSON, District Judge. The libel in this case, with the amendment added to it, contains two grounds of complaint. The first charges several acts of personal violence, committed by the respondent upon the libellant, at different times, for which damages are claimed. The second is a demand for wages alleged to be due to the libellant for his services as cook and steward on board the Suffolk, on her late voyage from the port of Shields, in the kingdom of Great Britain, to Philadelphia.

The former charge will be first considered. By the shipping articles it appears that the libellant shipped as cook and steward. Evidence has been given on the part of the respondent to show that when the libellant offered himself to the ship, as her cook, he represented himself to be well qualified to perform the duties of that service; that he said he was a good cook, and had been in that capacity on board another vessel for nine months. Some attempt was made to

[1] [Reported by William H. Crabbe, Esq.]

contradict this testimony, but I am inclined to believe it, because it is natural that an inquiry would be made of his capability to perform the duties he was to be hired for, and that he would answer affirmatively. It is not, however, of importance whether the libellant did or did not make this direct allegation of his fitness for the place he offered himself to fill; it must be presumed and implied from his contract. He was engaged as the cook and steward of the ship; he was hired and paid for his services in that capacity; and he thereby undertook that he had experience and skill to enable him to perform these services, at least reasonably well.

That the respondent chastised the libellant, on several occasions, is not denied, but it is alleged that it was not severe or unreasonable, and was justified by the discovery, soon after the vessel got to sea, that the libellant was unable to perform the duties he had undertaken; and that, from carelessness or obstinacy, he did not even do as well as he could; that the victuals were so badly cooked as to be unfit for food; and that his galley, and cooking utensils, were kept in a state of disgusting dirt and filthiness. It cannot be doubted that his cooking was exceedingly bad, either from want of skill or wilful neglect; and the evidence is satisfactory to show that his galley and pans were kept in a very dirty condition. The bad cooking is proved by the crew, his own witnesses, as well as by the officers of the ship. Complaints were made of it by the crew, to the captain; so that it was not only the table of the cabin, or the taste of the officers, that was offended, but the appetites of the sailors could not encounter the libellant's cooking. The captain and mate were frequently obliged to cook, not only for themselves, but for the crew. The men once went, in a body, to the captain, with the complaint that the victuals were so badly cooked that they could not eat them. The fault was not in the ship's provisions, which, it is admitted, were good. The libellant has endeavored to excuse himself for this fault, by charging it on the inconvenient smallness of the galley, and the insufficiency of his cooking utensils. He has certainly failed in this. Not only the officers of the ship, but competent disinterested witnesses, who have examined the galley and utensils, testify that both are as good, and, indeed better, than are usually found in a vessel of the same size. It is also proved by the witnesses of both parties that the ship had the same galley, and fewer pans, on her voyage from Boston to Havana, and thence to London and Shields, than on her return, but that no complaint was made, by the former cook, of any deficiency in his conveniences for cooking, nor was there any complaint of his cooking by officers or men.

So stands the case of the libellant, on the question of his performance of his duties as cook and steward of the ship. If his deficiencies were the result of carelessness or obstinacy, he was, doubtless, a fit object of punishment, and if he was really ignorant and incapable of the duties of the place he had assumed, he was guilty of a fraud and deception in undertaking to perform them, and comes here entitled to no particular favor. However this may be as to his cooking, it can hardly be denied that, with ordinary care and industry, he might have kept his galley and pans clean. Upon the subject of his ignorance and incapacity, we cannot avoid to remark that it was of very serious importance to the officers and crew of a ship. To have before them a long voyage, with the disheartening prospect of having their food set before them in a condition hardly fit to be put into their mouths, was indeed a trial of patience and temper that few men would pass through and maintain their good humor. The defects of an ordinary seaman may be supplied by his comrades, but the cook stands by himself, and if he fails, no substitute, unless by an accident, can be found. To have a good dinner spoiled by the cook, is only next to having no dinner. The stomach has a wonderful control over the man and his passions, and a good-natured man, disappointed of his dinner, may become very cross. It is further in evidence that, when the cook was spoken to, by the officers, for his bad cooking, he would make rude and insolent replies. All the witnesses, however, on his part, testify that he never was insolent or disobedient to any order given him.

Having thus stated the cause and provocation given by the libellant, for the injuries he complains of, we must look to the conduct of the other party, and see whether he has exceeded the bounds of moderation, in punishing the offences of the libellant; for it must not be understood that this, or any other provocation, will justify cruel and immoderate chastisements. Libels in this court, for assaults and batteries, committed on the high seas, are becoming so frequent, and have sometimes been for such trivial injuries, that it is well that the principles which govern me in deciding them, should be distinctly explained. The expedition with which such suits are disposed of in this court, being generally terminated in a few days, naturally brings the complaints here, as the necessary delays of the common law courts, unless in cases of extraordinary aggravation, make it impossible to obtain redress there. Neither the parties nor their witnesses can be detained until the trial can be had in the course of the business of the court. If, therefore, the doors of this court were not open to such complaints, much oppression, and many grievous injuries, might be suffered, without redress. On the other hand, it must be remembered that the speed and facilities of trial here, with the moderate costs attending it, offer a temptation to

seamen, under bad advisers,—generally their landlords,—to try experiments in bringing suits on false and frivolous pretences, to take their chance of getting, by trial or compromise, something from the master. If unsuccessful, they are unable to pay the costs of suit; and, in truth, the attempt is made with some prospect of gain, and no apprehension of loss in any event. While, therefore, I have been prompt to give a reasonable compensation for real wrongs, I have endeavored to check and discourage frivolous suits and vexatious litigation.

Nobody will believe that the law which governs the deportment of men on shore to each other, can be applied to their habits and conduct on board of a ship. That which would be an assault, or an assault and battery, in a drawing-room, or in the streets of our city, and punishable by indictment or a civil suit, cannot be so considered among the rough inmates of a ship at sea. The code of manners is entirely different, as is the situation and character of the men. If striking at a man, without touching him, or pointing an offensive weapon to him, or holding up the fist, were to be considered as good ground for a suit; if any rude or angry touching of the person, however lightly, is to be adjudged an assault and battery, for which damages may be recovered; no vessel could arrive without a plentiful crop of actions, equally injurious to the plaintiff and defendant. This cannot be the law of the sea practically, whatever it may be in theory. In questions of this kind, between the officers and the seamen of a ship, my desire has been to maintain a safe and proper discipline, preserving, on the one hand, a necessary and salutary obedience on the part of the seamen, and on the other, protecting him from all cruelty and undue violence, and from any severity not required for the support of the proper authority of the officer, giving a liberal consideration to the exigencies of the occasion. The officer may not, under the pretence of discipline, take advantage of some trifling fault to indulge ferocious passions, or some particular ill will against the offender.

Generally speaking, I should consider a seaman entitled to recover damages for an assault and battery from the officer of a ship —First, where personal violence was inflicted upon him, although not excessively, wantonly and without any provocation or cause; second, where provocation and cause were given by the seaman, but the punishment was cruel and excessive, having no reasonable proportion to the provocation or fault for which it was inflicted; third, I have always looked with a severe eye to the instrument used in punishing. It should be that which is the ordinary instrument for such occasions. To employ a deadly, or dangerous weapon; to strike a man down with a handspike, or bludgeon; to cut him with a sword, or stamp upon him, when prostrated, endangering his health and life, I have always deemed unlawful modes of punishment, although the injury received from them may not have been very severe. But if a seaman has given cause for punishment, by disobedience, or neglect of duty, by insolence and insubordination to the officers and their lawful authority, and the officer, in a moment of irritation, should strike him with his fist (although I do not approve of such blows, a rope being the proper instrument of punishment), or shall correct him with a rope, I cannot institute a very nice and scrupulous comparison between the offence of the sailor and the number or violence of the blows inflicted upon him for it. It will be incumbent on him to show that they were cruel and excessive.

Having these principles in view we will examine the circumstances of the case now to be decided. First, as to the provocation or cause given by the libellant for punishment, I have already stated it. In his libel, as a material part of his case, he has averred that "during the whole time he was on board of the said ship he did well and truly perform his duty." We have seen how far he has been from sustaining this averment. The question is, whether his delinquency was a fit subject of punishment; and if so, whether the punishment inflicted was excessive, and so disproportionate to the offence, so marked with cruelty and oppression, as to entitle him to damages for the wrong. Thinking that his offence justified punishment, I shall confine my inquiry to the question of excess. The first assault and battery complained of in the libel, is that which is spoken of by the witnesses as having happened two or three days after the ship got to sea. She sailed on the seventh of August, and the libel lays the assault on the tenth. None of the witnesses (indeed but one of them testifies to this transaction) give such an exaggerated account of it as is presented in the libel. Was the wrong proved such an one as supports the claim for damages?

Joseph Torente, the first witness examined, knew nothing of this beating. He began his testimony by saying he knew of libellant being flogged once, which was when they had been twenty days out. The second charge laid in the libel is for an assault and battery on the twenty-ninth of August, which in point of time corresponds very nearly with that mentioned by Torente, but they differ materially in their circumstances. The libel asserts that the assault was made with a table knife, with which the respondent struck the libellant a violent blow across his mouth, cutting his lips; that the respondent seized him by the throat, and struck him violently with a frying-pan and kicked him. The statement given by the witness is very different. The affair of the knife and frying-pan was spoken of by other witnesses, and we shall see what they say about it, hereafter. Torente's account of the flogging

when they were twenty days out, is that the libellant was flogged with a large piece of rope. He saw nothing of the knife, nor of the frying-pan, nor of seizing him by the throat. He says that it was about a pan which the captain said was not clean. When the captain had given some blows, the cook asked the crew if they would stand by and see him abused. This is all he said of that transaction. He afterwards said that he recollected another beating, with a piece of rope five or six feet long, and an inch and a half in diameter; that the captain gave the libellant five or six blows, not very heavy, the captain saying he would not hurt him. It was about burning some coffee. He then added that he saw the libellant's mouth cut after both these beatings; that his lips were bleeding, but not much; that he does not know whether they were cut or not. After these beatings libellant went immediately to his duty. This witness testifies to the general humane conduct of the captain to the crew; indeed, with the exception of the cook, none complained of the treatment, or had any reason to do so. The next witness was George Owens. The first beating he saw was after they had been twenty days out. Of course he gives no support to the first assault charged in the libel. He says that the first beating was about a frying-pan that was dirty. The captain gave him about six lashes, and the rope gave out, that is, it unravelled, and he then tied a knot in it, and struck the libellant violently. The witness was more than half the ship distant from them. He does not mention, as Torente did, that the cook called out to the crew, but, like Torente, he knew nothing of the blows with the knife, the seizing by the throat, &c., as set forth in the libel to have happened at this time. As to the knife, he testifies that, after the affair just related, which took place when they were twenty lays out, the pan had some rust in it; that the captain took a knife and began to scrape it, and then daubed it in the cook's face. It cut his face, and the blood came out. This, I presume, is the explanation of the assault and striking made with a knife. This witness saw the captain pull the cook out of the galley several times, and strike him on the head with his fist. This witness somewhat impaired my confidence in his testimony by saying, in conclusion, that the captain behaved middling to the crew, no great things, but that he would not sail with him again for five hundred dollars a month. John Collins was a steerage passenger in the ship. He saw the captain beat the libellant with a rope's end. It was about the cooking. He says the cook showed him his body; it was very bad, it looked black. At another time he saw the cook come up from the cabin with his mouth cut and bleeding; but he did not know how it happened, or who did it. George Appel saw the captain give the cook about fourteen blows; they were not heavy, but middling; saw him strike him with a frying-pan, and kick him on the cheek. He struck him with the pan because it was not clean. George Wilson, the cabin boy, about ten years of age, but smart and intelligent, is the only witness who speaks of the beating laid in the libel to have been about the tenth of August; but he gives no details such as are set forth in the libel. He says it was about three days after they were at sea; that it was about the pans being dirty; that the captain got some dirt out of the pan, with a knife, and wiped it across the cook's face. The boy saw the captain strike one blow on the cook's body with his fist; that he struck him for dirtiness; that the pans, cups, and towels were dirty; and that complaints were made that the victuals were not well cooked.

Here the libellant closed his evidence, and it must be seen that he has not made out a strong case by his proof, and that it falls far short of the allegations of his libel. No serious injury appears ever to have been done to him, at any time; he went to his work, as usual, immediately after every beating, and none of the witnesses speak of the beatings as being severe, much less disabling. The instrument used was a rope, about the size of which there is a difference between the witnesses of the libellant, and those produced on the part of the respondent.. The wiping a dirty knife across his face, and the blow with a dirty frying pan, can not be considered as very aggravated or cruel assaults, nor were they followed by any serious consequences. If the articles in question were as dirty as they have been represented, we can hardly be surprised that they should suddenly have been used as the means of punishment.

The two officers of the ship, the first and second mates, were produced on behalf of the respondent; none others were left for him, as the libellant had called all the crew that remained in this city. Elihu Arnold testified, as some of the other witnesses had done, that when the libellant came on board to get employment, he said he was a good cook and steward; that he made good pies, &c.; that fault was found with him the first day; the victuals were not half cooked; the utensils were very dirty; that he was often spoken to, but did not amend; nothing was done better. This witness testified to the good accommodations of the galley, and the sufficiency of cooking utensils. He says that breakfast, which ought to have been ready at eight o'clock, was sometimes as late as ten o'clock. That the captain spoke to him in a mild manner, but the libellant would not give a direct answer, nor any cause for his conduct. He saw the captain scrape dirt out of one of the pans. He described the rope used by the captain as much smaller than was said by the libellant's witnesses; that the captain gave him four blows when

he called out to the crew to assist him, upon which account the captain gave him four or five blows more, after which the libellant went immediately to his duty. Both the witness and the captain had to cook for the cabin and the people. The galley was kept filthy and dirty. John Clifford, the second mate, gave substantially the same testimony with Elihu Arnold. Two respectable masters of vessels testified that they had examined the galley and cooking utensils of the Suffolk; that they were as good, and, in some respects better, than is usual for vessels of her size.

To apply the general principles I have stated to this case:

1. The chastisement inflicted on the libellant was, certainly, not without fault and provocation on his part. He had undertaken duties, important to the health and comfort of all the persons on board of the ship, and he either could not or would not perform them. His cooking was so bad as not only to call for repeated remonstrances from the cabin, but to cause a formal complaint, to the captain from the crew, who, we may presume, were not very dainty in their diet. The provisions were good and wholesome, but spoiled by the great want of skill or the carelessness in preparing them for the table. No one will say that it was not a more than ordinary provocation to be obliged to eat such meals for weeks together; nor that some efforts might not reasonably have been made to correct the evil. The cause of complaint was greatly aggravated by the libellant's habitual dirtiness, which he might have corrected by care and labor.

2. As to the instruments used in correcting him. The beatings were inflicted with a rope, the usual and proper instrument. There is a difference in the testimony about the size of the rope; but a rope was used. No blow was struck with a knife; if his lip was cut, it was but slightly, and was done by drawing the knife across his face, or mouth, to wipe the dirt from it which had been scraped from the pan.

3. There was no extraordinary severity in the chastisements inflicted upon him. There was no tying up, or stripping, nor anything to show a deliberate design to punish the libellant painfully or severely. The blows were given on the instant of the provocation; they were not numerous or heavily laid on, as the libellant's witnesses testify. He was never disabled, but went immediately to his work.

I cannot say that this is a case for damages. The libellant stands with the fault upon him, the origin and cause of all his maltreatment, of having hired himself for services he could not perform, and thereby imposed himself upon the captain and crew, who were daily suffering the penalty of his deception. It is worse for him if he was able to do the duties of his station, and, from carelessness, laziness, or obstinacy, would not. I should not omit to mention, that it was discovered, after they got to sea, that the cook was blind of one eye, and saw imperfectly with the other. These defects, certainly, in a measure disqualified him for the performance of his duties in a proper manner, at least so far as to require from him an increased attention and labor, which he would not bestow. When he was told of these defects, and his concealment of them,—for they did not appear on a cursory inspection,—he replied that his blindness was a misfortune, not a fault; he was answered, that is certainly so, but it was a fault to pass yourself upon us, as an able and competent cook, if, from any cause, you were unable to do the duties of one. He replied, that he must get a living somehow. He said he had come out of the hospital a short time before he came on board.

Upon this part of the case, if there were no other cause of action in the libel, it would be my duty simply to dismiss it, with or without costs, as I might think the circumstances required. The libel, however, claims a balance of wages due to the libellant, and wages are due to him, but at a rate not quite half of that he claims in his libel. In support of his demand at the rate of five pounds a month, he refers to the shipping articles, and prays that they may be produced. They have been produced, and it there appears, under his own signature, well and distinctly made, that his contract was for two pounds a month, which is but little below the wages of the rest of the crew. No attempt has been made to prove that any fraud or imposition was practiced upon him, or that he did not fully understand the contract he had made.

The account will stand thus:

Wages, from 6th August to 22d September	£3 0 0
Less amount received	2 0 0
Balance due	£1 0 0

It is ordered, adjudged and decreed, that as to those counts or articles in the libel which charge the respondent with sundry trespasses, and assaults and batteries, upon the person of the libellant, judgment be entered for the respondent; and that, as to the counts or articles which claim and demand wages to be due to the libellant, judgment be entered for him for the sum of $4.84, with costs of suit. But no costs or charges are allowed for the attendance of the witnesses of the libellant, as their evidence related entirely to the counts or articles for the assaults and batteries, upon which the decree is in favor of the respondent.

FORBES (PENTLETON v.). See Case No. 10,966.

FORBES (UNITED STATES v.). See Case No. 15,129.

FORBES, The R. B. See Case No. 11,598.

Case No. 4,930.

FORBUSH et al. v. BRADFORD et al.

[1 Fish. Pat. Cas. 317;[1] 21 Law Rep. 471.]

Circuit Court, D. Massachusetts. May, 1858.

PATENTS—INJUNCTION—CONDITIONS—INFRINGEMENT.

1. In acting upon application for preliminary injunctions, there is much latitude for discretion. The application may be granted or refused unconditionally, or terms may be imposed on either of the parties, as conditions for making or refusing the order.

[Cited in Hodge v. Hudson River R. Co., Case No. 6,560; Earth Closet Co. v. Fenner, Id. 4,249. Quoted in Scribner v. Stoddart, Id. 12,561.]

2. The state of the litigation, where the plaintiff's title is denied, the nature of the improvement, the character and extent of the infringement complained of, and the comparative inconvenience which will be occasioned to the respective parties, by allowing or denying the injunction, must all be considered.

[Quoted in Scribner v. Stoddart, Case No. 12,561. Cited in Hanson v. Jaccard Jewelry Co., 32 Fed. 204; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 804; Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 933.]

3. Where there has been a trial at law, and a bill of exceptions taken, the court is bound to exercise its own judgment upon the questions involved in the bill of exceptions, with a view to see whether the litigation that remains, presents such serious doubts concerning the title, as ought to influence its judgment in granting or withholding the injunction.

[Cited in Morris v. Lowell Manuf'g Co., Case No. 9,833; Hoe v. Boston Daily Advertiser Corp., 14 Fed. 916. Approved in American Middlings Purifier Co. v. Christian, Case No. 307.]

This was an application [by Merrill A. Forbush and George Crompton] for a provisional injunction [against Shadrack S. Bradford and Royal C. Taft] to restrain the infringement of letters patent [No. 491, granted to W. Crompton, November 24, 1837, and reissued September 13, 1853 (No. 247)] which had already been the subject of an action at law between the same parties, in which the plaintiffs had a verdict. The facts involved in the decision of the motion are stated in the opinion.

Causten Browne, for complainants.

T. A. Jenckes and A. Payne, for defendants.

CURTIS, Circuit Justice. In acting on applications for temporary injunctions to restrain the infringement of letters patent, there is much latitude for discretion. The application may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions for making or refusing the order. And the state of the litigation, where the plaintiffs' title is denied, the nature of the improvement, the character and extent of the infringement complained of, and the comparative inconvenience which will be occasioned to the respective parties, by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused; and if at all, whether absolutely or upon some and what conditions. In this case, the thing patented is an improvement on a loom. The loom itself is not claimed; but only a particular modification of a loom previously in use.

The defendants in these cases do not make and sell looms having the patented improvement; they only use in their mills certain numbers of such looms. The complainants are makers of looms, but do not use them. So that this particular mode of infringement by the use of the thing patented, though it is a violation of the exclusive right claimed by the complainants, does not deprive them of a monopoly which they desire to retain in their own hands, because practically, it deprives them only of what they would be entitled to receive for a license to use the thing patented. Nor does it, like the manufacture and sale of the thing patented, constantly widen the field of litigation, and render it more and more difficult for the complainants to vindicate their rights.

On the other hand, the defendants can not be prohibited from using the thing patented without being at the same time deprived of the use of the entire loom. For though it is possible to alter their looms, and work them without the patented improvement, it is shown that in the present state of the business, and while the litigation is pending, no prudent man would do this. The practical effect of an injunction would therefore be to stop all these looms, and thus deprive the defendants of the use of a large amount of capital lawfully invested, and which they have the right to the benefit of; and it would also throw out of employment a large number of operatives who are now engaged in running the looms, and in the processes of manufacture which depend upon their use. All this would not prevent the court from granting an injunction, if the right had been finally established at law. But a bill of exceptions has been taken, upon points which involve the validity of the patent. This, again, does not present an insuperable objection to a temporary injunction. This court is bound to exercise its own judgment upon the questions involved in the bill of exceptions, with a view to see whether the litigation that remains, presents such serious doubts concerning the title as ought to influence its judgment in granting or withholding the injunction. I can conceive of many cases in which a temporary injunction ought to issue, where there has been a trial at law, and a bill of exceptions taken, even though serious questions are raised, upon which the court of errors may reverse the judgment. See Bridson v. Benecke, 12 Beav. 1. And a fortiori when the court that tried the cause, and is applied to for an injunction, is fully

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

satisfied of the correctness of its judgment. But even in such a case, when the bill of exceptions is not merely frivolous, as the litigation is not in fact terminated, and its result may be adverse to the complainants' title, it is necessary for the court to contemplate that as a possible result, and look at the consequences, in that event, of allowing or refusing the injunction. See Bridson v. McAlpine, 8 Beav. 229.

Upon the particular facts of these cases I am of opinion an injunction should issue, unless within ten days after notice of the order, the defendants shall give a bond with sufficient surety, to be judged of by the clerk of this court, conditioned to keep an account of the quantity of cloth made on each of the looms in question, and to file such account under oath, once in three months, in the clerk's office of this court, and to pay the amount of any final decree in the cause. And also, that neglecting for the space of ten days to file such account, an injunction should issue.

It has been suggested that, as it appears this manufacture is not at present carried on to any profit, the complainants will receive no compensation for the use which may be made of their invention. But I apprehend that the account to which the complainants may be entitled, will not be of the general profits of the business, but of the profit made by using the patented improvement, in place of some other method of manufacture not patented. And if they shall so elect, they may waive an account of profits, and bring their action at law for damages.

[NOTE. For another case involving this patent, see Forbush v. Cook, Case No. 4,931.]

Case No. 4,931.

FORBUSH et al. v. COOK et al.

[2 Fish. Pat. Cas. 668; 20 Law Rep. 664; Merw. Pat. Inv. 423.] [1]

Circuit Court, D. Massachusetts. May, 1857.

PATENTS—ANTICIPATION—ELEMENTS OF COMBINATION.

1. The defendant, in a patent cause, may show that the thing patented, or some substantial part thereof, existed in a foreign country, and was known to the patentee before his application for a patent, and may have put to the jury the question whether the patentee believed himself to be the original inventor, though such foreign invention had not previously been patented or described in any printed publication.

2. To make a valid claim for a combination, it is not necessary that the several elementary parts of the combination should act simultaneously.

[Cited in Herring v. Nelson, Case No. 6,424; Hoe v. Cottrell, 1 Fed. 600; Hoffman v. Young, 2 Fed. 77; Holmes Burglar Alarm Tel. Co. v. Domestic Tel. & Tel. Co., 42 Fed. 227; National Progress Bunching-Mach. Co. v. John R. Williams Co., 44 Fed. 192; Brickill v. Mayor of City of Baltimore, 50 Fed. 275.]

3. Nor is it requisite to include in the claim for a combination, as elements thereof, all parts of the machine which are necessary to its action, save as they may be understood as entering into the mode of combining and arranging the elements of the combination.

[Cited in Parham v. American Buttonhole Over-Seaming & S. M. Co., Case No. 10,713; M'Millan v. Rees, 1 Fed. 725; Hancock Inspirator Co. v. Jenks, 21 Fed. 916.]

4. If the patentee first made a new and useful combination, he is entitled to a patent for it, though each one of its elements were known before, and two out of three of them had actually been combined in a prior machine.

[Cited in Hoe v. Cottrell, 1 Fed. 603; Haffcke v. Clark, 50 Fed. 535.]

5. It is decisive evidence that a new mode of operation has been introduced, if the practical effect of the new combination is either a new effect, or a materially better effect, or as good an effect more economically attained. And, in such case, it is not material how much study, thought, time, expense, or experiment was required to make the change.

[Cited in Celluloid Manuf'g Co. v. Comstock & Cheney Co., 27 Fed. 360; Ligowski Clay-Pigeon Co. v. American Clay-Bird Co., 34 Fed. 332.]

This was an action on the case [by Merrill A. Forbush and others against Willis Cook and others], tried before Mr. Justice CURTIS and a jury, to recover damages for an infringement of letters patent [No. 491] for an "improvement in power looms for weaving figured fabrics," granted to William Crompton November 24, 1837, extended for seven years from November 24, 1851, assigned to plaintiffs and surrendered by and reissued to them September 13, 1853 [No. 247]. The particular claim which was alleged to have been infringed by the defendants, was for a combination of a pattern cylinder, with double-hooked jacks, and a lifter and depressor, which were described as so constructed and arranged that the pattern cylinder, in the act of revolving and presenting a section of the pattern, pressed by its projections, which corresponded with the section of the pattern, upon such of the jacks as were required to be raised, and pushed these jacks into a position to have one set of their hooks caught by the elevator, the other jacks not thus acted on remaining in a position to have the other set of their hooks caught by the depressor; the elevator and depressor rising and sinking, and carrying with them the required jacks thus disposed to receive their action; the shed of the warp being thus opened both ways simultaneously, and the threads necessary to form the figure being disposed in the upper part of the shed.

The defendants insisted that a valid claim for combining these three elements, namely, the pattern cylinder, the double-hooked jacks, and the lifter and depressor, could not be made—First, because the office of the pattern cylinder was fully performed,

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 423, contains only a partial report.]

and the cylinder was at rest when the jacks, and lifter, and depressor began to act, and so they did not act in combination, but separately; and, second, because the shed could not be formed without the assistance of a fourth part, namely, certain inclined wires, whose office it was to hold in position the jacks not acted on by the pattern cylinder, so that the depressor would catch their hooks in sinking, and that it was necessary to embrace this fourth element in the claim for a combination.

Causten Browne, C. M. Keller, and Rufus Choate, for plaintiffs.

E. F. Hodges and T. A. Jenckes, for defendants.

CURTIS, Circuit Justice, (charging jury): To make a valid claim for a combination, it is not necessary that the several elementary parts of the combination should act simultaneously. If those elementary parts are so arranged that the successive action of each contributes to produce some one practical result, which result, when attained, is the product of the simultaneous or successive action of all the elementary parts, viewed as one entire whole, a valid claim for thus combining those elementary parts may be made. Nor is it requisite to include in the claim for a combination, as elements thereof, all parts of the machine which are necessary to its action, save as they may be understood as entering into the mode of combining and arranging the elements of the combination. If inclined wires are necessary to the action of the combination specified, so are many other parts of the machine, and all parts necessary to the action and combination specified might be said to enter into the mode of combining and arranging the elements of the combination, but need not be and ought not to be included in the combination claimed.

The defendants have offered evidence to prove that two looms, models of which were produced, existed in England long before William Crompton made the thing patented, and were well known to him there. One called the Jones and Milldun loom contains the double-hooked jacks combined with the lifter and depressor, and a pattern cylinder and chain; but the pattern cylinder and chain differ from Crompton's in this: The cylinder revolved so as to present toward the jacks the protuberances corresponding with one section of the pattern, and then stopped; by another combination of mechanism it is then moved horizontally against the jacks, which are thus pushed out into position to have their hooks caught by the elevator. The pattern cylinder is then restored to its former position

This machine was patented in England, and described in a printed publication before Crompton's alleged invention was made. There is evidence tending to prove that those two movements of the cylinder, when compared with the mode of operation of Crompton's cylinder, are more complex, involve greater cost of construction and repair, and require more time; and that for these reasons Crompton's has a decided practical advantage over Jones and Milldun's.

The other loom relied on is what is called the Witch loom. It has a pattern cylinder like Crompton's, but only single-hooked jack, and opens the shed but one way. It is conceded that to open the shed but one way strains the warp, and is an imperfect mode of operation. This loom has not been patented, nor described in any printed publication.

But the defendants insist that Crompton, having knowledge both of the Witch loom and the Jones and Milldun loom, it required no invention to combine the pattern cylinder of the former with the double jacks, and lifter and depressor of the latter, and therefore that he has made no invention.

The act of congress of July 4, 1836, § 15 [5 Stat. 123], has provided that when it shall satisfactorily appear that the patentee, at the time of his making his application for a patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been before known or used in any foreign country, it not appearing that the same, or any substantial part thereof, had before been patented or described in any printed publication. If you find that when Crompton made application for the patent, he believed himself to be the first inventor of the thing patented therein, his patent is not invalidated by the prior existence of the Witch loom in England. But in considering whether he did believe himself to be the original inventor of what was patented to him, it is material to determine whether he was, in fact, the original inventor thereof. If he was, there is an end to all inquiry on this subject. If he was not, still he may have believed himself to be so.

It has not been denied that in point of fact he first combined the pattern cylinder of the Witch loom with the double-hooked jacks, and elevator and depressor of the Jones and Milldun loom; but some witnesses have testified that in their opinion it did not require invention to devise this combination. Other witnesses have expressed the opposite opinion. The true inquiries for you to make in this connection are, whether the combination made by Crompton was new and useful? If it was a new and useful combination within the meaning of the patent law, it was the subject-matter of a patent, and is not important whether it required much or little thought, study, or experiment to make it, or whether it cost much or little time or expense to devise and execute it. If it was a new and useful combination of parts, and he was

the first to make the combination, he is an inventor, and may have a valid patent. When I say it must be new, I do not refer to the materials out of which the parts are made, nor merely to the form or workmanship of the parts, or the use of one known equivalent for another. These may all be such as never existed before in such a combination, and yet the combination may not be new, in the sense of the patent law. To be new in that sense, some new mode of operation must be introduced. And it is decisive evidence, though not the only evidence, that a new mode of operation has been introduced, if the practical effect of the new combination is either a new effect, or a materially better effect, or as good an effect more economically attained by means of the change made in the combinations of the patentee. A new or improved, or more economical effect, attributable to the change made by the patentee in the mode of operation of existing machinery, proves that the change has introduced a new mode of operation, which is the subject-matter of a patent; and when this is ascertained, it is not a legitimate subject of inquiry, at what cost to the patentee it was made, nor does the validity of the patent depend on an opinion formed after the event, respecting the ease or difficulty of attaining it. Witnesses have described to you the practical advantages of Crompton's loom over any other loom for the weaving of fancy fabrics, previously known, and have pointed out the cause of these practical advantages. They attribute them to the modification made by Crompton in the Jones and Milldun loom, changing the double action of the cylinder to a single rotary motion. If this is so, if he first made this modification, and thus made a combination not only new in fact, but which produced the practical advantages described, he was entitled to a patent for that combination, though each one of its elements were known before, and two out of three of those elements had actually been combined in the Jones and Milldun loom. When he introduced the third element, which had not previously been combined with the others, and thereby made a better loom, he made an invention within the meaning of the patent law.

The judge then summed up the evidence respecting Crompton's belief that he was the first inventor, and also on the question of infringement.

The jury found for the plaintiff.

[NOTE. For another case involving this patent, see Forbush v. Bradford, Case No. 4,930.]

FORBUSH v. SOUTHWICK. See Case No. 4,930.

FORBUSH v. WALLING. See Case No. 4,930.

FORBUSH v. WHEELOCK. See Case No. 4,930.

FORCE (KERR v.). See Case No. 7,730.

FORCE (KING v.). See Case No. 7,791.

Case No. 4,932.

In re FORD et al.

[18 N. B. R. 426.] [1]

District Court, S. D. New York. Sept. 18, 1878.

BANKRUPTCY—PROVABLE DEBTS—ARBITRATION OF CREDITORS' CLAIMS—NOTES SUBJECT TO SET-OFF.

1. It is not competent for a creditor and the bankrupt to submit to arbitration the question of the amount due to the creditor from the bankrupt's estate.

2. The Code of New York has no application to bankruptcy proceedings.

3. A submission of a claim by stipulation to the register to hear and determine is not in the nature of an arbitration or a reference under the New York Code, and the decision of the register in such case is not final or conclusive, but is subject to the review of the court.

4. The holder and owner of a claim can alone make the proof.

5. A note which is subject to an offset for a larger amount is not a provable debt.

6. The claim of one of the creditors, J. W., was upon two notes, which, with others, had been given by the bankrupts to the firm, W. & H., for a debt due to the firm, secured by a pledge of stock. The firm afterwards surrendered to the bankrupts a large number of notes, and signed an agreement to take up and surrender others, including the ones in question, and received from the bankrupts a cash payment, which, it was agreed, with the stock held by them, should be taken in satisfaction of the debt. The claimant became the indorsee of the notes after their maturity and dishonor. *Held*, that the notes were paid.

[In the matter of John B. Ford & Co.]

T. Saunders, for bankrupts.

E. F. Brown, for creditors.

CHOATE, District Judge. This case comes up on the certificate of the register of proceedings taken before him for the re-examination of claims of two alleged creditors of the bankrupts, and has been argued as a motion to expunge the proofs of debts, which were allowed by the register. The application for re-examination was made by the bankrupts pending proceedings for a composition. The case is not therefore strictly within general order No. 34, which regulates re-examinations of claims on motion of an assignee or a creditor. After the testimony was taken before the register, the attorneys for the bankrupts and the alleged creditors whose claims were in dispute, entered into a stipulation in writing referring the matter to the register to hear and determine. As originally drawn the stipulation contained the word "finally," but at the suggestion of the bankrupt's attorney the word "finally" was stricken out. It is now claimed by the creditors that the decision of the register is final and conclusive, either on the ground that the submission was in the nature of an arbitration or on the ground that it was a reference under the New York Code to hear and determine, and that the decision of the referee is final because exceptions have not been filed within the time limited by the Code.

[1] [Reprinted by permission.]

Neither position is well taken. It is not competent for a creditor and the bankrupt to submit to arbitration the question of the amount due to the creditor from the estate of the bankrupt. That is not one of the methods appointed by the bankrupt law for ascertaining the claims upon the estate. Such an agreement would seriously affect the rights of other creditors, and they have a right to have all creditors' claims determined in the mode appointed by law. Nor does the stipulation purport to be a submission to arbitration. It seems to have been resorted to as a convenient mode of declaring the testimony closed, and of submitting the questions arising on the testimony to the register, and there is nothing to show that either party intended that in passing on those questions the register should exercise any other than his ordinary powers in similar cases. The Code of New York has no application to bankruptcy proceedings, and there is nothing in the stipulation to show that the parties intended to make its provisions applicable to this case, even if it was competent for them to do so. The decision of the register is therefore subject to the review of this court.

The claim of one of the creditors, Joseph Warren, is on two promissory notes given by the bankrupts to Warren & Howard for value, and Joseph Warren became the indorsee thereof after their maturity and dishonor. They are therefore subject to the same defences as if held by Warren & Howard. In July, 1875, the bankrupts were indebted to the firm of Warren & Howard, mainly for goods sold and delivered, in about fourteen thousand five hundred dollars, for which Warren & Howard held the bankrupt's notes, in all about twelve thousand dollars, including the two notes now held by Joseph Warren —the balance of the debt was due on open account. As security for this debt, the bankrupts transferred to Warren & Howard thirteen shares of the capital stock of the Christian Union Publishing Co. On the 4th of January, 1876, Warren & Howard surrendered to the bankrupts a large number of the notes held by them, and signed an agreement to take up and surrender others, including the two now in question. On the same day they received the bankrupts' checks for eleven hundred and fifty dollars.

There is some conflict of testimony as to the consideration for this agreement, but, upon all the evidence, I am satisfied that it was then agreed between the parties that the stock held by the creditors should be taken, together with the cash payment then made, in satisfaction of the debt. This view of what took place, testified to by Mr. Ford, is far more consonant with the written evidence, and a far more probable account of the transaction than that given by Mr. Warren, according to which the stock still remained as security. Upon his statement of the matter I can see no occasion whatever for the surrender of the notes or the giving of the agreement of January 4, 1876. The notes held by Warren, therefore, must be treated as paid, and his claim must be expunged.

The claim of Warren & Howard is on three notes, one for one thousand six hundred and thirty dollars and forty-nine cents, and two for one thousand two hundred and ninety dollars and forty-three cents each. As to the last named, it was shown by the testimony, and not disputed, that they belonged to another party to whom Warren & Howard had transferred them, and that there is an agreement between Warren & Howard and the holder that Warren & Howard should prove the debt and receive the dividend, and pay it to the holder. The claimant must, in his deposition of proof, swear that the amount of his claim is justly due from the bankrupt to him. Section 5077. It is obvious, therefore, that the holder and owner of the note can alone make the proof. And the proof made on these notes must be expunged. As to the note of one thousand six hundred and thirty dollars and forty-nine cents, which appears not to have been included within the release of notes affected on the 4th of January, it is subject to an offset for a larger amout due to the bankrupts by the failure of Warren & Howard to take up and surrender other notes mentioned in the agreement of that date, and therefore the proof of this claim should also be expunged. Ordered accordingly.

FORD (CARRINGTON v.). See Case No. 2,449.

FORD (CLARK v.). See Case No. 2,820.

FORD (COOKE v.). See Case No. 3,173.

FORD (EVARTS v.). See Case No. 4,574.

Case No. 4,933.

FORD v. KEYS.

[15 Int. Rev. Rec. 59; 4 Chi. Leg. News, 156.]

Circuit Court, S. D. Ohio. Jan. 31, 1872.

BANKRUPTCY—JUDGMENT AND EXECUTION ON COGNOVIT.

[Taking judgment on a cognovit, and levying execution on the bankrupt's property, by his sufferance or permission, before the institution of proceedings in bankruptcy, is a fraud upon the act, although the cognovit is dated more than six months before the filing of the petition.]

[This was a proceeding by Ford, assignee in bankruptcy, against Keys.]

Hutchins & Ingersoll, for assignee.

Grannis & Henderson, for defendant.

EMMONS, Circuit Judge, held: That where judgment had been taken by confession on a cognovit, and execution levied up-

on the property of a bankrupt by the sufferance or permission of the bankrupt before proceedings in bankruptcy were instituted, it was a fraud upon the act, notwithstanding the cognovit may have been dated more than six months prior to the filing of the petition in bankruptcy. That in such cases the date of the cognovit was entirely immaterial. Holding the law on that subject to be in accordance with the late cases, referring to Hood v. Karper [Case No. 6,664]; Haughey v. Albin [Id. 6,222]; In re Hafer [Id. 5,897]; and some ten or twelve other concurring decisions. Remanded for amendment and further proceedings.

FORDYCE (STANWOOD v.). See Case No. 13,300.

FORDYCE (UNITED STATES v.). See Case No. 15,130.

FOREIGN MISSIONS OF PRESBYTERIAN CHURCH, BOARD OF, v. McMASTER. See Case No. 1,586.

Case No. 4,934.

FOREMAN v. BIGELOW et al.

[4 Cliff. 508; 7 Cent. Law J. 430; 18 N. B. R. 457; 7 Reporter, 137; 26 Pittsb. Leg. J. 128.] [1]

Circuit Court, D. Massachusetts. May Term, 1878.

CONTRACTS — FRAUD — RIGHTS OF THE PARTIES — CORPORATIONS — PURCHASE OF PROPERTY WITH STOCK — OVERVALUATION — BONA FIDE PURCHASER OF STOCK — LIABILITY OF THOSE CONNECTED WITH THE CORPORATION.

1. Fraud does not render a contract void, only at the option of the party defrauded, whether the fraud was committed by one of the contracting parties upon the other, or by both upon persons not parties to the transaction. Where fraud was committed by one of the parties upon the other, the contract remains operative, and in force, until it is disapproved by the injured party.

[Cited in McCan v. Conery, 12 Fed. 318.]

[Cited in New Haven Horse Nail Co. v. Lindon Springs Co., 142 Mass. 356, 7 N. E. 773.]

2. A mining corporation bought certain mineral lands, and paid for the same in shares of the stock, which were issued to the directors as paid-up stock. The lands were greatly overvalued, and were not worth the amount at which they were valued. The corporation went into bankruptcy, and suits were brought by the assignee to recover the difference between the real value of the lands and the par of the stock. *Held*, the complainant could not, without disaffirming the contract of purchase, set up the theory that the property taken in payment of the shares was less than their estimated value, nor seek redress against a bona fide purchaser of the stock in the open market.

[Cited in Steacy v Little Rock & Ft. S. R. Co., Case No. 13,329.]

[Cited in Coffin v. Ransdell, 110 Ind. 423, 11 N. E. 20.]

3. So far as an innocent purchaser of the stock in open market is concerned, the shares were paid-up stock, as shown by the books of the corporation.

[Distinguished in Flinn v. Bagley, 7 Fed. 789.]

[Cited in Erskine v. Löwenstein, 82 Mo. 303.]

4. Notice of any fraud upon the respondents was not alleged. But the mere fact that a person has become a shareholder, pursuant to a scheme in which he was a party, and which is ultra vires, will not relieve him from liability as a contributory, if the shares he has taken can be considered as legally existing.

[Cited in Re South Mountain Consol. Min. Co., 14 Fed. 349.]

[Cited in Skrainka v. Allen, 76 Mo. 392.]

5. Power to issue stock was possessed by the company, and therefore the rule that the holder takes nothing where the power is entirely wanting does not apply.

6. Every person connected with a company which issues certificates of stock for paid-up stock, when the money or value has not been paid, is guilty of a personal wrong towards the company, and may be made answerable for it in the same way, and to the same extent, as if the money had been taken out of the coffers of the company to pay up shares.

[Cited in Doty v. Johnson, 6 Fed. 482.]

The complainant [William C. Foreman] was the assignee in bankruptcy of the Central Coal Mining Company, and the respondents [Henry Bigelow and others] were the owners of certain shares in the capital stock of that company. Attempt was made by the bill of complaint to compel the respondents holding such shares to pay certain sums alleged to be due for the non-payment in full of the amount of the capital of the company represented by such shares. From the bill of complaint it also appeared that the corporation was organized with a capital of $400,000, divided into shares of $100.00 each, and that certain persons named, five in number, none of whom were made respondents in the case, became the corporators and directors of the company; and that the whole amount of the original stock was issued to those five persons, of which $353,790 in amount was issued in consideration of the conveyance to the corporation, by the directors, of certain coal lands, fraudulently valued at that sum, as between themselves, though in fact the lands were worth only twenty or thirty per cent of that amount, and that the remaining $46,210 of the stock was issued to the directors without consideration. Corporate authority was subsequently given to the directors to issue the bonds of the company, secured by mortgage in the sum of $100,000, and to increase the capital stock in that amount. New stock for $100,000 was accordingly issued, and given, under a vote of the company, such persons as purchased said bonds at ninety per cent, without other consideration, that the directors, pursuant to that vote, did increase the capital stock of the company $100,000, and did issue certificates of shares for the same, and gave them away without consideration. Shares of the capital stock of the company

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. 7 Reporter, 137, and 26 Pittsb. Leg. J. 128, contain only partial reports.]

in due form were held by the respondents in the amounts specified in the bill of complaint. Debts to a large amount were contracted by the corporation, and on the 4th of May, 1874, the corporation was adjudged bankrupt. Nor was it questioned that the complainant was the lawful assignee of the bankrupt's estate, having duly succeeded the person who was first appointed to that place. As such assignee, he, on the 26th of April, 1877, petitioned the proper bankrupt court for a call and assessment upon the capital stock of the company to pay the debts of the corporation. Hearing was had, and the court decreed that $200,000 of the original stock remained unpaid, and that nothing had been paid on the increased capital stock; that the amount required to be raised was $281,120. Pursuant to that finding the court ordered a call and assessment on the whole capital stock, original and increased, of one hundred per cent, less any sum or sums that might have been paid thereon. Due and proper notice was given of that adjudication at the time it was made. The bill of complaint prayed for an account of the stock of each of the three issues held by each respondent,—how, and in what manner, and to what extent the same had been paid for,—and that the respondents might be decreed to pay the par value of the same severally held by the respondents, less any amounts they might have paid for the same. Respondents demurred, and set up two grounds of defence: 1. The statute of limitations; 2. That they were not liable to the assessment set up in the bill of complaint.

Dryden & Dryden and McComas & McKeighan, for complainants.

The liability of the stockholders to pay the assignees, who represent the creditors, such portion of the unpaid stock as may be necessary to liquidate the bankrupt's indebtedness cannot be seriously questioned after the numerous decisions by the supreme court of the United States. The capital stock of a corporation is a trust fund for the payment of its debts, publicly pledged to all who deal with it. Ogilvie v. Insurance Co., 22 How. [63 U. S.] 387. It is a trust fund to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Upton v. Tribilcock, 91 U. S. 47. The capital stock is a substitute for the personal liability which subsists in private partnerships. Sanger v. Upton, Id. 57. No subscription or express promise to pay is necessary; the taking and holding the stock raises an implied promise to pay. Webster v. Upton, Id. 65, and cases before cited. A corporation cannot give away its stock and issue paid-up certificates. Such action is ultra vires, at least as to those who deal with the corporation. Green's Brice, Ultra Vires, 153; Sawyer v. Hoag, 17 Wall. [84 U. S.] 610; Tuckerman v. Brown, 33 N. Y. 297; Ogilvie v. Insurance Co., 22 How. [63 U. S.] 380; Osgood v Laytin, 3 Keys [*42 N. Y.] 521. The purchaser of shares from original holder stands in his shoes. He succeeds to all his rights and all his obligations. Upton v. Hansbrough [Case No. 16,801]; Seymour v. Sturgiss, 26 N. Y. 134; Sagory v. Dubois, 3 Sandf. Ch. 466; Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Armstrong v. Wheeler, 9 Cow. 88. Stock certificates are assignable, but not commercial paper. The assignee may have paid full value for it, and relied upon the representations of the assignor and the officers of the company that the shares were fully paid for, yet, if the shares were not paid for, the assignee is liable to creditors. Myers v. Seeley [Case No. 9,994]; also, cases cited in 91 U. S. This must be so as to creditors. The assignor of stock may estop himself by his representations; the company may, perhaps, estop itself by its representations on the certificate, or otherwise, but, the capital stock being a trust fund for the benefit of creditors, which is known to all the world, this trust cannot be destroyed by the representations of the company. Even certificates to stockholders made payable to bearer are not negotiable or commercial paper, and purchasers of the same are held to all the responsibilities of original holders, although, in fact, innocent of the trust resting on original owner. Railroad Co. v. Howard, 7 Wall. [74 U. S.] 415; Shaw v. Spencer, 100 Mass. 382; Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599. The payment of stock in any thing but money will not be regarded as a payment of any thing, except to the extent of the true value of the property. Osgood v. King, 42 Iowa, 483; Burnham v. North Western Ins. Co., 36 Iowa, 632; Nathan v. Whitlock, 3 Edw. Ch. 215. An executory contract to pay in any thing but money will not be enforced as against creditors, and trustees of a corporation cannot be both vendors and vendees. Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Goodin v. Cincinnati & W. Canal Co., 18 Ohio St. 169.

Does the plea of the two years' statute of limitations of the bankrupt act constitute a good defence to their action? Two questions must be passed on:—1st. Does the statute apply at all to recover debts or enforce a mere money liability on a contract? 2d. Did the specific right of action to recover the assessments here sued on accrue to the assignees at the date of the deed of assignment, or when the assessments were made and payment refused?

Reference is here made to section 2 of the bankrupt act [of 1867 (14 Stat. 518)], as it stood before the adoption of the Revised Statutes. The first part of this section is jurisdictional, giving—First, a superintending and supervisory control to the circuit courts over district courts, and from the action of which no appeal or writ of error lies to the supreme court; and, secondly, concur-

rent plenary jurisdiction, in a distinct and accurately described class of cases, to the circuit courts. It will be conceded that the latter part of the section operates as a limitation only in the cases to which concurrent jurisdiction is given. As to what cases the circuit courts had jurisdiction of by this section, there have been several decisions by circuit courts, which all concur in denying jurisdiction to actions necessary to recover debts or money due on contracts, and confining the jurisdiction to actions wherein the defendant's claim, whether assignee or claimant, was adverse as to some interest in dispute. The language employed clearly indicates that the action must relate to something the existence of which is not the subject of the controversy, but which is adversely claimed. This is not so in an action to recover money on a debt. The defendants here do not claim the debt alleged, or any interest in it, adversely to the assignee. The controversy is not, In whom is the right of property in the debt? but, Is there a debt? If it is decided that there is no right of property, the defendants will not succeed as having an adverse and superior right to the debt, or any interest therein. The language of the act is: "Which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by 'such person' against such assignee." The "such person" referred to is the same person before described as an adverse claimant,—in one case plaintiff, in the other defendant. This could not be true as to creditor and debtor. The defendants here could not, in the nature of things, have any action to recover any portion of the assessment from the assignees. The bankrupt act, in section 1, had conferred on the district courts jurisdiction for "the collection of all the assets of the bankrupt." The studied use of different language, not pertinent to the mere collection of debts, in two sections, one immediately following the other, shows that congress meant to distinguish between different subjects of controversy, having reference more particularly, in section 2, to disputes arising under section 35 of the act of 1867. The following decisions construe section 2 as it stood in the act of 1867, before the Revision: Bachman v. Packard [Case No. 709]; Sedgwick v. Casey [Id. 12,610]; Davis v. Anderson [Id. 3,623]; Smith v. Crawford [Id. 13,030]; Stevens v. Hauser, 39 N. Y. 302; Union Canal Co. v. Woodside, 11 Pa. St. 176.

The act of June 22, 1874 [18 Stat. 178], amended section 2 by inserting in the place of the word "same," in line 12, the word "any," and after the words "claiming an adverse interest," the words "or owing any debt to such bankrupt." If the circuit court had jurisdiction to recover debts before the amendment, the amendment performs no office. It will be claimed, however, that since the amendment the limitation clause of section 2 has been enlarged by the increased jurisdiction given to circuit courts by two things: First, by the intimate connection between the different parts of the section, and by the phrase in the limitation clause "touching the property and rights of property aforesaid." Even if section 2, at the date of the amendment, was in force as section 2, it would be more plausible than sound to say that the phrase quoted would refer to debts which were only brought into the jurisdictional clause by the amendment. If the decisions cited are correct, then the limitation clause did not apply to debts. The amendment does not profess to amend the limitation clause. It is left untouched. Statutes, like contracts, are to be construed with reference to the objects sought to be attained, and the state of things existing at the time of their adoption. Congress, with the same ease and in the same amendment, could have inserted in the limitation clause, after the phrase "touching any property or rights of property," the words "or any debt owed to the bankrupt." It did not see fit to do it, but left the limitation clause to refer to what it did before.

But the defendants are not entitled to the apparent advantage given them by considering section 2 still in force. The amendment of June 22, 1874, never did take effect as an amendment to section 2 as it stood before the adoption of the Revised Statutes. The Revision went into effect on the same day of the amendment, June 22, 1874. Rev. St. 1091, 1092. All acts of congress passed prior to Dec. 1, 1873, any portion of which was embraced in any section of the Revision, were repealed by express language. See same pages. The bankrupt act of 1867 was, of course, passed prior to Dec. 1, 1873, and the Revision embraced section 2. Without, therefore, the aid of another section of the Revised Statutes, the amendment of June 22 would fall to the ground. And the same result follows, whether the amendment is considered as going into effect before, at the same instant, or after the repeal. By the Revision the different parts of section 2 were sent into independent and unconnected sections, uncorrupted by each other. The jurisdiction clause reappeared in section 4979, the limitation in section 5057. This (section 5057) is the only statute of limitations in force in the bankrupt act, and from it is stricken the word "aforesaid," and the language of the section made more emphatic,—that it bars only suits "between the assignee and a person claiming an adverse interest." It cannot be claimed that section 5057 has been amended, nor would section 4979 be affected by the amendment of June 22, 1874, were it not for section 5601, p. 1092, of the Revised Statutes, which reads as follows: "Sec. 5601. The enactment of said Revision is not to affect or repeal any act of congress passed since the first day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full ef-

fect, as if passed after the enactment of this Revision, and, so far as such acts vary from, or conflict in, said Revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith." By the terms of this section it is plain that the act of June 22, 1874, can only apply to, and amend, section 4979. Said section, so amended, and as it appears in recent editions of Bump, is as follows: "Sec. 4979. The several circuit courts shall have, within each district, concurrent jurisdiction with the district court of any district, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits, at law or in equity, brought by an assignee in bankruptcy against any person claiming an adverse interest, or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee." It would seem that every pretence is taken away, by the Revision, for contending that the amendment enlarging the jurisdiction also enlarges the limitation section. On the contrary, the views we have insisted on are strengthened by the consideration that section 4979, as it now stands, divides the suits over which circuit courts have jurisdiction into two classes, one class being where the claims of the assignee and claimant are adverse as to the subject-matter of the controversy, and the other class being actions to recover debts owed to the bankrupt. Section 5057 applies, by using the same language, only to the first class of actions. There may be reasons here for legislation, and there may not, but there is no ground for judicial intervention.

The eighth section of the bankrupt act of 1841 [5 Stat. 446] was as follows: "Sec. 8. The circuit court shall have concurrent jurisdiction with the district courts of all suits, in law or equity, which may and shall be brought by an assignee in bankruptcy against any person claiming an adverse interest or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee; and no suit, at law or in equity, shall, in any case, be maintainable by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued." This is, in effect, the same as section 2 of 1867. In the cases of Clark v. Clark, 17 How. [58 U S.] 315; Stevens v. Hauser, 39 N. Y. 302; Union Canal Co. v. Woodside, 11 Pa. St. 176; Carr v. Lord, 29 Me. 54; and In re Conant [Case No. 3,086],—it was decided that section 8 of the act of 1841, both as to jurisdiction and limitation, applied only to actions where the interest in the subject-matter was adverse. Against cases cited, construing section 8, will be produced only two cases: Mitchell v. Great Works Milling Co. [Case No. 9,662]; Pritchard v. Chandler [Id. 11,436]; Walker v. Towner [Id. 17,089]. The last case merely follows the first. We can afford to offset against these cases the cases cited, and the powerful criticisms of Judge Blatchford and Judge Deady, in Smith v. Crawford [Id. 13,030], and Bachman v. Packard, already cited. We will be referred to the opinion of Judge Miller, in Bailey v. Glover, 21 Wall. [88 U. S.] 345, in which the strong language of the judge is supposed to favor the construction of the defendants. That decision, however, must be taken in connection with the case itself, which was a suit brought to set aside a conveyance to a fraudulent grantee. Manifestly the defendant was an adverse claimant, although his counsel, being in extreme peril, contended he was not. In that case the assignee was allowed to maintain his action, although begun more than two years from his appointment, the court holding that the statute did not run until the fraud was discovered by the assignee. In Clark v. Clark, 17 How. [58 U. S.] 315, in which the statute of limitations was pleaded, the supreme court said: "The interest adversely claimed, and which the statute protects, is an interest in a claimant other than the bankrupt."

The second question for the court to decide is when the right to recover the specific amount of money sued for accrued to the assignees. We claim that, when the deed of assignment was made to the assignees, their right of action against the stockholders depended upon a contingency; viz., whether the other assets of the company would be sufficient to pay its debts; and the amount which they would have a right to sue depended upon what the difference between the assets and liabilities should turn out to be. The assignees, representing the creditors only in these suits, have no other legal or equitable right than that of recovering such assessment as the bankrupt court may determine necessary to discharge the company's indebtedness. Adler v. Milwaukee Patent Brick Manuf'g Co., 13 Wis. 63; Myers v. Seeley [Case No. 9,994]; [Kennedy v. Gibson] 8 Wall. [75 U. S.] 505. The liability of the stockholders depends upon the necessity for funds, in addition to the other assets, to pay the bankrupt's debts; and this necessity must first be determined by the court which makes the call, or authorizes the assignees to do it. The assignees represent the creditors; the unpaid stock is a trust fund for the benefit of the creditors, to the amount necessary to satisfy their claims. This trust may not be, and is not in this case equal to the whole amount of the unpaid stock. When the debts are paid, the trust resting upon the unpaid stock and the stockholders who owe it is discharged, so far as the creditors

or the assignees are concerned. This was held by Judge Treat in Myers v. Seeley [supra], and also in Chandler v. Keith, 42 Iowa, 99, and Payson v. Stoever [Case No. 10,863]. In both the first two cases the assignee and receiver brought suit with an assessment, and their bills were dismissed, and they remanded to proceedings for an assessment. In both cases the reasons for the necessity of an assessment are ably given, and no court has held otherwise. It cannot be held that the statute runs against a mere delay to obtain a cause of action, however negligent the assignee may have been. In this case, however, the assignees were constantly engaged for two years in trying to realize something out of the lands and leases of the company, and in fighting and defeating nearly $100,000 of fraudulent claims presented for allowance, mostly founded upon contracts made during the last days of the corporation by the officers and agents of the company. The justice or injustice of these claims had to be determined, and the lands and leases disposed of, before the assignee could represent, or the court determine, how much of the trust fund was necessary to call in. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring the action. Whitcher v. Hall, 5 Barn. & C. 269; Mayor, etc., Bristol v. Visger, 8 Dowl. & R. 346. It will be claimed that the right of action of the assignees is like a note payable on demand, on which suit may be brought at once, the suit being held a sufficient demand. There is no analogy. Such is not the stockholder's liability. There is more analogy in the case of a note payable at a certain time after demand, in which case a demand is necessary before suit. Little v. Blunt, 9 Pick. 488; Wenman v. Mohawk Ins. Co., 13 Wend. 267. The bankrupt statute of limitations could not run until this assessment was made, and the stockholders had failed to pay as required. Even as against a corporation, the statute of limitations does not begin to run until a call or assessment is made. Gibson v. Columbia & N. R. T. & B. Co., 18 Ohio St. 396; Bigelow v. Libby, 117 Mass. 359; and 42 Iowa, already cited. See Howland v. Edmonds, 24 N. Y. 307.

We also claim that the plea of the statute of limitations is not good because these suits are brought to enforce a trust. The statute does not run against an express trust until after the trustee has been called upon to execute his trust, and he has refused or disavowed the trust. The trustee does not hold adversely to the cestui que trust until this refusal or disavowal. Ball. Lim. 369; Prevost v. Gratz, 6 Wheat. [19 U. S.] 481. In 3 Swanst. 585, Lord Nottingham defines an express trust as a "trust raised or created by the acts of the parties, which are declared either by word or writing, and these declarations are established either by direct and manifest proof or violent and necessary presumption." Tested by this rule there is no difficulty in reaching the conclusion that the defendants, as members of the corporation, are trustees of an express trust, and they did not hold adversely until after the call was made and they refused to pay. In Payne v. Bullard, 23 Miss. (1 Cushm.) 88, it is held directly that the stockholders could not interpose the plea of the statute of limitations, as the unpaid stock was a trust fund.

W. G. Russell, George Putnam, Moorfield Storey, and Sidney Bartlett, for respondents.

Brief of W. G. Russell and George Putnam:

The bill alleges that the stock of the Central Coal Company was not in fact full paid, although issued as such, and that the defendants are holders of such stock. It does not allege that the defendants, or any of them, were parties to any of the fraudulent issues, or had any notice that the shares were not full paid. It may be therefore assumed that the defendants purchased the shares as full paid in good faith. The defendants being purchasers of stock, issued as full paid, and without notice that it is not, in fact, full paid, cannot be assessed for the unpaid portion of their shares, even in bankruptcy and for the benefit of creditors. Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29; Guest v. Worcester, &c., R. Co., L. R. 4 C. P. 9; Spargo's Case, 8 Ch. App. 410; Nicholls' Case, 26 Wkly. Rep. 334. The remedy for unpaid calls in such case is against the original subscriber, who was a party to the fraudulent issue. Society for Illustration of Practical Knowledge v. Abbott, 2 Beav. 559; Wallworth v. Holt, 4 Mylne & C. 619; Spargo's Case, 8 Ch. App. 410; Nathan v. Whitlock, 9 Paige, 152; Nicholl's Case, 26 Wkly. Rep. 334; Ex parte Currie, 7 Law T. (N. S.) 486; Leifchild's Case, 13 Law T. (N. S.) 267; Ashworth v. Bristol R. Co., 15 Law T. (N. S.) 561. And see Phelan v. Hazard [Case No. 11,068]. In Webster v. Upton, 91 U. S. 65, where a purchaser of stock was held liable to pay up the unpaid instalments, the stock showed upon its face that it was only partially paid. And the same is true of all the cases in which a purchaser of stock has been held to pay subsequent calls. Bend v. Susquehanna B. & B. Co., 6 Har. & J. 128; Hall v. U. S. Ins. Co., 5 Gill, 484; Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Upton v. Hansbrough [Case No. 16,801]. No case can be found in which a purchaser of stock which did not show upon its face that it was not full paid has been held liable for calls or assessments made after his purchase. And the cases in which it has been held that creditors can enforce rights which the corporation itself would be estopped to enforce on account of fraud of its agents,

were suits against original subscribers for instalments upon stock which, upon its face, was not full paid. Oakes v. Turquand, L. R. 2 H. L. 325; Upton v. Tribilcock, 91 U. S. 45; Upton v. Englehart [Case No. 16,800]. Now, if a purchaser of stock is bound to find out whether the stock was honestly paid or not, he must clearly go beyond the books and ascertain the real value of the property transferred. And inasmuch as many properties, especially mining properties and patent rights, have been sold and bought in perfect good faith at prices which turned out to be grossly in excess of their true value, he must, if the value seems excessive, go further and ascertain whether it was honestly valued or not at the time of its transfer to the corporation. And it would also follow, contrary to the well-settled rule, that the original perpetrators of the fraud cannot be held to make good their fraudulently issued stock; for the ground of the equity of the bill is that the vendor has ceased to be, and the vendee has become, a stockholder, and that the liability to pay assessments is transferred with the stock. Webster v. Upton, 91 U. S. 65, and cases cited; Ang. & A. Corp. § 534.

The cases in which it has been held that the purchaser of stock is liable to calls, notwithstanding the fraud of the corporation or of the vendor, are all cases in which the stock appeared on its face not to be full paid, and the fraud consisted, not in issuing it as full paid, but in making false representations as to its value or its liability to assessment. Oakes v. Turquand, L. R. 2 H. L. 325; Webster v. Upton, 91 U. S. 65; Upton v. Englehart [supra]. The stockholder has been held liable by reason of laches in not discovering the fraud or in not repudiating the stock when the fraud was discovered. Upton v. Tribilcock, 91 U. S. 45; Upton v. Englehart [supra]; Farrar v. Walker [Case No. 4,679]. The bankruptcy proceedings do not preclude defendants from taking the defences here set up. Lamb v. Lamb [Case No. 8,018]; Upton v. Hansbrough [supra]; In re Republic Ins. Co. [Case No. 11,704]; Michener v. Payson [Id. 9,524]; Sanger v. Upton, 91 U. S. 56. The defences of individual contributories are left to be dealt with in the suits brought by the assignee. In re Republic Ins. Co. [supra]; Lamb v. Lamb [supra].

The statute of limitations in the act relating to bankruptcy (Rev. St. § 5057) is a bar to the maintenance of the present bill. That act applies to all judicial contests between the assignee and any person whose interest is adverse to his. Bailey v. Glover, 21 Wall. [88 U. S.] 342; Walker v. Towner [Case No. 17,089]. It appears that the present suit was brought more than two years after the appointment of the assignee, but less than two years after the order of the bankruptcy court directing the assessment of the capital stock. If, then, the cause of action accrued to the assignee at the time of his appointment, the bar of the statute applies. If it did not accrue till the assessment was made by order of the court, then it is not barred. We contend that it accrued to the assignee at once upon his appointment. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Ward v. Griswoldville Manuf'g Co., 16 Conn. 599; Adler v. Milwaukee Pat. Brick Manuf'g Co., 13 Wis. 61; Mann v. Pentz, 2 Sandf. Ch. 257; Hall v. U. S. Ins. Co., 5 Gill, 484; Henry v. Vermillion & A. R. Co., 17 Ohio, 187. The right of the creditors rests on the right of the corporation, as against the subscribers to its capital stock and those who have succeeded to their liabilities, to compel the payment of so much of the capital as has not already been paid in. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Ward v. Griswoldville Manuf'g Co., 16 Conn. 599; Adler v. Milwaukee Pat. Brick Manuf'g Co., 13 Wis. 61; Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29. The suit may be brought by the corporation itself, or by the stockholders who have paid in full, against delinquent subscribers, for the purpose of paying the corporate debts. Society for Illustration of Practical Knowledge v. Abbott, 2 Beav. 559; Wallworth v. Holt, 4 Mylne & C. 619; Nathan v. Whitlock, 9 Paige, 152. And upon the bankruptcy of the corporation, the suit, which up to that time might have been brought by any creditor or by the corporation itself, may be brought by the assignee who represents both the corporation and the creditors, and succeeds to all their rights against the debtors to the corporation. See Baker v. Atlas Bank, 9 Metc. [Mass.] 182; Com. v. Cochituate Bank, 3 Allen, 42.

The discussion in this brief has proceeded upon grounds open to any bona fide purchaser of shares of either of the three issues, and upon the assumption that the theory of the plaintiff's bill is maintainable, viz., that the original transaction between the directors and the corporation, by which their land was taken in payment for the first issue, may be treated as a partial payment for that stock, leaving the balance due thereon to be recovered by the corporation or the assignee. We do not, however, concede this proposition. The original issue of stock, so far as any contract rights ever existed or are to be enforced between the parties, was full-paid stock. The fraud might furnish ground for avoiding and rescinding the contract by the corporation, or for the recovery of damages by the corporation or its assignee against the parties concerned in it; but even as against them it can furnish no ground for assuming or enforcing a contract which they never made, namely, a contract to pay for stock which, by the very terms of their real contract, was to be taken as full paid. Still less can it furnish ground for assuming and enforcing such an implied contract against bona fide purchasers of the stock so issued, who have taken it as full paid, and without knowledge of the fraud. It is evident that

the remedy for such fraud, whatever it may be and against whomsoever it may lie, might have been pursued by the corporation at any time after the perpetration of the fraud, and by the assignee at any time after his appointment. In addition to the cases there cited, we refer to Ex parte Currie, 7 Law T. (N. S.) 486; Carling's Case, 1 Ch. Div. 115; Maynard's Case, L. R. 9 Ch. 60; De Ruvigne's Case, 5 Ch. Div. 306, 323.

Brief of Moorfield Storey:

A transferee of shares is not liable for unpaid subscriptions on his shares unless he has agreed with the corporation to pay them. If he has not promised he is not liable. A transferee's promise may be implied as well as that of an original subscriber. The latter may procure a release from his liability, if some one else, with the consent of the corporation, will assume his obligation. If a man buys shares from another, knowing that the seller is liable to the corporation for a portion of their price, procures a transfer of the shares to himself on the books of the corporation, and receives from the corporation a new certificate which on its face expresses the liability, it is not difficult to find in this transaction the intention of the buyer to assume the seller's liability, and the consent of the corporation to the substitution. The buyer knows that the seller is bound to pay the corporation the balance still due on the shares; he knows that, by the sale of his stock, the seller parts with all interest in the corporation and all right to share in its profits; and as no sensible man would part with the chance of profit, and retain the liability for loss which he assumed only for the sake of profit, and as a transfer cannot extinguish the corporation's claim to the balance due, it is clearly the intention of all the parties that by novation the buyer shall assume the seller's liability to the corporation. The cases support this view. Where there is no agreement by the transferee to pay, he is held not liable. President, etc., of the D. & S. Canal Nav. Co. v. Sansom, 1 Bin. 70; Palmer v. Ridge Mining Co., 34 Pa. St. 288; Franks Oil Co. v. McCleary, 63 Pa. St. 317; Pittsburg & B. C. C. & I. Co. v. Otterson, ubi sup. [4 Wkly. Notes Cas. 545]; Franklin Glass Co. v. Alexander, 2 N. H. 380; Seymour v. Sturgess, 26 N. Y. 134; Jay Bridge v. Woodman, 31 Me. 573; Upton v. Burnham [Case No. 16,798]. Where there is an agreement by the transferee to pay, either express or clearly to be inferred from his acts, he is liable. Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Ward v. Griswoldville Manuf'g Co., 16 Conn. 593; Mann v. Cooke, 20 Conn. 178. These cases are all cases where the intent of the buyer to assume the seller's liability was clear. In Bend v. Susquehanna Bridge & B. Co., 6 Har. & J. 128, the defendant acquired his stock by a transfer which recited that thirty per cent. had been paid, and that it was assigned "subject to the payment of the remaining seventy per cent. agreeably to the charter." In Hall v. U. S. Ins. Co., 5 Gill, 484, the original subscriber expressly promised to pay $20 on every share for which he subscribed. He afterwards assigned to the defendant, who subsequently paid various instalments on the stock. The court says, "The transfer of the stock having been duly made to him, and he having assented thereto, as is unequivocally demonstrated by his payment of instalments subsequently called in by the president and directors of the company, he was, in respect to said stock, substituted to all the rights and liabilities which would have attached to the assignor had he continued the owner thereof." In Merrimac Mining Co. v. Bagley, 14 Mich. 501, where a transferee was held liable, there was a clear novation. Campbell, J., who dissented from the decision in the case of Carson v. Arctic Mining Co. [5 Mich. 288], in this case gives the opinion of the court. In dissenting he assumed that the court put the liability of an original subscriber on the relation of stockholder, independent of a promise to pay, whereas, in fact, the court made it rest on a promise. Merrimac Mining Co. v. Levy, 54 Pa. St. 227, was a suit by the same Michigan corporation in Pennsylvania, and the court follows the Michigan decision, saying it considers itself bound by it in construing Michigan statutes. But the clearest recognition of the principle above stated is found in the decision of the supreme court in Webster v. Upton, 91 U. S. 65. This was an action for calls against a transferee of stock, and the court distinctly made the defendant's liability rest on a promise to pay, proved by the circumstances attending the acquisition of his shares. It is clear, from the authorities, that the liability of a stockholder for unpaid capital in every case rests upon a promise to pay, which if not express may be implied from "proof of circumstances that show the party intended to assume an obligation." As sustaining this proposition, see, also, Williams' Case, 1 Ch. Div. 576; Shackleford's Case, L. R. 1 Ch. 567; Mallorie's Case, L. R. 2 Ch. 181.

No contract of subscription preceded the organization. The bill expressly alleges that "up to this date none of the capital stock of said company had been subscribed for, issued, or sold." It is not claimed that any subscription agreement was signed afterward. No provision in the charter or any other statute prescribed the manner in which the capital should be paid, or imposed any liability to pay it upon the holders of shares. The contract of the original stockholders in this corporation was not express, nor can its terms be found in the language of any statute. It must, therefore, be implied, and the only fact from which any contract by the original stockholders can be implied is the fact that they took stock from the corporation. From this fact the law implies simply

a promise to pay for it, not at some future time or in instalments, but at once and in full. The taking of the stock creates a debt from the taker for its full value, which is due as soon as the stock is taken. When, therefore, this corporation issued its stock, the law imposed upon the original holders an obligation to pay for it, from which they could be relieved in only two ways, viz., payment, or obtaining some one to assume the liability whom the corporation would accept as its debtor. In the latter case a new person contracts with the corporation to pay the old debt, and the new contract is accepted as a substitute for the old. If the respondents in this case are liable, it is because their shares have not been paid for, and they have assumed the obligation of the original takers, and have relieved them from their liability by agreeing to pay their debt. It is perfectly clear that they never made this agreement.

No express promise is alleged. No circumstances are alleged which show that they intended to assume any obligation to the company. On the contrary, the stock was issued by the corporation and taken by them as fully paid. Seymour v. Sturgess, 26 N. Y. 134. So far as the shares are concerned which were issued in payment for land, it is clear that there is no liability for this assessment. Neither the corporation nor the original takers of the stock contemplated any further payment on account of it. By the terms of the contract the land was taken as full payment for the shares. and by that payment all liability to the corporation for their price was extinguished, as long as that contract is not avoided. Where the contract is express no different contract can be implied; and neither by the original holders of this stock nor their transferees was there ever any promise to pay any thing for these shares except the land. The transaction is precisely the same in effect as if the corporation had received cash in payment for the shares, and the directors had taken the money and paid themselves the price agreed on for their land. Great Luxembourg Ry. Co. v. Magnay, 25 Beav. 586; Governor, etc., in York Buildings v. Mackenzie, 8 Brown, Parl. Cas. 42; 2 White & T. Lead. Cas. Eq. (last Eng. Ed.) 253, note to Robinson v. Pett; Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Grymes v. Sanders, 93 U. S. 55.

It is well settled by authority that in cases of this sort such a transaction, until avoided, is an effectual payment for the stock. Pell's Case, 5 Ch. App. 11; Drummond's Case, 4 Ch. App. 772; Maynard's Case, 9 Ch. App. 60; Ferrao's Case, Id. 355; Adamson's Case, L. R. 18 Eq. 670; Schroder's Case, L. R. 11 Eq. 131; Coates' Case, L. R. 17 Eq. 169; Jones' Case, 6 Ch. App. 48; Spargo's Case, L. R. 8 Ch. 407; Carling's Case, 1 Ch. Div. 115. Morton's Case, L. R. 16 Eq. 104, illustrates our proposition both in making the liability to pay depend on contract, and in recognizing the novation in the case of a transferee. In Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 46, was a case where a defendant, sued by a corporation, set up that the whole capital stock had not been paid in, but that by a fraudulent arrangement between certain subscribers and the commissioners it had been made to appear that it was all paid in. See opinion of the court. In the case of Phelan v. Hazard [Case No. 11,068], Judge Dillon sustains the claim of the respondents on both grounds. This was a bill brought by a creditor to enforce the liability of a stockholder for the unpaid balance on his stock. The case arose in Missouri, under the statutes of that state, and therefore the liability of the defendant, so far as it depended on statute, was precisely the same as that of the respondents here. In that case, as in this, the shares had been issued in payment for a mining property which the corporation had purchased, and there also the defendant was not the original holder of the stock.

The liability of the transferee arises from a novation, and how can there be a novation when there is no contract to renew? The respondents are not the original takers of the other two sets of shares, those representing the balance of the original capital and those representing the increased capital, which were issued without consideration, but purchased them as full-paid shares from the original takers or their assignees, they cannot be held liable to pay the assessment in this suit. They never promised to pay a debt, of whose existence even they were ignorant. And the corporation must look to the original takers for the amount which they should have paid. The corporation, having issued full-paid certificates and so assisted to defraud the respondents, cannot now be allowed to say that the shares were not paid for, nor can its assignee. This view is sustained in Nicholl's Case, decided by the court of appeal, chancery division, and reported in 26 Wkly. Rep. 334. In this case a company issued certificates of shares as fully paid up, when in fact no payment had been made, and they were taken without notice by Nicholls in payment for land which he sold a third party. The court unanimously held that Nicholls could not be held liable as a contributory for unpaid shares.

It may perhaps be argued that the respondents cannot now contest their liability because the proceedings in the district court of Missouri are conclusive against them, and it therefore becomes necessary to consider precisely what effect must be attributed to these proceedings. In Hall v. U. S. Ins. Co., 5 Gill, 484, the corporation was put into the hands of receivers upon a bill in equity filed by a creditor, and afterwards, upon a petition filed in this suit, a decree was made, ordering stockholders to pay to the receivers all amounts unpaid on their stock, and directing the receivers to collect them by suit from all

who did not pay after sixty days' notice. In a suit brought by the receivers, the proceedings and decree in the equity suit were put in evidence under objection; and in discussing the exception taken to their admission, the supreme court of Maryland say: "The proceedings of Baltimore county court when sitting in equity, which were objected to as evidence, were not offered as an adjudication of any of the rights of the parties in any suit between them, and upon that ground as admissible evidence in the present controversy, but were offered without reference to the parties thereto, for the purpose of showing by what authority the present action was prosecuted. In that aspect of their being offered, they are obnoxious to neither of the reasons urged for their rejection. The court's order for the institution and prosecution of this suit was definite and final." Upton v. Hansbrough, ubi supra, is the first case arising under the bankrupt law. In that case the unpaid balance was to be paid "on the call of the directors, when ordered by a vote of a majority of the stockholders themselves." In that case proceedings were taken in the bankrupt court, similar to those which were taken in this case. The proceeding in the bankrupt court takes the place of an assessment by the corporation, and its effect is the same, and the act of the court is held an exercise of the power to collect the assets of the bankrupt. But the claim of the respondents is supported by express adjudication. In re Republic Ins. Co. [supra]; Lamb v. Lamb [supra]. The claim is further supported by the recent decisions of the supreme court, which give to the proceedings in the bankrupt court the same effect and no more. The cases of Upton v. Tribilcock, Sanger v. Upton, and Webster v. Upton were all actions brought to collect from stockholders an assessment imposed by the bankrupt court. In every case proceedings in that court, like those detailed in the bill, preceded the suit. In Webster v. Upton, 91 U. S. 65, the effect of the decree making the assessment was not considered by the court, but in this case, as in all the others, there is not the least suggestion that the decree in the bankrupt court was conclusive. Each case proceeded on the theory that the stockholder could contest his liability in the suit brought to collect the assessment imposed by it. The same conclusion is sustained by Turnbull v. Payson, 95 U. S. 418; Chubb v. Upton, 95 U. S. 665.

But even if the respondents were ever liable, the provisions of the United States bankrupt act (section 5057 of the Revised Statutes) are a bar to this action. Under that section an assignee can maintain no suit, either at law or in equity, unless it is brought within two years from the time the cause of action accrued in his favor. That this provision applies to every suit by an assignee is settled. Bailey v. Glover, 21 Wall. [88 U. S.] 342; Walker v. Towner [supra]. The cause of action accrued when the assignment was made.

A reference to the circumstances under which the stock was issued makes this clear. In the first place, all the stock, both the original and the increased capital, was issued as fully paid up. Neither the corporation which issued it nor the parties who received it contemplated any further payment for it, or intended to make any contract which would bind them to pay for it. The parties understood that the shares issued in payment for the land were paid for in full by the land. The persons who took the corporation's bonds at ninety cents on a dollar, and at the same time, as a further consideration for their money, received shares, did not intend, by receiving them, to make any contract to pay for them. Such a contract would have made the receipt of the shares not an inducement to buy the bonds, but a reason for not buying them. The directors who took the balance of the original capital without paying for it did not intend to pay for these shares,—they meant to take them discharged of the liability to pay. In each case, if we look only at the intention of the parties, no contract to pay for the shares was made. The contract under which the original recipients of the stock were liable to pay for it is a contract implied by the law against the intent of the parties. It is implied from the receipt of the shares and the knowledge of the recipients that they had not been paid for. The only promise that can be implied from the taking of stock under such circumstances is the promise to pay for it at once. The price of the shares is due as soon as the holder takes them. The liability to pay for them accrues then. Horsey's Case, L. R. 2 Eq. 167; Terry v. Anderson, 95 U. S. 628, 635, 636. This case, therefore, differs from those which have been cited, where the bankrupt court has made an assessment. In those cases it was a term of the subscriber's contract that there should be an assessment before he was called upon to pay any thing. His promise was a conditional promise; until that assessment was made, there was no debt from him to the corporation. In such cases it may be said that the right of action does not accrue until the assessment is made. In the case at bar there is no ground for interpolating into the subscriber's contract any new term, making the payment dependent on an assessment to be made. No call or assessment was contemplated by the subscribers when they took the shares. The promise which the law raises against their intention is an absolute promise to pay, implied from the receipt of unpaid stock. The debt for the price was due the moment the shares were taken. So far as the shares are concerned, for which the takers paid nothing, the corporation might have sued at any moment thereafter. No assessment was necessary to give it a right of action. The assignee ac-

quired the corporation's right, and might have sued for the full value of the shares as soon as he received the assignment. No action of the bankrupt court was necessary to give him that right, and there was no ground for its interposition. Terry v. Anderson, ubi supra.

Brief of Sidney Bartlett:

First. What would be the remedy of the corporation itself against the parties to whom the shares were thus fraudulently issued? Carling's Case, 1 Ch. Div. 115, 124; De Ruvigne's Case, 5 Ch. Div. 306, 323; Ex parte Currie, 7 Law T. (N. S.) 486; 9 Ch. App. 6.

Second. If, then, it be true that the only remedy open to the corporation is as above supposed, the question arises, have creditors, or an assignee representing creditors, different and distinct rights from those of the corporation? Spargo's Case, 8 Ch. App. 407. The contract under discussion is, except for the fraud, in its consideration, perfectly valid. The general doctrine as to the rights of assignees to redress wrongs suffered by a corporation is stated with precision by Lord Westbury in a recent case in the house of lords. Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29.

Having thus stated one of the defences to the claim of plaintiff to charge defendants who held shares issued in payment for mining property, we proceed to submit to the court the other defences applicable alike to that claim and to all the claims made by plaintiff's bill.

The first of these defences is, that each and all of the shares on which plaintiff's claim rests, are, as shown by the bill, held under certificates by bona fide purchasers not privy to the transactions attending their original issue, and not alleged by the bill to be affected with notice of the same, but who took the same on faith of the certificates issued by the company, and, as such bona fide holders, we submit they are not chargeable by the assignee with the vice attending the original issue or its consequences, but relief must be sought by him against the original parties to the wrong.

1. All the issues, as disclosed by the bill, were, and were intended to be, issues of full-paid shares, and it is a necessary inference that the certificates issued conformed to this expressed purpose, and contained no indication that they were not shares of that character, since otherwise a subsequent sale and transfer would be difficult, if not impossible, and the purpose of the parties be defeated.

2. That none of the present defendants were parties to the transaction under which the first issue of shares was made is distinctly stated in the bill, which gives the names of those parties. Simpson v. Fogo, 1 Johns. & H. 23; Ayck. Ch. Pr. 113; Foss v. Harbottle, 2 Hare, 461, 502, 503; Parker v. Nickson, 7 Law T. (N. S.) 461.

3. Assuming, then, that upon the pleadings and the legal results thereof defendants are to be deemed innocent holders of certificates of shares issued by the company subsequent to the issue of original shares (and upon their surrender), and that said original issue was fraudulent or without adequate consideration, the question is, whether, as against creditors or an assignee, defendants hold those shares, charged with the duty to pay the par value thereof or any sum whatever, or whether the assignee must resort to the parties to whom, under the fraudulent contract, they were originally issued. Bank v. Lanier, 11 Wall. [78 U. S.] 377; Leitch v. Wells, 48 N. Y. 585; Matthews v. Bank [Case No. 9,286]; Nicholls' Case, 26 Wkly. Rep. 334. It is to be noted that shares in a corporation are not mere choses in action which a transferee takes subject to all rights between the original parties. They are property in which the legal title vests by transfer (1 Lindl. Partn. 683, 684); and further, that plain certificates of shares, unless qualified on their face, contain nothing to put the purchaser on inquiry (Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29). The bill seeks to charge stockholders of a bankrupt corporation severally upon two separate and distinct statements of alleged fact, namely: As holders of shares originally issued in February, 1867, at the time of the organization of the company, to the parties who organized that company. Also, as holders of shares under a subsequent increase and issue made in April, 1870, and sold, together with the bonds of the company, to parties purchasers thereof. Of one or the other class of the above-described shares the bill charges that each of the defendants held, at the date of the decree of bankruptcy, and now holds a designated number, but it does not aver of which issue either of the defendants held shares. True, it avers that the bankrupt court has declared that an assessment on both classes of shares is required to pay the debts of the company, but as to the ownership of the shares its averment merely is that "the certificates of the shares of said stock were, at the date of the adjudication, held and owned by the following persons: namely, H. J. Bigelow, 380 shares," &c., &c., but of which issue the several parties were thus holders is not disclosed. In default of any averment that each defendant holds shares of both issues, if one or more of the defendants hold shares of the first issue only, and if, as to that issue, there is apparent on the face of the bill a defence as matter of law, is defendant shut off from demurring, and compelled to set up the fact by plea, namely, his ownership of that issue only, when by law it is the duty of the plaintiff in his bill to have averred how the fact was? The rule that, on demurrer, a "court is bound to adopt the construction which is least favorable to the plaintiff," and "every ambiguous statement must be taken in the

sense most adverse to the pleader," above referred to, need not be repeated. The true test is, if demurrer be overruled and no further proceedings had, and if one class of shares is, on the face of the bill, in law not liable, then what decree, and against whom, can the court proceed to enter? We submit, then, that it is to be inferred that some of the defendants do or may hold stock only of one of the issues; and as the question who they are is left by the bill uncertain, the objection may be taken by each defendant on general demurrer to the whole bill.

We come, then, to another ground of demurrer, namely, the limitation of suits to be brought by the assignee to two years from the time when the cause of action accrued to him. The statute applies to all judicial contests between the assignee and any persons whose interest is adverse to his, including actions for unpaid assessments of stock. Bailey v. Glover, 21 Wall. [88 U. S.] 342; Walker v. Towner [supra]; Payson v. Coffin [Case No. 10,859], referred to in same. In this case the question is, did the cause of action accrue immediately upon the appointment of the assignee, or did it only accrue at the date of the order for assessment, the 4th May, 1877 (if the same is valid), for which order the application was made on the 26th April, 1877, nearly three years after the appointment of the assignee? The answer to this inquiry will necessarily involve the determination of all or of a part at least of the following questions: (a.) Is an assessment of any character by the bankruptcy court in any case a necessary preliminary to suit by the assignee, and, if in any case it be, still, may he not by bill in equity proceed to cause such assessment, and also obtain in the same suit decree charging the stockholders? So that his right of action is immediate on his appointment. (b.) If such assessment by the bankruptcy court is in any case necessary, is its necessity confined to cases where, by the terms of the subscription to shares or by the charter or by-laws, subscribers to stock are by contract liable to future calls only in the mode and at periods to be thereafter fixed by the directors or corporation, and where such calls have not already been made prior to bankruptcy? (c.) Can such assessment ever be a prerequisite to bringing suit by the assignee when not only no right exists by contract regulating the mode and time of future calls, but where shares are issued by the corporation by agreement (fraudulent in part or in whole) as being full-paid shares, so that no executory contract exists between the parties, but merely a right of action for the fraud after or without rescinding the contract? (d.) If in the case last named an assessment be a legal prerequisite to suit by the assignee, what is its purpose, and what its effect after it has been obtained, upon the rights of the parties in future suits by assignees against shareholders? (e.) Has there been in this case any such assessment (if such an assessment was a necessity), as has complied with the law or is valid for any purpose?

1. It will be conceded, we think, that it is the right and duty of the assignee to enforce all the claims of the corporation, whether against delinquent shareholders or others, to the end that, in case the property shall prove more than sufficient to pay the debts, all its property and rights shall be restored to the corporation unimpaired. The assignment vests in the assignee all the corporate property and rights, and among them the right to collect unpaid subscriptions. The corporation, though not extinct, is thenceforth powerless to collect or enforce those rights. However speedily the bankruptcy act may look to the winding-up of the estate, it is obvious that if it be not the duty of the assignee to enforce the payment of delinquent subscriptions until he has ascertained that they are requisite, after exhausting the other assets for payment of debts, insolvency, migration, or other causes may impair, if not destroy, all chances of their collection. If, then, a bankruptcy assignee represents both the corporation and creditors, it is submitted that, without applying for any assessment, such assignee has the right and duty to collect all unpaid subscriptions of the capital, whether needed to pay debts or otherwise. Defendants admit that under the usual creditor's bill, to reach the equitable assets of an insolvent corporation, consisting of unpaid subscriptions to shares or capital distributed among stockholders, it has been held that the only equity of the creditors is to subject such unpaid subscriptions or divided capital to their claims, when the other assets of the company shall have been exhausted or shown to be insufficient. The ground upon which this doctrine rests would seem to be that, as between a corporation and its shareholders, the capital is to be held as a fund to be resorted to only when there is a deficiency of other corporate property, and that creditors have no other or higher equity, as to this fund, than the corporation,—a doctrine seemingly open to discussion, at all events inapplicable in bankruptcy, where the assignee is bound to collect all assets for the benefit as well of the corporation as of its creditors. The only possible ground, therefore, for petitioning for an assessment in the bankruptcy court would seem to be that by contract between the shareholders and the company, at the outset, the former are not to be called on to pay assessments, except in the mode and at the times fixed by that contract. And such is the judgment of the supreme court (Terry v. Anderson, 95 U. S. 628, 635), which case deals with the rights of creditors against stockholders whose subscriptions are not full paid, thus: "There the charter of the bank made a call by the directors, and sixty days' notice of it to the stockholders, conditions precedent to the collection of unpaid stock subscriptions, and it was consequently held that the

statute did not commence to run against a liability until the requisite call had been made and notice given. Neither in this case, nor in Terry v. Tubman [92 U. S. 156] does any such provision of the charter appear. For all that is shown in the record the stockholders were liable at any time for the balance due from them." Further, it has been determined, that in case of bankruptcy, or technical insolvency, where such contract exists (based as it is upon the assumed solvency of the corporation), it has no legal effect or force. Henry v. Vermillion & A. R. Co., 17 Ohio, 187.

2. But if it shall be held that, notwithstanding bankruptcy, such contract with shareholders, if made originally, still subsists,—that an assignee represents merely the creditors and not the corporation, and that, in conformity with that contract, he must in some court obtain an assessment,—the doctrine could have no application to this case, where there was no contract as to assessments, but a contract that no future assessments should be made. Whatsoever remedy the corporation had for the fraud was immediate and direct. It is submitted that the assignee had the immediate right which belonged to the company, and that it cannot be requisite to go through any form prior to bringing suit.

3. If, then, there was in this case no legal necessity for an assignee to procure an assessment in the bankruptcy court, it is hardly necessary to discuss the general character and effect of such assessments, when required and when legally made, nor of the character of the one attempted in this case, since it is obvious that the statute of limitations began to run with the date of the appointment of the assignee.

4. But if all this be wrong and unsound, and if an assessment was in some form and in some character a prerequisite in this case, it may be well to advert, first, to the general purpose and effect of such assessments; and, next, especially to the character of the pretended assessment in this case. Upon the assumption that the assignee represents creditors alone and not both creditors and the corporation, so that, as such representative, his rights are limited to recover for unpaid stock only when there is a deficiency of assets to pay the debts and to the extent of that deficiency, and that there must in all cases be ascertained at some time and in some mode the quantum of debt and the amount of assets to determine the extent of the shareholders' liability; it is clear, as will be shown hereafter, that there are two modes of accomplishing this object: One, by a suit in equity in which the debts and assets can be marshalled, the extent of the liability be determined; and the question whether the parties proceeded against as shareholders, are or are not chargeable with this liability, can be determined in a single suit. This is the usual course in regard to insolvent corporations not in bankruptcy, where creditors or receivers seek to recover unpaid assessments of capital. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Ward v. Griswoldville Manuf'g Co., 16 Conn. 599; Adler v. Milwaukee Pat. Brick Manuf'g Co., 13 Wis. 61; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Nathan v. Whitlock, 9 Paige, 152; Mann v. Pentz, 3 Comst. N. Y. 415. The other course usually adopted in bankruptcy, in cases of unpaid subscriptions to stock subject to future calls, is to apply by petition to the bankruptcy court for an assessment on unpaid subscriptions, in which proceeding the question of deficiency of assets, and the amount necessary to be raised and the sum for which the shares are liable, is determined as against all parties, leaving the assignee to enforce the assessment by suit at law or in equity against such parties as shall prove to be liable therefor. This course has probably been adopted instead of a suit in equity to avoid the necessity which would otherwise exist, in cases of the numerous suits necessary to charge the parties in different jurisdictions, of furnishing in each of those suits proof of such amount and deficiency and of the sums due upon the shares. In each of the following cases this last-named course has been adopted, and in most of them the question of the liability of the party sought to be charged is, in the suits brought to enforce such assessment, held to be open among the matters at issue; and it has been further distinctly held that only the quantum of the assessment, as distinguished from the question whether the defendant is chargeable therefor, is to be deemed settled by the bankruptcy court. Turnbull v. Payson, 95 U. S. 418; In re Republic Ins. Co. [supra]; Lamb v. Lamb [supra]; Upton v. Hansbrough [supra]; Upton v. Englehart [supra]; Michener v. Payson [supra]; Upton v. Tribilcock, 91 U. S. 45; Sanger v. Upton, Id. 56; Chubb v. Upton, 95 U. S. 665.

5. Such being the purposes and effect of assessments in general, where such assessments are by law or original contract necessary as preliminary to a suit by the assignee, although, as we have seen, wholly inapplicable to this case, yet, if it would be so applicable, this attempted assessment is wholly nugatory and void. An order or decree which leaves the quantum of delinquent assessments unsettled, and thus, if it be valid, leaves, in any future proceedings in other tribunals—facts open to proof and controversy, which are essential to the establishing of that quantum, and thus fails to accomplish the object on which its jurisdiction rests, is a nullity. The order or decree of the bankruptcy court in this case finds and declares the amount of the assets, the amount of debts, the quantum of deficiency of assets to pay those debts. It, then, instead of ascertaining and determining the amount of unpaid assessments due upon the several shares or classes of shares (which, as has already been suggested, may differ

widely in the cases of the several defendants), proceeds to order an assessment of one hundred per cent. on each share, less whatever may, in future suits, be proved by the defendants respectively to have been paid on their shares. Is it valid? It would seem to be clear that such a decree, which ascertains part only of the elements necessary to determine the amount of unpaid assessments, and thus furnishes part only of the complete foundation on which to base future suits, to determine the liability and amount of liability of the parties sought to be charged, cannot be even received in evidence. It need not be added that, if no valid order or assessment by the bankruptcy court is shown, then, if such assessment be a prerequisite, the bill must be dismissed; if it be not a prerequisite, then the statute of limitations dates from the accruing of the original cause of action, viz., from the appointment of the assignee.

We next submit that even if an assessment was, in this case, one mode of ascertaining the deficiency of assets to which the assignee might lawfully resort (which, and the effect of which, in its bearing on this case, this defendant denies), and if this pretended assessment were a real assessment, yet it cannot be in the power of an assignee to defeat the statute of limitations by postponing his application for such assessment, as in this case, until long after the statute has run to completion, and thus continue defendant's liability indefinitely at his pleasure. If the filing of such petition for assessment be deemed the commencement of a suit by the assignee, of which the present suit is a mere continuation, then it was not filed until nearly three years after his appointment, and it almost warrants the suggestion that its filing was an experiment with a view to avoid, it might be, the bar which had already matured.

Finally, upon this point arising from the statute of limitations, we submit that if an assessment by the bankruptcy court was one of the lawful methods of proceeding in this case, and it had been legally made, yet there was another clear and complete remedy equally open to the assignee, in which an assessment and a final decree could be had, and the right of which accrued to him from the date of his appointment. And further, that he cannot lay by for years, neglect this remedy, and finally resort to an assessment as the means to avoid the statute. Defendants contend that the assignee had the legal right, at any period within the two years, without seeking an assessment from the bankruptcy court, to bring a suit in equity, in which, in conformity with the procedure of courts of chancery, all questions of the existence and amount of unpaid subscriptions on the shares or class of shares held by the defendants respectively, the question of deficiency of assets, the extent of that deficiency, the liability and amount of liability of each separate defendant, and the calls and assessment in conformity, could all be ordered, tried, and determined. Or, if it shall be held that such assessment can only be had in bankruptcy courts, then the bill in equity, and a proceeding for assessment in the bankruptcy court, may be brought contemporaneously, and the former proceeding, if need be, stand or be suspended until the order fixing the quantum of assessment on shares held by each class shall have been passed, and then the question of defendant's liability be heard and determined under the bill.

First. As to the first of the above propositions, it is submitted that although no case has been found where the assignee has, without procuring such assessment, proceeded to accomplish the same purpose by a bill in equity, yet it is undeniable that the jurisdiction of a court of equity is fitted in all respects to work out and perfect every step preliminary, or otherwise necessary in case of bankruptcy, to charge the proper parties for the proper amounts of unpaid subscriptions. This is shown by the various cases in which creditors of insolvent corporations by bill, in behalf of themselves and other creditors, and also where receivers appointed in cases of insolvency, have successfully invoked the aid of a court of equity to attain the same ends which are sought in this case by the plaintiff. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Ward v. Griswoldville Manuf'g Co., 16 Conn. 599; Adler v. Milwaukee Pat. Brick Manuf'g Co., 13 Wis. 61; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Hall v. U. S. Ins. Co., 5 Gill, 484; Mann v. Pentz, 2 Sandf. Ch. 257. If the processes of a court of equity are thus found adequate to accomplish in behalf of a creditor all that is sought in this case, it is difficult to see why the same remedy does not exist in behalf of an assignee in bankruptcy, who, upon the theory above stated, is the representative of creditors. The bankruptcy act (Rev. St. §§ 40, 79, 49, 72) confers on all district courts, including that in which the decree of bankruptcy is made, and on all circuit courts, full equity jurisdiction in all bankruptcy matters. Bump, Bankr. Pr. (9th Ed.) 341, in notis, 323, 324; Wilkins v. Davis [Case No. 17,664].

Second. As to the second of the above propositions, namely, that if it is by law requisite that the assessment be had in a bankruptcy court only, yet a bill to charge the defendants for their liability as ultimately ascertained, and a petition to the bankruptcy court to assess the amount attributable to the shares held by each defendant, may be instituted at the same time. For this we refer to the cases of Com. v. Cochituate Bank, 3 Allen, 42; Baker v. Atlas Bank, 9 Metc. [Mass.] 182. The first of these cases was a bill in equity, by receivers of an insolvent bank, to obtain an order conferring and carrying into effect an assessment made by them to enforce a statute liability in favor of bill-holders against parties who were stockholders when the bank stopped payment. The defence was

the statute of limitations; to which it was replied that the right of action or process against the stockholders did not accrue until after assessment made by the receivers in conformity to the statute ascertaining the deficiency of assets. But it was held that the statute began to run when the bank stopped payment, and that suits against the bank, under which the assessment may be ordered to be made, and suits against the stockholders by the bill-holders, might be commenced and go on pari passu. This case reaffirms the same doctrine that is contained in the last-cited case (Baker v. Atlas Bank), which was a creditor's bill to enforce against shareholders the statute liability for mismanagement of directors. A synopsis of the case will be found in the opinion of the court in the Cochituate Bank Case, above cited. The argument in that case, in answer to the statute of limitations, was that the statute did not begin to run until the plaintiffs' right to sue arose from the refusal of the receiver to commence an action for their benefit, to which the court replied, "If this argument would hold good, the plaintiffs might delay the application to the directors or receivers any length of time, and the statute would be inoperative and nugatory;" and in answer to the suggestion that the statute could only begin to run after it was first ascertained what would be paid by the assets of the bank, the court declare that suits against the bank and against the stockholders may be brought at the same time.

CLIFFORD, Circuit Justice. Fraud does not render a contract void, but voidable only at the option of the party defrauded, both at law and in equity, whether the fraud was committed by one of the contracting parties upon the other, or by both upon persons not parties to the transaction, the rule being that where the fraud was committed by one of the parties upon the other, the contract remains operative and in force until it is disaffirmed by the injured party. Chit. Cont. (10th Ed.) 626; Add. Cont. (7th Ed.) 228; Clough v. London & N. W. Railway, L. R. 7 Exch. 34; Jones v. Carter, 15 Mees. & W. 722; Upton v. Englehart [supra].

Due consideration will be given to both defences, but it will be more convenient to examine the one addressed to the merits before considering the question whether the claim is barred by the statute of limitations.

Considered broadly, the bill of complaint seeks to enforce from the respondents the payment of the entire capital stock of the company, or such portion of the same as may be necessary to pay the debts of the corporation less the amount any particular holder of the stock may have paid towards his shares. Three classes of shares were issued, as plainly appears from the allegations of the bill of complaint: 1. Shares to the amount of $350,790, fraudulently issued to the directors in payment for the mining lands which they, at a greatly overvalued estimation, conveyed to the corporation. 2. Unpaid shares to the amount of $46,210, issued to the directors without any consideration. 3. Shares to the amount of $100,000, issued by the corporation to such persons as took an equal amount of the mortgage bonds of the corporation at ninety per cent.

Viewed in the light of these suggestions, it is plain that it is sufficient for the respondents to show that the complainant cannot sustain any claim against them as holders of the first issue of the original stock, as the bill of complaint does not charge that the respondents are holders of any particular issue of the stock, or either of the other issues. Such being the state of the pleading, it is open to the several respondents to assume that his stock, as charged, is wholly of the first class of the stock which was issued to the directors in payment for the mining lands, the rule being that pleadings which are uncertain or ambiguous must be taken in the sense most adverse to the pleader. Story, Eq. Pl. (7th Ed.) § 257; Foss v. Harbottle, 2 Hare, 503; Simpson v. Fogo, 1 Johns. & H. 23; Ayck. Ch. Pr. 113; Parker v. Nickson, 7 Law T. (N. S.) 461. .

Certificates of shares of that kind were issued to the amount of $350,790; and, nothing being alleged to the contrary, the several respondents in this controversy may properly assume that they are charged with holding of shares in the capital stock, the certificates of which were of that issue which were entered upon the books of the company as shares paid up in full. Issued, as these shares were, to the directors in payment for the mining lands, they were, as between the grantors of the land and the directors issuing the shares, fully paid up, as the shares paid for the land, and the land conveyed paid for the shares; and all this appears upon the books of the company. Transferees of the shares took the certificates with nothing on their face to show any unfairness, and with nothing appearing on the books of the company to put them upon inquiry. Suppose that is so, still the complainant contends that such payment was made in mineral lands at a fraudulent valuation, not binding on the corporation. Admit that, and still the fact remains that the land was actually received by the company in full payment for the stock, and that the shares were issued and delivered as fully paid up shares. Taken as a whole, the averments of the bill of complaint show that the transaction in purchasing the mineral land, and in issuing the first class of stock in payment for the same, was a gross fraud upon the company which cannot be sustained; but it does not follow that the present suit against the respondents is the proper remedy to redress the injury, for the reason that the contract was duly executed by the execution of the deed of conveyance to the corporation, and by issue of fully paid up shares to the corporation for the

whole amount of the agreed consideration of the mineral land.

Nothing can be plainer in legal decision than that the title to the mineral land passed to the corporation, and that the title to the paid-up stock passed to the directors. Being formally executed the contract must stand until it shall be rescinded, or the assignee, if he prefers that course, may retain what the company received for the stock, and seek redress in damages against those who defrauded the corporation. And the redress is at his command, but he certainly cannot be allowed to disaffirm the contract only in part, and affirm it as to the residue, as he must do in order to maintain the present suit against the respondents.

Beyond all question the present respondents are bona fide purchasers and holders of shares in the capital stock of the company, which the books of the company show were fully paid for by the directors, and which, by the terms of the contract between the directors and the grantors of the mineral land, were fully paid in the manner stipulated by the contract. Under such circumstances it cannot be that the complainant, without disaffirming the contract, can be allowed to set up the theory that the property taken in payment of the shares was less than their estimated value, and to seek redress for the difference against bona fide purchasers of the same in the open market. Gross fraud may have been perpetrated between the parties to the sale and purchase of the mineral land; but it is nevertheless true, so far as the shares of the capital stock are involved, that the shares, as between the corporation and innocent purchasers of the stock in open market without notice, knowledge, or means of knowledge of the fraud, were paid up, as shown by the books of the corporation. Notice of the fraud as respects the respondents is not alleged, nor is there an intimation in the bill of complaint that any facts or circumstances were known to the respondents, to put them upon inquiry in respect to any such imputation.

Innocent purchasers of the stock in the open market are not liable in such a case; but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity. Support to the opposite theory is attempted to be derived from the adjudication of the bankrupt court; but the decree of the bankrupt court was only an adjudication that, for the purpose of paying off the indebtedness of the company, a call and assessment be made on the stock of one hundred per cent., less any sum or sums that may have been paid thereon. Properly considered, as a whole, the decree of the bankrupt court does not absolutely fix and determine the amount to be assessed. Instead of that, it merely calls for one hundred per cent. less all payments; nor does the decree in any respect contradict the theory that the class of stock first issued was fully paid up before it was put upon the market; and, if so, the court is of the opinion that the proper remedy of the complainant is against the perpetrators of the alleged fraud, which he might have enforced the moment he was appointed assignee of the bankrupt's estate. Holders of shares issued improperly stand on a different footing from the holders of shares which the company had no power to issue, as the purchaser in the latter case acquires nothing, and cannot, in general, be held as a contributory. 2 Lindl. Partn. (3d Ed.) 1381; Bank of Hindustan v. Alison, L. R. 6 C. P. 54, 222. But the mere fact that a person has become a shareholder pursuant to a scheme which is ultra vires will not relieve him from liability as a contributory, if the shares he has taken can be considered as legally existing, and he was himself a party to the scheme, or had knowledge of the fraud. Even where the shares were fraudulently issued, it is necessary to give strict attention to the precise facts in order to ascertain what are the rights of the parties in the case. The respondents were not subscribers to the stock, but the purchasers of the shares in the open market as paid-up shares. It was held in Carling's Case that, where the contract was to take paid-up shares, the court could not convert the contract into one for unpaid shares, for reasons which are obviously sound and correct. Carling's Case, 1 Ch. Div. 124.

Where there is a contract, even if fraud be imputed, the party seeking redress must disaffirm the contract, or proceed for damages against the perpetrators of the fraud. Such a party must throw over the agreement altogether, or he must take it as a whole. He cannot adopt as to one part, and reject it as to the rest. De Ruvigne's Case, 5 Ch. Div. 323. Certain shares of capital stock were allotted as fully paid up shares, and the court held that, as the shares had been allotted to a stranger as paid-up shares, they could not be considered otherwise, and that neither he nor his alienees could be liable to contribute in respect of the shares. Ex parte Currie, 7 Law T. (N. S.) 486.

Argument, to show that the transaction of issuing the stock in payment for the mineral land would have been valid if unmixed with fraud, is scarcely necessary, as the proposition is one which finds support in the daily transactions of life. Spargo's Case, 8 Ch. App. 413. Shareholders are not required to suspect fraud or to institute inquiries where all seems fair and conformable to the requirement of law and fair dealing. Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29. Where certificates of shares were issued as fully paid up, when in fact no payment had been made, it was held in the chancery court of appeal, reversing the vice chancellor, that by the issue of the certificates the company were estopped from alleging that the stock was not paid up, and that an innocent holder of the shares could not be placed on the

list of contributories in respect to such shares as unpaid shares. Nicholl's Case, 26 Wkly. Rep. 334.

Three of the judges gave opinions: The master of the rolls said: "Where you have a receipt given you by the company, a final receipt as a certificate of payment, what more is a bona fide purchaser to ask for, and what occasion has he to make inquiry? He has the representation of the company by the certificate that the shares are fully paid up. It appears to me the company, having made that representation by the certificate to be used by the vendor as evidence of title, is estopped from saying afterwards that the company has not received the money. * * * It appears to me impossible that the company should be allowed to say the shares were not paid up in due course." James, L. J.: "Every person connected with the company who issues a certificate for paid-up shares in money, when the money or value has not been paid, is guilty of a personal wrong towards the company, and may be made answerable for it in exactly the same way and to the same extent as if the money had been taken out of the coffers of the company to pay up the shares, or as if by some fraud of the directors and officers receipts had been given for the payment when payment had not been made. If any person is a party to such a breach he can be made answerable for it, but that cannot affect the position of one who says, 'You made a representation to me, and you are bound by every principle of law and equity to make good the representation upon the faith of which I was induced to act.'" Thesiger, L. J., held that any such shareholder may show either that the shares have been paid up in fact, or that the company whom the liquidator represents have, by their words or conduct, estopped themselves from disputing that the shares have been so in fact paid up.

Certificates of shares in due form were issued as paid-up shares, and there is much reason to hold that the corporation, as to innocent holders of the same, is estopped to set up the defence that they are void. They admit that the shares were paid up to the extent of fifty per cent, and the opinion of the bankrupt court contains a finding of the same import, which strengthens the position that the corporation is estopped to set up the defence that the certificates are void. Riche v. Ashbury Ry. C. & I. Co., L. R. 9 Exch. 264.

Power to issue shares was possessed by the company, and hence the rule, that the holder takes nothing where the power is entirely wanting, does not apply. Ferguson v. Landram, 436;[2] Stace's Case, 4 Ch. App. 688. Cases arise, however, where the suit was against the perpetrators of the fraud, or against holders of the stock, with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put them upon inquiry, in which the rule is different. Equity, in such a case, regards the property of the corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it in whosesoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, or to any dividend of the profits, until all the debts of the corporation are paid. Railroad v. Howard, 7 Wall. (74 U. S.) 409.

Assignees in bankruptcy in such a case represent creditors as well as the bankrupt, and may disaffirm the contract, or retain what passed to the bankrupt and proceed for damages against the perpetrators of the fraud, or against subsequent transferees of the stock with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put him upon inquiry. Decided cases which assert that rule are quite numerous and decisive. Two or three cases of the kind deserve consideration, of which the following is, perhaps, the most important.

Money was owed to the corporation for a subscription to the capital stock, and the debtor and the officers of the company entered into an agreement to extinguish the stock debt, and to convert it into a debt for the loan of money. Bankruptcy of the corporation ensued, and the assignee claimed that the stock debt was due. Justice Miller gave the opinion, and, in replying to the argument that the assignee can assert no greater right than the bankrupt, said: "The assignee is the representative of creditors, as well as of the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt would be bound. * * * Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation is a trust fund for the benefit of the general creditors of the corporation." Sawyer v. Hoag, 17 Wall. [84 U. S.] 619. To the same effect also is the case of Upton v. Tribilcock, where the opinion was given by Justice Hunt. He decided that the original holder of stock in a corporation is liable for unpaid instalments of stock without an express promise to pay the amount, and that a contract between such a subscriber and the corporation or its agents, limiting the liability therefor, is void, both as to the creditors of the company and its assignee in bankruptcy; that representations by the agent of a corporation, as to the non-assessability of its stock beyond a certain percentage of its value, constitute no defence to the action against the holder of the stock to enforce payment of the entire amount subscribed, where the holder has failed to use due diligence to ascertain the truth or falsity of such representations. Upton v. Tribilcock, 91 U. S. 45. Due care and diligence was not exercised by the

[2] [5 Bush, 230.]

purchaser in that case, although the proof was full to the point that he was legally put upon inquiry. Thomas v. Bartow, 48 N. Y. 193. Half a century before these cases were decided, Judge Story held that the capital stock of a corporation was a trust fund for the payment of the debts of the corporation, and that it might be followed into the hand of the stockholders or of any persons having notice of the trust attached to it. Wood v. Dummer [Case No. 17,944].

Trusts are enforced not only against those persons who are rightfully possessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust and with notice of the same, and whoever comes so into possession is considered as bound, with respect to that special property, to the execution of the trust. Taylor v. Plumer, 3 Maule & S. 574; Adair v. Shaw, 1 Schouler & L. 262. Reported cases almost without number lay down the same rule, but those referred to will be sufficient to illustrate the principle. Nothing is alleged in the bill of complaint tending to show that the respondents were participants in the fraud, or that they had notice of the transaction, or knowledge of any facts or circumstance tending to put them upon inquiry; and if there were any such matters alleged in the bill of complaint it could not benefit the complainant, as it is settled law that in such a case the cause of action arose in favor of the complainant when the estate of the bankrupt corporation vested in him as the assignee in bankruptcy.

Where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills, in proportion to the number of shares held by the stockholders respectively, the supreme court held that the liability of the stockholder arose when the bank refused or ceased to redeem, and became notoriously insolvent. Terry v. Tubman, 92 U. S. 156. Just the same question, with others, was presented to the supreme court in a subsequent case in which the court held—the chief justice giving the opinion—that the liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank, and that all such balances passed to the assignee under the assignment, which, by the bankrupt act, is of all the property, estate, credits, and assets of the bankrupt, whether a corporation or an individual; and, for all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them as such stockholders. Kennedy v. Gibson, 8 Wall. [75 U. S.] 505; Com. v. President, etc., of Cochituate Bank, 3 Allen, 42; Baker v. President, etc., of Atlas Bank, 9 Metc. [Mass.] 182; Terry v. Anderson, 95 U. S. 632. Apply that rule to the case before the court and it follows that, even if the bill of complaint had charged that the respondents had notice of the fraud, or were put upon inquiry in that regard, it would not have benefited the complainant, as in that event his claim would have been barred by the two years' limitation of the bankrupt act. Bailey v. Glover, 21 Wall. [88 U. S.] 342.

Purchasers of stock, where it appears upon its face that it was only partially paid up, may be held liable to pay up the unpaid instalment; but the authorities to that effect have no application in this case. Webster v. Upton, 91 U. S. 65; Upton v. Hansbrough [Case No. 16,801]. Adjudged cases, in which it has been held that creditors or assignees in bankruptcy may enforce such payments when the corporation would be estopped to do so, are suits against original subscribers or transferees implicated in some way in the fraudulent transaction. Upton v. Tribilcock, 91 U. S. 45. Failure to use due diligence when put upon inquiry was the ground of the decision in that case. Oakes v. Turquand, L. R. 2 H. L. 325. Whatever remedy for the fraud the assignee had, it is evident he might have pursued at any time after he acquired title to the bankrupt's estate. Ex parte Currie, 7 Law T. (N. S.) 486; Carling's Case, 1 Ch. Div. 124; 9 Ch. Div. 60; De Ruvigne's Case, 5 Ch. Div. 323.

Demurrer sustained. Bill of complaint dismissed.

Case No. 4,935.

FOREMAN v. HOLMEAD.

[5 Cranch, C. C. 162.] [1]

Circuit Court, District of Columbia. March Term, 1837.

DEPOSITIONS.

A deposition cannot, under the act of congress, be taken before a judge of the city court of the city of Lexington, in Kentucky.

Mr. Redin, for plaintiff, offered to read a deposition taken before the judge of the city court of the city of Lexington, in Kentucky.

Mr. Brent, for defendant, objected that the judge was not such a judge or chief magistrate as is described in the 30th section of the judiciary act of 1789 (1 Stat. 73); and—

THE COURT (MORSELL, Circuit Judge, absent) refused to suffer it to be read.

Case No. 4,936.

The FOREST.

[1 Ware, 429.] [2]

District Court, D. Maine. Oct. 26, 1837.

SEAMEN—RIGHT TO BE CURED AT EXPENSE OF SHIP—MEDICINE CHEST.

1. By the general maritime law, if a seaman becomes sick during the voyage, he is entitled to be cured at the expense of the vessel.

[Cited in The Ben Flint, Case No. 1,299; Brown v. The D. S. Cage, Id. 2,002.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Edward H. Daveis, Esq.]

2. The act of congress of July 20, 1790, c. 56, § 8 [1 Stat. 134], exempts the owner from the expense of medical advice and attendance, provided there be a medicine chest on board, with suitable medicines and directions for their use. But the owners are not exempted from these expenses although there be a medicine chest on board, when the seaman cannot have the benefit of the medicine, whether it be because he is removed ashore, or that there is no person on board the vessel by whom the medicine can be safely administered.

3. Where the master, mate, and four of the men were sick with the yellow fever at the same time, it was held that the owners were bound to pay the expenses of the attendance and advice of a physician, although a suitable medicine chest had been provided.

This was a libel for subtraction of wages. The libellants shipped for a voyage from Portland to one or more ports in the island of Cuba, and back to Portland. The service was performed, and there was no controversy about the amount of the wages earned. The only question in dispute was as to the claim of a deduction from the wages in the nature of a set-off. While the brig lay at Havana, the master [Blake], mate, and four of the crew were taken sick of the yellow fever, and the owners claimed to deduct from the wages of the men the sums paid to a physician for medical advice. These sums amounted to more than the whole balance of wages due.

Mr. Haines, for libellants.

Fessenden & Deblois, for respondents.

WARE, District Judge. The question whether the deductions claimed to be made in this case by way of set-off should be allowed, depends on the true construction of the 8th section of the act of congress of July 20, 1790, c. 56 [2 Bior. & D. Laws, 114; 1 Stat. 134, c. 29], and the act of March 2, 1805, c. 442 [3 Bior. & D. Laws, 657; 2 Stat. 330, c. 28]. The act of 1790 requires every vessel of 150 tons and upwards, navigated by ten or more persons, when bound on a foreign voyage, to be "provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and said medicines shall be examined by the same, or some other apothecary once at least in every year, and supplied with fresh medicines in the place of such as have been used, or spoiled; and in default of having such medicine chest so provided, and kept fit for use, the master or commander of such ship or vessel, shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of, in case of sickness, at every port or place where the ship or vessel may touch, or trade, during the voyage, without any deduction from the wages of such sick seaman or mariner." The act of March 2, 1805, extends the provisions of this section to vessels of seventy-five tons, navigated by six or more persons, and bound to any port in the West Indies.

It will aid us in giving a construction to the statute, to consider what was the state of the law when it was enacted. Before the passing of this act, a seaman, when he received any injury while in the service of the vessel, or became sick during the voyage, and the sickness was not occasioned by his own fault, was entitled to be cured at the vessel's expense. The whole expense of his sickness, that for medical advice and attendance, as well as other expenses, whether he remained on board or was put on shore, was a charge on the ship. In the case of Harden v. Gordon [Case No. 6,047], where this subject was most fully and learnedly examined, it is shown that this principle, which makes the expenses of the sickness of any of the crew a charge on the vessel, is adopted as customary law, or incorporated in their maritime codes by nearly every nation of Europe. It is shown also to have been established among the usages and customs of the sea, from the earliest epoch to which we can trace the elements of the existing maritime law of the great commercial commonwealth of Christendom. It is found in nearly all those early digests of maritime law, which in various places were made for the regulation and government of maritime commerce upon the revival of civilization, letters, and the peaceful intercourse of commerce during the middle ages. It is not certain that the principle does not remount to an age even anterior to the Christian era, as we find traces of it in that ancient compilation of law which goes under the name of maritime law of the Rhodians. 1 Pardessus, Collection des Lois Maritimes, c. 2, p. 258; Id. c. 46, p. 257. And it is not questioned that this generally received principle has been adopted as part of the maritime law of this country. It has been supposed by learned judges that this provision in the act of congress was intended as a benefit to the mariner, and not as a measure of relief to the shipowner,—Walton v. The Neptune [Case No. 17,135]; Swift v. The Happy Return [Id. 13,697]; Lamson v. Westcott [Id. 8,035]; that it was not the intention of the legislature to deprive the mariner of any advantage, which the law before allowed him, but to provide additional security for his health and comfort. And this is certainly the inference which would naturally arise from the terms in which the law is expressed. It imposes on owners a new obligation, to which they were not subject by the maritime law, without liberating them in its terms from any liabilities, to which they were subject before. And it professedly subjects the master, within the range of whose peculiar duty it would be to see that the law is complied with, to a personal liability in case it is not; to which perhaps it may have been doubted whether he was subject by the general maritime law. For though there could be no doubt of the liability of the master for wages upon the ground of the contract, it might not have been deemed so certain that he was liable for the extraordinary expense of sickness of the crew, a liability not resulting from the terms

of the contract, but imposed on the owners by the policy of the law. Harden v. Gordon [Id. 6,047].

But whatever may have been the intention of the legislature, the act appears early to have received a judicial construction by which the owners were exempted from their liability for medical advice and attendance in case a medicine chest was provided in compliance with the law. To this extent the act was held to be an implied repeal of the pre-existing law. The medicine chest, with the directions for the use of the medicine, was held to be a substitute for the advice of a physician. Though in the ordinary complaints with which seamen are affected, the medicine may without doubt be safely administered by the master with the aid of the printed directions which accompany the chest, yet it cannot be doubted that it would be an act of temerity in him to undertake to prescribe under such general directions as those with which he is furnished, for the case of dangerous and malignant disease, such as the libellants were affected with in this case; and great doubts have been repeatedly expressed, allowing the received construction of the statute to be correct, whether it ought to be extended to exempt the owners from the charge for medical advice in such cases. Swift v. The Happy Return [supra]; Lamson v. Westcott [supra].

But admitting that the providing of a chest of medicines with proper directions for their use, by the operation of the statute, exempts the owners from the charge for medical advice and attendance, it can only have that effect when the seamen can have the benefit of the medicine, administered under the printed directions for its use by the master or some other person fit to be intrusted with so delicate a duty. If the medicine chest is inaccessible to the seaman, it is the same thing to him as though none were provided. If the medicine chest is deemed by the law a substitute and an equivalent for the advice of a physician, it can only be so when the seaman can have the use of it, safely and properly administered. It cannot be pretended that he has the advantage of the medicine, when there is no person on board by whom it can be administered, or, what amounts to the same thing, no person of such intelligence and discretion, that it would be safe to intrust him with a duty of so much delicacy and responsibility. Would there be any safety in sending a common sailor to the medicine chest with the printed directions to serve out medicine to a patient laboring under a disease of such violence as the yellow fever? Surely but one answer can be given to this question. But the seamen are as much entitled to the benefit of the printed directions as they are to the medicine, and the owners, to bring themselves within the statute exemption, are as much bound to furnish one as the other. It may be said that the owners have done all in their power; they have provided a sufficiency of medicine with directions for its use; and having done all that is required by law, they are not in fault and ought not to be rendered responsible for the act of God. "Casus fortuitus nemini facit injuriam." The general principle of law is admitted. But it applies with equal force in favor of the seaman as it does for the owners. It is no fault of his that the medicine is inaccessible to him. Still the consequences of this unavoidable casualty must be borne by one or the other. On whom then does the law leave it? When a party claims under a special act of the legislature an exemption from any particular liability to which he is subject by the general law, he must show that the condition on which the exemption is granted, has been complied with. It is no excuse for him to say that a fortuitous event has rendered the performance of the condition impossible. When a right is to vest on the performance of a condition, and the condition becomes impossible before the right vests, the right is gone; and when a party claims the benefit of an exception, he must bring himself within the exception. It is not enough for him to say that he was prevented from doing it by an overruling fatality.

The application of these principles to the section of the law under consideration does not rest in speculation merely. It has been established by judicial decisions. In the case of The George in the circuit court of Massachusetts, and in the same case in the district court,—The George [Case No. 5,329]; Lamson v. Westcott [supra],—it was decided that if a sick seaman was put on shore for the convenience of the ship, the expense of medical advice, as well as the other expenses of sickness, were a charge on the vessel, notwithstanding there might be a sufficient medicine chest on board. The decision rests on this plain principle, that the seaman is deprived, without his own fault, of that which the law has directed as a substitute and equivalent for the advice and attendance of a physician; that he is entitled to the benefit of the directions for the use of the medicine, and to their being administered by some person fit to be intrusted with such a service, as well as to the medicine itself.

If these principles be applied to the facts of the present case, the conclusion to which they lead is very obvious. The master was first taken down sick with the yellow fever, a disease in that climate of the most dangerous and malignant character; and which ordinarily proves fatal unless the most powerful remedies are promptly applied. Before his recovery the disease simultaneously seized the mate and three of the men; and after a short interval, and before the full recovery of those first taken sick, the fourth man. If the disease had been of a less malignant character than it in fact was, of what use would a chest of medicine be on board a vessel when the whole ship's crew were sick? Would it be safe or prudent for the sick to prescribe

for the sick? Would it not be considered as the height of imprudence, when the advice of a physician could be obtained? The mate seems to have thought so, and finding himself and all the crew, excepting one man, with the symptoms of the approaching fever upon them, immediately called a physician.

It is said that some of the men objected, and it is argued that as the physician was not called at their request, the expense ought not to be charged upon them. It is also said that the advice of a physician might not have been necessary. I do not, however, put my opinion on that ground. I think that there was no reason to doubt that the disease was the yellow fever, and that the advice of a physician was necessary, not improbably indispensably so, to the preservation of their lives. The fever was then prevailing in the place with great virulence, and swelling to a melancholy extent the bills of mortality. When the physician saw his patients he pronounced the malady to be the yellow fever, prescribed for it as such, and they all recovered under his prescriptions. In my opinion the mate was not only justifiable in calling a physician without the consent of the seamen, but would have been hardly excusable if he had not done so. All, who are conversant in maritime affairs and acquainted with the habits of seamen, know their carelessness with regard to the exposure of their own health and safety. The apprehension that the earnings of the voyage may be absorbed by physicians' bills, is more than enough to overbalance their fears for their own health. It is for these reasons that the maritime law, with a provident regard, not less to the general interest of commerce than to the safety and health of this valuable class of the community, made the expenses of the sickness of the crew a charge on the vessel. It is the duty of the master to call in the aid of a physician when it is necessary to preserve the health of his men. The case now before us is a strong one to illustrate the wise forecast of those who introduced this principle into the customary law of the sea, and to show that in its operation it is equally beneficial to the owners and the mariners. If the advice of a physician had not been obtained, it is, to say the least, probable that this vessel might have lost her whole crew. It was far better for the owners, in point of economy, and looking to the prospects of the voyage in a mere pecuniary point of view, to say nothing of the duties of humanity, to pay the physician's bill, than to risk the loss of the crew and incur the extraordinary expense and delay of collecting a new crew in a sickly port.

My opinion is that the wages are due without the deduction of the charges for medical advice and attendance, that it is not the intention of the law that the fact of a medicine chest being provided with suitable medicines and directions, should be held as a substitute for the advice and attendance of a physician, in cases in which the seaman without any fault of his own, cannot have the benefit of them, from whatever cause it may be, whether because it becomes necessary to put him ashore, or because there is no person on board by whom the medicine can be administered.

FOREST CITY, The. See Case No. 301.

Case No. 4,937.

The FOREST KING.

[Blatchf. Pr. Cas. 45.] [1]

District Court, S. D. New York. Aug., 1861.[2]

PRIZE—ENTRY INTO BLOCKADED PORT—SUPPLIES—RESTORATION OF CARGO—CONDEMNATION OF PART OF VESSEL.

1. Cargo restored, being neutral property, and there having been no attempt to violate the blockade; but no costs or damages awarded, as the vessel was confiscable in part.

2. In the absence of notice of a blockade, an inquiry at a blockaded port excused.

3. An entry into a blockaded port to obtain necessary supplies excused.

4. A part of the vessel condemned as enemy property; the rest of the vessel restored.

In admiralty.

BETTS, District Judge. The schooner Forest King, her tackle, &c., and cargo were captured on the 13th day of June, 1861, in the harbor of Key West, by the United States flag-ship Mississippi, under command of William Mervine, flag-officer. The libel charges that various other vessels of the United States were in sight at the time of such capture, and that the master of the schooner had notice and due warning of the blockade of the port of Key West, yet entered such port and violated the blockade thereof, whereby the schooner and her cargo became liable to condemnation as lawful prize; that the cargo laden on the schooner was enemy's property and liable to seizure and condemnation as such. The owners of the vessel, alleging that she was held in separate shares, all but four thirty-second parts, or one-eighth part, by residents in the state of Massachusetts, and that the one-eighth share is owned by a resident in Darien, Georgia, intervene and claim the vessel as an American bottom, owned by citizens of the United States, and deny that she is subject to seizure by reason of any charges in the libel contained. They state that she sailed under a charter-party dated at New York, January 17, 1861, for a voyage to Rio Janeiro, in Brazil, and back to an Atlantic port of the United States north of Cape Hatteras, or Gulf port of discharge in the United States, (Philadelphia and Boston excepted,) took on board

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Affirmed by circuit court. Case not reported.]

a cargo of coffee in bags, and sailed from that port April 20, last past, bound to New Orleans; that having learned that the Mississippi was blockaded, she altered her course and spoke the blockading squadron at Pensacola for information, and there had a warning indorsed on her register against entering Pensacola, or any other port south of the Delaware, as they were all blockaded; that the schooner on June 30 entered the port of Key West to obtain supplies, and for no other purpose; and that the vessel was there seized as prize. The claimants also interpose exceptions similar in substance to those taken in other antecedent causes to the course and validity of the suit and the jurisdiction of the court.

The firm of Rostron, Dutton & Co., trading at Rio Janeiro, and of Richard Rostron & Co., (through their agent,) of Manchester, England, British subjects, intervene and claim the whole cargo seized, and deny that the master was their agent, in relation of the cargo, in the navigation of the ship; that any of the owners of the cargo were and are enemies of the United States; that they had any knowledge or notice that Key West was blockaded, or that they attempted or intended to violate any blockade in the importation of the above cargo; and a commercial agent of theirs verifies the statement of their interest in the claim by his test affidavit.

Upon the issues and proofs, it appears to the court that no rightful cause of seizure is established against the cargo that was shipped, by two bills of lading, dated April 16, 1861, at Rio Janeiro, by the claimants, to P. A. Giraud & Co., or to their assigns, in New Orleans. Two causes of seizure are alleged against the cargo: First, that it was the property of citizens and residents of a blockaded port, and belonged to the consignees, who are enemies of the United States; and, secondly, that the ship, with knowledge that the port was blockaded, attempted to violate the blockade; and it would seem, further, to be urged that she was confiscable for afterwards entering Key West under formal warning.

Supposing the rule is not definite, whether the consignors or consignees shall, in presumption of law, be deemed owners of goods in transitu, on affreightment, evidence is furnished, in this case, which relieves that uncertainty, and shows that the cargo was shipped as English property by the consignors. It is so stated in the test oath by the agents of the owners, and also in the affidavits made before the British consul in Rio Janeiro, upon the bills of lading, at the time of their execution; and the consignors assumed control of the consignment in written instructions directed to the master after the vessel sailed, and which were taken with the ship's papers. These supply but slight facts, but are sufficient to indicate that the property was not intended to vest in the consignees, but remained at the control of the shippers on the voyage; and it belonged to the captors to give evidence changing that presumption. Had the evidence, then, convicted the master of an intent to violate the blockade, it would not affect the neutral cargo, because he is not shown to have been agent of the owners of the cargo, so as to render his illegal act binding upon them, or to subject their property to his control. The cargo, therefore, must be restored to the claimants, but, the ship being in part confiscable for other cause, the captors are not responsible to the claimants for damages because of the arrest of the cargo, that having been placed at the risk of the owners, in a bottom liable to seizure and condemnation by the prize law.

I do not think adequate proof has been given by the libellants to convict the schooner of a wilful attempt to violate the blockade after notice thereof. The voyage round was undertaken at New York, in January, 1861, and the cargo was laden on board, and the vessel cleared on the voyage in question, at Rio Janeiro, on or about the 16th day of April, 1861, so nearly coincident with the earliest public act of the president of the United States recognizing the commencement of public hostilities by the insurgents against the United States, and the proclamation by Jefferson Davis, president of the Confederate States, announcing such hostilities, that it would, on account of the distance of the United States and Brazil apart, be impossible for actual notice to have reached the claimants that their shipment could not legally be directed to New Orleans. Prize courts regard physical disabilities of that character, in judging the bona fides of commercial operations, and forbear exacting from neutrals that exactitude, in conforming to the instructions or conduct on very remote adventures, which would be enforced in those within reasonable proximity. The Betsey, 1 C. Rob. Adm. 332; Wheat. Capt. 194, and cases cited.

The master testifies that he approached Pensacola to ascertain the fact whether a port could be entered in that vicinity free from blockade, and that he, in making that attempt, received the first formal notice of the blockade of that section of the coast and up to the capes of the Delaware. I consider that his conduct in making the inquiry or search he did was blameless. So, also, I regard it as within the fair spirit of the doctrine adverted to that the master, under the information and suggestions given by officers of the United States blockading squadron off that coast at the time he was warned off, that he could properly go into Key West for supplies or stores, committed no evasion of the blockade of that port in entering therein. This is recognized by Lord Stowell as a fair and reasonable excuse for the entering of a blockaded port (The Neptunus, 2 C. Rob. Adm. 110) by a vessel acting in good faith on such notice; and as no claim for further

proof has been made to the court to correct or impeach the testimony to this point, I shall accept the statement as true, and presume that the schooner was taken by her master into Key West for the purpose of obtaining supplies necessary to the voyage. Neither he nor his mate seems to have been required, on the preparatory examinations, to specify the wants of his vessel at Key West, or whether or not they were obtained by her. I must, on the case as it stands, regard the object of her visiting Key West as admitted to be that stated by the witnesses in their examination in preparatorio. The visit was for an allowable object, and the doings of the master do not therein compromise the safety of the vessel. The extra extent of the voyage to be performed renders probable the assertion that the vessel required further stores, and, at all events, removes the suspicions that generally apply to such excuses. The Fortuna, 5 C. Rob. Adm. 27; The Hurtige Hane, 2 C. Rob. Adm. 124.

I shall, accordingly, reject the application to condemn the vessel in full, and direct seven-eighths of the value to be restored to the loyal owners named as claimants. One-eighth of the value of the vessel owned by a claimant resident in the state of Georgia, being enemy's property, is condemned, with costs; and, part of the vessel being rightfully seized as enemy's property, the owners of the cargo are not entitled to costs against the captors.

The decree in this case was affirmed on appeal, July 17, 1863. [Case not Reported.]

FOREST KING, The. See Cases Nos. 6,451 and 12,261.

Case No. 4,938.

The FOREST QUEEN.

[3 Ben. 181.] [1]

District Court, N. D. New York. March, 1869.

COLLISION ON LAKE ERIE—STEAMER AND SCHOONER—LOOKOUT—PRESUMPTION OF FAULT—CHANGE OF COURSE.

1. Where a collision takes place between two vessels, neither of which had a proper lookout, it is most likely that both vessels were in fault.

2. Where it is not clear what particular fault or faults should be deemed to be the more immediate and real cause of the collision, the absence of a lookout, and the want of careful attention to his duties on the part of the officer in charge of each vessel may be considered to be the causes of the disaster.

3. Inability of the officer in charge of a steamer to give instant orders to the engineer, when a collision is impending, is negligence.

4. A change of course made by a sailing vessel, in accordance with a hail from an approaching steamer, cannot be considered as a fault chargeable to the sailing vessel.

This was an action for collision, brought by the Western Transportation Co., owners of the propeller Tonawanda, against the schooner Forest Queen. The collision occurred on the night of the 22d of October, 1868, near Long Point in Lake Erie.

The propeller was about two hundred feet in length, and her speed was about eight or nine miles an hour. Her lights were good and the night though dark was not foggy. The master of the propeller, who had had the watch on deck for more than an hour, testified among other things, that the wind was about north, blowing quite fresh, and that the propeller's course was east by south; that he was standing a little abaft the capstan when he first made the white light of the Forest Queen, about twenty minutes before the collision, and about a point on the port bow of the propeller; that he remarked to his second mate that it was Long Point light; that his second mate took the glass and looked at the light and said, "No, sir, it is a vessel, I can see her green light;" that he (the master) then took the glass and could see both her red and green lights; that the schooner stood along, showing both lights five minutes, more or less; that she then shut in her green light and showed her red, and then bore about a point off the propeller's bow; that she stood along in that position ten or fifteen minutes, showing only her red light, which seemed to open on his port bow, and that the propeller continued on in her course of east by south; that the red light opened on his port bow until it bore from two to two and a half points off that bow, when the schooner shut in her red and showed her green light; that she might then have been a quarter of a mile off, and that up to that time there had been no indication of danger; that he then spoke to his second mate and said: "She has shown her green light; what is the meaning of that?" and that his reply was, "She has probably thrown off a little and will straighten up in a moment;" that he (the master) then took the glass and saw that the schooner was "standing right for" the propeller, and that the second mate at the same time started for the pilot house; that he (the master) ordered the wheel "right a-port" as soon as he saw the green light through the glass, and ordered it "hard a-port," in two seconds or but a few seconds after he saw the green light without the glass; that the wheelsman answered his order, and that, a minute or a minute and a half afterwards, the vessels struck; that he should judge the propeller had swung from two to three points before she was struck; that the schooner struck the propeller on her port bow, about twenty or twenty-two feet from her stem, and at an angle of about five points between the sterns of the two vessels, as near as he could judge; that the lookout had been on duty all night and had gone aft, about five minutes before the collision, and was then aft; that, while he was aft, the witness and his second mate were on the promenade deck; that he did

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

not think there was time, after the red light was shut out and the green light appeared, to stop and reverse his engine; and that, when the schooner was four or five lengths from the propeller, he sung out to the schooner to put his helm hard up (to the starboard).

The testimony of the master of the schooner (who was also part owner) showed that she was one hundred feet in length; that the collision occurred about half past two o'clock and that he had not left the deck that night; that he made the light of the propeller about twenty minutes before the collision, and from half a point to a point on the schooner's starboard bow; that he then took it to be a green light; that the schooner's course was then west by south, but that he immediately changed her course to west south west, and that she was kept steady on that course until just before the collision; that immediately after giving the order to change her course to west south west, he observed that the propeller's light was from a point and a half to two points off his starboard bow; that the schooner went on steady on her course of west south west, and the propeller's light opened more on his starboard bow; that ten minutes before the collision the man who had been on the lookout was sent aft, to assist at the wheel and keep the schooner steady, the wind being puffy; that he (the master) remained between the foerigging and the foremast, and that the greatest distance the light bore on his starboard bow was about four points; that, when that was the bearing of the light, he observed a change in the propeller's course, and got a dim sight of her red light; that he had not before seen either of her colored lights; that after seeing the red light, and at the same time, came the call from the propeller to put his wheel hard up, and he sung out to the men at the wheel, "hard up," and got a response from both of them; but before there was time to get the wheel more than half up, the vessels struck at about a right angle.

Geo. B. Hibbard, for libellants.
Albertus Perry, for claimants.

HALL, District Judge. Upon the pleadings and proofs, it is entirely clear that the collision was caused by gross negligence, or grosser unskillfulness; but it is not entirely certain whether it was caused by a fault or faults imputable to only one of the vessels, or whether both vessels were in fault. It is, however, certain, that neither of the vessels had a proper lookout, at the time when the services of a competent and faithful lookout would have been of the most essential service in preventing the collision; and it is, therefore, most likely that both were in fault.

The absence of a proper lookout, and the want of careful attention to his duties, on the part of the officer of the deck, of each of the vessels, may sufficiently account for the absence of any testimony showing what particular fault or faults should be deemed the more immediate and real cause of the collision; and these circumstances may well be considered as the remote, if not the proximate, causes of the disaster.

The evidence in the case is, in most respects, unreliable and unsatisfactory; and there is not only much conflicting testimony, but it is also quite difficult, if not impossible, to reconcile many of the statements of the witnesses, on either side, with some of the admitted facts of the case.

As examples of the difficulty just alluded to, it may be useful to refer to the testimony of the master of each of the colliding vessels, in respect to their relative position, at the time each observed the change in the course of the other vessel;—to which change he attributes the collision. It should, first, be remarked, that the vessels were running in nearly opposite directions—there being but a single point between the lines of their respective courses—and that the speed of the propeller was about eight miles, and that of the schooner about nine miles, an hour. The testimony of the master of the propeller tends to show that the change of the schooner's course was made when she was about eighty rods distant, and from two to two and a half points off the propeller's port bow. Now, if this is correct, the schooner—fixing her position at two and one-fourth points off the propeller's bow—was more than thirty rods to the northward of the line of the propeller's course, and only about seventy-four rods to the eastward, and it is incredible that the schooner could have changed her course, as stated, and have reached and struck the propeller, except by a well-directed and persistent effort to follow the propeller, and produce a collision. On the other hand, the testimony of the master of the schooner tends to show, that the change of course made by the propeller, was made four or five minutes before the collision, and when she was four points off his starboard bow—a statement more incredible than that of the master of the steamer, as the bearing was more off the bow, and the schooner's speed exceeded that of the propeller;—especially, as the propeller's wheel was ported at the time of the change, and the testimony of the master of the schooner is, that the course of his own vessel was not changed, until it was changed under a hail from the propeller; and as the position of the claimant is, that it was not changed until it was apparently necessary, to lessen the chances, or diminish the force of the collision, which, as the event proved, it was then too late to avert. In truth, this case is one in which no very satisfactory conclusion in regard to the material questions of fact, controverted at the hearing, can be reached; but, unless several witnesses have been guilty of deliberate perjury, it must be conceded, (notwithstanding there is testi-

mony from other witnesses which would lead to a different conclusion,) that each vessel exhibited her proper signal lights; and, that such lights might have been seen at a distance of more than two, if not more than three, miles, on the night of the collision. It is, therefore, clear that the collision was caused by negligence or fault in the management of these vessels, or of one of them.

Upon the whole evidence, it is clear, that the propeller was in fault, because she had no competent lookout stationed and kept on duty, during the time when the services of a lookout were most essential, for the purpose of preventing the collision which occurred. It is quite certain that, with a proper lookout, and a competent officer of the deck, in the best position to secure prompt action on the part of the engineer and wheelsman, the collision might have been avoided. The officer of the deck was at a distance from the point where he should have been, to communicate instant orders to his engineer; and the consequence was, that no orders to stop the engine were given. This should have been done, and the omission must be considered as a fault which may have contributed to the collision.

It is clearly shown that the schooner was in fault, in not having a competent lookout stationed and kept in the faithful discharge of that duty. The failure to observe the colored lights of the propeller shows that no sufficient lookout was kept by any one; and the master, knowing that the lookout had been sent aft, did not use ordinary care in the discharge of his duty as officer of the deck. The negligence thus distinctly proved, the testimony on the part of the libellants, and other circumstances, create grave doubts in regard to the correctness of the statements in respect to the steady and continued course of the schooner; and these doubts are much increased by the difficulty of accounting for the collision, upon the case made by the claimants —assuming a change of course, on the part of the propeller, when her light was four points off the starboard bow of the schooner.

Besides the faults which have been already imputed to the propeller and schooner, it is now quite certain that, if the propeller had put her helm hard-a-starboard, when it was put hard-a-port, there would have been no collision, if the schooner's course and change of helm were such as appears from the testimony; and if the propeller's course and change were those stated by her master, it is also quite clear that there would have been no collision, if the schooner's helm had been put hard-a-port, when it was put hard-a-starboard, or even if the schooner's course had remained unchanged. The change of course was, doubtless, made by both vessels, very near the same time, and each must have swung about three and a half or four points —or one somewhat more, and the other about as much less, than that—in order to strike at the angle they did actually strike, as established by the pleadings and evidence. Indeed, the testimony of the master of the propeller even indicates a greater change than that, or nine or ten points of change, to be divided between the two vessels.

The change made by the schooner, under the hail made by the master of the propeller, cannot be a fault chargeable to the schooner; and my experience in collision trials has satisfied me that a master who assumes to take command of an approaching vessel, with which his own is likely to come in collision, generally acts unwisely. The master of a steam vessel is rarely called upon to direct a change of helm on an approaching sailing vessel, unless his own negligence has previously brought the two vessels into imminent danger of collision.

From the best consideration I have been able to give the case, it must be considered one of mutual fault, and the damage to both vessels must be aggregated, and then equally apportioned; and no costs will be allowed to either party, as against the other.

Case No. 4,939.

FORMAN v. CAMPBELL.

[9 Ben. 472.] [1]

District Court, E. D. New York. April, 1878.

BANKRUPTCY—FAILURE OF ASSETS—SECURITY FOR COSTS.

An assignee in bankruptcy who is prosecuting an expensive litigation, and is without funds belonging to the estate, may be required to furnish security for the costs.

[This was a suit by James Forman, assignee, against Felix Campbell.]

C. F. Dickinson, for plaintiff.

A. J. Perry, for defendant.

BENEDICT, District Judge. The power to stay proceedings till security for costs shall be filed, is a power inherent in every court, and may be exercised independently of any statute. Swift v. Collins, 1 Denio, 659; People v. Oneida Common Pleas, 18 Wend. 652.

This power may properly be exercised in a case like this, where an assignee in bankruptcy, who is substantially without funds belonging to the estate, is prosecuting an expensive litigation. He may well call upon the creditors who are to reap the benefit of the litigation if it succeed to furnish him security to pay the costs of the litigation if it should fail.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

Case No. 4,940.

FORMAN et al. v. MILLER et al.

[5 McLean, 218.] [1]

Circuit Court, D. Ohio. April Term, 1851.

CONTRACTS—DEGREE OF CARE AND SKILL REQUIRED IN PERFORMANCE—DAMAGES.

1. Persons undertaking to pack pork, are bound to exercise all the skill and care which the business requires.

2. And if any part of the pork packed prove to be unsound, the jury will ascertain whether the unsoundness was attributable to the manner in which it was put up.

3. The damages sustained by the plaintiffs, for whom the work was done, may be ascertained by comparing the sales of the unsound article, with the market price for a good article.

[This was a proceeding by Thomas S. Forman and others against E. J. Miller and others.]

Mr. Chase, for plaintiffs.
Mr. Fox, for defendants.

OPINION OF THE COURT. This suit is brought on a contract made between the parties, in which the defendants agreed to cut hogs enough to make fifteen thousand pounds of prime and mess pork. The declaration charges that the pork was badly put up, that many of the barrels were injured, and several of them fell short of the weight, and damage was claimed for meat not accounted for. The price for packing per barrel, and finding the salt, was fixed at one dollar and seventy cents; for selling shoulders per hundred pounds, sixteen cents; for selling hams, heads, and offal, two and a half per cent. Hams to be sold at four and one-half cents per pound, and lard at six and one-fourth cents. Rendering lard at thirty-three and one-third cents per one hundred pounds. And the defendants agree to give sixteen cents for each hog's head that may not be wanted in making prime pork. Six thousand shoulders were to be delivered to Holmes & Co., of Pittsburgh, they paying for the same $2.70 per hundred pounds. Plaintiff agreed to furnish the cash to make purchases. Defendants only to pack the number of barrels which the hogs purchased should fill.

It seems from a settlement that the number of barrels purchased amounted to twelve hundred and eighty-six. And the account was balanced. From the evidence it appeared that four hundred and seventy-three barrels were injured. And the court instructed the jury to inquire into the extent of the damages sustained by reason of any want of skill or care of defendants in packing the pork. The plaintiff's partner was present occasionally and witnessed the progress of the packing, and seemed to be well satisfied. And there is some evidence conducing to show that the plaintiff took the responsibility of directing in what manner the pork should be put up. So far as this evidence may go, the jury will consider it. If the plaintiffs changed the ordinary mode of packing, thus far the defendants are not answerable for damages. But, it is to be presumed that the plaintiffs relied on the skill and knowledge of the defendants in the business of packing pork.

The pork was packed, it appears, for the New Orleans market. Several barrels were sold at Cincinnati as bad pork. About fourteen thousand two hundred and thirteen pounds were sold. The defendants sent down to Louisville, as the proceeds of the unsound barrels, one hundred and ninety-nine dollars. The shipments were made on the order of the plaintiffs. The above sums the plaintiffs refused to receive. Twenty-six barrels were claimed as not accounted for. This was ascertained from the amount of pork purchased, and the amount packed.

The jury were instructed they should ascertain the damages suffered by the plaintiffs from the sale of the unsound pork at Cincinnati, comparing it with the price of good pork at the same market. The sales of the pork at New Orleans to be compared in the same manner with the marketable price of a sound article. This will enable the jury to come to a satisfactory conclusion as to whether the pork was well put up at Cincinnati, that being the place of delivery, as to the injury, if any, the plaintiffs sustained. And if it shall appear that the loss was caused by a want of skill or care, or both, by the defendants, the plaintiffs will be entitled to the market price of good pork at Cincinnati, where the plaintiffs received the pork.

The defendants made no other contract than that the pork should be well put up, and it will be for the jury to say whether there was anything in the season, or in the transportation of it to New Orleans, which could have injured it, had it been well packed. In holding themselves out to the public as pork packers, the defendants were bound to use the skill in the business which such a business requires.

The jury found for the plaintiffs $2756.63.

At a subsequent day a motion for new trial was made by the defendants' counsel, and strenuously urged. The ground was, that the jury had rendered a higher verdict than the facts authorized. It was argued that the season was very unfavorable, and that a great deal of the pork packed at Cincinnati and elsewhere spoiled. That it was impossible to expel the animal heat from the meat, before it was necessary to salt it to prevent it from spoiling. That the jury had misapprehended the facts, as, if they had found for the plaintiffs' at all, they could not have assessed the damages at the sum returned in their verdict. On the other side, the plaintiffs' counsel contended that the

[1] [Reported by Hon. John McLean, Circuit Justice.]

damages should, or at least, they might have been higher. That they must have omitted some of the items claimed. And this was attempted to be demonstrated by the items of damages claimed, showing the price of the pork sold as unsound, and comparing it with the price for which a sound article sold at Cincinnati.

BY THE COURT. There is no particular complaint as to the charge of the court. Specific charges were asked, and the court gave general instructions to the jury, embracing the points on which instruction was asked. This is a better mode, as the jury will see the views of the evidence applying to the case in connection with the law. The charge being delivered, no exception was taken to any part of it, nor was it intimated that any one of the points in the instruction prayed, had been omitted. This was necessary, if there was any objection to the instruction, as the court, by having its attention directed to the particular point noted, might correct or modify the instruction. Not long since, in a similar case, the court permitted an exception to be taken which had not been made when the charge was given; and although the decision of this court was affirmed in the supreme court, yet it subjected the plaintiff to delay and expense. Being convinced that an error in law is a matter of strict right, I determined that a strict practice, in justice, was required; and, consequently, where the matter of exception is not noted during the trial, a bill of exceptions will not be allowed afterwards.

In regard to the verdict of the jury in this case, if the verdict had been for a less sum, the court would not have set it aside for that cause. The jury were instructed that if they should find the defendants had been negligent in putting up the pork, the damage to the plaintiffs would be, the difference in the Cincinnati market between sound articles and those which were sold in that market as unsound. And that the pork shipped to New Orleans could only be examined at that port to ascertain its true condition when it was delivered at Cincinnati. That the Cincinnati market afforded the datum for an estimation of the damages.

After a deliberate revision of the evidence, the charge of the court, and the verdict, we are not brought to the conclusion that the verdict of the jury is against evidence. The weather was, undoubtedly, very unfavorable for pork packing the season this pork was packed; but the experience and skill of the defendants as packers were relied upon, and they should have acted under a knowledge of such a responsibility. Under such circumstances, the skill of the defendants is specially required. They should have declined killing the hogs, if they did not believe the pork could be saved. After this advice, had the plaintiffs directed them to kill and pack the pork, they would have been exonerated from any liability, had they put up the pork as carefully and skilfully as could be done by persons acquainted with the business. We do not feel ourselves authorized to set aside the verdict; the motion for a new trial is, therefore, overruled, and judgment on the verdict.

Case No. 4,941.

FORMAN v. PEASLEE.

[21 Law Rep. 273.]

Circuit Court, D. New Hampshire. May Term, 1857.

CUSTOMS DUTIES — "PERIOD OF EXPORTATION" — COST OF LOCAL TRANSPORTATION BEFORE EXPORT — APPRAISEMENT.

1. The plaintiff entered into a contract with T. & Co. for the transportation of iron from Wales to the United States, in pursuance of which, T. & Co. employed coasting vessels to bring it from Wales to Liverpool, where it was transshipped on board their packets for Boston. *Held*, that the "period of exportation" at which the market value was to be ascertained, under the act of 1851, was the time when the goods left Liverpool for the United States. Gant v. Peaslee [Case No. 5,212] distinguished.

[Cited in Gibb v. Washington, Case No. 5,380.]

2. The cost of transportation from Wales to Liverpool is not a dutiable charge which can be added to the market price.

[Cited in Tomes v. Redfield, Case No. 14,085.]

3. By the act of March 3, 1851 (9 Stat. 629), all goods subject to an ad valorem duty are to be appraised at the period of exportation, and this includes goods obtained otherwise than by purchase.

4. The 17th section of the act of 1842 (5 Stat. 564) must, since the passage of the act of 1851, be *held* to point out the mode and consequences of all appraisements of imports, whether procured by purchase or not.

[At law. Suit by W. H. Forman against Charles H. Peaslee.]

Choate & Griswold, for plaintiff.

Mr. Hallett, Dist. Atty., contra.

CURTIS, Circuit Justice. This is an action against the collector of the port of Boston and Charlestown, to recover back moneys paid under protest for duties on an importation of railroad iron, manufactured by the plaintiff in England, and exported by him to this country, to be sold here on his account. It appears that the plaintiff made a contract with Train & Co., who had a line of packet ships plying between Liverpool and Boston, to transport this iron from Wales, where it was manufactured, to Boston, at a freight of twenty-two shillings and sixpence per ton. Train & Co. employed coasting vessels to take it on board at the ports of Newport and Cardiff, in Wales, and bring it to Liverpool, where it was laden on board their packet ships and brought to Boston. In appraising the iron, the appraisers fixed its market value at the time of its departure from Liverpool. The plaintiff insisted it should be at the time of his departure from Newport and Cardiff; and protest-

ed for this cause against the payment of the duties exacted by the collector. The act of March 3, 1851, § 1 (9 Stat. 629), requires the appraisers to ascertain the market value of the import, "at the period of the exportation to the United States." The natural meaning of the words "period of exportation," is termination of exportation. The period of exportation is that point of time when the act of exportation is complete. The subject matter of the statute is the appraisal of goods exported from a foreign country and imported into the United States. So that the inquiry in this case is, at what point of time was the act of exportation of this merchandise from the foreign country, England, complete? My opinion is, when it left Liverpool. Its transportation coastwise from one English port to another was not an exportation from England. Until the vessels of Train & Co. having it on board were cleared and sailed from Liverpool, there was no completed act of exportation. Until that time the property was under the control of the British government, whose order could have arrested and detained it within that country, and whose control over it would have been unaffected by the fact that it had been brought from Cardiff and Newport for the purpose of being sent to the United States.

The plaintiff's counsel relied on the case of Barrett v. Stockton & B. Ry. Co., reported in 2 Man. & G. 134, and on error in 3 Man. & G. 956, and 11 Clark & F. 590. But that case tends to support the construction which I place on the act of congress. It is true it was decided in all the courts that under the act of parliament then in question, exportation might mean simply carrying out of a port; and as between the public and a corporation claiming a toll, and upon the special provisions of that act, it was held it did mean so. But it was admitted that its more usual sense was a more restricted sense, and covered only cases where property was not merely sent out of one port to another of the same kingdom, but carried to a foreign country. And that such is the meaning of the word "exportation" in this act of congress can admit of no doubt, for it can have no reference to transportation from one port to another of the same country; its language and its object and its subject matter all confine the exportation here spoken of to an exportation from some foreign country to the United States.

But it is further argued that the merchandise left Wales for the United States, and under a bill of lading which showed that it was to come hither. The bill of lading, if it can be considered as but one, which I doubt, and the intent of the party in sending the property from Wales, cannot make the act of exportation from Great Britain complete on leaving Wales, when it was not so in fact.

It is further insisted that this case is like Gant v. Peaslee [supra]. But this is not so. Goods, the produce of Turkey, were exported from that country to the United States. On their way hither they were carried to England, and without being landed were transshipped. I held they were not imported into the United States from England. Their going to England and being transshipped there affected only the route and means of their transit after the act of exportation from Turkey had been completed. But here the fact that this merchandise went to Liverpool and was there transshipped, affected the mode and time of transit out of Great Britain, and prevented that from being complete until the merchandise left Liverpool.

The next objection is that the collector added to the charges six shillings sterling per ton for the cost of transporting the property from Wales to Liverpool. I am of opinion this was illegal. There was no such charge in fact. The plaintiff agreed with Train & Co. on a certain rate of freight from Wales to the United States. It does not appear that he paid any more freight because Train & Co., instead of sending their ships to Newport and Cardiff, chose to bring the iron in other vessels to Liverpool. It appears that the market price of railroad iron is always quoted, and was so taken by these appraisers, at so much per ton "free on board in Wales." So that from the nature of the trade no charges which precede the shipment are to be added to the market price. They are included in that price, and are borne by the seller. That marine freight, whether an import be brought direct from the country of exportation or via other ports and places, is not a dutiable charge, has been repeatedly held. Gant v. Peaslee [supra]; Millar v. Millar [Case No. 9,546].

The next objection involves a question of much importance, and which is attended with no little difficulty. It is, whether these goods, having been procured otherwise than by purchase, were rightly appraised by pursuing the course marked out by the 17th section of the tariff act of 1842 (5 Stat. 564), as amended by the act of March 3, 1851 (9 Stat. 629), or whether it was necessary to conform to the act of March 1, 1823 (3 Stat. 729). This question affects—First, the point of time at which the value should be ascertained; second, the persons by whom the appraisement should be made; third, the consequence of the appraisement as respects the additional duty by way of penalty.

As to the first of these, it is insisted by the plaintiff, that as these goods were procured otherwise than by purchase, their actual value at the time and place when procured, and not their market value at the period of their exportation, should have been ascertained, pursuant to the fifth section of the act of 1823 (3 Stat. 732). Independent of the first section of the act of March 3, 1851

(9 Stat. 629), this position would probably have been held to be correct. But the language of that section is, "in all cases in which there is or shall be imposed any ad valorem rate of duty, &c., it shall be the duty of the collector, &c., to cause the actual market value or wholesale price thereof at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported into the United States, to be appraised, estimated, and ascertained." This language is broad enough to cover cases of imports procured otherwise than by purchase. It expressly embraces all cases of imports subject to an ad valorem rate of duty. And when it is added that this law is known to have been passed to change certain rules decided by the supreme court in Greely v. Thompson, 10 How. [51 U. S.] 225, and that that was a case of goods not purchased, there can be no doubt that congress intended to embrace such cases and change the rule of the act of 1823, and bring them all under one uniform rule as to the time in reference to which the value should be fixed.

The second particular, viz., the persons by whom the appraisal is to be made, is attended with more difficulty. The sixteenth section of the act of 1823 required the president to appoint two appraisers for each port therein mentioned; and the eighteenth section provides for a reappraisement by two merchants chosen by the importer, together with the two government appraisers; and also, a further appeal to the secretary of the treasury. The 17th section of the act of 1842 (5 Stat. 564) points out the mode of proceeding by the government appraisers, confers on them certain special powers to enable them efficiently to discharge their duties, and gives an appeal to two merchants, to be chosen by the collector. This was the mode followed in the present case; and it is insisted that it was illegal, because this section applies only to the appraisement of goods purchased. It is said that in Greely v. Thompson [supra] the supreme court so viewed this section, and that this court followed this view in Barnard v. Morton [Case No. 1,005]. I think this is so. But in neither of these cases was this point necessarily involved in the decision, nor does the question whether the seventeenth section of the act of 1842 is restricted to cases of imports procured by purchase, appear to have been examined and carefully considered. Still, I should follow what is said in Greely v. Thompson [supra] if I did not think the subsequent legislation, in the act of 1851, had a most material bearing on the question. I proceed, therefore, to examine it. There can be no doubt that the sixteenth section of the act of 1842 applies only to goods purchased. It may be admitted, also, that the mode and means of appraisement provided for in the seventeenth section, had reference more immediately and prominently to the cases embraced in the sixteenth section. But the question is whether they extend to no other cases. The language is broad enough to include all cases of merchandise requiring an appraisal. "It shall be lawful for the appraisers, &c., to call before them and examine upon oath or affirmation any owner, importer, consignee, or other person, touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of any merchandise imported," &c. The subject of the appraisement is any merchandise imported. The purpose of the appraisement is to ascertain the actual market value; and by the act of 1823 (section 5) the actual value, which means the same thing, was to be ascertained. The mischief to be remedied was the same. No reason is perceived why it was not as necessary to give the appraisers these new powers in reference to importations of goods manufactured or produced, as well as goods purchased by the importer. Indeed, where there was an actual purchase, there would seem to be less danger of undervaluation than where no actual transaction had occurred to fix the market value of the particular goods. Upon mature reflection I should feel great difficulty in holding that this new and more efficient mode of appraisal, which in terms is extended to any merchandise imported, was designed to include only goods purchased. And the act of March 3, 1851, passed after the decision of Greely v. Thompson [supra] tends strongly, in my judgment, to show that the seventeenth section of the act of 1842 must now be construed to include all cases of appraisement. It has already been stated that the first section of that act extends to and includes goods procured otherwise than by purchase. The second section also applies to all cases of appraisement, and makes the certificate of one appraiser sufficient. The third section provides for the appointment of general appraisers, who are to visit such ports as may be designated by the secretary of the treasury, to give aid and assistance so as to secure uniformity in the collection of the revenue; and it proceeds: "And wherever practicable, in cases of appeal from the decision of United States appraisers under the provisions of the seventeenth section of the act of 1842, the collector shall select one discreet and experienced merchant to be associated with one of the appraisers to be appointed under this act, who together shall appraise the goods in question; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final, and deemed and taken to be the true value of the said goods, and the duties shall be levied thereon accordingly, any act of congress to the contrary notwithstanding." Now it is, to say the least, highly improbable that congress would by the first and second sections of this act embrace all cases of importations calling for

an appraisement, and change the rules as to the time of valuation and the number of appraisers required in all, and yet, when they came to these new and important provisions to secure uniformity of valuation, leave out of their operation all cases where goods were procured otherwise than by purchase. And yet they have done so if the seventeenth section of the act of 1842 does not include those cases. For they extend the new provisions only to appeals which are claimed under that seventeenth section. In my judgment this has a very strong tendency to show that the seventeenth section was intended to embrace, and does embrace, all cases of appraisements of goods, however the same may have been procured. And as these acts are in pari materia, and each is to be construed by the aid of all the light which can be obtained from all the rest, I shall hold, until otherwise instructed by the supreme court, that the seventeenth section of the act of 1842 points out the mode and the consequences of an appraisement of goods procured otherwise than by purchase. And this determines the remaining question, whether any penalty was incurred when it was found that the appraised value exceeded the invoice value ten per centum. As the seventeenth section of the act of 1842, in my opinion, applies to the case, and as the penalty fixed by that section was the one exacted, there was no error, save that the penalty was assessed on the charges; it was, in that particular, not warranted by law. The result is, that the plaintiff is entitled to recover back the six shillings per ton added to the valuation as a charge, and such part of the penalty as was assessed on the charges. For this, when computed, a verdict will be entered, as was agreed by the parties.

FORREST (CUSHWA v.). See Case No. 3,517.

FORREST (DAVIS v.). See Case No. 3,634.

Case No. 4,942.

FORREST v. HANSON.

[1 Cranch, C. C. 12.] [1]

Circuit Court, District of Columbia. June Term, 1801.

ATTACHMENT OF PRIVILEGE.

A clerk of this court is not entitled to sue by attachment of privilege.

Action on the case for slander.

The plaintiff [Uriah Forrest] being clerk of the court, had sued out an attachment of privilege, and now moved for a rule upon the defendant [Samuel Hanson] to plead on some day during the present term.

It was contended, on the part of the plaintiff, that the privileges of the officers of courts is a part of the law of Maryland, which, by the act of congress concerning the District of Columbia,—27th February, 1801, § 1 (2 Stat. 103),—was adopted as the law of this part of the District. That the legislature of Maryland had acknowledged the principle, by passing an act (1799, c. 29) restraining the application of it in some cases. That, in Maryland, it is not a matter of favor, but of right, to rule the defendant to plead at the first term. The oldest writers consider it as part of the common law of England. 4 Bac. Abr. 215, 218, tit. "Privilege," B; 2 Inst. 55, 551; 4 Inst. 71; Bract. 99, 112. It is the privilege of the court, and not of the officer. It is founded on the same reason and principle as the privilege of witnesses, jurymen, &c., to be free from arrest. 4 Bac. Abr. 222, 223. No court has power to issue a process not authorized by common, or statute law; the attachment of privilege is not authorized by statute law; it must therefore have issued as a common law process. Salk. 543, 544. In Maryland an attorney must be sued by bill of privilege; if he does not appear, he will be forejudged; and then being no longer an attorney, a capias may issue against him. Brown v. Van Braam, 3 Dall. [3 U. S.] 344. The act of congress respecting the courts of the United States authorizes them to make rules not repugnant to the laws and constitution of the United States.

On the part of the defendant, it was said that the privilege of the officers of the courts at Westminster is no part of the common law. It depends altogether upon the usage and custom of the courts. It extends only to the court of king's bench, the common pleas, the exchequer, and court of chancery. It is not claimed by all courts of record, as such. The privilege of officers of the common pleas must be certified to the king's bench, and that of the officers of the exchequer must be proved by the red book. 17 Vin. Abr. 518, 530, 531, tit. "Chancery"; articles 12, 16, "Stannary Courts"; 4 Bac. Abr. 219, 224; Id. "System of Pleading," 343, 348. It is to be presumed that it was originally granted to certain courts only, by the original grant or charter by which the courts were erected. By the charter to Lord Baltimore, he was empowered to erect courts, and if the privilege is claimed by the courts in Maryland, it may be presumed to be claimed under the charter (section 7). See Act Assem. 1637; 2 Rich. Pr. Com. Pl. 176, for the form of a plea of privilege.

KILTY, Chief Judge. It is the unanimous opinion of the court that the rule should not be laid, and that the privilege is not to be allowed. The court consider that the privilege, as exercised by certain courts in England, does not depend on any principle of the common law, extending, generally, to all judicial bodies, but is in the nature of a particular grant or charter to a certain court.

[1] [Reported by Hon. William Cranch, Chief Judge.]

The exercise of the privilege in the state of Maryland depends on the like principle, and flows from a grant or charter to the courts there. The adoption of the laws of Maryland in this county, under the law by which this court is established, does not give to the court the privileges which have been thus derived to the courts of Maryland, and therefore they are not authorized or bound to extend to their officers the benefits or disadvantages of the privilege contended for; and have not the power to extend it to the prejudice of other persons. See 2 Hawk. P. C. 2, 4, 5.

[NOTE. See Forrest v. Hanson, Case No. 4,943.]

Case No. 4,943.

FORREST v. HANSON.

[1 Cranch, C. C. 63.] [1]

Circuit Court, District of Columbia. March Term, 1802.

SLANDER—PROOF TO SUPPORT PLEA OF JUSTIFICATION—ACTIONABLE WORDS—"SWINDLER"—INSTRUCTION TO JURY—COSTS.

1. A plea of justification in slander, must be substantially proved.

2. A breach of trust accompanied by falsehood does not amount to swindling, unless also accompanied by an intent to defraud.

3. The court is not bound, at the request of either party, to instruct the jury after they have retired to consider their verdict, unless the jurors themselves request such instruction.

4. It is actionable to say of a director of a bank, that he is a swindler.

5. In slander a verdict for one cent damages carries full costs.

6. The statute of Glocester is, but St. 21 Jac. I. c. 16, respecting costs, is not, in force in Maryland.

Action on the case for words. The plaintiff [Uriah Forrest] declares that being a director of the Bank of Columbia, the defendant [Samuel Hanson] on the 1st of June, 1801, in a certain discourse had concerning the plaintiff, as one of the directors, &c., spoke the following false, scandalous, &c., words of him, as a director, &c., "General Forrest is a liar and a swindler, and I can prove him to be so. I, as cashier, say so of one of the directors, and I think one or the other of us ought to be turned out of the bank." The 2d count states also the words liar and swindler (with this innuendo), meaning that the said Uriah Forrest had been guilty of falsehood, fraud, deceit, knavery, and dishonesty in his conduct, as one of the directors of the Bank of Columbia, whereby the plaintiff is injured in his good name, as one of the directors of the said bank, and his credit with the bank impaired, and he has been in danger of being turned out of the bank, and of losing his office as director, &c. The defendant pleaded in justification fourteen pleas, each plea containing a separate fact or transaction, upon which issues were joined. In the trial of the cause, at September term, 1801, the jury having retired to consider of their verdict, and before they had agreed, requested leave to return into court and ask the opinion of the court upon a question of law; whereupon, being brought into court, they asked whether they could find a verdict for the defendant upon any one plea if all the facts stated in such plea should not have been proved to their satisfaction.

THE COURT thereupon instructed them that the facts stated in such plea, must be substantially proved, and that where fraud was alleged in the plea, there fraud must be proved; and that where falsehood and deceit were alleged in the plea, there falsehood and deceit must be proved; to which opinion of the court and instruction the counsel for both parties assented. Whereupon the jury retired again, and not agreeing upon any verdict after being together some hours, THE COURT ordered the jury to be brought into court, and informed them that if they had any doubt upon matter of law they might inquire of the court. Whereupon the jury asked the opinion of the court whether a breach of trust accompanied with falsehood amounted in law to swindling. To which THE COURT replied "No, unless accompanied also with an intent to defraud." The counsel for the defendant then moved the court (while the jury remained standing at the bar) to instruct the jury that if they find the facts stated in any one plea to be substantially true, they should find the issue upon that plea for the defendant, although such facts do not amount to the crime of swindling in its legal acceptation.

But THE COURT refused so to instruct the jury. First, because they did not think themselves bound to instruct the jury, after having retired to their room unless the jury should request such instruction. And secondly, because they conceived they had already substantially instructed the jury to the same effect, in giving the instruction above stated.

The jury found a verdict for the plaintiff, with one cent damages.

The defendant moved, in arrest of judgment, because the words are not actionable; and also contended that the plaintiff was not entitled to full costs, because the verdict was for only one cent.

Mr. Dennis, Mr. Gantt, and Mr. C. Lee, for plaintiff.

Mr. Simms and Mr. Jones, for defendant.

1. For the defendant, it was contended that "swindler" is a word of uncertain meaning. It is not to be found in any dictionary. There is no statute against swindling. The term does not imply, in this country, any particular crime punishable by law. Words are not actionable in themselves unless they contain a charge of a crime for which the

[1] [Reported by Hon. William Cranch, Chief Judge.]

plaintiff might be punished by law. 1 Com. Dig. 266, 267; Onslow v. Horne, 3 Wils. 177. The act of 30 Geo. II. c. 24, respecting false pretences, is not in force in this country. The offences described in that act were not before cognizable by law; and the word "swindler" has been introduced since that statute, and is understood to indicate the offences created by it. 2d. As to costs. At the common law no costs were given. They were first given by the statute of Glocester. The statute of James (21 Jac. I. c. 16, § 6) respecting costs in actions of slander, where the damages are assessed at less than forty shillings is in force in Maryland. Acts Md. 1785, c. 87, § 2. By the practice of the general court of Maryland, no costs are given when the sum recovered is not sufficient to support the jurisdiction.

For the plaintiff, it was said, 1st, that the words were actionable in themselves; 2d, that they were actionable by reason of their being spoken of the plaintiff in his official character; 3d, that the statute of Glocester was, and that of James not in force in Maryland. The following authorities were cited: J'Anson v. Stuart, 1 Term R. 748; Berryman v. Wise, 4 Term R. 366; [Respublica v. Teischer] 1 Dall. (1 U. S.) 335-338; U. S. v. Ravara [Case No. 16,122]; 4 Bac. Abr. 487, 484, 485, 506; Hoyle v. Young, 1 Wash. [Va.] 152; Rue v. Mitchel, 2 Dall. [2 U. S.] 58; 4 Bac. Abr. 489; 1 Com. Dig. 180; Herty's Laws Md. 1793, c. 30, § 12, p. 86; St. 30 Geo. II. c. 24; Police of London, 105; Mesca's Case, 1 Dall. [1 U. S.] 74, 75; Esp. N. P. 504; 6 Bac. Abr. 222, 223; St. 33 Hen. VIII.; Charter Md. § 10; Act Md. 1763, c. 18; Id. 1785, c. 87, § 1; Id. 1713, c. 4, § 3; Id. 1763, c. 23, § 4; Id. 1771, c. 11, §§ 2-4; Entick, Dict. tit. "Swindler"; Bullock's Law of Costs, c. 1; 3 Bl. Comm. 400.

At this term, THE COURT gave judgment for the plaintiff with full costs.

Before KILTY, Chief Judge, and CRANCH and MARSHALL, Circuit Judges.

CRANCH, Circuit Judge. In this case, it is not necessary to consider whether the words would be actionable in themselves, if not spoken of a person who exercises an office of trust, because the plaintiff has grounded his action upon the speaking of the words respecting him in his official character as a director of the bank, and the words are alleged to be spoken of his official conduct. The question then is, whether these words, spoken of the official conduct of a person who holds an office of trust, are actionable? There is no doubt that words not actionable when spoken of a common person, may become actionable when spoken of an officer, and in relation to his official conduct. The general rule is laid down in 4 Bac. Abr. 489. thus: "As all words spoken of any person who is in the enjoyment of an office of honor, profit, or trust, which import a charge of unfitness to discharge the duties of the same, must be prejudicial to such person; these have, and with good reason, been always held to be in themselves actionable; but wherever words, in themselves not actionable, become so by being spoken of a person in office, it must appear from the words themselves, or from the pleadings, that they were spoken in a colloquium concerning his office; for the very foundation of the action is its being a disgrace in office." If this is law, (and the whole course of authorities proves it to be so)—if the office of director of the Bank of Columbia is an office of trust; if the plaintiff was a director at the time of the speaking of the words; if the words import an unfitness to discharge the duties of that office; and if it appears, from the words themselves, or from the pleadings, that they were spoken in a colloquium concerning that office, then it follows as an irresistible consequence, that the words thus spoken are actionable, and judgment must be rendered for the plaintiff. This is the result of a comprehensive view of all the cases decided on the subject.

The next question is, whether the office of director of the Bank of Columbia is such an office of trust as is contemplated by the law? That it is an office of trust seems to be proved by the words of the act incorporating the bank. By that act the directors are intrusted with the power of "regulating the affairs of the bank—of choosing a president and a cashier—of determining upon the manner of doing business, and the rules and forms to be pursued—of appointing and paying the various officers they may find necessary, and finally of disposing of the money and credit of the bank in the common course of banking, for the interest and benefit of the proprietors," &c., and by the 12th section any director who shall commit any fraud touching the money or property of the bank is liable to be prosecuted by indictment. It appears, then, that the office of director is an office of high trust and responsibility. The cases in the books speak not only of words being actionable by reason of their being spoken of judges and the higher judicial officers and justices of the peace, but also of sheriffs, stewards of courts-leet, church-wardens (Style, 338; Woodruff v. Weoley, Cart. 1); town clerk (Godb. 157, pl. 211; Yel. 142); a constable (Yel. 153); a deputy-clerk to an arch-deacon's register (Reignald's Case, Cro. Car. 563); and even a clerk to the Company of Merchant Tailors (Cro. Eliz. 358); and the steward of a private gentleman (Seaman v. Bigg, 3 Cro. Car. 480). Surely some of these offices are not more respectable, or of higher trust or responsibility than that of a director of a bank. In Sir Richard Greenfield's Case, March, 82, pl. 135, it is said, "that it is not material what employment he hath under the king, if he may lose his employment or trust thereby." In the case of Woodruff v. Weoley, Cart. 1, the action

was for words spoken of a church-warden. A colloquium was laid of the office. Bridgman, C. J., said, "that to say he hath cheated me, are words of passion; but if applied to a man in his office, the action will lie; and so it must be adjudged." In the case of Wright v. Moorhouse, Cro. Eliz. 358, words spoken of the clerk of the Merchant Tailors were held actionable on account of the office. In the case of Strode v. Homes, Style, 338, words spoken of a church-warden were also held to be actionable on account of the office; and Rolle, C. J., said, "Officers which have no benefit by their offices have more need to be repaired, if they be scandalized in their execution of them; and here the scandal is a great loss to an honest man; and what other remedy can he have to repair himself, but by this action on the case?" The office of a director of a bank is clearly within the reason of the cases; and therefore is within the law.

The next question is, do the words import an unfitness to discharge the duties of the office? Upon this point, I presume there can be no difference of sentiment. No man will say that a liar and a swindler is a fit person to be intrusted with the office of a director of a bank. In 1 Term R. 753, it is said to be formerly held that the word "swindling" was in general use, and that the court could not say they were ignorant of it. In the same case, Ashhurst, J., held it to imply crimes for which the person might be indicted; and Buller, J., said it contained as libellous a charge as can well be imagined. In Berryman v. Wise, 4 Term R. 366, there was no question but the word was actionable when applied to an attorney in his official character; and in the argument of the present case, it seemed to be agreed that it was a word which had come into use since the statute of 30 Geo. II. c. 24, and was generally understood to imply a charge of the crimes, or some of them, mentioned in that statute. One of the principal offences mentioned in that statute, and the one to which the term "swindling" seems to be most appropriately applied, is that of "knowingly and designedly, by false pretences, obtaining from any person money, goods, &c. with intent to cheat or defraud any person of the same." This offence is substantially and accurately the common law offence of cheating, which is described in 1 Hawk. P. C. 343, to be "deceitful practices, in defrauding, or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty." To charge a man with swindling, seems, therefore, to be substantially to charge him with an offence for which he may be liable to a prosecution at common law. I have before observed that it is not necessary in this case to decide whether the words were actionable in themselves, in the strict signification of the phrase, but I can have no doubt of their being actionable when applied to a man either in his professional or official character. No man in the least acquainted with the world, particularly with the commercial part of it, can say that he does not know the meaning of the word. Everybody knows that it implies a high degree of moral depravity, and that its essence is fraud. No one will say that it is not totally incompatible with that strict integrity of character which ought to be the first qualification of a director of a bank, and no one will say that it does not destroy all idea of fitness for the high trust of that office.

The last question on this point is, whether it appears from the words themselves, or from the pleadings, that they were spoken in a colloquium concerning that office? To decide this question, it is only necessary to read the declaration. It states that the plaintiff was a director of the Bank of Columbia, and as such had well demeaned himself, &c., yet the defendant knowing, &c. but intending, &c. and to have the plaintiff turned out as a director, and to prevent him from having and obtaining credit at the bank, on the 1st of June, 1801, in certain discourse had concerning the plaintiff, as one of the directors of the said bank, spoke the following words: "General Forrest is a liar and a swindler, and I can prove him to be so; I, as cashier, say so of one of the directors, and I think one or the other of us ought to be turned out of the bank." From this it appears that there is not only an express colloquium laid of him as director, but it also appears clearly from the words themselves, that they were spoken of him in his official character. The fact, that the plaintiff was a director of the Bank of Columbia, is admitted by the pleadings and verdict. Upon the question whether the plaintiff shall recover his full costs, I have no doubt. The statute of Glocester is the foundation of costs in Maryland. It seems to have been in force from the first settlement of the country, and gives costs in all cases where damages are recovered. The statute of 21 Jac. c. 16, does not appear to have been at any time practised upon in Maryland; and there seems to be good reason why it has not. It was not applicable to the circumstances of this country. The intention of that statute was to prevent trifling actions of slander from being brought in the superior courts in England. It was never construed to extend to those courts whose jurisdiction was limited to actions of forty shillings value. 6 Vin. Abr. 530; Ld. Raym. 181, 182. Consequently the statute was of a local nature, and only applicable to the peculiar relative situation of the courts in England, and even there, if the action was carried up to the courts at Westminster Hall by habeas corpus or certiorari, and damages assessed under forty shillings, yet the plaintiff had his full costs. 6 Vin. Abr. 356; Ld. Raym. 395; 1 Bac. Abr. 514; 7

Mod. 129; 4 Mod. 378. The question made at the bar, whether that statute passed before or after the first emigration of inhabitants to Maryland, seems to me of little importance as to the present point. For if it passed prior to that date, still it is not law by virtue of the declaration of rights in Maryland, unless it had by experience been found applicable to their circumstances, before the year 1776. This experience could only be by practising upon it in courts of law. And if it was passed after the date of the first emigration to Maryland, it would still have no force here, unless it had been practised upon by courts of law or equity prior to the same year. So that it is not necessary to ascertain the precise time of the first emigration to Maryland. No case having been produced in which the statute of James has been practised upon in Maryland, we cannot consider it as in force here; and if it is not, there is nothing to prevent the full operation of the statute of Glocester, which gives costs in all cases where damages are recovered. The jurisdiction of this court is unlimited by the amount of the claim, or of the verdict, in actions of slander; for although the court has decided that the justices of the peace have exclusive original jurisdiction in all cases where they have cognizance, yet the justices have no cognizance of actions of slander. For these reasons, I am clearly of opinion, that the plaintiff ought to have his judgment, with full costs.

[NOTE. See Forrest v. Hanson, Case No. 4,942.]

FORREST (JEFFERS v.). See Case No. 7,251.

FORREST (UNION BANK OF GEORGETOWN v.). See Case No. 14,356.

FORREST (UNITED STATES v.). See Case No. 15,131.

FORREST (WOOD v.). See Case No. 17,945.

Case No. 4,944

The FORRESTER.

[See Case No. 15,132.]

FORRESTER, The (UNITED STATES v.). See Case No. 15,132.

Case No. 4,945.

FORRESTIER v. BORDMAN.

[1 Story, 43; 2 Law Rep. 325; 1 Hunt, Mer. Mag. 506.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1839.

SUPERCARGO—POWER AND AUTHORITY — SALE OF CARGO—VALIDITY—USAGE OF TRADE—SALE ON CREDIT.

1. A supercargo is not bound to observe the exact terms of his instructions, if thereby the interests of the owner would be sacrificed or his objects frustrated.

2. In cases of necessity or great urgency it is only necessary, that the supercargo should act bonâ fide and with reasonable discretion, in order to bind the owner.

[Cited in Greenleaf v. Moody, 13 Allen, 367.]

3. If the owner receive the proceeds of a sale by the supercargo without objection, it is a ratification of the sale.

4. All sales but those by del credere commission are at the risk of the shipper.

5. The validity of a sale on credit depends upon the usage of trade in the place, where the sale is made, and such usage is a question of fact for a jury.

6. Where the usage of trade allows discretionary sales on cash or credit, a credit sale is at the risk of the shipper, unless some agreement can be shown restricting him to a cash sale.

7. Where a commission merchant or factor has sold goods upon credit, he is bound to exercise due discretion in enforcing payment, and not to sue or put the owner to expense, unless there is reasonable ground to believe, that he will be benefited.

[Cited in Greenleaf v. Moody, 13 Allen, 366.]

8. Where a commission merchant sells on credit to a person, who becomes insolvent, and does not give notice of that fact to the owner within a reasonable time, he is liable for all the damage the owner suffers in consequence of not receiving such notice.

This was an action of assumpsit brought by the plaintiff, a merchant of Batavia, to recover of the defendant, a merchant of Boston, $1637, the amount advanced by the plaintiff on a sale of flour made by him for the defendant on credit, the purchaser having become insolvent. It appeared in evidence, that in the year 1830, the defendant shipped in the Shylock, 1000 barrels of flour, and placed it in the keeping of Stephen H. Williams, as supercargo. The vessel sailed for Rio Janeiro, and 775 barrels of the flour were there sold. She then put into Monte Video, but the state of the market being very unfavorable, the supercargo concluded to carry the remaining portion to Batavia. He did so, and requested the plaintiff to sell it, and invest the proceeds, together with the proceeds of that sold in South America, for the benefit of the shipper. The market was glutted and the flour was somewhat damaged, but it was sold by the plaintiff to one Johannis, on a credit of six months, and the proceeds, deducting the interest, were invested in coffee, which was shipped to the defendant and by him received. No guaranty commission was charged in the account of sales, and Mr. Williams had no knowledge, that the flour was sold on a credit of six months, until after the sale was made. After the coffee had been shipped to the defendant, Johannis, to whom the flour was sold, became insolvent, and the plaintiff not being able to obtain payment from him for the flour, claimed in this action to recover of Bordman the amount of the advance.

C. P. Curtis, for plaintiff, objected, that the defendant ought not to be permitted to

[1] [Reported by William W. Story, Esq. 1 Hunt, Mer. Mag. 506, contains only a condensed report.]

deny the authority of Williams, the supercargo, to make the sale at Batavia. Williams was admitted as a witness under exception by the plaintiff; he was not competent to prove such a defence as this, without a release, which had not been given him. If this point is insisted on, Williams's testimony ought to be rejected entirely. The sale by Williams at Batavia was a justifiable act. He found, that he could not dispose of the flour at Rio Janeiro, and went to Batavia, where he employed plaintiff to sell it and invest the proceeds in coffee, which the defendant received and appropriated to his own use without objection. This was a ratification by him, if any were needed. Story, Ag. 248, &c. In the next place the defendant objects to the recovery by the plaintiff, because he sold the flour on credit. The flour was consigned to the plaintiff for sale in the usual manner, without specific instructions, and it is proved by the testimony in the case, that sales on credit are usual and customary at Batavia. The flour was damaged, the sale dull, and the purchaser was in good credit when he made the purchase. Williams was in the plaintiff's counting-room almost all the time, and might have inquired about the transaction, and decided in relation to it, but he did not; he left the whole to the plaintiff's discretion, and the plaintiff was justified by the usages of the place in making the sale in the manner proved. Id. 60–220; Paley, Prin. & Ag. 212; 5 Cow. 473. But, it is alleged by the defendant, that the plaintiff, by advancing the amount of the sale and investing it in merchandise consigned to the defendant, assumed the risk of collection at maturity; and that, if this was not so, yet by his neglect to notify the failure of the purchaser to the defendant, he made the debt his own, and so ought not now to recover the amount claimed. As to the first of these averments, the plaintiff replies, that his account of sales showed, that the sale was on six months' credit, and his account current contained no charge of a guaranty commission, which would have appeared there, if the plaintiff had assumed or guarantied the sale. The charge of "discount" was the rebate of interest on the amount of the sale, for six months, at nine per cent. per annum, which is the usual rate of interest at Batavia. This was for cashing the sales. Williams testifies, that Barrell, the plaintiff's clerk, told him the sale was guarantied to him; but Barrell had no authority to make such a declaration for his employer; and the plaintiff was not bound by it; and the documents (which are in Williams's own handwriting), namely, the account sales and account current show no such thing, but negatively prove the contrary. As to the other averment of the defendant it is true, that a considerable time elapsed before the defendant had notice of the insolvency of the purchaser of his flour and of the plaintiff's reclamation on himself; and if defendant has sustained any loss through the plaintiff's neglect in this particular, he is entitled to a deduction to that extent. Story, Ag. 196; Paley, Prin. & Ag. 39. The defendant, however, received notice of the loss of the debt, and of the plaintiff's intention to call on him for reimbursement in May, 1833. He has received the plaintiff's money and has had the use of it ever since November, 1830; and if he now pays it back, he will be just where he would have been, if the plaintiff, instead of advancing the amount of the sales of flour, had waited for the maturity of Jordan Johannis's note. The evidence shows clearly, that the plaintiff has done all that he could to collect the amount, and in fact succeeded in getting something on account of it, for which he has given the defendant credit. It is said by defendant, that the plaintiff settled his account and paid over the balance, intending such payment to be final. That is the very question. We deny that such was the plaintiff's intent; his conduct shows the contrary; it shows only that he was willing to accommodate the defendant, by advancing the amount, but not that he intended to assume the ultimate responsibility of the debt, without compensation. The plaintiff is entitled to a credit for the balance of his advance with interest.

S. Hubbard and Willard Phillips, for defendant.

This claim is a surprise upon the defendant. It is the first one of the kind in the history of the East Indian trade, yet no one can doubt, that innumerable bad sales have been made by factors in the course of that trade. There are now outstanding debts for sales in India to vast amounts, which would be equally good ground of reclamation by the factors there, against American and European consignors. In order to recover, the plaintiff must show, that a sale by the factor, on credit, at the risk of the consignor, was previously authorized or subsequently ratified by the consignor. It is no violation of duty in the factor to sell on credit in any case, provided he pays over an amount, eqaul to the net proceeds, to his principal, and assumes the outstanding debt for the sales himself. This we contend the plaintiff did in this case; and this we contend is generally done, where the sales are on credit in India, and there is no express explicit understanding between the principal and factor, that the outstanding debt is at the risk of the principal. Sales are usually made on credit in all places, where commerce and civilization have made any progress; but this credit is in many places generally, and in individual cases in all places, a distinct concern between the factor and the vendee, and does not affect the consignor. The naked fact, therefore, that sales are made on credit, to a greater or less extent at any place, is no ground of presump-

tion, that the credit is at the risk of a distant consignor. Whether it be at his risk must depend upon all the circumstances of the case, showing that the parties so understood it; for the general presumption is, that the consignor does not authorize any other than a cash sale. The burden is on the factor, to make out the authority for any other sale; whether by barter or on credit, at the consignor's risk. The naked fact of occasional or frequent sales on credit at any place does not make out such an authority, without, by testimony, carrying home to the consignors the risk of the sales, and that in so public and notorious a manner, that the consignors may be affected by a notice of the usage, that such risk of the sales reaches them. In this trade, and in all the East India trade, there is no proof of a single instance. We must look into the circumstances of this particular case, then, to find such authority, if it exists. Story, Ag. 208. The consignor is nine thousand miles off. It is his first and only transaction with the plaintiff, and indeed in India. The parties are utter strangers to each other. The business was put into the plaintiff's hands by the supercargo, with whom alone the plaintiff had any communication, direct or indirect, respecting it. No promise or intimation was held out to the plaintiff of any future business or intercourse. The vendee was an American merchant, utterly unknown to the consignor and the supercargo. The supercargo was a young man on his first voyage, and a stranger to the plaintiff.

Under the particular circumstances of this case we contend, that notice is irresistibly forced upon the plaintiff, that the consignor did not authorize or intend a sale on credit at his risk. It is shown, that the plaintiff himself supposed, that the credit was at his own risk, by his long delay to give the consignor notice of his claim, or make any demand upon him, though the communication between Boston and Batavia is easy and frequent. The case of the sale of the Jewel to the Emperor of Morocco, on credit, in which the agent was held to have given the credit at his own risk, does not by its circumstances negative an authority to sell on credit at the risk of the principal more strongly than this. The instructions to the supercargo, that he should take the proceeds of the sale of flour in South America to India, and there invest them in a return cargo, exclude any supposition, that a sale of the flour on credit in India, at the risk of the consignor, was authorized or intended, and these instructions were shown to the plaintiff. The testimony shows distinctly, that the supercargo did not authorize a sale on credit at the risk of the consignor, or at his own risk. He states distinctly, that he did not know of the sale being made, and that when the circumstance of the sale being on credit was first brought to his knowledge in the accounts at Batavia, when he was just ready to sail on his homeward voyage, he immediately, on the spot, in the plaintiff's counting-room, told the plaintiff's clerk, and only representative there, and who acted for the plaintiff in settling the accounts, the plaintiff being absent, that he, the supercargo, disclaimed for himself and his principal any sale on credit on his, or his principal's account and risk, and was told by the clerk in reply, that the credit was entirely the affair of the consignee, and the sale was guarantied. The plain meaning of which was this: "Though we have put down the term of credit in this account of sales, yet it is only for the purpose of showing you, that we make a proper discount of interest, in ascertaining the present cash value of the proceeds of your consignment, in the settlement of our accounts; this circumstance does not affect your risk or responsibility, or the risk or responsibility of your principal. The sale is in effect by the very transaction guarantied." So the supercargo understood the transaction, and so, we contend, he was fully authorized to understand it. The settlement of the account and payment of the precise balance, goes to the same conclusion. Oakley v. Crenshaw, 4 Cow. 250; Simpson v. Swan, 3 Camp. 291; Consequa v. Fanning, 3 Johns. Ch. 587.

The defendant has done nothing to ratify a sale on credit at his risk. He accepted the homeward shipment as the cash proceeds of the outward one, and as the accounts show it actually was. On the first notice of the claim, after so long a delay, he promptly repudiated the notion, that the credit was at his risk.

In the course of the trial a letter, written by the plaintiff's agent to the defendant was called for by the plaintiff, in which some facts were stated, having a bearing upon the case, of which the letter itself was not competent evidence. The defendant objected to the introduction of the letter itself, contending that, if he admitted the facts, intended to be proved by the plaintiff by the introduction of the letter, the letter could not be called for, or at least, that in case of such a letter or paper, a copy of the parts only of which the letter was evidence, could be called for. THE COURT ruled, that the plaintiff had a right to introuuce the letter, the jury being instructed not to regard the parts, which were not evidence.

STORY, Circuit Justice (summing up to the jury). The first point made at the bar is, that Williams, the supercargo, had no authority to carry the flour to Batavia and to sell it there, under the terms of his instructions. The voyage contemplated was to several ports of South America, where it was supposed, that the flour might and would be sold, and from hence the vessel was to proceed to India, for a return cargo. Certainly the instructions, in their terms, did not con-

template any other event than a sale of all the flour at some one or more of the South American ports. It turned out, however, that the flour could not all be sold at the South American ports, or at least not sold, unless at an enormous sacrifice. The parties had not looked for any such event. What then was it the duty of the supercargo to do, in such a case of unexpected occurrence, not within the contemplation of the instructions? Was he to sacrifice the flour, or throw it overboard? No one pretends, that it was intended to be brought back again to the United States under any circumstances. It would probably have been spoiled and ruined on the return voyage, and come home utterly worthless. Now, I take it to be clear, that if by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner, and amount to a total sacrifice of his interests, it becomes the duty of the supercargo, under such circumstances, to do the best he can, in the exercise of a sound discretion, to prevent a total loss to his owner; and if he acts bonâ fide, and exercises a reasonable discretion, his acts will bind the owner. He becomes, in such a case, an agent from necessity for the owner. Suppose, for example, that a cargo of a perishable nature is shipped on a voyage, and is to be carried to a particular port of destination, and there sold, and the ship should in the course of the voyage meet with a storm, which should disable her, and she should go into a port of necessity to refit; and that the cargo should be found so much damaged, that the whole must perish before her arrival at the port of destination; would not the supercargo have a right to sell it there, in order to prevent a total loss, although no such case was contemplated in his orders? Certainly he would have a right to sell; and indeed it would become his duty, under such circumstances, to sell. In truth, in all voyages of this sort, there is an implied authority to act for the interest and benefit of the owner in all cases of unforeseen necessity and emergency, created by operation and intendment of law. I shall put it to the jury to say, therefore, whether the carrying the flour to Batavia, and selling it there, was not an act of necessity to prevent a total loss to the owner. If it was, then the supercargo was justified in directing the sale.

But, in the present case, the flour was actually sold and the proceeds thereof invested in coffee, which came home in the Shylock, and was received by the owner in Boston, without objection, with a full knowledge of all the circumstances, and sold on his own account. Now, I put it to the jury, whether this was not a complete ratification and confirmation of the sale. If the owner did not mean to ratify the sale, it was his duty at that time to have made his objections. He made none; and I put it to the jury to say, whether, having received the coffee, he ought now, at this distance of time, to be permitted to say, that he never meant to ratify the sale. Are his acts reconcilable with any supposition but that of an intentional ratification of the sale, even if unauthorized by necessity? Then, was the sale at Batavia a sale on credit at the risk of Forrestier, or of the defendant? We see, that no del credere or guaranty commission was in fact charged by Forrestier; and, therefore, it is not to be presumed, that the sale was at his sole risk, unless the other circumstances warrant the presumption, that it was so understood and intended between the supercargo and Forrestier.

And here the first point, which meets us, is, whether a sale on credit by Forrestier was authorized. That depends upon the usage of trade at Batavia. If it is the usage of trade there to sell for cash or upon credit, according to the discretion of the factor or commission merchant employed in the business, and the factor or merchant does sell upon credit, in the exercise of his discretion, then I take it, that the owner is bound by the sale, and the sale is at his risk, unless he can show, that there was some restriction imposed by himself, or by the supercargo, requiring a sale for cash. In every sale on credit, justified by the usage of the trade, the sale is at the risk of the owner, and not of the factor, unless the latter receives a guaranty commission, or the agreement of the parties, or the usage of the trade, makes the sale at the risk of the factor, or the risk is voluntarily taken by him. Now, in the present case, it seems to me, that the evidence clearly shows, that a sale upon credit is justified by the usage of trade at Batavia. But that I shall leave as a matter of fact for the jury to decide. The evidence seems also to establish, that sales on credit in this trade, like sales on credit in our home trade, are ordinarily at the risk of the owner. At least there is no determinate evidence, (as I understand it,) showing a contrary usage. But that I shall also leave for the consideration of the jury. Then, was any restriction imposed upon the factor in this case as to selling upon credit? No express restriction is pretended. The supercargo does not pretend to have given any. All he says is, that he directed Forrestier to sell and to hold the proceeds subject to his orders, to be invested, as he should direct. He does not pretend, that he directed the sale to be for cash only. Now, certainly, if the usage at the port was to sell for cash or credit, at the discretion of the factor, and he received orders to sell generally, he might fairly presume, that he was authorized to sell either for cash or credit, as would be most for the benefit of his employer. The flour was damaged. It might bring more upon a credit than upon a cash sale; and

thus a credit sale, although the proceeds were to be invested in a return cargo, might by a discount or advance pro tanto, be more for the benefit of the owner, than a cash sale. The question, therefore, for the jury to decide is, whether Forrestier did, by a sale on credit, violate his orders, or act contrary to his duty, so as to make that sale at his own risk.

It is said, that as the supercargo was in the port at the time, Forrestier ought to have consulted him, before he sold on credit. But why should he do so, if he had no knowledge, that the supercargo wished a sale for cash, or wished to be consulted before a sale on credit? The supercargo was a very young man, utterly unacquainted with the trade; and this was his first voyage. It will be for the jury to say, under such circumstances, whether it was the duty of Forrestier to consult him before the sale on credit, or not. There is no usage of trade shown, which requires such a consultation. Then it is said, that the form and language of the account of sales show, that Forrestier took the note of Johannis to himself, and that the whole transaction was thus closed and settled. Now, this is a matter to be judged of by the jury. Does the language of the account import on its face, that the sale was at the risk of the shipper, and that he took the note to himself, advancing cash for the amount, deducting the discount for the time the credit was to run? If the language is equivocal, it is open to construction and interpretation from the known usage of merchants. Ordinarily, in the home trade of the United States, most, if not all the witnesses (as far as I recollect) say, that the like words and statements of account would not import, that the cargo was at the risk of the factor; but that it was at the risk of the owner. However, this is a point, upon which the jury must judge for themselves. Then come the statements of Mr. Barrell, the clerk of Forrestier, made to the supercargo, and to which the latter has testified. I admitted the evidence, but with some hesitation, and thought it proper to be submitted for the consideration of the jury. Now, as Forrestier was not present, unless Barrell had authority in this case, or in cases of this sort, to act and speak, and interpret for Forrestier, his declarations will not bind the latter. The first point, therefore, to be established is, whether Barrell had such authority. If the jury think he had not, then his declarations are of no importance in the cause. If Barrell had such authority, then the jury will consider all the circumstances, and decide, what credit ought to be given to those declarations compared with the other facts and circumstances of the case. If the jury are of opinion, that Barrell was authorized to speak for Forrestier in the premises, and they believe, that there is no mistake or misrecollection of the supercargo at this distance of time, (and he has certainly testified with great candor and fairness,) then it seems to me, that the evidence does show very strongly, if not conclusively, that Forrestier took the risk to himself of the sale on credit; and the present action is not maintainable. It is most unfortunate, that when the supercargo was, as he says, surprised at the sale on credit, which did not come to his knowledge until the day before he sailed on the return voyage, that he did not speak to Forrestier on the subject. If he had, the difficulty would probably have vanished; or at least, a full explanation could have been made. The supercargo seems to have acted under a strange delusion, that Barrell was a partner in the house. This was an entire mistake.

The next point in the case, (supposing the case to be otherwise with the plaintiff,) is, whether there has been any negligence on the part of Forrestier in not making a demand of Johannis at the maturity of the note, or subsequently in not collecting it from him if then unpaid. It does not appear exactly when Johannis failed. He was in good credit, when the sale was made, (in November, 1830,) and his failure must have been before September, 1831; for he then absconded, the note having become due in the preceding May. The case is left imperfect in this respect. If the note might have been paid, or secured in May, and Johannis was not then insolvent, and the money has been lost by the negligence of Forrestier in not demanding payment or getting security, then he is not entitled to recover. But if Johannis was then insolvent, and unable to pay the note, I do not know, that there was any absolute obligation on Forrestier to institute a suit against Johannis for the recovery of the amount of the note. He was bound to exercise a sound discretion in this respect; and ought not to sue, or put the owner to expense, unless he had some reasonable ground to believe, that a suit would be productive of benefit to the owner. Then was Forrestier guilty of negligence in not giving earlier notice of his claim to the defendant, and of the insolvency of Johannis? Undoubtedly the notice ought to be given within a reasonable time. And if the defendant has suffered any damage or loss by its not being given within a reasonable time, the plaintiff must bear such loss or damage, to be deducted pro tanto from his claim. The letter containing the notice was not sent until the 22d of December, 1832, and it reached Boston about May, 1833. Was there any change of circumstances of Johannis between May, 1831, and December, 1832, from which the defendant has suffered any injury or loss by the delay? The injury must decide this point upon the whole evidence.

Upon the whole, the case is submitted to the jury upon all these points; and they will apply the facts accordingly.

Verdict for plaintiff.

Case No. 4,946.

FORSAITH v. MERRITT et al.

[1 Lowell, 336;[1] 3 N. B. R. 48 (Quarto, 11); 2 Am. Law T. 123; 1 Am. Law T. Rep. Bankr. 168.]

District Court, D. Massachusetts. June, 1869.

CONVEYANCE BY INSOLVENT FIRM—DISCHARGE OF ONE MEMBER OF SUCH FIRM—STATUS AND EFFECT OF THE CONVEYANCE.

1. The assignee in bankruptcy of one partner cannot set aside a conveyance made by both partners with intent to prefer a joint creditor, the other partner not being bankrupt.

2. The payment of a joint debt does not become a voidable preference unless the debtors both become bankrupt within the time limited by the statute.

3. The assignee of one partner becomes a tenant in common with the other partner, and his equities depend on the title of his assignor.

Bill in equity by the assignee of Charles A. Church, alleging that said Church and Amos M. Farnum, both now of Boston, were copartners doing business in Chicago from December, 1867, to June, 1868; that on the fourth day of the latter month they were insolvent and dissolved their partnership, and on the same day made a conveyance of nearly all their joint personal property to the defendants, George and John Merritt, who were creditors of the firm, and had reasonable cause to believe them insolvent; that within four months afterwards the said Church was declared a bankrupt in this district, upon his own petition, and the complainant [W. J. Forsaith] has been duly appointed assignee of his estate. The bill made the former partner, Farnum, a defendant, and prayed for an account of the partnership dealings, and that the conveyance may be set aside. The defendants severally demurred to the bill.

W. A. Herrick and W. J. Forsaith, for plaintiffs.

H. A. Clapp, for defendant.

LOWELL, District Judge. This is a case of new impression. The plaintiff who is the assignee of one partner seeks to set aside a preference given by both to a joint creditor. There is a suggestion of Mr. Justice Story that in some cases the court may require the partner who is not in bankruptcy to deliver up the joint assets. Parker. v. Muggridge [Case No. 10,743]. And Judge Ware acted on this intimation, and decreed to the assignee the possession of joint books and accounts which were in the possession of the insolvent partner, who was not a technical bankrupt. Ayer v. Brastow [Id. 682]. But I have seen no case which decides that a preference by two partners can be avoided by the assignee of only one of them. A preference is valid at common law and in equity, and is voidable only by an assignee in bankruptcy, and only when the proceedings in bankruptcy are begun within four months, or according to another construction of the statute, within six months after the act is committed; but in this case the defendant, Farnum, has not become bankrupt, and six months have elapsed, so that it is conclusively settled that there has been no joint preference. Now the assignment does not vest the joint property in the assignee of one partner, and he cannot sue for it without joining the other partner. Eckhardt v. Wilson, 8 Term R. 142. It does not dissolve an attachment of joint property theretofore made at the suit of a joint creditor. Fern v. Cushing, 4 Cush. 357. The equities of the separate assignee must be worked out through the title of his assignor. The decision of Judge Ware was founded on the equity which each partner has, to see that joint creditors are paid pro rata; but a partner has no equity to set aside his own conveyances.

I am not now dealing with the right of a separate assignee to recover the bankrupt's interest in joint property conveyed by a joint fraud, or to recover his share in a surplus. What I decide is that here was no joint fraud, because a preference is only fraudulent sub modo and on condition that the grantors become bankrupt within four or six months, and the bill clearly shows that there was no surplus.

If the facts are truly alleged in the bill the joint creditors should have taken care that both partners were adjudged bankrupt, within the time limited by the statute. As they have not taken this course, I must infer that they did not think it worth their while to interfere with what, in the absence of bankruptcy, is only the payment of a just debt.

So far as the bill seeks an account from Farnum of the partnership affairs, it is demurrable only on the ground of multifariousness and misjoinder, and may, perhaps, be amended on proper terms, by striking out all other matters after the defendants George and John Merritt have been dismissed. Demurrer sustained.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

Case No. 4,947.

FORSHAY v. DU FAIS.

[N. Y. Times, Jan. 29, 1855.]

District Court, S. D. New York. Jan. 26, 1855.

DEMURRAGE—EFFECT OF USAGE.

[A usage by which vessels, after reporting themselves to the consignee, allow two or three days for a sale of the cargo, and, if directed to another wharf, go there at their own expense, will not deprive a vessel of the right to demurrage, where her cargo was sold before arrival, and she gave immediate notice of readiness to discharge, and no objection was made, but she was detained for over a week.]

[In admiralty. Libel by David Forshay, master and owner of the schooner Eliza Jane, against F. Du Fais, for freight and demurrage.]

Benedict, Scoville & Benedict, for libelant.
Bowdoin, Barlow & Larocque, for respondent.

Before INGERSOLL, District Judge.

This was a suit brought by the master and owner of the schooner Eliza Jane, to recover the freight upon a cargo of grain brought from Norfolk to this port, and consigned to the defendant, and demurrage for delay in unloading the vessel. The freight had been paid into court by the defendant, leaving the question of the demurrage the only one before the court. Evidence was given by the libelant that the vessel arrived here on Sunday, the 12th of August last, and notice was given on Monday morning to the defendant; that the vessel lay at the wharf until Thursday, when she was ordered to another wharf, and was not finally unloaded until the Monday following; and that the vessel could have been discharged in one day. A witness was then examined for the defendant, who testified that there was a usage in the trade for vessels arriving from the South with grain to report themselves to the consignee—then to allow two or three days for the cargo to be sold, and, when directed, to go to another wharf, at the expense of the vessel, and unload there.

Judge INGERSOLL said that even if such a usage were proved, it would not alter this case, as the testimony was that this cargo had been sold before the arrival of the vessel; and that after a vessel had arrived in a proper place, and was ready to discharge, and notice was given of such readiness, and no objection made by the consignee, it would not follow, from such a usage, that where a consignee did then delay the vessel, he was not bound to pay a demurrage. A decree was accordingly rendered that the libelant recover demurrage for six days' detention, with a reference to a commissioner to ascertain and compute the amount.

FORSOKET, The (WILLENDSON v.). See Case No. 17,682.

Case No. 4,948.

In re FORSYTH et al.

[7 N. B. R. 174.] [1]

District Court, E. D. Michigan. 1873.

BANKRUPTCY—FRAUDULENT PREFERENCE — JUDGMENT BY DEFAULT AND EXECUTION—PROVABLE DEBTS.

1. A creditor, who receives money and merchandise from his debtor knowing him to be insolvent, is guilty of obtaining a fraudulent preference; hence, if he refuses to surrender to the assignee the property and money so received, he cannot prove his claim, and must pay the costs of the proceedings by the assignee to compel him to relinquish his preference.

2. A debtor suffers his property to be taken on legal process when he allows it to be seized in execution on a judgment obtained against him by default.

3. When the execution creditor knew that his debtor was unable to pay his debts at maturity he was put upon inquiry at once, and must be adjudged chargeable with the knowledge he would have thus obtained, and guilty of receiving a preference with reasonable cause to believe his debtor insolvent. The claim cannot be proved until the creditor has surrendered to the assignee the advantage obtained by his judgment.

4. A note given in an individual transaction of one of the bankrupts and in no manner for the benefit of the firm, though signed in the firm name, is not provable in bankruptcy against the joint estate

On the certificates of the register, Hovey K. Clark, Esq., of issues of law and fact arising upon three several petitions of F. G. Russell, assignee, to expunge the claims of certain creditors who have proven their claims, viz.: (1) The claim of David Wilson; (2) the claim of Philip Nettre; (3) the claim of Vincent J. Scott.

LONGYEAR, District Judge. First, as to the claim of David Wilson. Section 23 of the bankrupt act [of 1867 (14 Stat. 528)] provides, among other things, as follows: "Any person who, after the approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove his debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference." The issue certified arises under this provision, and the questions presented are:

1. Had Wilson accepted a preference on account of the debt or claim proven by him?

2. Had he, at the time he accepted the same, reasonable cause to believe that the same was made or given by the debtors contrary to any provision of the act?

The bankruptcy proceedings were commenced October twelfth, eighteen hundred and seventy-one. Wilson's claim, as proven, is a stated account for money loaned and interest on the same, amounting to nine hundred and twelve dollars and seventy-six cents, and admitting credits for cash and merchandise received by Wilson on account at sundry times from April twenty-ninth, eighteen hundred and seventy-one, to September twenty-eighth, eighteen hundred and seventy-one, amounting in all to seven hundred and seven dollars and ninety-seven cents, of which amount four hundred and fifty-seven dollars and ninety-seven cents appear by the statement and also by Wilson's admission in his answer, to have been so received during the month of September next before the commencement of the proceedings in bankruptcy.

The issue was submitted upon the petition and answer alone. From these it clearly ap-

[1] [Reprinted by permission.]

pears that the debtors were insolvent during the entire month of September. It needs no argument to show that payments made by an insolvent debtor to any one or more of his creditors necessarily operates as a preference to such creditor or creditors to the extent of the payments so made, and that, therefore, Wilson, by receiving the payments which were made to him during the said month of September, in fact, accepted a preference. The first question presented must, therefore, be answered in the affirmative.

The first consideration presented by the second question is whether the preference so accepted by Wilson was made or given by the debtors contrary to any provisions of the bankrupt act. The debtors, as we have seen, were insolvent when they made the payments in question. It is now well set tled, not only by an almost unbroken current of decision in the bankruptcy courts, but by the highest judicial tribunal of the United States,—Toof v. Martin, [13 Wall. (80 U. S.) 40],—that payments so made are to be presumed to have been made with a view on the part of the debtor to give a preference. It needs no argument to show that a preference so made or given by a debtor, is contrary to the express provisions of the act contained in the first clause of section 35. See, also, section 39.

The only remaining consideration under the second question is whether Wilson, when he accepted such preference, had reasonable cause to believe that the same was so made or given by his debtors contrary to the provisions of the act. Wilson, in his answer, admits as follows: "This respondent further admits that when he received said money and merchandise as aforesaid (referring to the money and merchandise received by him on his debt during the month of September) he knew that said George Forsyth was in New York for the purpose of effecting a compromise with the creditors of said firm, and that said Forsyth & Murtha were insolvent and wholly unable to pay their debts." This admission settles the question beyond all doubt. Knowing the facts upon which, as we have seen, the illegality of the preference given him depends, he not only most unquestionably had reasonable cause to believe, but he of course actually knew that such preference was so unlawfully given by his debtors. The answer to the second question must also be in the affirmative.

Wilson not having surrendered to the assignee the property, money, benefit and advantage received by him under such preference, it results that proof of his debt or claim is absolutely prohibited by the clause of section 23, above quoted. The prayer of the petition is, therefore, granted, and Wilson's claim, so proven, must be expunged, and Wilson must pay the costs of this proceeding, to be taxed, including an attorney's fee of fifteen dollars. He appears to have been a sort of confidential clerk of the bankrupts, having the management, to a large extent, of their financial matters, and was thus enabled to take advantage of their other creditors. And having full knowledge of their condition, there is no excuse for his holding on to the advantage he has gained and presenting his claim for proof, and then insisting upon it after it was attacked, in plain violation of law. I there fore consider it but just that he should bear the burden of the costs of these proceedings instead of the estate.

Second. As to the claim of Philip Nettre. The issue certified arises under the same provision of the bankrupt act, (second clause of section 23) and the questions presented are the same as in the case of David Wilson, just disposed of by the first part of this opinion. As before stated the bankruptcy proceedings were commenced October twelfth, eighteen hundred and seventy-one. Nettre's claim, as proven, is for a balance due upon a judgment in his favor against the bankrupts obtained in the circuit court for the county of Wayne, in this state, September twenty-ninth, eighteen hundred and seventy-one. A statement of the account upon which the judgment was obtained accompanied his proof of claim and constituted a part of it, and by which a credit is admitted for money received by Nettre, October fifth, eighteen hundred and seventy-one, one hundred and ninety-one dollars and eighty-five cents. From Nettre's answer, and also from a stipulation in writing, at the hearing, it appears that this one hundred and ninety-one dollars and eighty-five cents was collected by the sheriff upon an execution issued on the aforesaid judgment. It is conceded by the stipulation that the debtors were insolvent; that the debt upon which the judgment was obtained was past due, and that the judgment was obtained by default. Here clearly was a preference of Nettre over the other creditors of the bankrupts to the amount of one hundred and ninety-one dollars and eighty-five cents. The debtors being insolvent, such preference was the necessary result of the facts stated. The first question, therefore, must be answered in the affirmative—that Nettre did accept a preference on account of the debt or claim proven by him.

The first consideration under the second question presented, whether the preference so accepted was contrary to any provision of the bankrupt act, is disposed of by a simple reference to section 39, the portions of which material in this connection are as follows: "That any persons residing and owing debts as aforesaid, who, after the passage of this act, shall," etc., "or, who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall * * * suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors * * * shall be deemed to have committed an act of bank-

ruptcy," etc. Here the debtors clearly suffered their property to be taken on execution, and they did so none the less because it was so taken against their will (as it is claimed in Nettre's answer) if such was the fact. A person suffers that to be done which he has the power to prevent and does not prevent. The debtors could have prevented their property being taken on Nettre's execution by going into voluntary bankruptcy, and thus placing their property where all their creditors, including Nettre, could share alike. That it was so suffered with intent to give a preference to Nettre, the debtors being, as we have seen, insolvent at the time, does not admit of discussion, since the decision of the supreme court in the case of Toof v. Martin [supra]. See, also, the remarks upon this subject in the case of Wilson's claims in the first part of this opinion.

It results, therefore, that the preference so accepted by Nettre was contrary to the provision of the act. Had Nettre reasonable cause to believe the preference was of that character? The debtors were merchants. As to them, inability to pay their debts as they became due in the ordinary course of business was insolvency, in the sense in which the term "insolvent" is used in the act in reference to debtors of that class. Toof v. Martin [supra]. The fact of insolvency is expressly conceded in the stipulation. Nettre was apprised of their inability to pay, and of course of their insolvency, by their failure to pay his debt, as to which they made no defense, and it is fair to presume they had none. This was at least sufficient to put him upon inquiry as to their solvency, and being so he must be held chargeable with the knowledge he would have thus obtained, which in this case would have been that his debtors were in fact insolvent. Nettre of course knew that his debtors suffered their property to be taken on the execution on his judgment against them, and that he thereby obtained a preference over their other creditors, which, as we have seen, the law presumes was intended by the debtors, and Nettre must therefore be held to have accepted such preference with reasonable cause to believe that the same was contrary to the provisions of the act above quoted.

A creditor may of course, if he chooses, do as Nettre did, instead of putting his debtor into bankruptcy in the first instance. In doing so, however, he takes the chances of his debtor going into bankruptcy within four months thereafter, either voluntarily or involuntarily, and thus losing the advantage obtained. In such cases, all he has to do to remove the obstacle to proving his claim in the bankruptcy, and to his standing on an equal footing with the other creditors, is simply to surrender such advantage to the assignee, as is provided in the provision of section 23, quoted in the first part of this opinion. Nettre not having so surrendered, his claim was not provable. The prayer of the petition must, therefore, be granted, and Nettre's claim must be expunged accordingly. As the unprovable character of Nettre's claim is founded largely on presumptions, I shall not impose costs in favor of either party as against the other.

Third, as to the claim of Vincent J. Scott. Scott's claim is founded on two promissory notes, both signed "Forsyth & Murtha," one for one thousand dollars, and one for five hundred and sixty dollars. The note for five hundred and sixty dollars only, is objected to. The objection is founded upon the allegation that the note was given in an individual transaction of the bankrupt George Forsyth, and in no manner for the benefit of the firm, and without Murtha's consent; all of which was well known to Scott. The note being signed with the firm name, it was prima facie a valid claim against the estate, and entitled to be paid out of the joint assets; and I think the burden was on the assignee to maintain his charges against it. This he contends he has done by the admissions contained in Scott's answer. The specific charges made by the assignee against this claim is that it "is not an indebtedness of said bankrupts to said Scott; that the note given for said sum of money * * * was signed in the firm name by said George Forsyth, without the knowledge or consent of said Murtha, and that said sum of money thus obtained from said Scott was not in any manner used in and about the business of said Forsyth & Murtha, or for firm purposes, but was obtained by said Forsyth for individual purposes solely, and was by said Forsyth delivered to his brother, James Forsyth, to enable said brother to visit Europe," etc., and charges Scott with knowledge of those facts.

Scott's answer, responsive to these charges, is as follows: "That the disputed claim of five hundred and sixty dollars was paid by him to James Forsyth, on receiving the note of the firm for that amount, to enable said James Forsyth to go to Great Britain, where he had an offer of employment, * * * and that the advance of this money by him at the request of both brothers was merely an act of friendship and to enable the said James Forsyth to accept employment, without which he could not have been enabled to accept it." The answer, it will be observed, fully sustains all the charges made by the assignee, except the one that the firm name was signed to the note by George Forsyth, without the knowledge or consent of Murtha. As to this last named charge, it does not need argument to show that the money having been advanced by Scott on the procuration of the bankrupt, George Forsyth, for a purpose which must have been known to Scott to have been entirely outside of the partnership business of Forsyth & Murtha, the burden of proof was shifted, and it was on Scott to show Murtha's consent to the giving of the note, or that George Forsyth had the right,

as a member of the firm, to bind it for the payment of the money so advanced by Scott to James Forsyth, by reason of some indebtedness or obligation of the firm to the said James. The issue was submitted on the assignee's petition and Scott's answer alone, without any proofs being taken—Murtha's consent, or George Forsyth's right to sign the firm name to the note, nowhere appears. The statement thrown into Scott's answer that the money so advanced by him "was the whole consideration the said James Forsyth received for his interest in the stock of Forsyth & Co., which amounted to several thousand dollars," even if it could be considered as responsive to the charges made by the assignee, and so entitled to be taken as true without proof (which, I think, cannot be,) is of no avail. Its relevancy to the matter in controversy is not made in any manner to appear.

Upon the case submitted, therefore, it must be held that Scott's claim, so far as it is based upon the said note for five hundred dollars, was not a legal claim against the firm of Forsyth & Murtha, and therefore not provable against their joint estate in this court.

The prayer of the petition of the assignee is, therefore, granted, and the claim of Vincent J. Scott must be abated accordingly. A separate order will be signed in each case in accordance with the foregoing opinion.

Case No. 4,949.

FORSYTH v. CLAPP et al.

[6 Fish. Pat. Cas. 528; Holmes, 278; 4 O. G. 527; Merw. Pat. Inv. 448.] [1]

Circuit Court, D. Massachusetts. Oct., 1873.

PATENTS—PATENTABILITY—ANTICIPATION—CONSTRUCTION OF REISSUE.

1. McBurney having formerly prepared a tube from fibrous material and India-rubber in a certain manner, and cut it into rings for stuffing boxes, Forsyth's use of similar tubes upon shafts for the rolls in a wringing-machine does not entitle him to monopolize them as his invention.

2. He may have a patent for the combination of such tube with the shaft, although united in the same way that other tubes and shafts have been before united for the same purpose, provided new results are obtained. Two old elements combined in an old manner but producing a new result, are patentable.

3. Moulton's roll for a wringer consisting of fibrous material, of which the fibers are looped about a wire wound closely about the shaft, and run out from the shaft in a radial direction, the whole imbedded in India-rubber, which is thereby attached to the shaft, is not an infringement of the Forsyth patent.

4. Although a reissued patent may have claims so broad as to cover a defendant's device, yet the court will look beyond the claims, into the body of the specification of both the original and reissued patents, and ascertain whether there is any invention to support the claim.

[Cited in Atlantic Giant Powder Co. v. Mowbray, Case No. 624. Quoted in Swain Turbine & Manuf'g Co. v. Ladd, Id. 13,662.]

[Bill in equity [by James B. Forsyth against Charles M. Clapp and others] to restrain alleged infringement of reissued letters-patent [No. 5,081] for a wringer-roll, dated Oct. 1, 1872. The original patent [No. 101,994] was granted to the complainant April 19, 1870. The claim of the reissued patent was for "a rubber roll whose interior is composed of vulcanized rubber mixed with fibres, where the fibres are arranged substantially as above described;" i. e. (as stated in the specification), "so that they will extend through the rubber radially from the shaft." The principal question in the case was, whether the defendants infringed. The construction and operation of the complainant's and defendants' rolls are stated in the opinion.] [2]

William Whiting and James E. Maynadier, for complainant.

Benjamin R. Curtis and George L. Roberts, for defendants.

SHEPLEY, Circuit Judge. Without at this time stating the conclusions at which the court arrived in relation to several questions presented in this case, it will be sufficient for the disposition of the cause to state the decision of the court upon the question of infringement. For a proper consideration of this question, it is necessary to consider the state of the art at the time of the alleged invention of Forsyth.

Rubber rolls for wringers were first made in the form of tubes or hollow cylinders, and expanded on to a plain shaft. Then attempts were made to secure the roll more firmly to the shaft, first by winding the shaft with wire, and afterwards with twine. An effort was made to secure a more lasting union to the shaft by forcing the tube upon a heated shaft. Next followed a mode of making the shaft itself of two or more parallel rods. The rubber rolls first made with a number of holes corresponding to the number of rods were forced on to these rods, which were then connected at their extremities. Canvas was also interposed between the shaft and the roll, and cemented to both. Various other devices appear to have been resorted to for the purpose of fastening more firmly the tube to the shaft. The purpose of all of these inventions was to make a more perfect connection of the elastic roll with the metallic shaft.

The difficulty which Forsyth thought he saw, and which he claimed had not been obviated by any of the other devices, was not so much the separation of the roll from the shaft at the lines or points of connection, as the tendency of the strain on the rolls when in use to a destruction of the body of the roll itself.

[1] [Reported by Samuel S. Fisher, Esq., and Jabez S. Holmes, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 6 Fish. Pat. Cas. 528, and the statement from Holmes, 278. Merw. Pat. Inv. 448, contains only a partial report.]

[2] [From Holmes, 278.]

His theory was, that while the connection of the shaft with the homogeneous body of the roll constricted on to the shaft was sufficient for all practical purposes in the use of a wringing-machine, the real difficulty to be overcome was, that the particles of rubber in contact with the shaft separate and tear away from the rest of the rubber composing the body of the roll. He acted upon the hypothesis that while the various connections of the roll with the shaft were sufficient to withstand the strain, a portion of the body of the roll would break away from the portion retaining its connection with the shaft by a process of disruption or rending asunder of the body of the roll itself. He commenced, thereupon, a series of experiments, the object of which was to substitute for the homogeneous rolls in use a roll with a tougher, stronger, and less elastic substance in the interior than in the exterior portion of the roll. After trying various methods to accomplish this result by the addition of fibrous or other nonelastic material to the stock of which the interior of the roll was composed, he finally constructed a roll with fibrous material arranged in the interior portion of the tubular roll in a manner which in an expression proximately descriptive he calls "radially." A sheet of cloth, with a thin layer of vulcanizable compound on each side of it, is first cut into long strips, "bias," or diagonally across the threads or fibres of the cloth. Several of these long strips are placed upon each other and pressed together until the surfaces of rubber or vulcanizable compound are cemented and permanently united. The sheet thus formed is cut into strips or bands of suitable width to admit of their being easily wound on a mandrel, or the shaft of a roll, in such a manner that the fibres of the cloth will radiate from the mandrel or shaft. As shown by the drawing accompanying his specification, it is obvious that each thread would thus extend from the interior to the exterior of the fibrous portion of the roll in a curved radial line, the threads crossing each other, and such threads being nearer together at the core or axis, and separated further from each other as the distance from the core or axis increases. The roll is then made up to the desired size by winding rubber sheets around it coated with cement, when it is placed in moulds and subjected to the vulcanizing process, the rubber in its soft and plastic state filling up all the crevices around and between the layers and incorporating the parts together. In this way it is claimed that "the tenacity of the roll and the degree of adhesion of the parts are much increased, and the position of the fibre is better adapted to resist any tendency of the roll to become loose and turn on its shaft when subjected to a strain."

Charles McBurney had invented and manufactured at the works of the Boston Belting Company a tube substantially, if not precisely, like the tube of Forsyth. No appreciable material distinction can be discovered between the modes of making the McBurney and the Forsyth tube, or in the tubes themselves when made on a mandrel. McBurney's tubes and their mode of manufacture are represented by Exhibits 10 to 14, inclusive. These tubes were made of all sizes, from three-quarters of an inch to several inches interior diameter, and from one-half inch to an inch and a half thickness of tubing, and sold in tubes to consumers. The purchasers cut them in sections or rings for stuffing boxes. Such a tube constricted on to a shaft would be Forsyth's roll. Forsyth does not describe any particular mode of connecting the tube with the shaft. He leaves that to be effected by any of the old and well-known processes in use. All that can with any show of reason be claimed for his roll is the combination of an old tube with an old shaft, in a mode which was old, to accomplish a new and useful result.

Treating it as a valid patent for this new combination of an old shaft with an old tube by old means of connection, for the purpose of considering the question of infringement in the light of the state of the art as existing when he made his roll, we now proceed to examine the construction of the Moulton roll as actually made, and relied upon as an infringing device. The Moulton roll, as manufactured by the defendants, was made by applying transversely to a sheet, or between two sheets, of vulcanized rubber, a layer or range of strands of fibrous material, and cutting this sheet into ribbons of the desired width at right angles to the length of the strands. These ribbons are folded in the centre, and a metallic wire is enclosed in the fold and wound spirally about the shaft under great torsion, from end to end between the journals, the wire being fastened to the shaft at each extremity. A cylinder or sleeve of rubber is applied over the surface, and the whole is subjected to a vulcanizing process until the whole mass of the roll is thoroughly compacted together. The wire is so tightly wound under pressure, that it, in fact, becomes a part of the shaft. The fibrous threads are, in fact, loops which pass into one orifice and out of another in the metallic shaft, their ends extending strictly radially into the body of the roll.

There is a radical and obvious difference in the function of the fibres in the two rolls. Their similarity consists in the fact, that the fibres in one are arranged in curved, radial, diverging lines, extending in a direction towards the periphery of the roll, and in the other in radial lines extending in the same direction. In both of them the effect of the fibres is more or less to diminish the elasticity of the interior portion of the resilient roll; but in the Moulton roll, as made by the defendants, not to any material, or to a scarcely appreciable, extent. Their difference consists in the function which they per-

form. The inner ends of the fibres in the Forsyth tube touch or nearly touch the shaft. They do not fasten the rubber compound to the shaft, or aid in fastening it. The ends of the fibres themselves are not fastened to the shaft except so far as they are cemented by the vulcanizable material. The vulcanizable material holds the ends of the fibres up to the shaft, instead of the fibres performing that function for the vulcanizable compound. The inner ends of the fibres in the Forsyth roll were attached to the rigid portion of the roll resting upon the shaft, and the outer ends extended from this rigid portion towards the circumference of the roll, thus tending to secure that "adhesion of the parts" of the roll to each other, at which he aimed, as well as to limit the mobility of the rubber into which they extend. If McBurney's tube, or Forsyth's, be constricted upon a shaft which is too small, or insufficiently cemented, or connected to the shaft by any of the then existing modes of connection in an imperfect manner, so that the shaft turns in the tube, that result would not be owing to the fact that the fibres of Forsyth failed to perform perfectly their function of confining the rigid portion of the roll to the more elastic portion of it, and of limiting the mobility of the rubber in which they are buried. So when the roll is subjected to strain by the passage of the sliver of cloth between the rolls of a wringer, causing the outer surface to be compressed in one place, and expanded in others, the fibres in the inner portion of the Forsyth roll do undoubtedly tend to prevent the body of the roll from being separated from the shaft; but they do not effect this result by reason of their attachment to the shaft preserving the connection between the shaft and the rubber, but by reason of their acting at the same time to preserve the form of the inner and more rigid portion of the tube, and keep up the adhesion of such parts with the outer portions where the mobility and resiliency is greater. But perfectly as the fibres may perform this function, a tube imperfectly cemented to the shaft may still, for that reason alone, turn on the shaft in the Forsyth roll. Now, the loops or bows in the Moulton fibres enter the shaft, and the ends of the fibres extend like "staples" (which they resemble in form) into the body of the roll, for the purpose of securing the interior of the resilient body to the shaft. The fibrous loop is to be taken as a whole. The parts of the fibres which extend from the interior towards the exterior of the rubber roll would not operate to confine the rubber to the shaft without the loops. By none of the methods in use at the date of Forsyth's patent, of making the connection between the shaft and the rubber, was the connection made any more tenacious by presenting the ends of the fibre to the surface of the shaft. In some of them the presence of the ends of the fibres lessened the adhesion by as much as it displaced the rubber. The principal function of the fibres in the Forsyth tube, as before stated, is to make the inner portion of the tube more rigid, and to tie the more rigid to the more elastic portion of the tube. Now, in the Moulton roll, as manufactured by the defendants, the principal function of the fibrous loops is to tie the rubber to the shaft, and they do not create any material rigidity in the interior portion of the tube. The method of fastening in the Moulton roll is an inseparable part of the roll itself, being necessarily constructed and built up with the roll, and constituting the inner portion of the roll. It is not adaptable to Forsyth's tube, nor is Forsyth's tube capable of having Moulton's fastening applied to it. Because Forsyth borrowed from McBurney his method of constructing the interior of a tube with fibres of cloth arranged in radial curves, it would be the height of injustice to allow him to monopolize any use of fibres for any purpose whatever in a wringer-roll, if the ends of the fibres extended in a radial direction into the body of the roll. His reissued patent, examined in the light of the invention described in the original patent, if valid, must be limited to such a mode of introducing the fibres of a woven texture radially into the tube for the purposes indicated, without regard to the mode of fastening to the shaft.

The court will look beyond the mere form of words in the claim of a reissued patent into the specifications, in both the original and reissued patent; and even if on the face of the reissued patent it does not embrace any thing not described or suggested in the original, nevertheless, the court will ascertain whether there is any substantive invention adequate to support a claim ingeniously worded, not so much for the purpose of describing what the patentee really invented, as of grasping within its terms, some contrivance not within the knowledge or contemplation of the patentee, and for that reason, not by reason of inadvertence or mistake, not embraced in the claims of the original patent.

Comparing the two rolls, as we have done in some more essential particulars, and without recapitulating other points of difference, enough has already been stated to show, that, so radically different is the structure of the rolls, and the function of the fibrous material, and its mode of operation, that the Moulton roll, as manufactured by the defendants, is clearly no infringement upon any thing secured to Forsyth by his reissued patent, even giving to the invention claimed in that patent the fullest scope claimed for it in the evidence of Forsyth himself, and the expert testimony introduced by him. Bill dismissed.

Case No. 4,950.

FORSYTH et al. v. SMALE et al.

[7 Biss. 201;[1] 8 Chi. Leg. News, 322; 7 Reporter, 262.]

Circuit Court, D. Indiana. May, 1876.

BOUNDARY OF LAND BORDERING ON STREAM — NON-NAVIGABLE LAKE—LINE AS MEASURED ON STREAM.

1. The law upon the subject of land bordering upon streams, is that the navigable streams are to remain navigable; that the land covered by the water is not to be sold. The acts of congress require that these streams shall always remain navigable as public highways; and in relation to streams not navigable, the law has always been that the purchaser takes the land to the center of the stream.

2. A non-navigable lake is governed by the same principles.

[Cited in Indiana v. Milk, 11 Fed. 395.]

3. Where land is purchased bordering upon a non-navigable stream, and the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land, the grant includes any land between the meandered line and the water.

[Cited in Hardin v. Jordan, 16 Fed. 827; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 811, 838; Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. 822, 840; Ex parte Davidson, 57 Fed. 885.]

[Cited in Cooley v. Golden, 117 Mo. 55, 23 S. W. 100.]

Ejectment [by Caroline M. Forsyth and Jacob Forsyth against John Smale and others] for land in what is called Lake George, in Lake county, Indiana. Demurrer to complaint.

Baker, Hord & Hendricks, for plaintiffs.

Harrison, Hines & Miller and McDaid & Knight, for defendants.

DRUMMOND, Circuit Judge. Lake George, according to the complaint, is a body of water about two miles long, north and south, and about three-quarters of a mile wide, east and west; its depth is not stated. It is called a non-navigable lake, and it is said that for many years after the survey was made by the United States, in 1835, the lake had no outlet. The plaintiffs are owners of the title from the government of two tracts of land on the east side of the lake, called lots No. 3 and 4, being parts of fractional section 18, in township 37 north, range 9 west, the western boundary of section 18 being most of it in the lake, certainly that part of it immediately west of lots 3 and 4.

Proceeding south on the shore line of the lake, the plaintiffs are owners of parts of section 19, which extend to the southern boundary of the lake; they are also the owners of parts of sections 24 and 13, extending around the lake by its south boundary, and north on its western boundary, so as to include the land immediately opposite lots 3 and 4. The plaintiffs are thus the owners as alleged, of all the land bordering the lake east and west, as well as south, that is to say, south of a line produced west on the northern boundary of lot 3, so as to cross the lake, and it would include all south of that, and on both sides of the lake, as the property of the plaintiffs. The complaint admits that when the survey was made, the lines were run, not upon the water's edge of lots 3 and 4, but they were run in the usual way for the purpose of ascertaining the quantity of land and from point to point near the boundary of the lake,

The complaint alleges that the defendants claim that the boundaries did not include whatever land was left west of lots 3 and 4, between the meandered line and the lake. It is insisted, however, on the part of the plaintiffs, that this meandered line was run simply for the purpose of ascertaining the quantity of land, and not to exclude from that quantity the land between the meandered line and the lake.

The complaint produces and makes part of the pleading two plats, copies of the government survey, according to which it appears that the western boundary of lots 3 and 4 was the lake. There is no land shown on the west between the meandered line and the lake, but the lines are run from the eastern boundary of section 18, and of lots 3 and 4 to the lake, and it is admitted, extending the lines thus surveyed and as marked in rods they would not reach the lake; but this is not shown upon the surveys produced in evidence; on the contrary, as before stated the western line of lots 3 and 4 appears to be the lake. There is no gore or tongue of land represented on lot 3 according to this survey, but the water line is represented to be the ordinary varying line of the lake. The complaint alleges that there is a gore or strip of land extending from lot 3 in a south westerly direction into the lake, and it is in relation to that gore or strip of land that this controversy arises.

Defendants are in possession of that land, and the plaintiffs claim it for the reason as they allege, that whatever land is there is a part of lot 3; at any rate so far as the northern line of lot 3, when produced west, would describe the boundary of that gore or strip of land. The complaint says nothing about the condition of the lake at the time of the survey, whether it is the same now or at the time the suit was brought, as it was at the time of the survey. Whether any changes have taken place in the condition of things does not appear.

The first question to be determined is, whether the boundaries of lots 3 and 4 did extend to the lake, or whether, on the other hand, they did not include more or less of land which might be left between the meandered line and the lake, and, I think, upon the face of the pleadings as they stand when

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

connected with the maps, we must assume that the boundaries extended to the lake.

It seems to me that the principles which are decided by the supreme court of the United States in the case of Railroad Co. v. Schurmeir, 7 Wall. [74 U. S.] 272, must to a great extent control this case. That was a case where there was a tract of land surveyed on the Mississippi river; a meandered line was run, outside of which was the tract of land in controversy in the case, which was claimed by the railway company, by virtue of a grant from the government to the state of Minnesota, but which was also claimed by the party who had entered the land bounded by the river. That line was run just as this was, with a meandered line upon the river, and the party purchased the land of the government as so much land, and took his patent for it, and the question was, whether the patent included the land outside of the meandered line, and which was sometimes covered with water and sometimes bare. The supreme court held that the patentee had the better right to the land because his patent covered the land in controversy. The meandered lines were run for the purpose of ascertaining the quantity of land, but the intention of the government was to leave the river as the boundary of the land, and the court says (Railroad Co. v. Schurmeir, 7 Wall. [74 U. S.] 286-289):

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

"In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water course, and not the meander line, as actually run on the land, is the boundary.

"Proprietors, bordering on streams not navigable, unless restricted by the terms of the grant, hold to the center of the stream; but the better opinion is, that proprietors of lands bordering upon navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be, and remain public highways. * * * * *

"Rivers were not regarded as navigable in the common law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that congress did not employ the words 'navigable,' and 'not navigable,' in that sense, as usually understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide waters, and in which there were no salt water streams. Viewed in the light of these considerations, the court does not hesitate to decide, that congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways."

Now these principles are strictly applicable to this case, and in accordance with the facts of this case. The only difference is, the court was there speaking of a navigable river, in this case it appears that the lake, so far as we know anything about it, is non-navigable. But why should that, by any possibility, exclude the plaintiffs from the operation of the principle? One would think that, so far from having that effect, it might be brought within the rule of law in relation to non-navigable streams. The law upon the subject of the survey of land bordering upon navigable and upon non-navigable streams is, that the navigable streams are to remain navigable; that the land covered by the water is not to be sold. The acts of congress require that these streams shall always remain navigable as public highways; and in relation to streams not navigable, the law has always been that the purchaser takes the land to the center of the stream, as is stated by the supreme court in the case of Railway Co. v. Schurmeir, supra. So that, as to navigable streams, the purchaser takes the land only to the border of the stream, with the right, of course, to make improvements upon the stream, as wharves, just as can be done in water courses where the tide ebbs and flows. This is the case of a non-navigable lake, not of a stream, and the question is, whether that changes the principles of the case as stated. So far as we can judge from the statement made in the pleadings, it seems to me that it cannot. In the argument of this case a great many facts have been stated of which the court can take no judicial notice. For example, it is stated that the government, in many cases of these non-navigable lakes, has regarded the land covered by the water as still belonging to the government, and has had it surveyed, and has sold it. Some cases in Missouri are referred to and another on the Calumet river, in Illinois and Indiana. We do not undertake to lay down any absolute rule upon the subject. We do not say but that circumstances might change the principle applicable to such a case as this, but if it be true, as we have the right to assume upon the pleadings that it may be, or is, that the physical condition of this lake has not substantially changed between the time of the survey and the time when this suit was commenced, then it seems clear that the plaintiffs, in obtaining the title to lots 3 and 4 would have the right

to include within the boundary of their land, as that which was sold by the government, all of the extension into the lake.

Whether or not this was the effect of a gradual accretion upon the land, or of some sudden cause, all we can judge from is the facts as they appear from the pleadings. As this lake is only three-quarters of a mile wide, it may be doubtful whether the same rule ought to be applicable to this case as to a larger lake, which, owing to the cultivation of the country or other cause, might dry up gradually or suddenly. For example; the plaintiffs being the owners of all the land on the east and west and southern boundaries of this lake, suppose that there is a gradual withdrawal of the lake, and the bed of the lake bordering upon the plaintiff's land should become dry land, what is to prevent the principle of accretion from operating in such a case as this, where the lake is only three-quarters of a mile wide? Ought there to be any difference in this case from that of a non-navigable stream, so called? Is not this within the spirit of the acts of congress? Whether that would be true of a large body of water where the water gradually or suddenly retired, it is not necessary to decide. It might be supposed in such case that the government did not intend to convey the land covered by the water, but that perhaps is not necessary to be decided in this case. Neither do I feel inclined to decide absolutely as to the rights of the parties in this case.

It may be that if the facts were all known to us, if the changes which had occurred since the time of the survey and the sale, and the time when this suit was brought were known, we might take a different view of the case. But as far as we can at present see, there seems to be no reason for taking this case out of the general rule, where land is purchased bordering upon a non-navigable stream, and where the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land. The uniform rule as to the description of lands in deeds is that the great natural object is to govern, and courses and distances are to yield to the object. The great natural object here was the lake or the water, and the plat shows that the western line of lots 3 and 4 was intended to be the water, and we conclude that the government did not intend to exclude from the operation of the grant which was made to the purchaser, any land between the meandered line and the water, so without actually deciding what may be the ultimate rights of the parties, we must hold that the demurrer is not well taken, and must be overruled. Ordered accordingly.

FORSYTH (WOODS v.). See Case No. 17,992.

Case No. 4,951.

FORSYTHE v. BALLANCE.

[6 McLean, 562.] [1]

Circuit Court, N. D. Illinois. July Term, 1855.

GRANT—CONSIDERATION—GRATUITY — DECEASE OF SETTLER — PATENT TO LEGAL REPRESENTATIVES —SALE FOR PAYMENT OF DEBTS — REGULARITY OF THE PROCEEDING.

1. A grant made by congress to certain settlers in the village of Peoria, whose buildings had been destroyed by a company of militia, in the service of the United States, cannot be considered as a gratuity.

2. The grant, when made, referred back to the consideration and fully recognized it.

3. The individual who made the settlement, and whose property was destroyed, died before the grant was made. The property descended to his heirs, and when the patent was issued, it was properly made to the legal representatives of the deceased.

4. Under the laws of Illinois, where the administrator finds it necessary to sell the real estate of a deceased person for the payment of his debts, he may make the heirs, if not residents of the state, or of the United States, parties to the proceeding by publication under the order of the court.

5. When this proceeding is offered collaterally, it cannot be objected to, the jurisdiction being undisputed.

6. The heirs being content, a stranger cannot object to the irregularity of the proceeding.

At law.

Mr. Williams, for plaintiff.

Mr. Browning, for defendant.

Before McLEAN, Circuit Justice, and DRUMMOND, District Judge.

McLEAN, Circuit Justice. This is an ejectment to recover the possession of a certain lot of land in the town of Peoria, of which the defendant is in possession, under a title adverse to that under which the plaintiff claims. The plaintiff claims under Lecroix, who was an early settler in Peoria, and who claimed under the acts of congress of 1820 and 1823. The first was entitled "An act for the relief of the inhabitants of the village of Peoria," passed the 15th day of May, 1820 [3 Stat. 605]. The 1st section provides, "that every person, or the legal representatives of every person, who claims a lot or lots in the village of Peoria, shall, before the first day of October, deliver to the register of the land office at Edwardsville, a notice in writing of his or her claim, and the register is to make report to the secretary of the treasury of the evidence in support of the claim, and his opinion whether it ought to be confirmed." The register reported, among others, that Michael Lecroix claims a lot in the village of Peoria, eighty feet by three hundred in depth. And it appears from the facts in the report, that Lecroix purchased it and three other lots in 1808 or 9, very soon after which he built on the above lot a large two story dwelling house, a large store house, and other out buildings,

[1] [Reported by Hon. John McLean, Circuit Justice.]

&c., and that he continued to occupy the same until the year 1812, when the village of Peoria was destroyed by Capt. Craig, who commanded a company of Illinois militia, in the service of the United States, because his company was fired upon at night, whilst at anchor in their boats in the lake opposite the town, by Indians, who were supposed to be friendly with the inhabitants.

On the 3rd of March, 1823, congress passed "an act to confirm certain claims to lots in the village of Peoria, in the state of Illinois" [3 Stat. 787]. The first section declared, "That there is hereby granted, to each of the French and Canadian inhabitants and other settlers in the village of Peoria, in the state of Illinois, whose claims are contained in a report made by the register of the land office at Edwardsville, in pursuance of the act of congress, approved May the fifteenth, 1820, and who had settled a lot in the village aforesaid, prior to the 1st day of January, 1813, and who have not heretofore received a confirmation of claims, or donation of any tract of land or village lot * * * so settled upon and improved, where the same shall not exceed two acres, * * * shall be confirmed." A survey of the lot in question was made by the United States in 1840, and a patent was issued to the legal representatives of Lecroix. The patent recited the report of the register, that "Michael Lecroix is the inhabitant or settler within the purview of the confirmatory act of congress, 3d March, 1823, &c., and that it has appeared to the satisfaction of said register and receiver, that the said inhabitant or settler, did not, prior to the said act, receive in confirmation of claims or donations of any tract of land or village lot from the United States, and that the legal representatives of the said Lecroix, in virtue of the confirmation act aforesaid," are entitled, &c. In March, 1848, the administrator of Lecroix filed his petition to have the lot sold for the payment of debts. Lecroix, having made a will, distributed his property between his wife and children, illegitimate, but recognized by him. He died in 1821. The court of probate, to whom the petition was presented, ordered publication, as required by the statute, as notice to the absent heirs who lived beyond the state of Illinois, some or all of them living in Canada. These heirs were made defendants in the petition, as well as the legatees of the deceased. After the requisite notice was given and the necessary proceedings had, the court directed a sale of the premises in pursuance of the statute, and a purchase was made by the administrator or executor of Lecroix, who afterwards sold to the plaintiff.

The right asserted by the defendant, originated before the patent, under which the plaintiff claims, was issued; and it is insisted that the title was a gratuity, and that until the patent was issued, no right vested in the representatives of Lecroix. That in this view the title of the defendant is paramount to that of the plaintiff. In no correct sense, can this lot be considered as a gratuity to Lecroix. It is true that the early settlers at Peoria had no right to the lots they occupied. They were the pioneers in that part of the country, and encountered privations and dangers incident to such a settlement. The country became involved in a war with England, and a consequent war with the Indians on our frontier. During this contest a Captain Craig, who commanded a company of militia, in the service of the United States, being fired on by some Indians from or near the village of Peoria, on the supposition that the people of the village were friendly to those Indians, in revenge destroyed the village. This was a great outrage, and was so considered by the government, and it was bound to remunerate the sufferers. It was done, to a limited extent, by giving to them the lots which they had occupied. The act of 1820 was passed for the relief of the inhabitants of Peoria. This was a recognition of the obligation by the government, but of a more limited extent than the merits of the inhabitants required, or was suited to the dignity or justice of the government. The report was made under the act of 1820, designating the extent of the claim of Lecroix. It seems he had constructed a large dwelling house, a large store house, and other buildings, on the lots awarded to him, and this was confirmed by the act of 1823, which granted the lots stated in the report to the former proprietors. This grant recognized the consideration of the former settlements and improvements, which had been burnt by the troops under the United States. The title related back, and took effect from the settlements made. To call this a gratuity would be to apply the term unjustly, as it supposes the thing to have been done without consideration, and would exclude the remuneration which was declared and intended by the government. Lecroix died before the act of 1823, but the proof of his loss was made, and the proceedings for his remuneration were not only commenced, but nearly completed. His claim was recognized by the government, and its final confirmation can not be separated from the basis on which it rests. It was property, property which, on the death of Lecroix, descended to his heirs. This was fully recognized by the government, by the issue of the patent to his legal representatives. This was not only a pre-emptive right, which is the right of purchase, but it was an absolute right to the property,—a right sanctioned by legislative grant, which is the highest evidence of title. This lot was sold as the property of the heirs of Lecroix, for the payment of his debts. The heirs, under the statute, were made parties to the suit. The proceedings are not alleged to be void for want of jurisdiction, or any other ground.

No fraud is charged. No person but the heirs can now object to the sale, and there is nothing in this case which shows that they are not content. The purchase was made under a judicial sale, and there is no presumption that it was not fairly made.

Can a stranger to this title object to the regularity of the sale? I think not. Under the laws of the state, the title of the heirs was transferred by the sale and the deed made under it. That sale was sanctioned, and the deed made, under the direction and special sanction of a court having jurisdiction of the case. The courts of the United States follow the decisions of the state courts in construing its statutes. The defendant, a stranger to this title, which is paramount to the one under which he claims, objects to the judicial proceedings under which the plaintiff claims, when they are offered in evidence collaterally. This cannot be done where the jurisdiction of the court is unquestionable. In Grignon v. Astor, 2 How. [43 U. S.] 319, in a case where there was a sale of property by an administrator for the payment of the debts of a deceased person, the court say, "The power to hear and determine the case is jurisdiction; it is coram judice, whenever a case is presented which brings the power into action. If the petitioner presents such a case, as, on demurrer, the court would render a judgment in his favor, it is an undoubted case of jurisdiction." And, "if the law confers the power to render a judgment or decree, the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." A case so adjudged, however, erroneously, when the judgment is given in evidence, must be considered as conclusive of the matters determined. I think the legal title is in the plaintiff.

DRUMMOND, District Judge, considered the grant to the legal representatives of Lecroix as a gratuity, which could not be reached by the creditors of the deceased.

[NOTE. See Ballance v. Forsyth, 13 How. (54 U. S.) 18, and 24 How. (65 U. S.) 183.]

FORSYTHE (UNITED STATES v.). See Case No. 15,133.

FORSYTHE (VORHIS v.). See Case No. 17,004.

Case No. 4,952.

FORT v. UNION PAC. R. CO.

[2 Dill. 259;[1] 11 Am. Law Reg. (N. S.) 101.]

Circuit Court, D. Nebraska. Nov. 10, 1871.[2]

NEGLIGENCE — LIABILITY OF MASTER TO SERVANT FOR ACTS OF FELLOW-SERVANT—DAMAGES.

1. A railroad company is liable for the negligent act of a foreman having charge of dangerous machinery, who, in the course and within the scope of his duties, orders an infant employé under him upon a service hazardous to life or limb, and which was not within the scope of the ordinary or proper duties of the servant thus commanded to perform it; in such a case the rule which exempts the employer from liability to one servant for the negligence of a fellow-servant in the same common service, has no just application.

[Cited in Evans v. Atlantic & P. R. Co., 62 Mo. 50; Lehigh Val. Coal Co. v. Jones, 86 Pa. St. 440; Stephens v. Hannibal & St. J. Ry. Co., 86 Mo. 223.]

[See note at end of case.]

2. Damages down to and even beyond the day of trial may, in proper cases, be given.

Action by the plaintiff [Jesse L. Fort] for an injury to his minor son when in the employment of the defendant. The allegations of the petition in respect to the manner in which the injury was caused are as follows: "Plaintiff further says that on or about October 1st, A. D. 1867, plaintiff's minor son, James H. Fort, then aged about sixteen years, was hired and employed by defendant to work in defendant's machine shop in the city of Omaha; that a portion of said shop and the machinery therein was under the superintendence and control of one Collett, agent and servant of said defendant; that said Collett, being grossly negligent and careless in so doing, did order and direct (being thereto duly authorized by defendant, and said minor as such employé being under him as such superintendent) said minor to ascend to a great height, to-wit—twenty feet from the floor of said shop, and among rapidly revolving and dangerous machinery, for the purpose of adjusting a certain belt by which a portion of said machinery was moved; that said undertaking was a hazardous one even for an adult to perform; that said minor undertook to perform said order, but in attempting so to do was caught by the right arm by said belt, said belt being caught by a certain key which was improperly projecting from the shafting near which he was so directed to go, and said arm torn from his body; that said minor was guilty of no negligence or carelessness in attempting to discharge said order, but that he was compelled to obey all orders and directions of said Collett pertaining to his said employment."

The answer puts in issue the substance of these allegations in regard to negligence.

After the evidence was produced, the jury were charged as follows by the circuit judge:

"1. This action is brought by plaintiff to recover damages for an injury to his minor son, resulting in the loss of an arm while in the employ of the defendant. That the plaintiff's son was employed by the defendant, and by an accident his arm was torn off by machinery in the car shop of the defendant, are facts which are admitted. Evidence has been offered tending to show that the defendant, in its works at this city (Omaha) had a car department, of which Mr. Gamble was the superintendent; that under him, and hav-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 17 Wall. (84 U. S.) 553.]

ing immediate control of the shop, was a foreman, Mr. Ballou; that under the foreman there were various sets, or, as a witness called them, 'gangs,' of men, under the immediate direction and control of some employé or 'boss;' that, among those having control of a set or gang of men working in the shop was a Mr. Collett (named in the petition); that Collett's duty was to run and superintend the running of a certain machine, or certain machinery, in the shop; that, from the time the plaintiff's son was employed he had been working under Collett, obeying his orders and directions; that the chief employment of the son had been at a moulding machine, receiving and putting away mouldings as they came from the machine. After the son had been thus engaged for some months, the evidence tends to show that, on the day the accident in question happened, a belt or band connected with a shaft, some fourteen or sixteen feet high, was off the drum, or pulley, and needed lacing. It does not very clearly appear, perhaps, whether the belt thus out of order belonged to the moulding machine or some other machine near by; but there is evidence tending to show that it was within the scope of Collett's duty to see that it was repaired. The plaintiff has given evidence, which has not on this point been opposed by any evidence produced by the defendant, that at the time of the accident, Collett, wishing to lace the band at the end near the floor, ordered the plaintiff's son, about sixteen years of age, to ascend a ladder resting on the shaft at the upper end, which shaft was in motion at the rate of one hundred and seventy-five or two hundred revolutions per minute, and hold or keep the band or belt away from the shaft, while he (Collett) laced or sewed it together at or near the floor; and the right arm of plaintiff's son, while thus engaged, pursuant to the orders of Collett, was caught, or in some way became entangled, in the belt, or drawn between it and the shaft, and was instantly crushed to pieces and torn from his body. The plaintiff has offered evidence tending to show that he hired his son to the defendant to work in the car shop, making the contract with Mr. Gamble, the superintendent; that at the time Mr. Gamble went with the son into the shop, and directed him, in Mr. Collett's presence, to help Collett, or work under him, and obey his orders. Upon the evidence, I do not understand it to be claimed by the plaintiff that the accident was caused by the defect in the key (the only defect alleged in the pleadings as to the machinery), and on the trial no question has been made as to Collett's general skill, fitness, and capacity for the performance of the functions or duties assigned to him; and the specific ground on which the recovery is claimed is that Collett, in ordering the plaintiff's son to ascend the ladder and perform the service before mentioned, considering the age of the boy and the nature of the service required of him (which is claimed by the plaintiff to have been dangerous to life and limb), was guilty of a wrongful or negligent act, which resulted in the injury for which this action is brought.

"2. There is no statute in the state of Nebraska relating to the liability of masters to servants, and the rules regulating such liability must be found in the general principles of the law as declared by tl. courts. One of these principles, too often decided by all the English, and most of the American, courts, to be now denied, is, that a master is not liable to his servant or employé for the negligence of a fellow-servant while engaged in the same common employment or service, unless he has been negligent in the selection of the servant in fault, which is an element, as before observed, not in this case. And this doctrine has been extended by the English, and by many of the state courts in this country, to all persons serving the same master in the same employment, whether equal, inferior, or superior in grade, to the servant injured, and the fact that the injured servant was under the control of the servant by whose negligence the injury was caused, has been considered to make no difference in the application of the rule. Although the rule, particularly this extension of it, so as to exempt a master for the negligence of a servant within the scope of his employment, who has the control of another servant, for an injury to the latter, caused by his obeying the orders of his superior, has met with much, and perhaps, just and reasonable opposition; yet, it has been so often and so generally decided, that it is doubtful how far a court, whatever may be its own convictions, is at liberty to disregard it. But I do feel free to refuse to extend the rule to cases to which the reason on which it rests does not apply. The reason of the doctrine is, that a servant or employé, in making his contract, must be presumed to take into account all the ordinary risks of the business on which he proposes to enter, and obtains a compensation which, upon the average, covers these risks, amongst which are included negligence of fellow-servants in the same common employment, but he is not presumed to take into account a risk not included in his employment, and which, therefore, he has no reason to anticipate. In deciding this case, you should determine the nature of the employment on which the plaintiff engaged that his son should serve. If you find that his contract of service, or the duties which he engaged to perform were such that it was within the contract, or within the scope of those duties, that the son should assist in the repair of the machinery in question, and that the son, when injured, was in the discharge of a duty or service covered by the contract of employment, then the company is not liable for the negligence of Collett (if he was negligent), with respect to ordering the son to ascend the ladder and hold the belt away from the

shaft. But I draw this distinction: If the work which the son was ordered by Collett to do was not within the contract of service, —was not one of the duties which fell within the contract of employment, but was outside of it, then Collett, in ordering the service in question (if he was in scope and course of his duties and power at the time), must, as to this act, be taken to represent the company (which is presumed to be constructively present), and if that act was wrongful and negligent, as hereinafter defined, the company, his employer, would be liable for the damages caused by such negligent and wrongful act; and the principle before adverted to, that the master is not liable for the neglect of a co-employé in the same service has, in my judgment, no application, or no just application, to such a case; for in such a case they are not, in any proper sense, 'fellow-servants' in the same common service.

"3. This action is based essentially upon the alleged negligence of Collett, and the negligence imputed consists in the nature of the order which he gave the plaintiff's son. If, under the foregoing instructions, you find that the company is liable in respect to the act of Collett in ordering the boy up the shaft, you will then have to inquire whether that act was wrongful and negligent. Now, gentlemen, that depends upon the circumstances of the case, which you should attentively consider. An employer is not an insurer of the lives and limbs of his men, but he does impliedly engage that he will not expose them to unnecessary, unusual, and unreasonable risks to life, or serious bodily injury. Negligence is the omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, under all the circumstances surrounding and characterizing the particular case; and in this case it is the duty of the jury to consider the age, and experience, and extent of judgment of the boy, and the nature of the service demanded of him, in respect to its being hazardous to life or limb, or otherwise. If a reasonable and ordinarily prudent man would not have ordered a boy of his age, under the circumstances, upon such a service, because it was dangerous, then it was a negligent and wrongful act; but if it could not, by a man of reasonable prudence and sagacity, have been foreseen that the service demanded was perilous to the life or limb of the boy, the company is not liable, although the act required of the boy was one not falling within the scope of his employment.

"4. This is an action by the father for loss of service of the son, and under the pleadings he can only recover pecuniary damages, which include actual or necessary expenditures for supplies for the son during his recovery, the value of his and his family's necessary attention to the son, and the value of the loss of the services of the son from the date of the accident down to the time of trial."

The jury returned a general verdict for the plaintiff in the sum of $2,264.92, if the damages be computed only to the date when suit was brought, March 10, 1870, but in the sum of $3,056.58, if damages be computed to the time of trial, November 10, 1871. The jury also made the following special finding in regard to the nature of the employment of Collett and of the plaintiff's son, and the cause of the injury, to-wit: "We find that the car department of the defendant was under the management of a general superintendent, who employed and dismissed the hands; that the shop, as to practical operations therein conducted, was under a foreman; that the employés were divided, according to their work, into sets, with an under or immediate foreman; that one of these under-foremen was Mr. Collett, named in the petition, under whom plaintiff's son was to and did serve, as a workman or helper, and whose orders he was to and did obey; that Collett had charge of running and superintending certain machinery in the shop. We find that the plaintiff's son was injured in executing or carrying out an order of Collett, as described in the petition; that this order related to a matter within the scope of Collett's duty and employment. We find that the order to the plaintiff's son (in carrying out which he lost his arm) was one which was not within the scope of the son's duty and employment. We find that it was not a reasonable order, and that its execution was attended with a hazard to life or limb, and that a prudent man would not have ordered the boy to execute it."

A motion was made by the defendant for a new trial, which was denied for the reasons stated in the opinion of the court.

Redick & Briggs, for plaintiff.

A. J. Poppleton and E. Wakeley, for defendant.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. 1. In support of the motion for a new trial, it is urged by the defendant's counsel that the court erred in that portion of the second division, its charge to the jury commencing with, "But I draw this distinction," and ending with the words, "for, in such a case, they are not, in any proper sense, 'fellow servants' in the same common service." I fully appreciate the difficulties that surround the question here presented, and I do not feel certain that this particular case can be discriminated from those in which it is held that the common employer of two servants is not liable to one for the act or negligence of the other in the course of the common employment.

Considering, however, the peculiarities of the case,—the tender age and inexperience of the servant injured, the specially hazardous, extraordinary service which was demanded of him, and that the superior servant, who ordered the boy to perform it, was in the course of his proper duties, and that the injury resulted directly from his negligent and wrongful command, I do not think that it justly falls within the principle which disentitles a servant to recover from the master for an injury caused by the negligence of a co-servant in the same common service. At all events, it is my clear and fixed conviction, that, upon reason, principle and public policy, the employer ought to be, in such a case as the present, responsible civilly for the act of the servant whose neglect and wrongful conduct caused the injury. I do not intend to elaborate my views, nor enter upon a discussion of the authorities. I am aware of the great extent to which the general rule has been carried by the courts—particularly by the courts of England. I place my judgment upon this ground: Collett, in superintending the repair of the belt attached to the machinery, was in the discharge of a duty entrusted to him by the corporation, and in the performance of that duty he, and he alone, at that time, represented the corporation, which, in contemplation of law, was there present in his person, and when he ordered, without due and reasonable care and reflection, the boy to perform a service attended with so much danger, and one which involved a risk not within his ordinary duties and employment, the company ought to be held liable for the wrong the same as if, under the like circumstances, the same act had been required of the boy by an individual employer. True, Collett was a servant of the company, but so was Ballou the general foreman of the shop, and so was Gamble the superintendent, and so are all the other officers of the corporation in the long line of gradation from the president to the lowest. If the company is not responsible for the wrongful act of Collett, it would not be had the same act been done by the foreman of the shop, by the superintendent of the car department, or even by the president of the company himself. Here was dangerous machinery in operation; here was a service, dangerous in its nature, to be performed. Public policy requires that the master, where the safety of a person of tender years and inexperience is concerned, if, indeed, in any case, should not be able to abdicate his duty, or to shift upon another his liability, and this he is enabled effectually to do if he is not liable for the tortious act and neglect of his own servant, and his only representative in connection with the service which was required of the boy. Without denying the general rule, our conclusion is that it should not be extended to this case.

2. On the trial it was contended by the defendant that the jury could in this action only consider and allow for such damages as had happened when the action was brought, while the plaintiff maintained that the jury might take into consideration all the damages that had been sustained up to the day of trial. On this point the court charged as requested by the plaintiff, and there is little doubt that this was a view sufficiently favorable to the defendant. It has been held, indeed, that, in proper cases, damages prospective in their nature, but certain to result from the wrongful act, may be considered and allowed, when they do not form the basis of a new action. Wilcox v. Plummer, 4 Pet. [29 U. S.] 172; cases cited, 2 Greenl. Ev. §§ 268a, 268b.

Judgment will be entered upon the verdict for the sum of $3,056.58.

Judgment accordingly.

[NOTE. A bill of exceptions was signed, and the case taken to the supreme court, where the judgment of the circuit court was affirmed; Mr. Justice Davis delivering the opinion, in which it was held that the master's exemption from liability for the negligent conduct of a coemployé in the same service rests upon the theory that the employé, in entering the service of the principal, is presumed to take upon himself risks incident to the undertaking, among which are to be accounted the negligence of fellow servants in the same employment. But, remarked the learned justice, this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. The injury in this case, it seems, did not occur while the boy was doing what his father had engaged he should do. On the contrary, he was at the time engaged in a service outside the contract, and wholly disconnected with it. He was employed as a helper at a moulding machine, or common work hand, on the floor of a shop; and this, in the language of Mr. Justice Davis, is a very different thing from ascending a ladder resting on a shaft, to adjust displaced machinery, when the shaft was revolving at the rate of 175 to 200 revolutions per minute, and at the order of his foreman. Mr. Justice Bradley dissented. Union Pac. R. Co. v. Fort, 17 Wall. (84 U. S.) 553.]

NOTE. As to measure of damages, see Filer v. New York C. & H. R. R. Co., 49 N. Y. 42, in which it was held that successive actions will not lie for the recovery of damages resulting from an injury to the person in consequence of a single wrongful act; but the recovery may include present damages, and such future or prospective damages as it is reasonably certain will necessarily and inevitably result from the injury.

[The case of Hines v. Union Pac. R. Co., which is published as a note in 2 Dill. 269, is here published as Case No. 6,521.]

In England the rule is "conclusively settled that one fellow-servant cannot recover (from the master) for injuries sustained in their common employment from the negligence of a fellow-servant, unless such fellow-servant is shown to be either an unfit or improper person to have been employed for the purpose. Morgan v. Vale of Neath Ry. Co., 5 Best & S. 570 (in exchequer chambers, Id. 736); L. R. 1 Q. B. 149. And this rule is not altered by the fact that the servant to whom the negligence is imputed was a servant of superior authority, whose lawful directions the plaintiff was bound to obey." Per Mellor, J., in Feltham v. England (1866) L. R. 2 Q. B. 33. "A foreman is a servant as much as the other servants whose

work he superintends." Per Willes, J., in Gallagher v. Piper (1864) 111 E. C. L. 669; Wigmore v. Jay (1850) 5 Welsb., H. & G. 354; Skipp v. Eastern Counties Ry. Co., 9 Welsb., H. & N. 221; Wiggett v. Fox, 11 Welsb., H. & N. 832; Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266.

Fellow-Servants—Who are? See, also, Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266; Waller v. Southeastern Ry. Co., 2 Hurl. & C. 102; Gallagher v. Piper, 111 E. C. L. 669; Morgan v. Vale of Neath Ry. Co., 5 Best & S. 570, 736; Feltham v. England, L. R. 2 Q. B. 33; Tunney v. Midland, etc., Ry. Co., L. R. 1 C. P. 291; Lovegrove v. London, etc., Ry. Co., 16 C. B. (N. S.) 669. See Murphy v. Smith, 19 C. B. (N. S.) 361, as to servant being considered as the master's representative in the establishment. All the cases concur in holding that the master is liable for his own personal negligence.

Duty of master to take reasonable precautions for the safety of his servants. Brydon v. Stewart, 2 Macq. H. L. Cas. 30; Paterson v. Wallace, 1 Macq. H. L. Cas. 748.

Responsibility for defective or improper machinery, or absence of proper guards. Jones v. Yeager [Case No. 7,510]. See, also, Weems v. Mathieson, 4 Macq. H. L. Cas. 215; Clarke v. Holmes, 7 Hurl. & N. 937; Tarrant v. Webb, 18 C. B. 797; Searle v. Lindsay, 11 C. B. (N. S.) 429; Watling v. Oastler, L. R. 6 Exch. 73; Roberts v. Smith, 2 Hurl. & N. 213.

Effect of servant's knowledge and voluntary use of the defective machinery, or knowledge of danger. Jones v. Yeager [supra]. See, also, Holmes v. Worthington, 2 Fost. & F. 533; Id. 238; Senior v. Ward, 1 El. & El. 385; Griffiths v. Gidlow, 3 Hurl. & N. 648; Assop v. Yates, 2 Hurl. & N. 768.

Contributory negligence on plaintiff's part disentitles him to a recovery; but knowledge of the incompetence or unfitness of the fellow-servant is only evidence on the plaintiff's part to be submitted to the jury. Hoey v. Dublin, etc., Ry. Co., 5 Ir. C. L. 206.

FORT (WHITNEY v.). See Cases Nos. 17,587 and 17,588.

Case No. 4,953.

The FORTITUDE.

[3 Sumn. 228;[1] 1 Law Rep. 124.]

Circuit Court, D. Massachusetts. May Term, 1838.

SHIPPING—AUTHORITY OF MASTER—REPAIRS AND SUPPLIES AT FOREIGN PORT—BOTTOMRY—DUTY OF LENDER—LIEN—BURDEN OF PROOF.

1. The master of a ship has authority in a foreign port to procure all supplies and repairs necessary for the safety of the ship, and the due performance of the voyage.

[Cited in Pope v. Nickerson, Case No. 11,274.]

[Cited in Bliss v. Ropes, 9 Allen, 341.]

2. This authority is not confined to such supplies and repairs as are absolutely necessary or indispensably necessary; but includes all such as are reasonably fit and proper for the ship and voyage.

[Cited in Greely v. Smith, Case No. 5,750; The George T. Kemp, Id. 5,341.]

3. Where such supplies and repairs are reasonably fit and proper, the master, if he has not suitable funds, or cannot obtain money on the personal credit of the owner, may take it upon bottomry.

[Cited in Joy v. Allen, Case No. 7,552; Burke v. The M. P. Rich, Id. 2,161; The Lulu, 10 Wall. (77 U. S.) 204.]

4. The lender on bottomry is bound to exercise reasonable diligence, in order to ascertain whether such supplies and repairs are necessary and proper. He is not bound, however, to show that there was a positive necessity. It is sufficient, if there is an apparent necessity, so far as the lender is able upon due inquiry and due diligence to ascertain the facts.

[Cited in The Lulu, 10 Wall. (77 U. S.) 201.]

[Cited in Leddo v. Hughes, 15 Ill. 43.]

5. The lender upon bottomry will be protected in such a case of apparent necessity for his advances, even though, upon a fuller examination and a more thorough investigation of the facts, at a subsequent period, it should be doubtful whether the supplies and repairs were really necessary.

6. Where there is an apparent necessity for repairs, the lender on bottomry is under no obligation to inquire as to the best mode of making the repairs, or whether they are made in the most judicious manner, or to ascertain the cause of the injury. As, for example, where an acknowledged leak exists, how it is caused. It is sufficient if he acts with good faith, and does not co-operate wilfully in any unnecessary expenditure.[2]

[Cited in Nippert v. The William, 39 Fed. 828.]

7. A master, acting with reasonable diligence, discretion, and skill, upon the advice of competent persons, at a foreign port in making repairs, will be protected, even though a more judicious course might possibly have been adopted in the judgment of other more skilful persons.

[Cited in The Lucinda Snow, Case No. 8,591.]

8. In a suit on a bottomry bond, in rem, where the defence is, that the repairs were not necessary, it seems, that the master is not a competent witness for the libellant to establish the necessity of the repairs: as the decree would be evidence of this necessity in a suit brought against him by the owner for improper conduct in directing the repairs. But under such circumstances the court will presume favorably for the master, until the presumption is overcome by clear proofs.

9. Material men, and shipwrights and repairers, have a lien for repairs made on a ship in a foreign port, whenever these repairs are apparently reasonable and proper, although not absolutely necessary. All that is required on their part, is good faith, and reasonable ground for action.

10. A regular survey, by competent and skilful persons, and repairs made in pursuance of their recommendation, is primâ facie evidence of the propriety of making the repairs, to justify the master and lender on bottomry.

[Cited in The Grapeshot, 9 Wall. (76 U. S.) 139; The Director, 34 Fed. 60.]

[1] [Reported by Charles Sumner, Esq.]

[2] In the case of Soares v. Rahn, on a bottomry bond, before the judicial committee of the privy council in England, on the 10th of January, 1839, in an appeal from the high court of admiralty, the court said: "If the foreign merchant shall have instituted reasonable inquiry, for the purpose of ascertaining, whether the repairs were necessary, and whether the owner had not personal credit, the transaction (the bottomry bond) will not be impeached, because making such reasonable and bonâ fide inquiry, the repairs were not necessary, and the owner had personal credit." See Month. Law Mag. (Eng.) Feb. 1839, p. 30.

11. The lender on bottomry is primâ facie presumed to have made inquiries as to the apparent necessity of repairs, and to have acted upon the facts and circumstances, as made known by the survey to the master.

12. The onus probandi, that the master has other funds, or that the owner has a personal credit in that port, is not upon the lender on bottomry, but lies on the owner, who resists the bottomry bond.

[Cited in Furniss v. The Magoun, Case No. 5,163; The Grapeshot, 9 Wall. (76 U. S.) 137.]

[Appeal from the district court of the United States for the district of Massachusetts.]

This was the case of a suit in rem [against the ship Fortitude, Haven and others, claimants], founded on a bottomry bond given by the master of the ship, at Calcutta, East Indies, for moneys taken up for the repairs of the ship. The main question raised by the pleadings was upon the necessity of the repairs, the respondents contending, that they were unnecessarily, if not fraudulently made. At the hearing, the counsel for the libellant, (Dexter & Stackpole), offered the deposition of the master in proof of the necessity. The counsel for the respondents, (Choate & Mason), objected to it, upon the ground of the incompetency of the master.

STORY, Circuit Justice. The question now submitted is, whether the master of the ship, it being a suit on a bottomry bond, and the necessity of the repairs being denied by the answer, is a competent witness to establish the necessity of the repairs. The suit is in rem; and indeed no personal suit would lie against the owner. If the master is admissible to prove the necessity of the repairs, then it is plain, that, if a decree is obtained by the libellant, the master is discharged from all further responsibility. So that he has a direct interest in the event of the suit under this aspect, and will by his own testimony exonerate himself from all liability to the libellant. Then, does he stand indifferent from an opposing interest? Certainly he does not, if the decree in rem will exonerate him also from all liability to the owner of the ship. The question, then, arises, whether the decree in rem will be conclusive as to the necessity of repairs, in a suit brought by the owner of the ship against the master? I think it will, for two reasons; (1.) A decree in rem, as to the direct point decided in it, (and here the necessity of the repairs must be directly decided,) is conclusive in all other cases. In case of asserted forfeiture, the decree of acquittal or condemnation is conclusive, not only as to the property, but as to the point of forfeiture, or not. So it was adjudged in Rose v. Himely, 4 Cranch [8 U. S.] 241, and in Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246. (2.) In the next place, the owner cannot found any claim against the master, but upon producing the proceedings and the decree in admiralty, for his loss and damage grew out of that. If so, the decree is evidence not merely of the fact of the decree of sale, but of the validity of the bottomry bond, and the necessity of the repairs. I do not say, that it is conclusive; that is not necessary to say in the point of view in which I am now looking to the case. It is sufficient if it be primâ facie evidence in the case, in favor of the master. If it be the latter only, can he be a witness, thus to create evidence in his own favor in such a suit? I think not. But if it be evidence at all in such a suit, (and that it is cannot be doubted), then it seems to me, that it must be conclusive as to the very hinge of the controversy.

Now I find, that in another class of cases, far less imposing and clear, a very able admiralty judge, (the late Judge Peters), decided, that the master is not a competent witness against the seamen. I mean in cases of libels for seamen's wages, brought by a suit in rem against the ship; or in personam against the owner of the ship. He gave, as a reason, that the decree in rem would be evidence in favor of the master in a suit brought in personam against him by the seamen for the same wages. And he applied the same reasoning to a suit in personam against the owner. In Malone v. Bell [Case No. 8,994], which seems to have been a suit in personam against the owner, the master was offered as a witness by the owner, and the learned judge said; "If a decree passes against the seamen in a procedure in rem, or against (it should be for, and is an obvious mistake) the owner, it may be given in evidence to repel a suit against the master." And he accordingly rejected the master's testimony. In Jones v. The Phoenix [Id. 7,489], the learned judge recognized the same doctrine in a suit in rem. In Atkyns v. Burrows [Id. 618], the same learned judge rejected the master as a competent witness for the owner, to prove that he had rightfully displaced the mate, (the libellant), from his station; and stated, that he was liable over in damages to the owner for his misconduct, in discharging the mate, if improper. The same doctrine was admitted at the bar, and acted upon by the court, in Galloway v. Morris, 3 Yeates, 445. In Robinett v. The Exeter, 2 C. Rob. Adm. 261, the master, under the like circumstances, was rejected as a competent witness. These cases are certainly far less cogent in favor of the rejection of the testimony of the master, than the present. In short, the whole merits of this controversy turn upon the master's conduct. If this suit were upon a policy of insurance by the owner against the underwriters, and the defence were barratry, or deviation by the master, he would not be a competent witness for the owner to establish the contrary fact. So, if a suit were brought against the owner, founded upon his misconduct or negligence, he would not be a competent witness for the owner to disprove his negligence or misconduct.

I am aware of the cases cited at the bar at common law. One answer is, that they are all suits in personam, though I confess, that I do not well see how all of them can be supported on that distinction. The case of Evans v. Williams, 7 Term R. 481, note c, may possibly have turned upon another point; not the necessity of borrowing, but the misapplication of the money when borrowed. Milward v. Hallett, 2 Caines, 77, and Rocher v. Busher, 1 Starkie, 27, proceeded on the same ground as Evans v. Williams, and indeed was very similar in its circumstances. If these cases are not reconcilable with the principles which I have already stated, I shall still adhere (at present) to the doctrine, that, in proceedings in rem turning upon the very point of the necessity of the repairs, the master is not a competent witness. At the same time, I am ready to confess, that I am not confident, that this opinion rests upon grounds so clear, that it ought not to yield to a settled course of practice; and I greatly fear, that there is no authority, which directly sustains it. Deposition rejected.

At a later day, the following opinion was pronounced on the merits of the whole case:

STORY, Circuit Justice. This is the case of a suit on a bottomry bond, executed at Calcutta on 21st of December, 1836, on the ship Fortitude, by one Jeremiah Spalding, the master thereof, in favor of the libellant. The libel asserts, that the money was advanced to supply the necessary repairs for the ship; and the defence set up is, in substance, that the repairs made, and for which the money was advanced, were, with a trifling exception, unnecessary and not required by the state and condition of the ship. And the respondents have, accordingly, imputed gross misconduct and want of judgment, and, indeed, the more grave offence of meditated fraud to the master. They have not, however, imputed any connivance or participation in that misconduct or fraud to the lender; although they do certainly rely upon his want of the exercise of due diligence in making inquiries as to the true state and condition of the ship. The cause has been most elaborately argued by the counsel on both sides, upon the principles of law applicable to the case, as well as upon the facts; and I propose to examine, in the first instance, those principles of law, as I cannot but think, that when well understood and clearly defined, they will greatly aid us in coming to a right conclusion as to the material facts, which ought to govern the judgment of the court.

It is agreed on all sides, that the master is to be treated as the general agent of the owner or employer of the ship, as to procuring repairs and supplies for the ship, in a foreign port, in the absence of the owner or employer. And it is equally agreed, that this power is not unlimited; but is restricted to such repairs and supplies as are, in a just sense, necessary for the ship under the actual circumstances of the voyage. But as to what is the true meaning of the word "necessary," or in other words, as to what repairs or supplies are to be deemed necessary in the sense of the rule, the learned counsel widely differ; the counsel for the respondents contending, that the repairs must be positively and absolutely necessary for the voyage in a strict sense; and the counsel for the libellant as strenuously contending, that all that is required is, that they should be reasonably fit and proper for the occasion. The respondents' counsel have placed great reliance in support of their position, upon certain language to be found in some of the text-books and authorities upon this subject, where it is suggested that the master's authority is confined to cases of actual necessity, of great extremity, of extreme necessity, of great and invincible necessity, and of absolute necessity. Language like this may undoubtedly be found in the text-books and authorities, sometimes used in a very loose and inexact manner; and sometimes looking to the subject-matter immediately in judgment, exceedingly appropriate, and, understood with its just limitations, entirely accurate. As far as I have been able to examine the authorities and text-books cited to sustain these intensive expressions of necessity, they are used in reference to bottomry bonds, as contradistinguished from other ordinary contracts for repairs. There is a manifest difference between that necessity which will justify repairs, and that superadded necessity, if I may use such an expression, which will justify the giving of a bottomry bond. To justify the giving of a bottomry bond, it is not only essential that there should be a necessity for the repairs, but that there should also be a necessity of resorting to a bottomry bond, in order to procure the proper funds to defray the expenditure. If the master has funds of his owner in his own possession, or if he can procure funds upon the personal credit of the owner, he is not ordinarily at liberty to resort to a bottomry loan. In short, it is only when this is the only or the least disadvantageous mode of borrowing, that the master is at liberty to resort to it as a dernier resort. The giving of a bottomry bond is, therefore, properly said to be justifiable only in cases of great extremity, of urgent necessity, or of extreme pressure. In cases of bottomry, the expressions may be appropriate, when they would be utterly inapplicable to common cases of repairs. See Heathorn v. Darling, 1 Moore P. C. 6, 14.

The distinction here alluded to is expressly stated in the case of The Aurora, 1 Wheat. [14 U. S.] 102, where it is said by the court: "The law in respect to maritime hypothecations is, in general, well settled. The master of the ship is the confidential servant or agent of the owners, and they are bound

to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use. This rule is established, as well upon the implied assent of the owners, as with a view to the convenience of the commercial world. As, therefore, the master may contract for repairs and supplies, and thereby, indirectly, bind the owners to the value of the ship and freight, so, it is held, that he may, for the like purposes, expressly pledge and hypothecate the ship and freight, and thereby create a direct lien on the same, for the security of the creditor. But the authority of the master is limited to objects connected with the voyage, and, if he transcend the prescribed limits, his acts become, in legal contemplation, mere nullities. Hence, to make a bottomry bond executed by the master a valid hypothecation of the ship, it must be shown by the creditor, that the master acted within the scope of his authority; or, in other words, it must be shown, that the advances were made for repairs and supplies necessary for effectuating the object of the voyage, or the safety and security of the ship; and no presumption should arise, that such repairs and supplies could be procured upon any reasonable terms with the credit of the owner, independent of such hypothecation. If, therefore, the master have sufficient funds of the owner within his control, or can procure them upon the general credit of the owner, he is not at liberty to subject the ship to the expensive and disadvantageous lien of an hypothecatory instrument." And again (page 506) it is added: "It is incumbent upon the creditor, who claims an hypothecation to prove the actual necessity of those things which give rise to his demand; and if from his own showing, or otherwise, it appears, that he has funds of the owner in his possession, which might have been applied to the demand, and he has neglected or refused so to do, he must fail in his claim." Nor is there any thing new in this statement. The same doctrine will be found laid down in all the leading elementary treatises and authorities, as incontrovertibly established. See 3 Kent, Comm. (3d Ed.) lect. 46, p. 171; 2 Emer. Traité à la Grosse, c. 4, §§ 6, 11; Abb. Shipp. 125 (Am. Ed. 1829), and note 2, and cases there cited; Moll. bk. 2, c. 11, §§ 11, 12; The Virgin, 8 Pet. [33 U. S.] 538; The Nelson, 1 Hagg. Adm. 169, 175; Jac. Sea Laws, bk. 4, c. 2, p. 359, by Frick; 1 Bell, Comm. (4th Ed.) 430–434; The Rhadamanthe, 1 Dod. 201, 206; The Alexander, Id. 278, 280; Pard. Droit Com. tom. 3, n. 910, 911, pp. 509, 510.

Let us proceed, then, to the consideration of what, in the sense of the law, are necessary repairs, for which, when ordered by the master, the owner would be liable in case no bottomry bond had been given. Now, we all know, that where money is advanced in a foreign port, for necessary repairs, the owner is liable for the amount advanced for such repairs in a suit in personam at the instance of the lender. And if the work is done, and materials furnished for such necessary repairs in a foreign port, the material men and workmen, if unpaid, have a treble remedy, by a suit in personam against the master, and by a like suit against the owner, and by a suit in rem in the admiralty to enforce the lien given to them by the maritime law. This doctrine is well established; and the right to proceed in rem has been fully recognized by the supreme court of the United States. This inquiry is the more important, because, if the repairs made were, in the sense of the law, necessary repairs, for which the owner would have been personally liable in the manner above mentioned, if no bottomry bond had been taken; then it seems to me, that, if the necessary funds in order to make those repairs could not otherwise be obtained, and the bottomry bond was bonâ fide entered into by the lender, it would be extremely difficult to show, that it ought not to be upheld by this court. In relation to what are necessary repairs in the sense of the law, for which the master may lawfully bind the owner of the ship, I have not been able, after a pretty thorough search into the authorities and text writers, ancient and modern, to find it any where laid down in direct or peremptory terms, that they are such repairs, and such repairs only, as are absolutely indispensable for the safety of the ship, or the voyage, or that there must be an extreme necessity, an invincible distress, or a positive urgent incapacity, to justify the master in making the repairs. The general formulary of expression found to be laid down is, simply, that the repairs are to be necessary, without in any manner pointing out, what repairs are, in the sense of the law, deemed necessary, or what constitutes the true definition of necessity. But a thorough examination of the common text writers, ancient as well as modern, will, as I think, satisfactorily show, that they have all understood the language in a very mitigated sense; and that necessary repairs mean such, as are reasonably fit and proper for the ship under the circumstances, and not merely such as are absolutely indispensable for the safety of the ship or the accomplishment of the voyage. The Roman law manifestly took this view of the matter. In commenting upon the Pretor's edict, De Exercitoria Actione, it is well remarked by Ulpian, that as we are obliged from necessity to contract with masters of ships, of whose character and condition we are ignorant, it is equitable that the owner should be bound by his acts; and that the case is stronger than that of a contract with the clerk of a shopkeeper; for sometimes in the case of the master of a ship, neither the time nor the place allow us the opportunity of full deliberation. "In navis magistro non ita est; nam interdum locus, tempus non patitur plenius deliberandi concilium." Dig. lib. 14, tit. 1. And, there-

fore, the owner is held to contracts made in good faith with the master, since otherwise the persons contracting might suffer from his frauds. "Omnia facta magistri debet praestare qui eum praeposuit; alioquin contrahentes decipientur." This consideration may not be unimportant in reviewing other parts of the present case. Id. l. 1, § 5. The text of the Roman law then proceeds to state the right of the master of the ship to bind the owner as being limited to the concerns of the ship; "Ejus rei nomine cujus ibi praepositus fuerit, id est, in eam rem praepositus sit;" and illustrates it by reference to his ordinary power to buy things proper for the navigation of the ship or for repairing the ship; "utputa, si ad onus vehendum locatum sit: aut aliquas res emerit utiles naviganti; vel si quid, reficiendae navis causa contractum, vel impensum est." Id. l. 1, § 6; Id. l. 4, § 5. And it then declares, that if he borrows money for the same purpose, "ad usum ejus rei, in quem praepositus est," as, for example, to repair the ship, the owner will be liable therefor, even though the master should afterwards convert the money to his own use, (Id. l. 1, § 6; Id. l. 7; Emer. tom. 2, c. 4, § 5), if the creditor lent the money bonâ fide, and the ship stood in need of repairs and he knew it. "Si cum pecunia crederetur, navis in ea causa fuisset, ut refici deberet,—si illud quoque scierit necessarium refectioni pecuniam esse." Dig. lib. 14, tit. 1, l. 7; Poth. Pand. lib. 14, tit. 1, n. 7, 8; Emer. tom. 2, c. 4, § 5. It seems difficult to avoid the conclusion, that the Roman law understood that the owner was liable in the exercitorial action for all repairs, which the master, virtute officii, had an implied authority to order; and that the repairs which he had a right to order were not such as were strictly indispensable, but such as were reasonably useful and proper (utiles), and that money might be safely lent by the lender, whenever there existed such a good cause for repairs. But still the lender even in such a case, had a right to lend no more than was necessary for the repairs,—"Multo tamen magis pecunia credita fuerit quam ad rem esset necessariam non debere in solidum adversus Dominum Navis actionem dari,"—and if he did wantonly and knowingly lend more, then the owner was not responsible. Emerigon and Voet seem so to have interpreted the Roman law. Emer. Traité des Contrats à la Grosse, tom. 2. cc. 4, 5, 7, § 8; Voet ad Pand. lib. 14, tit. 1, §§ 3, 6. Cujacius has expounded it in the same manner in an ample commentary, illustrating the doctrine by stating, that if the creditor lends money to buy a sail for the ship, he must shew, that the ship wanted the sail, not that it was indispensably necessary. "Necesse erit probandi se veli emendi causa credidisse, et velo navem indiguisse." Cujacii Opera, tom. 1. cols. 1450–1453, ad Leg. 7; Dig. lib. 14, tit. 1, Afric. Quest.

In looking into the regulations customary or positive of modern commercial nations, it will be found, that language is used, which admits, if it does not absolutely require a similar force of the word necessary. The Consolato del Mare requires the merchant or shipper to lend to the master money, when it is necessary to procure rigging or other things necessary for the ship; and authorizes the master to buy whatever equipments or other things are necessary for the ship. The laws of Oleron (article 1) authorize the master to pledge the ship, if he needs money to defray the expenses of the ship. "Si après le départ, le maître d'argent pour les depens de la nef, il peut mettre aucun d' appareux en gage," &c. Consolato del Mare, cc. 106, 107; Pard. Coll. Lois Marit. tom. 2, pp. 109, 110; Id. p. 224, c. 239; Emer. Traité à la Grosse. tom. 2, c. 4, § 5. The laws of Wisbuy, (article 13) declare, that if the master is in need of provisions or supplies, he may pledge a part of his equipments therefor. Emer. Traité à la Grosse, tom. 2, c. 4, § 5. The old Hanseatic ordinance (article 60) declares, that, if the master stood in need of money for the ship in a foreign country, he might take it up on bottomry, if he could not do better. "S'il a nécessité et besoin d'argent pour le navire." Id. The new Hanseatic ordinance (article 6, § 2) is more impressive. It provides, that if the master in foreign places perceives a probable damage in the ship or its equipments, and he cannot obtain money on exchange, and has not goods in the ship, which he can sell more for the benefit of the owner than to take up money on bottomry, he may do the latter. "Si nauclerus in caeteris locis, et probabile damnum in navi, aut instrumentis navis perceperit, ac isthic loci nullum cambium ad exercitores transmittendum obtinere queat, &c.; tum hoc in casu necessitatis pro servanda navi et bonis habeat potestatem summae universarum Exercitorum tantum pecuniae sub faenore nautico accipiendae, quantum ad reparationem damni et alios similes casus necessitatis opus habet." Id.; Pard. Coll. Lois Marit. tom. 2, 527; Id. 547; Emer. tom. 2, c. 4, § 11. "Le Guidon de la Mer (chapter 5, art. 35) states: "Après la tourmente passée et les damages souferts, le maître pour restaurer son navire peut prendre argent sur le quille," &c. Emer. Traité à la Grosse, tom. 2, c. 4, § 5; Pard. Coll. Lois Marit. tom. 2, p. 396. The French ordinance of 1681 (article 19, of the captain) declares, that the master may, in the course of his voyage, take up money upon the body and keel of the ship for the repairs, provisions, and other necessities of the ship, "pour radoub, victuailles, et autres nécessités du batiment." In the interpretation of this ordinance it has been held by the ablest commentators, Valin and Emerigon, that, at most, nothing more than an apparent necessity and good faith on the part of the lender are necessary to make a bottomry

by the master valid for repairs. Nay, it seems, that if the lender act in good faith upon the representations of the master, the bottomry will be valid, even if no necessity for the repairs really existed. Emer. Traité à la Grosse, tom. 2, c. 4, §§ 5, 7, 8, 11; 1 Valin, Comm. liv. 2, tit. 1, art. 19, p. 441; Id. liv. 1, tit. 14, art. 16, p. 362. See, also, Ersk. Inst. B. 3, tit. 3, §§ 44, 46; 1 Stair. Inst. by Brodie, B. 1, tit. 12, §§ 18, 19; Poth. Obl. 448, note.

The language of the earlier commentators upon the Roman law and the maritime law, as to this subject, is somewhat indeterminate; but their total silence, as to any intense phrases or qualifications implying absolute or indispensable necessity, seems to justify the conclusion, that all which was required on the part of the lender, was to ascertain, that there was a fair ground to believe, that the advances for the ship were reasonably fit and proper for its wants. Thus Peckius in his commentary on the Digest, de Exercitoria Actione, says: "Africani igitur praecepta creditorem observare oportet, quae haec sunt, quod sciat navem in ea causa esse, ut refici debeat; quod credat in eam causam contrahi; quod exprimat refectionis gratia mutuum se credere." Peck. Opera Omnia de Exercit. Actione, p. 838; S. P. Vinnius. Peck. ad Rem Nauticam, de Exerc. Actione, pp. 98, 99, 183. Vinnius in his notes on Peckius says: "Si navis instruenda aut reficienda sit, et magister in eam rem pecuniam mutuetur, etiam hoc casu actio in exercitorem dabitur. Caeterum non alios utiliter aget creditor, quam si concurrant illa omnia, quae hic exigit Africanus. Summa est; (1) ut navis in ea causa fuerit, ut refici deberet; (2) ut sciat se credere in hoc ipsum, cui sit aliquis magistri navis jure et nomine praepositus; (3) ut non major pecunia credita sit, quam navis reficiendae opus fuerit; (4) ut eo loco credita sit pecunia, in quo id, propter quod numerabatur, comparari potuerit." Vinnius, Peck. ad Rem Naut. de Exercit. Act. p. 183. And he repeats the same suggestions in his own commentary on the Institutes. Vinnius ad Inst. Lib. 4, tit. 7, § 2, nota 4. Marquardus, in his Treatise on Maritime Law, uses the following language: "Adeo autem favorabile est hoc refectionis navalis privilegium, ut si magister navis cavit se accipere in refectionem navis, etiamsi, in eam causam non impenderit, sed in suos usus converterit, tamen teneatur Exercitor. Marquardus, de Jure Marit. lib. 2, c. 5, p. 225, n. 27. Stypmannus says: "Si vero extra provinciam est, et navis indigeat, ex. gr. si vela emenda vel alia armenta, potest magister navis, pro resarciendo damno, quod navis a tempestatibus accepit, quantum est opus periculo exercitorem sumere; et quod ita accipit, tenentur exsolvere." He adds in another place: "Debet autem damnum in cujus reparationem pecunia accipitur, verum, non simulatum, vanum, aut imaginarium esse." (Stypmannus ad Jus Marit. p. 4, c. 5, n. 106, 107, 113–135, pp. 417–419); citing with approbation the commentary of Cujacius on the law of Africanus. Loccenius says: "Si navis reficienda aut instruenda sit, et magister in usum navis reficiendae aut instruendae, cui praepositus est, pecuniam, fuerit mutuatus, etiam si hoc non sciverit exercitor, tamen in exercitorem actio dabitur." He then puts the case of the money being misemployed; and states, that the owner is still bound; and then adds: "Sed et creditorem incautum esse decet eo ut dispiciat an in eam causum impendat pecuniam magister navis, in quam ab ipso mutuatus est; vel num iis impensis navis jam opus habeat, in quas ipsi credidit pecuniam; num navis in ea causa sit, ut refici debeat." Locc. de Jure Mar. lib. 3, c. 7, notes 6–8. Kuricke is far more direct: "Potest vero nauclerus in locis peregrinis faenus nauticum accipere; (1) si probabile damnum in navi et instrumentis navilibus adpareat; (2) si isthic loci cambio, sub fide exercitorum pecuniam ab exercitoribus solvendam comparare non queat; (3) si non habeat in navi bona, quae majori cum commodo exercitorum vendi, quam faenus nauticum contrahi, possint; (4) ne ultra quam ad reparationem damni, et similis casus necessitatis, opus est, accipiat." Kuricke Ins. Marit. Hans. ad tit. 6, art. 2, p. 765. Casaregis speaking of the greater liberty of the law in maritime affairs, says: "Quod exercitores remaneant obligati pro pecunia ad cambium capitaneo data in usum navis, absque onere creditoribus justificandi versionem pecuniae in illius utilitatem, juxta textum leg. ultimae, ff. de Exerc. Actione." Dig. lib. 14, tit. 1, c. 7. He adds: "In casu etiam generalis vel illimitatae praepositionis non potest aliquis cum magistro contrahere, nisi vero sciat navim indigere &c. Si vero contrahenti constaverit, quod navis non erat in ea causa, ut indigeret, vel saltem tanto non indigeret, tunc nulla ei dabitur actio contra navem ac exercitores." And he recognises in its full force the doctrine of the Digest, that the owner is bound, if the master procures things useful for the navigation of the ship, or to repair her: "Si aliquas res emerit utiles naviganti, vel si quid reficiendae navis causa contractum," (Casaregis Disc. 71, n. 12–14, 32, Dig. lib. 14, tit. 1, l. 1, § 7), as well as the doctrine of Africanus. Id. Disc. 71, n. 33. Roccus is equally significant in the passage cited at the bar. "Mutuans pecuniam magistro navis pro refectione ipsius navis aut ad hoc, ut aliquas res emerit utiles naviganti; vel pro salario nautarum, vel ad armendam et instruendam navem, semper dominus obligatus remanet." Roccus de Nav. et Naul. n. 23. He then adds: "Verum, nota circa hoc, quod si magister navis decipiat creditorem in mutuo pro dicta refectione vel in pretio rerum emptarum, hoc ad onus domini et exercitoris cedit, non autem ad onus creditoris." Roccus de Nav. n. 24. And he then proceeds to lay down the four rules already cited from Vinnius. In truth the whole of these writers have borrowed and adopted the expositions of Cujacius on this same subject, who has

laid down the same rules, the principal of which points to the duty of the creditor to ascertain, "an navis indigeat refectione; ut re vera navis indiguerit refectione; satis est si navis reficiendae causa credíderit, et in ea causa fuerit navis, ut refici deberet." Cujacii Opera, tom. 1, col. 1451, 1452; Ad Afric. Tract. 8.

I have been the more full in these citations from the older writers—most of which will be found collected in Emerigon and Boulay-Paty (Emer. Traité à la Grosse, tom. 2, c. 4, §§ 5, 11; Boul.-P. Dr. Com. tom. 2, § 14, p. 62, etc. See, also, Valin, Comm. tom. 1, lib. 2, tit. 1, art. 19),—because, unless I greatly misunderstand the purport of their expressions, they inculcate a very different doctrine from that which has been supposed at the argument to be the general result of the maritime law. These writers use no intensive expressions as to the necessity of the repairs. Their language imports no more than what is meant by our common English phrase, 'that the ship needs or stands in need of repairs ut refici deberet; and some of them press it further by requiring no more than a probable damage or probable cause of repairs. So that at most these writers leave the whole subject open to a liberal interpretation of what constitutes necessary repairs; and relieve the court from all necessity of qualifying their language. The doctrines maintained by Valin and Emerigon on this subject have been already stated; and their authority upon questions of maritime law is justly entitled to very great weight. The modern Code of Commerce of France authorizes the master to take up money on bottomry, if, during the course of the voyage, there is a necessity of repairs, or to buy provisions, after having verified the same by a report drawn up and signed by the principal officers of the crew. "Si pendant la cours du voyage il y a necessité de radoub, ou d'achat de victualles." Code de Commerce, art. 234; and see 2 Emer. Traité à la Grosse, c. 4, § 5; Boul.-P. Dr. Com. (Ed. 1827) pp. 461, 462. And it declares the master, who shall, without necessity, have taken up money on bottomry, or have given a false account of damages sustained, responsible to the owners, without prejudice to a criminal prosecution against him, if there be good cause. Code de Commerce, art. 236. The modern commentators upon this code agree, that if the lender has acted in good faith, the ship is responsible, notwithstanding there may not have been a positive necessity for the repairs. Thus, Pardessus says: "Les Armateurs ne peuvent refuser d'acquitter les engagemens pris pour ces causes et avec ces formalités, sous pretexte qu'ils entendent contester, ce, qu'a fait le capitaine—ou que l' emprunt n'etoit pas reellement necessaire, et que le capitaine a supposé des besoins." Pard. Dr. Com. tom. 3, n. 911. Boulay-Paty holds the same doctrine; using the words, "pour les necessités du navire, et pour les besoins du navaire," as equivalent expressions. Boul.-P. Dr. Com. tom. 2, § 14, pp. 62, 64, 68, 69, 75. But what is more important, each of these authors lays down the general authority of the master to do, in the absence of the owner, what he shall judge to be most proper for the safety of the ship, and the success of the voyage. "Tout ce qu'il jugera convenable" (says Boulay-Paty) pour le salut du batiment, et le succes de l'expedition." Id. tom. 1, § 1, p. 262. "Lorsque l'Armateur est absent, &c. il est presumé s'en etre rapporté au capitaine (ses pouvoirs)" (says Pardessus) "et l' avoir autorisé a faire les depenses, qu'il jugeroit necessaires, même dans le lieu de l' embarquement et avant le voyage commence." Pard. Dr. Com. tom. 2, pt. 3, tit. 2, c. 1, § 626, pp. 58, 59.

But assuming the law of continental Europe to be different from what I have supposed; still, after all, we must be governed by that law, which prevails in our own jurisprudence. Now, it seems to me clear, that, by our law, the master has a right in a foreign port to bind the owners for all supplies and repairs of the ship, which, in the liberal sense of the terms, are deemed necessary supplies and repairs; that is, such as are reasonably fit and proper for the ship and the voyage. Lord Tenterden, in his excellent treatise on Shipping (Abb. Shipp. [Ed. 1829] pt. 2, c. 3, § 3, p. 102), lays down the proposition in the following exact and perspicuous language: "In order, however, to constitute a demand against the owners, it is necessary that the supplies furnished by the master's order should be reasonably fit and proper for the occasion, or that money advanced to him for the purchase of them should, at the time, appear to be wanting for that purpose. The contrary in either case would furnish a strong presumption of fraud or collusion on the part of the creditor. The proper mode of ascertaining what is necessary is, to ask what a prudent owner himself would have done, had he been present." In Webster v. Seekamp, 4 Barn. & Ald. 352, the very question was before the court, in a case where the plaintiff had coppered a ship at the request of the master, the owner being in the same country, and brought his suit against the owner for the amount. The defence was, that the coppering was not absolutely necessary for the voyage; and it was found at the trial, that it was extremely useful to copper vessels on such a voyage, but not absolutely necessary; for many vessels went the same voyage without being coppered. The judge at the trial put the question to the jury, whether the copper was useful and proper for the voyage; and whether it were such as a prudent owner himself, if present, would have ordered. The jury found that it was, and the plaintiff obtained a verdict. Upon a motion for a new trial, the court affirmed the ruling of the judge at the trial. Lord Tenterden on that occasion said: "I am of opinion, that whatever is fit and proper for the service on which a vessel is engaged, what-

ever a prudent owner would have ordered, if present at the time, comes within the meaning of the word 'necessary,' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable;" and he rejected the suggestion, that they should be absolutely necessary as too narrow, and, in many cases, impracticable. The other judges concurred on the same ground; and Mr. Justice Best added: "No man can say, what is absolutely necessary. If the topmasts were lost, a vessel might sail without them, and possibly perform her voyage with safety. A topmast might, therefore, be said not to be absolutely necessary. Yet no prudent man would proceed to sea without it." Mr. Chancellor Kent has maintained a similar doctrine in his learned commentaries, stating that "the supplies must appear to be reasonable, or the money advanced for the purpose of them to have been wanting; and there must be nothing in the case to repel the ordinary presumption, that the master acted under the authority of the owners." 3 Kent, Comm. (3d Ed.) lect. 46, p. 163. See, also, Ross v. The Active [Case No. 12,070]; Phillips' Benecke, etc., on Average, 174–179; United Ins. Co. v. Scott, 1 Johns. 106. And such I conceive to be the established American law.

All the analogies of the law lead to the same conclusion. Thus, we all know, that infants are generally incapable of binding themselves except by contracts for necessaries, for necessary food, necessary clothing, and necessary means of instruction. In what sense does the common law interpret the meaning of such necessaries? Certainly not as limited to things absolutely and indispensably necessary; for then bread and water, the coarsest and meanest clothing, the narrowest means of the humblest knowledge would be the most, which could justifiably be embraced in such an interpretation. On the contrary, we all know, that necessaries for an infant, in the sense of the common law, are such as are suitable for his rank, degree, condition, and objects in life; and that a spirit of liberal allowance and enlightened policy governs in this matter, to attain the ends by the appropriate and best means. The same rule applies to cases where husbands are made responsible for necessaries furnished to their wives, either under ordinary or extraordinary circumstances. And, indeed, it will be difficult to find any department of the law, in which the same doctrine does not pervade the whole structure of its principles. The whole theory of the law of hailments turns upon it; as does also that of general agency.

Some criticism has been employed upon the words "moral necessity," as applied to the conduct of the master acting in cases of this sort; and it has been more than intimated, that the expression is quite new, and can scarcely be traced beyond the case of Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. 249. It does not appear to me, that the criticism has any just foundation, or that the expression is either new or inapt. It seems to me to indicate precisely that which such a case requires. Moral necessity arises, where there is a duty incumbent upon a rational being to perform, which he ought at the time to perform. It presupposes a power of volition and action, under circumstances in which he ought to act, but in which he is not absolutely compelled to act by overwhelming superior force. Indeed, I hardly know how a case of physical necessity can correctly be said to exist in cases where an agent is called upon to exercise judgment and discretion, to act, or not to act. Take the case of the master of a ship in a storm of imminent peril, where a jettison seems required, or masts are to be cut away to save the ship from foundering at sea. The master is called upon to act; but even in such an extremity he has a choice; and when he acts, he acts, properly speaking, upon his judgment, under a moral, rather than a physical necessity. But in ordinary cases, where a master orders repairs or supplies for the ship, it would be an entire deflection from the true use of language to call it a case of physical necessity. So far as the master is concerned, it is his duty to procure suitable repairs and supplies, in order to enable him to save the ship and prosecute the voyage; and this sense of duty, when it becomes imperative by its urgency upon his conscience and judgment, constitutes what is most appropriately called a moral necessity. No one can correctly say, in such a case, that the master is under a physical necessity to make the repairs, or to procure the supplies.

In the course of this examination I have not thought it proper to refer to the cases of sales by the master of the ship or cargo, or both, because they do not belong to his ordinary duties; and are only superinduced from an overwhelming or extreme necessity, which requires him to act in unforeseen emergencies for the best interests of all concerned. The Gratitudine, 3 C. Rob. Adm. 240, and Petapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 604, and Winn v. Columbian Ins. Co., 12 Pick. 279, 283, 286, fully illustrate the doctrine of such cases.

Then, as to another point suggested at the argument, viz.: that the creditor, who lends money, is bound to use due diligence in ascertaining, whether it is wanted for repairs and supplies; and to advance no more than is reasonably necessary for such a purpose. I entirely agree to the doctrine, when it is interpreted with what I consider to be its true and just limitations. The point can only arise, where no necessity for the repairs or supplies exists, and where, by the use of reasonable diligence, the absence of such necessity could have been known and ascertained. If the repairs and supplies are necessary, then the creditor will be entitled to recover the amount from the owner (for I am speak-

ing of cases of ordinary supplies and repairs, where no bottomry bond is taken), without making any inquiry whatsoever. On the other hand, if no inquiries whatsoever could have put the creditor in possession of the real facts, and he has acted upon the representations of the master, with good faith and under circumstances affording no ground of suspicion of ill faith in the master, I conceive that he is dispensed from all responsibility in regard to such inquiries. Thus, if he should be deceived in making advances for repairs or supplies for imaginary injuries or losses at sea, which he could have no means of knowing or tracing, but which the master and crew fraudulently pretended to exist, I presume that he would be enabled to recover against the owners for reasonable advances made by him to repair such injuries or supply such losses. Such certainly seems to be the doctrine of the civil law. "Omnia enim facta magistri debet praestare, qui eum praeposuit; alioquin contrahentes decipientur; et facilius hoc in magistro, quam institore, admittendum propter utilitatem." Dig. lib. 14, tit. 1, l. 1, § 5. "Sed et si in pretiis rerum emptarum fefellit magister, exercitoris erit damnum, non creditoris." Id. § 10; Emer. Traité à la Grosse, c. 4, § 5; 1 Valin, Comm. lib. 2, tit. 1, art. 19; Cujacii Opera, tom. 1, col. 1451, 1452; De Exerc. Actione. Pothier evidently so understood it; for in his edition of the Pandects, in his preface to the law of Africanus (Dig. lib. 14, tit. 1, l. 7), he says: "Sed etsi specialiter caverit (magister) se ad navis causam mutuari, puta, ad hujus refectionem; ita demum Exercitoria dabitur, si probabile videri potuit, quod ad hanc causam mutuaretur." Poth. Pand. lib. 14, tit. 1, n. 8. It certainly is the doctrine of the French maritime law. Emer. Traité à la Grosse, c. 4, §§ 5, 8; 1 Valin, Comm. lib. 2, tit. 1, art. 19. But where the creditor could by due diligence ascertain the necessity of the repairs or supplies, then, under such circumstances, if he makes no inquiries, and no such necessity in fact exists, he will have no claim upon the owner. Cujacius puts this doctrine in a strong light. "Hoc tantum exiginius, ut non fuerit falsa causa rogandae pecuniae mutuae, ut mutuo non fuerit quaesitus titulus falsus, id est, ut re vera navi indiguerit refectione, et uti hoc certo indagarit ac scierit creditor. Rogas me mutuam pecuniam in refectionem navis, cui dicis te esse praepositum. Ego debeo esse diligens et curiosus, et inquirere antequam numerem pecuniam, an navis indigeat refectione." Cujacii Opera, tom. 1, col. 1451; De Exer. Actione, L. 7, Africanus. But, notwithstanding this strong language, I conceive nothing more is meant than that after due inquiry there should be an apparent necessity for the repairs or supplies; for it is immediately afterwards added, that the creditor need not look to the exact amount required. "Quia non debet inquirere creditor, quanti sit impensa refectionis, vel quanti velum comparare possit, &c. Satis est, si navis reficiendae causa crediderit, et in ea causa fuerit navis, ut refici deberet." Id. Roccus himself admits, that if there be a case of apparent necessity, the owner will be bound, although the master has been guilty of fraud, in the passage already cited. Roccus de Nav. n. 24. Pothier, in his treatise on Obligations (449, note), put the rights of creditors for advances to the master upon the ground of the probable necessity, from the representations of the master. "Pourvuque la Declaration par le contrat d'Emprunt fut vraisemblable." Mr. Bell, in his Commentaries, (1 Bell, Comm. B. 3, pt. 1, c. 5, § 1, n. 454), says; "His (the master's) office holds him out as the accredited agent of the owners, on whose authority all repairs, furnishings of naval stores, subsistence or money necessary for the occasions of the voyage, may be contracted for or advanced on the credit of the owners. The only restraint is the necessity on the part of the furnisher or advancer of money to see, that the supply, which the master requires, is justified by at least apparent necessity." The language already cited from Abbott on Shipping, (part 2, c. 3, § 3), leads to the same conclusion; for it is there said, that "the money advanced should at the time appear to be wanting" for the supplies or repairs. Indeed, it seems to me, that any more strict rule would endanger the interests of all concerned, and more than all others of the owner; for who would be willing to lend a master abroad, if he were compelled to furnish positive proof of the necessity of the repairs or supplies beyond what fair inquiries and what the appearances of things would afford, upon due examination? If there ever was a case, in which the maxim should be applied, that, where one of two innocent persons must suffer, he should suffer who had by his confidence enabled another to perpetrate a fraud, this would seem to be the case, for the reason suggested by the Digest. "Eo usque producendam utilitatem navigantium." Kuricke, in the passage already cited, goes the whole length of the doctrine. "Si probabile damnum in navi et instrumentis navilibus adpareat." And Valin has wisely considered a different rule too subtile and punctilious for the usages of commerce.[3] I have, therefore, no difficulty in holding, that if there is an apparent necessity, at the time, for the repairs and supplies, the creditor, acting with good faith and reasonable diligence, will be justified, whatever may, at a future time, and under other circumstances, turn out to be the real state of things. The creditor must lend, if he lends at all, upon the faith of what is then known and seen

[3] Valin, Comm. lib. 2, tit. 1, art. 19, p. 442. See, also, 2 Valin, Comm. lib. 3, tit. 5, art. 7. Pothier seems to hold a like doctrine. Pothier, Traité à la Grosse, n. 52.

upon due examination; and his rights ought not to be jeoparded by new proofs, which, at a distant period, or in another place, may spring up to create doubts, or to change opinions.

Hitherto, we have been looking to this matter as connected solely with the interests of the creditor and the owner. But a most important consideration remains; and that is, how it affects the rights and duties of the master of the ship. He is clothed with the general authority to make repairs and order supplies in all the exigencies of the voyage. He is compelled by his duty and the confidence of the owner, to act for the best interest of all concerned in the voyage; and to exercise a sound judgment as to what is to be done in new and unforeseen exigencies. According to the doctrine which we have heard, he is bound to act; and yet he must act at his own peril. If he acts with the most entire good faith, upon the purest exercise of his own judgment, with the fullest advice and assistance of other intelligent minds of reasonable skill and prudence upon the spot; yet, if, upon a review of the whole proceedings, other minds, in a distant country, at a different time, and under other local or professional influences, should come to a different conclusion, as to the necessity or the extent of the repairs or supplies, he is to bear the sole responsibility, and to meet in poenam to the full extent (it may be) of his fortune all the consequences, in a suit at the instance either of the creditor or of the owner. Now, I confess, that I should be very reluctant to hold to such a rigid doctrine; a doctrine, in my judgment, utterly unsafe and impracticable for the ordinary purposes of navigation and trade. It is not, to my knowledge, any where established; and I have not hesitated upon many occasions to repudiate it, in that limited administration of public justice, which has fallen to my lot. If it were true, no creditor would dare to lend money to the master of a ship for repairs or supplies; and no master would dare to borrow money for such purposes. An innocent mistake, under circumstances of the highest caution, and the most abundant good faith and reasonable diligence, would be visited with the same effects as gross negligence or fraud. What, under such circumstances, would be the situation of the shipwright or material-man, who should furnish the repairs or supplies in a foreign port? The maritime law gives him a lien on the ship for his necessary repairs and supplies; and when he comes to assert it in the home port of the ship, he is met by the owner with the defence, that no lien attaches; because, although the repairs and supplies have been made in good faith, yet, upon a full re-examination and revision of all the circumstances, the master and themselves have erred in judgment as to the extent or the necessity of the repairs. They were at the time, indeed, apparently necessary and proper in the judgment of those who seemed well qualified by nautical skill and judgment to decide upon the matter; but there is now a weight of better skill and judgment the other way, as to the positive, though not, perhaps, as to the apparent necessity. It seems to me, that such a defence, successfully maintained, would spread an alarm through the whole maritime world. Before I should yield to such a doctrine, I should require the most stringent authority directly on the point. I am not aware of any such authority. Even in the case of the sale of a ship by the master, which can be justified only upon an urgent necessity, no rule so rigid has yet been established; for if such a necessity does apparently exist at the time, and upon the spot, I conceive that the master will be justified even in a sale of a ship, although subsequent events may show that a different course might have been attended with success. See Petapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 605; The Sarah Ann [Case No. 12,342]; The Tilton [Id. 14,054]; Idle v. Royal Exch. Assur. Co., 8 Taunt. 755; The Warrior, 2 Dod. 288; The Packet [Case No. 10,654]. See, also, Winn v. Columbian Ins. Co., 12 Pick. [Mass.] 279. In the case of a sale of the cargo by the master, which can only be justified by necessity, since he is not ordinarily the agent of the cargo, an apparent necessity would seem to be all that the law requires. In the case of The Gratitudine, 3 C. Rob. Adm. 240, 259, Lord Stowell, alluding to such a case, said: "In such emergencies the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law, that the cargo should be left to perish without care. What must be done? He must in such case exercise his judgment, whether it would be best to trans-ship the cargo, if he has the means, or to sell it. It is admitted in argument, that he is not absolutely bound to trans-ship. He may not have the means of trans-shipment. But even if he has, he may act for the best in deciding to sell. If he acts unwisely in that decision, still the foreign purchaser will be safe under his acts." In the case of Freeman v. East India Co., 5 Barn. & Ald. 617, which was the case of a sale of the cargo by a master, Lord Chief Justice Abbott said: "A sale of the cargo, or any part of it, by the master, could confer no title on the purchaser, unless there was an apparent necessity for such sale. That question I left to the jury, and they were clearly of opinion, that there was, in this case, no such apparent necessity." It is true, that the other judges, on the same occasion, used somewhat different language, speaking of the necessity, or the absolute necessity of the sale. But I conceive the lord chief justice's doctrine to be the true and exact doctrine.

The case of The Jane, 1 Dod. 461, 464, is still more direct in point; for in that case Lord Stowell puts the support of a bottom-

ry bond mainly on the good faith of the lender. "The question," says he, "then is, whether this was a fair transaction. Whether the money was bonâ fide advanced, on the representation of the master, that he was in want of supplies. By the general law, the master has a right to take up money in a foreign port for the use of his ship. As long as he remains the ostensible master, exercising all the functions of that situation, he has the authority attached to it; ei rei praepositur. It is not alleged, that the master had any personal credit. Had he not resorted to this mode of raising money, the ship might have lain in port, till it perished by decay. I see no reason to suppose the master exceeded his power. It is a power certainly liable to abuse by the extravagance, indiscretion, or dishonesty of the master. But the master is a person selected by the owners themselves. They repose that trust in him, and hold him out to others as trustworthy. The reasoning is not confined to persons employed in this capacity only. It is common to most situations in life. If a domestic servant, employed by his master to purchase necessaries for the use of the house, misapplies goods obtained under that pretence, though the authority is abused, the master is still liable for his acts. The tradesman who supplied the goods is not to be the sufferer, unless it could be shown that there was collusion with the servant for the purpose of defrauding the master, &c. I cannot agree to the doctrine, that the party lending is obliged to see to the application of the money. If there is no collusion, if he has reasonable grounds for believing that the money is fairly borrowed, it is a known principle in that case, that no such obligation is imposed upon the lender, &c. The transaction may be fair in all its parts. But taking it to be otherwise; supposing it to be tinged with a shade of dishonesty in the master, the merchant, if he did not participate in the guilt, could not be affected by it." Now, some part of this language is addressed to the line of the defence at the hearing, where it was suggested, that, at the time of the borrowing, the master was dismissed, or about to be dismissed; that the intention to dismiss was known to the lender; that there was no account of the items which composed the amount of the bottomry bonds, nor of the application of the money. But still it is most clear, that Lord Stowell sustained the bond in that case upon the apparent necessity only, and the fairness of the transaction on the part of the lender, upon the representation of the master. The doctrine of the same great judge, in the case of The Nelson, 1 Hagg. Adm. 169, 175, 176, and The Zodiac, Id. 320, 326, seems to me to have proceeded upon the same views; and it is difficult to imagine any one, in whose enlightened judgment upon a subject of maritime law more confidence would be reposed. See, also, 3 Kent, Comm. (3d. Ed.) lect. 46, pp. 171, 174.

In short, it appears to me, that all that the maritime law requires, is, that the master should exercise reasonable diligence in ascertaining what repairs and supplies are necessary; and that the creditor should use reasonable diligence to ascertain, if there is such an apparent necessity, as the master has represented; and if he does, and acts with good faith, he will be protected, and the owner be responsible to him for the repairs and supplies furnished by him. Hitherto my observations have been mainly directed to the consideration, what are necessary repairs and supplies, in the sense of the law, for which the master is at liberty to contract; and the circumstances, under which the owner will be bound for such repairs and supplies in common cases. If the repairs and supplies are in a just sense necessary, then it is clear, that if the master has no other known means of meeting the expenditure, he may take up the money therefor upon bottomry. If he has any other funds, which may be properly applied for the purpose; or if he can procure the advances upon the personal credit of the owner, then he is not at liberty to take up the money on bottomry. See Ross v. The Active [Case No. 12,071]. But the onus of establishing, that there were other funds, or that they might have been obtained upon such personal credit, is on the owner, and not on the lender. And, if he has acted in good faith, and without any knowledge or suspicion of the existence of such funds, or personal credit, or could not, upon reasonable inquiry, acquire knowledge thereof, then the owner will be bound, notwithstanding they existed, or might have been obtained. Not only does the doctrine of the Continental Jurists lead to this conclusion; but it seems to me fully supported by the reasoning of Lord Stowell, in the case of The Nelson, 1 Hagg. Adm. 169; The Jane, 1 Dod. 461; The Rhadamanthe, Id. 201; The La Ysabel, Id. 273; The Hero, 2 Dod. 139; and of the supreme court, in The Aurora, 1 Wheat. [14 U. S.] 96; and The Virgin, 8 Pet. [33 U. S.] 538, 550.

If the views which have been thus far suggested are correct, it seems to me that they will greatly narrow the grounds of controversy in the present case, and save us from the necessity of reviewing many of the very elaborate expositions of the facts which have been so fully presented at the bar. But, before I proceed to consider those facts, on which alone, in my opinion, the real controversy must hinge, I wish to take a brief notice of the objection urged at the bar, that neither the libel nor the answer, in this case, is adapted to such a mitigated form of necessity as has been insisted on at the argument; but that they propound a case of unmitigated and absolute necessity. If the objection were well founded, I should

deem it my duty, as this cause was not heard in the court below, to admit the libel and answer to be reformed, so as to bring before the court the true merits. But, supposing the pleadings to be as suggested, still, in a court of admiralty, as the allegations are broad enough to cover the whole merits (if any there be), and upon the maxim, that omne majus in se continet minus, there would be little difficulty in maintaining their sufficiency. Even in the case of pleadings at the common law, in a declaration for a total loss, upon a policy of insurance, there may be a recovery for a partial loss by the same peril. The allegations of the libel are, that at Calcutta "the ship was in great need of reparations, provisions, and other necessaries to render her fit and capable of proceeding thence on her intended voyage back to the said port of Boston; and neither the owners of said ship, nor said Spalding (the master), having any funds or credit there, and the said Spalding being unable otherwise to procure the necessary money to repair, refit and supply said ship for her said voyage, the libellant did, at the request of said Spalding, advance and lend to him, said Spalding, the sum of 11,755 sicca rupees, &c., on the bottomry or hypothecation of said ship," &c. Now, if I have rightly understood the answer, as well as the argument at the bar, some repairs and supplies were necessary at Calcutta; and no argument has been addressed to the court to show, that the master had any other funds, or the owner any personal credit to meet the exigency. What the answer relies on is, that except some caulking in her upper works, and some supplies of provisions, and some inconsiderable repairs usual on such a voyage, the ship was not "in need of any other reparations, provisions, and other necessaries to render her fit and capable of proceeding thence on her then intended voyage." So that the whole matter of the repairs and supplies is left broadly open upon these general allegations; and, as far as by law they can, or ought to constitute a valid lien upon the ship, as useful, and proper, and reasonable under all the circumstances, for the master to make, they are fairly within the reach of the court.

Upon looking at the general outlines of the evidence, it appears to me, that the ship (which was only upon her second voyage,) was originally well and substantially built, of sound materials, and in a skilful and workmanlike manner. Still it is quite consistent with this general state of facts, that she might have betrayed some infirmity and weakness in some unexpected place. Nor ought this to surprise us, either upon general reasoning, or upon the admitted fact, that ships of this size, and with this peculiar build, that is, with very large round bottoms, exceeding greatly in their actual capacity the registered tonnage, are but of recent origin and structure in our shipyards. Here, for example, is a ship of the registered tonnage of 566 tons, with a capacity safely to transport a cargo of 1300 tons burthen. Under such circumstances, it would not be wonderful, that the degree of strength, which should be required for the keel and the keelson, and the proper positions of the scarfs thereof, relative to the masts, and to each other, should be a matter somewhat of experiment. It seems admitted also, that this class of ships are now built stronger than they were at first; as experience has led the parties interested therein to a more practical knowledge of their actual working at sea.

Now, the great defect supposed to exist in this ship is in the position of the scarfs of the keel and keelson, relative to each other and to the mainmast, and the want of a rider or false keel to increase the strength of this part of the ship. The scarf of the keel, it is said, is under or very near to the mainmast; and to remove this defect was the main object of the repairs, by placing what are called sister keelsons near to the main keelson, and thereby to increase the strength of that vital part of the ship. Upon this subject there is a great conflict of evidence and opinion; and it is somewhat difficult to say on which side there is a decided preponderance. If my judgment rested solely on this point, I should be greatly distressed; for I have not been able to persuade myself that the surveyors were wholly mistaken in their impression, that there was some infirmity of the ship, from the position of the scarfs, and the structure of the keelson, and the stepping of the masts. At least, my mind, after weighing the evidence and the argument, is left in some doubt. But it seems to me, that there are facts in this case, upon which the decision must finally turn, which are either uncontroverted, or, if controverted, are established by evidence entirely satisfactory. In the first place, it is admitted that the ship did leak on her outward passage from Boston to Calcutta, to a considerable extent; that the leak was progressive; and that in rough weather it was greater than in moderate weather; and that when the sea was heavy, and the ship was down on her sides, the leak was so great as to require from one thousand to fourteen hundred and more strokes a day. Now, that this leak, in a ship so new, and under the circumstances of the voyage, was of an unusual nature, and such as, for the success of the voyage, was necessary to be stopped by suitable examinations and repairs at Calcutta, has not been denied, and indeed cannot admit of any reasonable doubt. Indeed, it is positively testified by several shippers on the homeward voyage, some of whom were supercargoes on the outward voyage, that they should not have been willing to ship their goods on the homeward voyage, unless substantial repairs had

been made, so as to stop the leak. The necessity of some repairs is, therefore, as I think, incontrovertible; and the questions, then, on this point, are reduced to these: What repairs were necessary? and, what was the best mode of making them?

The master, on his arrival at Calcutta, did what every prudent master ought to do under the like circumstances. He called a survey of persons skilful in nautical affairs to assist his judgment; and for this purpose selected three masters of American ships, (the only American ships then in the port); a choice certainly, in all respects, unexceptionable, whether it respects their character, or responsibility, or experience, or presumed skill; since they enjoyed the confidence of their respective American owners, and must have every reasonable motive to perform their duty with fidelity and a just regard to the interests of all concerned. The propriety of such a choice, under such circumstances, has not been disputed. But the conduct of the surveyors in making the survey, and the credibility of their statements, have been assailed with a rigor and zeal approaching very nearly to the imputation of their being the victims of the gross frauds or delusions of the master, or of their having wantonly become participators in his meditated wrongs. Now, I must say, that such imputations ought not lightly to be entertained by any court; but ought to be sustained by the most clear and irrefragable proofs. If persons, entrusted with the command of ships in voyages of such high importance and with such valuable cargoes, are, upon mere diversities of judgment and opinions of other witnesses, found wiser than themselves, after the event, and at a distance from the scene, to have their credibility shaken, and their characters assailed, I fear, that hereafter there will be found few of them, who will be willing to undertake the irksome task of a survey; and that it must be left to other humbler and more willing instruments, less confided in by the commercial world, and less entitled to confidence. It is no very pleasing consideration, to perform such a duty at the solicitation of a brother shipmaster and a countryman, and to find ourselves rebuked by reproaches for the want of more honesty of purpose and more skill in judgment.

But it has been urged at the argument, that there are discrepancies in the testimony of the surveyors with themselves, as well as with each other, in different parts of their own depositions. Much minute diligence has been employed in selecting and pointing out and comparing them. Some of them certainly appear to be well founded; but I have not been able to perceive that they amount to enough to overturn the general credibility of their testimony. The circumstances under which the testimony has been taken afford some grounds to account for these discrepancies, independent of any notion of an intention of wilful and deliberate perjury. The testimony of the surveyors has been taken at considerable length of time after the occurrences; at distant places; and without the means of refreshing their memories by personal communications with each other, and with others who were on the spot. Some facts must naturally have faded from their minds; and others, again, have left but obscure and broken traces behind them. Of one of the surveyors, the testimony has been taken twice; and another was subjected to a most severe cross-examination of more than one hundred and fifty cross-interrogatories, under circumstances which would lead to some hurry, impatience, and perhaps carelessness of statement. Under such circumstances, it could not be surprising that there should exist some slips, and some discrepancies in the statements. Human infirmity, even with the greatest caution, is not beyond the reach of such occasional lapses.

Now, the court is called upon to reject the whole testimony of the surveyors, and to repudiate the integrity of the survey, upon the discrepancies and diversities of opinion already suggested. I confess, that I have not been able to bring myself to any such conclusion. The surveyors may possibly have erred in their judgments; they may not have examined with the scrutinizing caution of a vigilant owner; they may have made some mistakes in matters of fact. But that they have been either the credulous victims of, or artful participators in, a meditated fraud of the master of the Fortitude, is what I find no warrant for in the evidence. I feel it my duty to say, that I see no reason to impeach either their skill, or their fairness, or their honesty. Their characters as shipmasters, in an independent service, enjoying public confidence, and bound by no known ties to the master of the Fortitude, without any assignable motives for such gross misconduct, forbid me to indulge any belief of this sort, without evidence far more stringent in its bearings, than any in this case. It is not unimportant to add in this connection, that there is a total absence of all evidence on the part of the respondents from other witnesses at Calcutta at the time, to show any misconduct or incompetency on the part of the surveyors, or that their judgment was founded upon false suggestions, or deficient examinations. And yet, if the case was such as the argument at the bar has supposed, it would seem difficult to believe, that there did not exist adequate means at Calcutta to detect the impositions, or to establish a want of judgment in the repairs. On the other hand, the whole testimony, from other witnesses at Calcutta at the time, of the officers, the crew, and the shippers, so far as it goes, leads altogether the other way, and confirms the bona fides of the whole transaction. And then, again, we find, that a Mr. Kidd, (whose premature death has deprived the

parties of his testimony), a most distinguished naval architect, attended the surveyors, and coincided with their opinions both as to the necessity and the mode of the repairs.

We have not the testimony of the master in this case, to give us his own views of the necessity of the repairs, or to vindicate his own good faith in his proceedings. It was taken by the libellants; but upon an objection taken by the respondents at the hearing, it was rejected by the court, on the ground, that the master was incompetent, as a witness, to establish the necessity of the repairs in a suit in rem upon a bottomry bond, where the non-existence of such necessity was the very point of the defence. The ground upon which the court proceeded, in ruling out the deposition, was, that although, as a mere agent, he might not be an incompetent witness in an ordinary suit against the owner personally; yet, in a proceeding in rem upon the bond, the decree in favor of the libellant would necessarily be conclusive, as to the fact of the necessity of the repairs, or at least primâ facie evidence in any suit subsequently brought against the master for his supposed misconduct; since the owner must produce the decree as the substratum of his case. This decision is certainly with much difficulty reconcilable with the common law decisions on the same point, and especially with the case of Evans v. Williams, 7 Term R. 481, note c; Rocher v. Busher, 1 Starkie, 27; and Milward v. Hallett, 2 Caines, 77. I am by no means sure that I was right in this rejection of the deposition. My subsequent researches have not enabled me to feel more confidence in it. And in every case which I have since examined, in the supreme court of the United States, and in the high court of admiralty in England, I find the master's testimony has been admitted without objection, and commented upon as evidence; or else adverted to as proper evidence, when it happened to be absent, even when the point of the necessity of the repairs was directly before the court. See The Virgin, 8 Pet. [33 U. S.] 538; The Jane, 1 Dod. 461; The La Ysabel, Id. 273; The Nelson, 1 Hagg. Adm. 169. I find, too, that Mr. Bell (1 Bell, Comm. B. 3, p. 1, c. 5, § 1, note 456), asserts, that the master is held a competent witness to establish the necessity of the supplies for the ship. If, therefore, this cause should be carried by appeal to the supreme court, I hope, that the libellant will take care to have my judgment upon this point, as one of great practical importance, reviewed.

The rejection of the testimony of the master, under such circumstances, admonishes the court, that it ought not to make any unfavorable inferences against the good faith of the master, unless they are positively required by the most persuasive evidence against him. Primâ facie, and until the contrary is shewn, I must deem him to have acted with good faith, and upright intentions, and reasonable diligence; for he was otherwise guilty of a criminal departure from duty; and the argument has imputed to him meditated fraud, or gross disregard of the interests of the owner.

Now, the surveyors made, as they state, four surveys, three before the repairs, and one after they were completed. They recommended the very repairs to be made, which were made, with entire unanimity; and the estimate of the actual expense of the repairs exceeded that, which was incurred on the occasion. If the leak was in the bottom of the ship, and arose from the infirmity of the keel and keelson, and the scarfs thereof, as the surveyors supposed, I am not aware, that the acts done, and the repairs directed were not reasonable and judicious. Several skilful witnesses have expressed their approbation of them; and at all events they are not proved to be grossly or wantonly unfit for the purpose. The main stress of the argument rests on another ground, that the leak was in the upper works, and could have been removed at a trifling expense. Now, upon this point, whether the leak was in the upper works, or in the bottom, all the surveyors, assisted, as they were, by Kidd, were unanimously of opinion, that it was in the bottom. The weight of evidence, if not the entire evidence, of the persons on board the ship, who have spoken on the point, is the same way. And, indeed, if the question were to rest upon the case, as disclosed by the witnesses at Calcutta at the time, there could be no reasonable doubt of the fact. The difficulty arises from the evidence taken of home witnesses, who testify pointedly to the solidity and sufficiency of the build of the ship; and therefore, by inference, repel the other conclusion, aided by the admitted fact, that in her former voyage, with a large cargo, the ship made no complaint. Here, then, we may be said to have opinion against opinion, and positive affirmative testimony, met by other testimony, amounting to an inferential negative of the former. I do not stop to compare the various portions of the evidence with each other; for in whatever particulars they may agree, or differ, the conclusion which, upon the whole, my mind has arrived at, is, that it is not clearly made out, that the surveyors were under a mistake, as to the cause of the leak, or that the repairs were, under the circumstances, injudicious or improper. The case, made out upon the survey and proceedings at Calcutta, appears to me one, in which primâ facie the repairs ought to have been made by the master. The onus under such circumstances is upon the respondents to displace that case; and I am not able to say that it has been done. The most that can be said is, that some doubt has been thrown upon it.

But, assuming that the surveyors have acted upon a mistake (for in my judgment

there is not the slightest proof of fraud), and that all the Calcutta witnesses are equally under a mistake, as to the cause of the leak, and that the mistake, though then undiscovered and undiscoverable by the exercise of ordinary diligence, is now demonstrable upon a mere critical review of evidence then unattainable, but now within the reach of the parties, from the shipwrights who constructed the ship, and others, who are of great skill and experience; I say, assuming this to be the present position of the case, what is now to be the effect? Is the master, acting upon the best advice he could obtain at the time, and with an exercise of reasonable diligence, to be now treated as unworthy of confidence, and his acts utterly void, to bind his owner? What, under such circumstances, was the master to do? The shippers here told us, that they would not have shipped their goods, if substantial repairs had not been made. Was the master to give up all the interests of the voyage upon possible doubts, thereafter to be entertained, as to the repairs? It is true, that the ship was not then in the employment of the owners, but of the charterers for the voyage. But that makes no difference; for whatever it was his duty to do, if the owners had been interested in the freight for the voyage, it was equally his duty to do for the charterers. It seems to me that the master was reduced to this dilemma, either to give up the objects of the voyage, and return with little or no freight, or to go on, and make such repairs, as upon his own judgment, aided by the advice of competent surveyors, would meet the apparent exigencies of the occasion. If he has acted with reasonable discretion and diligence, it seems to me, that under such circumstances his acts ought to bind the owner, or there would be an end to all safety in commercial enterprises.

Then, again, what is the predicament of the lender under the like circumstances? No one pretends, that he is bound to superintend the repairs, or to see to the actual application of the money advanced therefor; or minutely to ascertain the exact amount required for the purpose. All the authorities, ancient and modern, speaking on the point, inculcate a very different doctrine as to his duty and responsibility. He is to see, that an apparent case of necessity for repairs is made out; and he is to take care, that he does not knowingly advance more money than what may be fairly deemed fit for the occasion. But having done this, and acted with good faith, he is protected by the law to the extent of his contract. Nothing more would seem necessary, than to refer to the very clear statements of Emerigon on this subject. Emer. Traité à la Grosse, tom. 2, c. 4, §§ 5, 8. If, then, there has been a mistake made, as to the mode or the extent of the repairs; but it has been unintentional, and after reasonable examination; and there was a leak necessary to be stopped, what has the lender to do with the matter? He is not supposed by the law to have any skill, or to exercise any particular judgment as to the mode of repairs. He may be utterly incompetent to decide upon such subjects; and he may be driven to rest his conduct upon the skill and judgment of others of reasonable nautical experience and practical knowledge. "Non oportet" (says the civil law), "creditorem ad hoc adstringi, ut ipse reficiendae navis curam suscipiat, et negotium domini gerat" (Dig. lib. 14, tit. 1, l. 7); and such is the language of all maritime jurists. For the same reason, the lender has no obligation on him to search out and ascertain the true cause of the loss, or the damage which requires the repairs. It belongs not to him rerum cognoscere causas; it is sufficient, that the necessity of the repairs is made apparent, and that he has made due inquiry into that fact. But, then, it is said, that the lender in this case made no inquiries, and exerted no diligence. But no proof is given to that effect. We find him advancing his money, and taking a bottomry bond from the master for the amount, which bond recites the ship's necessities; and it is to be presumed that he first made all due and reasonable inquiries on the subject which the occasion required. If the state of facts was such as justified the repairs, no diligence was necessary, except perhaps to ascertain whether the master had any other funds or credit, which is not pretended in this case; or at least was not made out at the argument. If there was no real necessity, and yet the lender could not by any diligence have ascertained the fact, the law would not force him to fruitless inquiries. If there was an apparent necessity, and farther inquiries would not have changed that predicament of the case, then it would be sufficient for him to act upon that apparent necessity. But it is hardly credible, that he should not have been informed of the survey, and of the opinion of the surveyors, and of the nature and extent of the repairs, for which he was required to advance his money. Indeed the bottomry bond contains a recital that, "a regular and careful survey had been made on the ship, and then it was found, &c. &c." What further duty of diligence was required of him? How is it shewn, that upon further inquiries his judgment would have been enlightened on the subject? Not a single Calcutta witness has been examined to disprove the state of things certified by the surveyors. I must presume, therefore, that none would be found, who would disprove it.

Having said thus much upon the general principles applicable to the case, and the material facts, so far as they bear upon the rights and duties of the bottomry lender, the subject is, with me at least, exhausted.

I have not thought it necessary to spread upon this opinion a minute survey of the evidence for, or against particular conclusions or presumptions. I have limited myself to such results as seemed to me to dispose of the whole merits of the case, so far, at least, as my judgment is concerned. In a case of this sort, I have not been able to persuade myself, that any comparison and balancing of minor facts, or supposed contradictions, though eminently fit and proper at the argument, would be of any service in the final judgment, which, after all, must rest upon a broad and general survey of the material facts necessary to sustain the bond. My judgment is, that the bottomry bond is well sustained; and that a decree ought to be rendered affirming its validity, and decreeing to the libellant the amount thereof with interest and costs.

FORT SCOTT (KEANE v.). See Case No. 7,631.

Case No. 4,954.

The FORTUNA.

[1 Brock. 299.] [1]

Circuit Court, D. North Carolina. Spring Term, 1815.[2]

PRIZE — VESSEL SAILING UNDER NEUTRAL FLAG — CONCEALED PAPERS — ENEMY'S PROPERTY.

A vessel, sailing under a neutral flag, was captured by an American private armed schooner, and brought into a port of the United States for adjudication. The vessel and cargo were libelled, by the captors, as enemy's property, and a claim was interposed, by neutrals, who appeared, by the ship's papers, to be the proprietors; but after the arrival of the vessel in the United States, other papers were found, artfully concealed, tending to show that the vessel and cargo were, in truth, British property; Great Britain and the United States being then at war. The concealed papers examined and compared with the ship's papers, and the vessel and cargo condemned as enemy's property; but order for further proof made, if an appeal should be taken, leaving the question of its admissibility to be determined by the supreme court.

[See note at end of case.]

[Appeal from the district court of the United States for the district of North Carolina.]

The Fortuna, sailing under Russian colours, left Riga on the 2d of September, 1813, for London, where she arrived; and from thence, sailed on the 18th of November, 1813, in ballast, on a voyage to the West Indies, took a British convoy at Portsmouth, in England, and proceeded with it to Barbadoes, and thence to Jamaica. From thence she sailed to the Havanna, where she arrived on the 12th of February, 1814; took in a cargo of the produce of Cuba, and left the port of the Havanna on the 25th of March, 1814, under protection of a British convoy, bound to Bermuda. After parting with the convoy, she was captured on the 19th of April, 1814, in the latitude of 38°, west long. 60°, by the private armed schooner Roger, and brought into Wilmington, North Carolina, for adjudication. The master, and all the crew, except the mate and two seamen, were taken out, and kept on board the privateer until the 14th of August, when they were sent in to be examined. A claim was interposed by the master for the ship, as the property of Martin Krause of Riga, one of the house of trade of M. & J. Krause, of that place, for 1520 boxes of sugar, and 144 quintals of Campeachy wood, as the property of M. & J. Krause: for 160 boxes of sugar, as the property of J. F. Muhlenbruck, as the master understood, "a native of Germany, and of late usual abode at Hamburg," and who went out in the vessel, and shipped the whole of the cargo; and for small portions of the cargo, as the property of the master, and of a Swedish captain, Steinmeitz.

There were found on board, a certificate of the built of the ship in Finland; a passport or sea brief to proceed to London, granted at Riga, by the harbour-master and commander at that place; a bill of sale of the ship, from P. A. Severnon & Son, of Riga, to Martin Krause; and certificates of naturalization of the crew. The cargo was documented in the usual formal manner. The prize master, in his affidavit, on delivering up the ship's papers, sworn to on the 7th of July, 1814, states, "that the said papers were found in the said ship, at three different periods, and that on coming into his possession, or on discovery thereof, he proceeded with them forthwith, and without delay, to the admiralty office, &c., and that the last parcel of papers were, on the 8th of June last, being a considerable time after the arrival of the said ship, found concealed in a tin box, carefully let into an old piece of timber, to wit, part of the frame or belfrey of a vessel, by means of a mortice hole, which said mortice hole was covered with a piece of wood, in a way to elude observation, and which said piece of timber was stowed away among the ship's firewood," &c. Certain papers were also found in the master's trunk, after the ship's arrival.

In his examination, on the standing interrogatories, the master swore, that he was employed and appointed by a Mr. Hoffengartner, who gave him possession of the vessel in London, in 1812; that the said Hoffengartner was then travelling; and died about March, 1813; but his place of abode, birth, and country, the master did not know. That Messrs. Bennett & Co. of London, gave him his instructions, and informed him, that Martin Krause had directed them to fit out the ship, and order her to the Havanna. That the ship had before gone by some other name, which he did not recollect. That a bill of sale of the ship

[1] [Reported by John W. Brockenbrough, Esq.]

[2] [Affirmed in 3 Wheat. (16 U. S.) 236.]

was made to Martin Krause, by the person from whom the said Krause purchased, but whose name he did not recollect, nor the time when it was made, nor in the presence of what witnesses; and there was no engagement different from, or in addition to, the bill of sale. He assigned, as his reasons for placing the papers in the piece of wood, that they were partly papers not belonging to the vessel, and partly private letters, and he did not wish to have them mixed with the ship's papers, as it might possibly create confusion, and that they might be put aside, when boarded by any private armed vessels, and, if there should be a necessity, produced when called for.

The ship and cargo were condemned in the district court, and the claimants appealed to this court.[3]

MARSHALL, Circuit Justice. The Fortuna, a vessel sailing under Russian colors, was captured on a voyage from the Havanna to some port in Europe, by the American privateer Roger, and brought into the port of Wilmington, where she was libelled by the captors as enemy's property. The vessel and cargo were claimed as belonging to neutrals. Both were condemned in the district court as prize of war, and from that sentence the claimants have appealed to this court.

The ship's papers, which were found at the time of capture, represent the vessel as Russian, and the bills of lading and other papers, relative to the cargo, represent that as the property of the neutral claimants. The testimony of the captain and crew comports with these papers. There is, indeed, some apparent contradiction in the affidavits given at different times by the captain. In his claim, and in one of the affidavits, he says that the Fortuna was the property of Martin Krause; in another affidavit he states her to be the property of M. & J. Krause. Now as M. & J. Krause were partners in trade, both Russians, and both residing at Riga, it was perfectly immaterial whether the vessel belonged to one or both of them, and it is entirely probable, as M. & J. Krause were the ostensible owners of the principal part of the cargo, that this inaccuracy of expression in one of the affidavits might escape him inadvertently, or might, as has been stated, be the fault of the translator or person who wrote the affidavit. Although such negligence in those who give testimony in any cause, must be very reprehensible, it would be punishing it rather severely, even if it were certainly committed by the witness, to confiscate a ship in consequence of it. I should, therefore, not lay much stress on that circumstance. But while the Fortuna lay in the port of Wilmington, a canister containing several papers was found concealed in an old piece of timber. It appears that in the port of Havanna, just before the sailing of the vessel, the carpenter had been taken into the cabin by the captain, who brought in at the same time this piece of wood. They were locked in together, and while there, the canister was let into the timber, and a piece of wood morticed over it for the purpose of concealing it. The timber was then thrown into the hole of the ship. The papers thus concealed have a material influence on the cause. The claimants represent Messrs. Bennett & Co. of London, to be the agents of M. & J. Krause of Riga, with respect to the vessel, the voyage, and the cargo. Bennett & Co. are supposed to have empowered a Mr. Muhlenbruck, a German, to purchase a cargo at the Havanna, to which place the Fortuna sailed in ballast, with which she was to return to Riga, touching on her return at Leith or some British port. The concealed papers furnish considerable ground for suspecting, that both the vessel and cargo are, in fact, the property of Bennett & Co.

The first of these secreted papers, contained in the transcript of the record, is a letter of instructions from Bennett & Co. to Captain Behrens, dated London, 18th November, 1813, immediately before the departure of the vessel for the Havanna.[4] This letter commences

[3] The editor, not having access to the record in this case, which was decided in North Carolina, has adopted the statement published in [The Fortuna] 2 Wheat. [15 U. S.] 161. See note of the decision of the supreme court, at the end of this case.

[4] "London, 18th November, 1813. Captain Henry Behrens,—As we have settled your ship's accounts, by paying you a balance of £206. 16s. 11d., up to November 13th, we now agree, that the arrangement made with Messrs. M. & J. Krause, when you were last at Riga, shall continue in force for the pending voyage, as far as relates to your pay and primage, and we agree to pay you a gratuity of £100 sterling, at the exchange current, whenever your voyage shall end; and, likewise, to allow you your cabin freight at the rate which the ship receives for her cargo. We have ordered Mr. J. F. Muhlenbruck, to supply you with the cash necessary for your expenses in the Havanna, when arrived out, which we beg may be as little as possible. And in case of your wanting any aid in Portsmouth, apply to Mr. Andrew Lindergreen, or in Plymouth, to Messrs. Fuge & Son, or in Falmouth, to Messrs. Fox & Son, who will supply you, on showing this letter. We desire that you will, with your ship Fortuna, as speedily as possible, join the West India convoy, now laying at Portsmouth, taking sailing instructions, and proceed with the same convoy to the Havanna, where you will apply to Mr. J. F. Muhlenbruck, at Messrs. Ychazo & Carricabura, merchants, there. You will receive, at the Havanna, Mr. J. F. Muhlenbruck's instructions, which you will follow implicitly. Mr. J. F. Muhlenbruck goes out to the Havanna, on board the Robert Bruce, or some other vessel in the convoy, if the Robert Bruce is too late. Should any accident befall him in the vessel, on board of which he goes, so that it is ascertained that Mr. J. F. Muhlenbruck cannot arrive at the Havanna, or if he should not be arrived there sixty days after you have arrived there, you will consult with Messrs. Ychazo & Carricabura, what is best to be done. Should the convoy be gone, on your arrival at Portsmouth, you are at liberty to follow it without convoy. Wishing you a good voyage, we remain, &c. (Signed) Bennett & Co. P. S. On your arrival at Leith, apply to Ogilvie & Patterson."

thus: "As we have settled your ship's accounts, by paying you a balance of £206. 16s. 11d., up to November 13th, we now agree," &c. The Exhibit No. 40 is an account (headed, "Dr.—Ship Fortuna,—Cr."), the balance on which is £206. 16s. 11d. The Dr. side of this account charges the ship with an account from Riga, due the captain, with primage going to Riga, the same from Riga, with cabin freight, and with his monthly wages from the 6th of May, to the 13th of November, and credits the ship by account against the captain from Carlscrona, the same from Gottenburg, and account in London, leaving the balance of £206. 16s. 11d. The balance arising against the captain, in London, is taken from Exhibit No. 3, which is headed, "Expenses in London, on the Voyage from Riga, Homeward." The account amounts to £202. 2s. 10d., and contains a credit for £300, received from Messrs. Bennett & Co., in cash, leaving, against the captain, the balance of £97. 17s. 2d., which is carried into the general account for final settlement. The Exhibit No. 1 is headed, "Expenses of the Ship Fortuna in Riga in the Month of July," and amounts to 1602.54⅔, Russian currency. A credit is there given in the following words: "From Mr. J. Krause in Riga, I received in cash 1600 roubles, leaving a balance in Russian currency due the captain of 2.54⅔, Russian currency." The same exhibit contains the expenses at Carlscrona, amounting to 161.39, and credits cash received from Buhling 180, leaving a balance against the captain of 18.9. Also, expenses in Gottenburg, amounting to 154.7, and credits by cash received from Mr. Wildenberg 150, leaving a balance due the captain of 4.7.

The appearance of these accounts demonstrates that no settlement was made with the captain at Riga, at Carlscrona, or Gottenburg which included them, but that advances were made to him at those places, respectively, to be accounted for by him when his accounts should be finally adjusted by Bennett & Co., and that the account itself was not stated, until after his return to England. The expenses of the whole voyage appear to be on the same paper, beginning at Riga. There, Mr. Krause is credited with a round sum of 1600 roubles, leaving due the small balance of two roubles and a fraction. This is the natural course of a person directed to make advances to the captain of a ship, but it is not credible that, had the account been settled, the precise balance would not have been paid. Precisely the same thing occurs at Carlscrona and at Gottenburg. At each place a round sum, as a sum in gross, is advanced, nearly the sum due, but never the exact balance. Then, these accounts appear, forming one exhibit, I suppose, drawn upon the same paper, showing that no account had been rendered at either of the foreign ports, but that the whole was received for adjustment with Bennett & Co. This is certainly very natural if Bennett & Co. be the owners of the ship, having agents at Riga, Carlscrona and Gottenburg, but very extraordinary if Krause at Riga was the owner, and Bennett & Co. were their agents in London. The force of this circumstance is, however, very much impaired by a paper which shows, that on the arrival of the Fortuna in Riga, in June, 1813, a settlement of some kind took place, in which the captain's wages, up to the 6th of May, and those of the crew, to the 22d of May, were included. With whom the settlement was made does not appear, but in the subsequent final adjustment with Bennett & Co., the wages of the captain and crew are calculated from the date at which this paper states them to have been paid. It appears then, that a settlement took place on his arrival at Riga on the 7th of June, including his wages to the 6th of May, and those of his crew to the 22d, and that his expenses at Riga, and at other ports, were to be settled in London on his return. There is some difficulty in accounting for the settlement as respects wages, if the vessel arrived at her home port in June. The most rational solution of the difficulty would seem to be, that his voyage commenced in May in London, and was to terminate in London, a circumstance from which it would rather be inferred that London had become her home port, rather than that Riga continued to be so. This is corroborated by the manner in which the account is headed, "Expenses in London on the Voyage from Riga Homeward." The critique on the word "homeward" is not sustained, for it is the voyage that is homeward, and the meaning is, expenses paid or settled in London, but incurred on the voyage. And we find in the account, the wages of the men from the last settlement. This phraseology might be used by men accustomed to consider London as their home, although the vessel might be chartered from a foreigner, but it could not be expected from a Russian captain, commanding a Russian ship, owned and sailing in the employ of Russians.

The other accounts in this record, relate chiefly to the Ceres, a vessel commanded by Captain Behrens, before he was placed in the Fortuna. They are somewhat mysterious, from the general want of dates, and names; but this may be readily accounted for. In other respects, they are not calculated to dissipate suspicion. That money was paid by Bennett & Co. in London, on account of the Ceres, furnishes strong ground for the opinion, that the account of December, 1812, was rendered to Bennett & Co. Now, that account appears, upon the face of it, to have been prepared for final settlement of the owners, or person, who acted as owner. The Fortuna and the Ceres, too, would seem to be under the management of the same person. Now, there is proof, that Bennett & Co. were the managers, and most

probably, the owners of the Ceres; but we should not be justified by any paper or testimony in the cause, in supposing that the Ceres was owned by Krause, or that Behrens was ever employed by him, or known to him, until he was placed in the Fortuna. These accounts, taken together, certainly indicate a long connexion between Bennett & Co., and Captain Behrens, and seem to show, that they were in the habit of employing him in their vessels. After referring to the settlement which had been made, the letter of instructions proceeds thus: "We now agree, that the arrangements," &c. It has been very properly remarked, that this agreeing to confirm the contract made by Krause in Riga, is not the language of an agent, relating to a transaction of his principal; but it is undoubtedly true, that the agreement made by Krause, might terminate on the arrival of the ship in London, when a new contract might be made for the voyage to the Havanna, for the basis of which, the parties took the agreement at Riga. There are, however, in this contract, expressions which appear somewhat suspicious. It commences thus: "On the following conditions, have I given to Captain Henry Behrens, the command of the ship Fortuna, under Russian colours, lying, at present, at Riga."[5] This contract is dated in August 1813. These words, certainly import, that under this agreement, Captain Behrens took command, for the first time, of the Fortuna. Yet, in fact he took command of her in London, in 1812, and had sailed in her as commander from London, to the Baltic. This cannot be a confirmation of his previous appointment in London, for it is not the language of approbation or confirmation, but of original appointment. And this appears to be more than two months after the arrival of Behrens at Riga. The language does not appear to be at all fitted to the occasion, and whenever that occurs, there is much cause to suspect that it is uttered with an object, and for a purpose, not avowed. If it be supposed, that this contract was made in contemplation of the voyage to the Havanna, the difficulty is shifted, but not removed. The question recurs, what need had this contract of the confirmation of Bennett & Co.? or of the gratuity of £100? There is too much reason to suspect, that this is a feigned paper, prepared to give the ship the appearance of her being owned by Krause. It is a little remarkable, too, that Bennett & Co. speak of it, as an arrangement made with M. & J. Krause, whereas it purports to be made with J. Krause only. The letter proceeds, "We have ordered Mr. J. F. Muhlenbruck to supply you with the cash necessary for your expenses in the Havanna, when arrived out, which we beg may be as little as possible." The letter proceeds to mention persons to whom he may apply for aid, in different ports in England.

It cannot escape observation, that this letter contains no reference to the interests of the Russian merchants. The money is not to be advanced on their account. Mr. Muhlenbruck is not represented as their agent, or as advancing money on their account. The caution to economy, is not for the sake of his owners. This is certainly the language of an actual owner, but is very unlike the language of an agent. The letter then proceeds to give detailed instructions for the observance of the directions of Mr. Muhlenbruck, in the Havanna, without once alluding to any connexion between Muhlenbruck and Krause.

The next letter is dated Havanna, 24th March, 1814, and is written by Muhlenbruck, to Bennett & Co.[6] This letter is written

[5] "On the following conditions, have I given to Captain Henry Behrens, the command of the ship Fortuna, under Russian colours, lying, at present, in Riga. 1. Captain Behrens shall have 25 Alberts dollars, monthly wages. 2. The whole cabin freight has been allowed him. 3. He is to receive 5 per cent. primage. 4. Travelling expenses for the benefit of the vessel, as likewise, victualling expenses for the use of the ship in port, consistent with moderation, have been allowed to the captain. Captain Behrens, on his part, promises to watch the interest of his owner, in every respect, and do the best he can for the benefit of the vessel. For the fulfilment of the present contract, I bind myself by my signature. Riga, the 12th of August, 1813.

"Per Proc. John Krause,
(Signed) "Schultz."

[6] Havanna, 24th March, 1814. Messrs. Bennett & Co., London—Gentlemen: I have the honour to refer you to my last letters, of 21st February, and the 1st of March, of which I have sent you, by different opportunities, triplicates. The first letter principally contained to request the favour of your opening me a credit in Jamaica, or Cadiz, to be able to settle the surplus of the amount already shipped, which may be left out of the proceeds of the outbound shipment, of the Robert Bruce. I hope that the above letter has reached you in time to grant me, as soon as possible, the favour, and beg to be convinced, that only the greatest necessity engages me to request it: not being able to draw on either England or America. I have now the greatest pleasure to inform you of the safe arrival of the Robert Bruce, James Chessel, master, under the protection of his majesty's ship North Star, Captain Thomas Coe, from Jamaica. From Cork she sailed with convoy, consisting of his majesty's ship Leviathan 74, Captain Adam Drummond, the Talbot, 20, Captain Spelman Swaine, and the Scorpion of 18 guns. Therefore, she has been the whole voyage under convoy and the insurers have to pay the full return of 6 per cent. The North Star, which sails to-morrow, takes all the ready vessels for Europe out to Bermuda; from thence another convoy will be granted to protect them to England, or at least as far as the latitude of Halifax. The Russian ship Fortuna, Captain Behrens, laden with 1520 boxes assorted sugars, bound to Riga, and for account and risk of Messrs. M. & J. Krause at that place, is ready to join this convoy. I enclose you invoice and bill of lading, which you will be pleased to forward with the first opportunity to the above friends. The captain, Behrens, has got instructions from me to tack, according to the prevailing winds, either in Leith or in the channel. By the present circumstances on the continent of Europe, Messrs. M. & J. Krause may have been induced

with circumspection, and represents the transaction in a manner entirely conforming to the pretensions of the claimants, and is certainly adapted to the inspection of cruisers. It could therefore be concealed only with a hope of keeping Bennett & Co. entirely out of view, if with any fraudulent motive. Taken alone, I should not be inclined to yield to the suspicions it has excited; taken in connexion with the letter of Bennett & Co. to Behrens, I acknowledge it acquires a meaning which might not otherwise be affixed to it. "The Russian ship, Fortuna, &c." This style of communication would rather create the idea, that with respect to the Fortuna, Muhlenbruck was the direct agent of M. & J. Krause, and gave this intelligence to Bennett & Co. as the friends and correspondents of that house; than that he was in fact the agent of Bennett & Co. appointed and instructed by them, with respect to this very vessel. "I enclose you invoice and bill of lading, which you will be pleased to forward by the first opportunity to the above friends." From this language, it could never be inferred, that Bennett & Co. had the sole management and direction of the vessel, and had employed Muhlenbruck, as a person who would obey and account to them. But if the invoice and bill of lading were intended for M. & J. Krause, why not have sent it in a letter to them? Why through Bennett & Co.? He then says, that he has given the captain orders to touch at Leith, or some port in the channel, according to winds, and gives as a reason for these orders, that M. & J. Krause may have been induced to countermand the destination to Riga, in some letter to their correspondents Bennett & Co.: thus studiously preserving the idea, that he acted directly for M. & J. Krause, and that the voyage was under their management, not under that of Bennett & Co. He suggests, that the idea of touching at Leith, or in the channel, originates with himself, and yet it appears from a postcript to the instructions given to the captain, by Bennett & Co., that they had ordered him to touch at Leith. "On your arrival at Leith," say they, "apply to Messrs. Ogilvie & Patterson." The next sentence requests them, should they have received orders from M. & J. Krause, to communicate them immediately to Captain Behrens; a request very proper from the agent of M. & J. Krause to their correspondents, but very extraordinary, if made by the agent of Bennett & Co., who were themselves, the sole managers of the vessel and voyage. The letter proceeds, "Please to inform, also, M. & J. Krause, that I have advanced here the captain $1332.04, for the use of the ship Fortuna." Who, that should collect his knowledge of the fact from this letter, would, or could suppose, that this money had been advanced by the agent of Bennett & Co., and by their express orders?

This letter, so far as it respects the Fortuna, is obviously intended to impress the idea, that Muhlenbruck was employed by M. & J. Krause, and that Bennett & Co. had neither the management of the vessel or cargo, but were written to by him, as the friends and correspondents of the owners at Riga, who might possibly have received instructions from them. Yet the letter of instructions from Bennett & Co. to Behrens, and their letter to the merchants at Charleston demonstrate, that if they were not the owners, they had the sole and exclusive management of the vessel and voyage, and that Muhlenbruck was their agent, appointed to superintend the affairs of the Fortuna, and of other vessels, acknowledged to be owned, or employed, by them. Why thus disguise the truth? If Bennett & Co. were not the owners of the vessel and cargo, but were, in fact, the agents of M. & J. Krause of Riga, with unlimited powers, why not address them in their real character? Why not write to them as the p rsons having full power o.e· the s ıbject, who had authorized Muhlenbruck to purchase a cargo for their friends, and who were responsible to him for the money he had advanced by their order? The letter of instructions from Mr. Muhlenbruck, to Captain Behrens, is written precisely in the spirit of that part of the letter to Bennett & Co., which relates to the Fortuna. It is precisely such a letter as would be written by the immediate agents of M. & J. Krause, supposing them to retain in their own hands, the control of the voyage, to their friends and correspondents, who had no certain agency in the business, but might possibly have received letters for the ship, countermanding orders previously given.

I will here notice the letter written by Mr.

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to send this cargo to a better market than it probably meets at Riga. Should they have given you any instructions concerning this vessel, the captain, Behrens, has orders to wait for your kind information in regard of the further destination, which orders from you I beg to send him as soon as you know at what port of the above mentioned he has arrived in England. Please to inform also Messrs. M. & J. Krause, that I have advanced here the captain 1332 dollars, 4 cents, for the use of ship Fortuna. Next week the cargo of the Robert Bruce will be all delivered, and I endeavour to procure the highest prices possible. The oznaburgs will sell as well as the estopillas, but I am sorry you was not able to get more of the latter, and of a finer quality, being always the leading article of an assortment of linen. The prices of sugar are nearly the same, and the arrival of this convoy has brought them up ⅛ to ¼ dollar higher. Coffee is lower, and I expect to buy and lay in good coffee at 10 to 12 dollars. Messrs. Hubberts, Taylor & Simpson inform me that I may not expect a convoy leaving Jamaica before the 30th of April. This same convoy can arrive here the 10th or 15th of May, and all possible exertion shall be made on my side to get the Robert Bruce laden before this time. I have till now not received an answer of Messrs. Hubberts, respecting the bills on London. Your kind letter of the 18th of December, I have duly received. I am happy that the sugars are bought within your limits, and wish to be as fortunate with those wanted for the Robert Bruce's cargo. I have the honour, &c. (Signed) J. F. Muhlenbruck."

Muhlenbruck, at the Havanna, to M. & J. Krause.[7] This letter was not secreted, but kept among the ship's papers. Who, that should read this letter, would imagine that Muhlenbruck had been appointed, not by M. & J. Krause, but by Bennett & Co.? Who, that has read the letter of instructions from Bennett & Co. to Behrens, would not expect that this letter would contain some reference to the manner in which the writer became the agent of the persons to whom the letter is addressed? If to this it be said, that this may have been done in a previous letter, I answer, that if any such previous letter had been written, it would, according to mercantile usage, have been referred to in this letter; and the stay of Muhlenbruck, in the Havanna, had been so short, as to diminish the probability of his having written a previous letter to Riga. I think it almost impossible, that a stranger, slipped by Bennett & Co. into the business of M. & J. Krause, would have written them a letter without hinting at the manner in which he became their agent, or referring to the information they might have received on this subject from Bennett & Co. The proof of any previous letter, or connexion, might diminish, or, perhaps, destroy the impression this letter is calculated to make, but, at present, it has much the appearance of being prepared for the purpose of keeping Bennett & Co. out of view. Such studious concealment always conduces to the opinion, that the person thus kept out of view, is more than a mere agent.

The concealment of the canister, in the piece of timber, cannot, I admit, give to the papers a meaning which their words would not justify. But it shows that the captain, who was much trusted by Bennett & Co., and had, most probably, been long employed by them, believed that these papers contained something which he ought to conceal; what could this be, but the agency of Bennett & Co.? And why should he conceal that, if they were no more than agents? If the letters appeared to be all written with the same view; if Bennett & Co. appeared throughout, as the avowed agents of M. & J. Krause, there would be nothing extraordinary, or suspicious, in the transaction; and there could be no fair reason for attempting to conceal this agency. It would seem as if the original design was to keep them entirely out of view, and the agency was kept in reserve, as the dernier ressort, if the part they had taken should be discovered. My present impression is, that if the original purchase of the Fortuna was not made by Krause, for Bennett & Co., she was transferred to them before the commencement of this voyage, and that they are to be considered as the owners of the ship, and of that part of the cargo which is claimed for M. & J. Krause. There is no proof that Muhlenbruck is domiciliated in England, and his property would be restored if he stood in court unimpeached. But he is so deeply concerned in this whole fraud, if it be one, that he must suffer the consequences of fraud. The property claimed by him, is, on that account, condemned also. This cause operates equally against the claim of the captain. There is, however, a small claim of a Swedish captain, which is not infected with this general contamination, and which, therefore, ought to be restored.

The conduct of the privateer, though justly reprehensible, cannot be punished by this court in the manner required by the counsel for the complainants. If their case depended, in any degree, on the testimony of the sailors who were taken out of the ship, and might be tampered with, that testimony might be disregarded. Any circumstance in the cause, which could be accounted for by the removal of the persons who ought to have remained in the prize, might be leniently considered; but it is apparent, that the cause rests on testimony in no degree affected by these circumstances, and that the question before the court, appeals, not to its discretion, but to its judgment.

The sentence of the district court is affirmed, with costs, except as to the claim made for Captain Steinmeitz, a Swede, with respect to which, it is reversed, and restitution ordered.

This case might be very much altered by a claim made by M. Krause, in person, or by affidavit, for the vessel, and by M. & J. Krause, for the cargo, by the exhibition of original letters, showing the ownership of the Fortuna, and the plan of this voyage; by the exhibition of letters, showing that Muhlenbruck's appointment was communicated to the house at Riga; by the letter of instruction from Bennett & Co. to Muhlenbruck, showing that he was to act for M. & J. Krause; and by any letter from Muhlenbruck to Krause, communicating his situation to them. I do not suspend the cause, to give time for the production of these papers, because they ought now to be ready; but if an appeal should be prayed, I will make an order for further proof, leaving it to the supreme court, to decide on its admissibility.

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[7] "Havanna, 24th March, 1814. Messrs. M. & J. Krause, Riga,—With the present, I have the honour to send you the invoice, and bill of lading, of a cargo of sugars for your esteemed account, in the Fortuna, Captain H. Behrens. The ship could not take more than 1520 boxes, white, and 600, brown, with Campeachy wood, which was necessary for stowing: together, $57,517.04; for which you will please give me credit. The sugars are of the new crop; bought at a moderate price, and of a very good quality. And I flatter myself you will be satisfied with the fulfilment of your kind commission. As there is a convoy leaving this place to-morrow, for Bermuda, I found it advisable for the Fortuna to join the same, and wish her a very quick and safe passage. Of the above documents, I shall send you duplicates, when I have the honour to write you again. The prices of Russian articles are, at present, raven's duck, $16; canvass, $42. Iron can only be sold with a loss, and in small quantities, as the price has fallen, &c. (Signed) J. F. Muhlenbruck."

NOTE. From this judgment, an appeal was taken to the supreme court, and the cause was argued at the February term, 1817, by Mr. Gaston and Mr. Hopkinson, for the appellants and claimants, and by Mr. Wirt, for the appellees and libellants. The court ordered that both parties be at liberty to produce further proof. [The Fortuna] 2 Wheat. [15 U. S.] 161. At the February term, 1818, it was submitted, without argument, upon the further proof, when the decrees of the courts below, were affirmed. The following points were decided: (1) That the cargo was British property, and even admitting the Fortuna to be Russian property (and there were many circumstances to maintain the suspicion that she was British property, or, at least, not owned as claimed), still, where a neutral ship-owner lends his name to cover a fraud, with regard to the cargo, that circumstance alone will subject the ship to condemnation. (2) That it is a relaxation of the rules of prize courts, to allow time for further proof, in a case where there has been concealment of material papers. Id., 3 Wheat. [16 U. S.] 236–246.

Case No. 4,955.

In re FORTUNE.

[1 Lowell, 306;[1] 2 N. B. R. 662.]

District Court, D. Massachusetts. Oct., 1869.

BANKRUPTCY — GOODS IN CUSTODY OF SHERIFF—PAYMENT OF SHERIFF'S COSTS BY ASSIGNEE—LIEN.

1. Where certain creditors attached the stock of goods of a trader for the express purpose of keeping it together and preventing waste, and the attachments were afterwards dissolved by an assignment in bankruptcy, and the sheriff had incurred charges for insurance, packing, &c., *held*: All necessary and proper charges for the care and custody of the property incurred after the petition in bankruptcy is filed, are incurred for the assignee, and must be paid by him out of the assets.

[Cited in Re Foye, Case No. 5,021; Re Hatje, Id. 6,215; Re Wells, 4 Fed. 71.]

2. If the assignee has taken possession of packing-boxes, policies of insurance, &c., procured by the sheriff, he must pay for the cost of them.

3. The sheriff has no lien for his costs upon a stock of goods attached by him when the attachment has been dissolved by the proceedings in bankruptcy; but the bankrupt court has power to authorize the assignee to pay such part of the costs as can be shown, or may be presumed to have been beneficial to the estate.

[Cited in Gardner v. Cook, Case No. 5,226. Followed in Ex parte Holmes, Id. 6,631.]

In bankruptcy. Several creditors petitioned for payment of the costs of attaching the property of the bankrupt. The evidence was that when Fortune stopped payment these creditors consulted together and agreed to attach his large and valuable stock of goods to prevent its being removed or disposed of; that the sheriff caused it to be carefully examined, scheduled, packed, and stored, and procured insurance upon it. The petitioners alleged that the assignee had adopted and ratified these acts, and had taken the benefit of them, and this was admitted. The petitions were not opposed.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

B. F. Brooks, A. S. Wheeler, T. F. Nutter, and E. A. Kelly, for creditors.

The sheriff has a lien for these charges including that for keeping the property. In re Housberger [Case No. 6,734]. At any rate the assignee may pay all reasonable expenses incurred for his benefit, whether before or after his appointment. He is not to take the assets and repudiate the necessary charges.

Hull & Childs, of New York, for general creditors.

J. H. Whitman, for bankrupt.

LOWELL, District Judge. The bankrupt act of 1841 [5 Stat. 440], in its operation in the New England states, failed to make an equal distribution of the effects of the bankrupt because it preserved the lien which creditors can always obtain by attachment. Mr. Justice Story endeavored to remove this objection by construction. Had not the statute itself expressly reserved all liens, his argument that the assignment operated per se to dissolve attachments would certainly have been very strong, because the attachment is only an incident to the suit, and the bankrupt court might stay the suit; but the language of the act was fatal to this interpretation. Ex parte Foster [Case No. 4,960]; Peck v. Jenness, 7 How. [48 U. S.] 612. The insolvent law of Massachusetts dissolved all attachments, but made the costs a preferred debt, whenever the attaching creditor chose to prove his principal debt against the assets. The act of 1867 [14 Stat. 517] dissolves all attachments not four months old, but fails to make provision for the costs; for section 28 refers to costs connected with or growing out of the bankruptcy. This is to be regretted, because there is an obvious injustice in destroying a valid and legal lien without compensation for the necessary expenses attending it. The creditor cannot even prove these costs and take a dividend on them, because, until judgment is obtained, they are not a debt of the bankrupt, for they were not incurred for his benefit, nor at his request.

I am unable to say that the sheriff has any lien for these costs. The attachment merely gives him a right of retainer until the suit is disposed of, and if the plaintiff chooses to discontinue his suit, or to discharge his attachment, the officer's only remedy is by action against the plaintiff himself. The report of the case in New York, cited in the argument, shows that the law is otherwise there, and that there is a right of retainer by the sheriff against the will of both parties. Applying the bankrupt act to such a law, there is perhaps no difficulty in concluding that the dissolution of the attachment does not destroy the right of the sheriff to the lien for costs, which he would have if the parties had themselves agreed to dissolve it. But I do not see how I can adopt that view here.

I have always required the assignee to pay all reasonable and necessary expenses incurred after the date of the filing of the petition, because his title relates to that time, and he is the debtor, by relation, for all such expenses. The bankrupt is bound to see that his estate is kept together and preserved for the assignee, and all the necessary charges for the fulfilment of this duty must be allowed him. In re Grant [Case No. 5,693]. And there is no reason why such sums expended by any person having a lawful connection with the estate should not be paid. The premiums of insurance on policies which have come to the possession of the assignee, and all other similar charges come within this rule, because they were no part of the attachment, and the sheriff would have the right to retain the policies, boxes, &c., until he was repaid. It is like the case of a consignee of goods becoming liable for freight or demurrage; or of the owners of goods saved at sea taking them out of the hands of the salvors, and thereby becoming liable to pay salvage for which there would ordinarily be no personal action.

To recur to the more difficult question whether the mere expenses of an attachment which has been dissolved can be paid by the assignee. Mr. Justice Story authorized such a payment to be made in Ex parte Foster [Id. 4,960], and it is the practice in the district of New Hampshire, as Judge Clark informs me, to allow them. I know of no authority to the contrary. Upon the whole I have come to the conclusion that the bankrupt court may, in the exercise of its equitable jurisdiction, require the assignee to pay such charges as appear to have benefited the estate in his hands, though incurred before the petition was filed and not protected by any absolute lien. It is a very doubtful point, and I should be glad to have my decision reviewed. It is placed on this ground: The attachment of chattels under the laws of Massachusetts requires for its validity that a keeper should be put in possession to preserve the goods to answer the judgment. When the attachment is dissolved by the assignment in bankruptcy it must usually happen that the assignee gets the benefit of this keeping. In this case the benefit is proved as clearly as such a fact can be proved, and it was the distinct purpose of the creditors that this result should be obtained. Equitably considered the assignee has received a benefit, and should sustain the burden. There are some analogous cases to be found, though it must be admitted that they are rare. In England, under a statute which has since been modified, the assignees were empowered to pay for services rendered to a committee of trustees, though the deed appointing the trustees was never valid under the bankrupt law. See Griff. & H. Bankr. 1070, where this and some other similar decisions are mentioned by the learned authors. Our law at section 17 speaks of the necessary disbursements of the assignee, which is very like the language of the English statute under which those decisions were made. But I rely mainly upon the practice of Mr. Justice Story, which was undoubtedly followed throughout this circuit. Ordered accordingly.

FORTUNE, In re. See Cases Nos. 3,586 and 6,725.

FORT WAYNE, The (COLLINS v.). See Case No. 3,012.

FORT WAYNE, ETC., R. CO. (GAYLORD v.). See Case No. 5,284.

FORTY BALES OF COTTON, PROCEEDS OF (RUSSELL v.). See Case No. 12,154.

FORTY-EIGHT HUNDRED GALLONS DISTILLED SPIRITS (UNITED STATES v.). See Case No. 15,134.

FORTY-SIX CASKS OF CALIFORNIA GRAPE BRANDY (UNITED STATES v.). See Case No. 15,135.

FORTY-THREE GALLONS OF WHISKEY (UNITED STATES v.). See Case No. 15,136.

FOSBENDER (McCLELLAN v.). See Case No. 8,695.

FOSDICK (DESHON v.). See Case No. 3,819.

Case No. 4,956.

FOSDICK v. STURGES.

[1 Biss. 255;[1] 3 Phila. 312; 15 Leg. Int. 404; 2 Wkly. Law Gaz. 401.]

Circuit Court, S. D. Ohio. Oct. Term, 1858.

FRAUDULENT STOCK—WHEN PURCHASER MAY RECOVER MONEY PAID—WHEN STOCK MAY BE REDUCED—AND HOW.

1. A purchaser of stock illegally issued by the directors of a railroad company at less than the charter price may rescind his contract and recover from his vendor who participated in the illegal issue of the stock the money paid for his stock.

[Cited in State Ins. Co. v. Redmond, 3 Fed. 767; Foster v. Seymour, 23 Fed. 67.]

2. The issue of the stock having been a fraud upon the law and the stockholders, the purchaser, although the stock has been regularly transferred to him upon the books of the company, and there was nothing in the transaction as to him to awaken his suspicion, may elect his remedy, and is not bound to remain content with the stock transferred to him.

[Cited in Taylor v. South & N. A. R. Co., 13 Fed. 155.]

3. A large amount of stock having been thus fraudulently issued, the prior stockholders being entitled to reduce it, in the hands of parties with notice, to the amount actually paid for, the fraud in which the vendor participated is material in its effects upon the rights of the purchaser.

At law.

Worthington & Matthews, for plaintiff.

Mr. Goddard, for defendant.

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[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

McLEAN, Circuit Justice. This action is brought to recover the sum of twenty-four thousand dollars, which was paid by the plaintiff to the defendant for stock in the Hillsboro and Cincinnati Railroad Company, on the ground of fraud.

The declaration states that on the 3d of January, 1853, the Hillsboro and Cincinnati Railroad Company were engaged in extending and maintaining their line of road to the Ohio river, at or nearly opposite Parkersburg, in Virginia; that the issue and disposal of the stock were vested in the directors for the time being; that Sturges, the defendant, entered into an unlawful scheme and device with the board of directors, who issued a bond for seven hundred and fifty thousand dollars, convertible into stock at par, with an understanding that the bond should be discharged by another bond for the sum of five hundred, twenty-one thousand, six hundred and seventy-seven thousand dollars; that Sturges was elected to convert the bond of the directors into stock, and that they issued to him certificates for fifteen thousand shares of stock, at fifty dollars per share, amounting to the sum of seven hundred and fifty thousand dollars; that in payment for such stock as had previously been agreed upon, he executed a bond to the company for five hundred, twenty-one thousand, six hundred and seventy-seven dollars, payable when called for; leaving the sum of two hundred and twenty-eight thousand, three hundred and twenty-three dollars less than the par value of the stock; that the defendant represented himself to be the lawful holder of the stock, so issued to him, and he proposed to sell to the plaintiff six hundred shares of the stock, at forty dollars per share, amounting to the sum of twenty-four thousand dollars; and that the plaintiff believing he was the lawful holder of the stock, purchased from him the six hundred shares, having no notice to the contrary.

The declaration further avers, that Sturges was not the lawful holder of the stock, his subscription for the same being void, as having been made in violation of the charter, for a less price than fifty dollars per share, as fixed by the charter; and the declaration also alleges, that Fosdick received from Sturges an assignment of the six hundred shares of stock, which on application were transferred to him on the books of the company, and a new certificate issued to him, which he brings into court, to be disposed of according to law.

To this count in the declaration a demurrer was filed.

There are other counts in the declaration, but they are not before the court on the demurrer.

The contract declared on, has been executed. Sturges assigned to Fosdick the six hundred shares of stock, and he paid for them twenty-four thousand dollars; and on the presentation of the assignment to the company, the stock was regularly transferred to him on its books. He had not, it seems, from the count demurred to, discovered the alleged frauds until after he had purchased the stock, and it had been regularly transferred to him, on the books of the company.

In the case of Sturges v. Stetson [Case No. 13,568], at the present term, it was held that the directors of the company had no power to receive subscriptions for stock at a less price per share than was fixed in the charter; and consequently, that notes given for stock, so obtained, could not be enforced. Such a subscription was held to be not only in express violation of the charter, but a fraud upon prior stockholders. Sturges, though holding by certificate his fifteen thousand shares of stock, regularly, to all appearance, entered upon the books of the company, was liable on the application to a court of chancery by a prior stockholder, to have his number of shares reduced to their par value.

Fosdick, on the demurrer, must be taken to be a bona fide purchaser of the six hundred shares of stock, without notice. The proceedings on the books of the company, in regard to the subscription of this stock by Sturges, can give rise to no suspicion of unfairness. The bond for seven hundred and fifty thousand dollars to be converted into stock, at the pleasure of the holder, in a limited time, was not out of the ordinary mode of business; and the issuing of the fifteen thousand shares on the surrender of the bond, could awaken no inquiry. The entire transaction in regard to the subscription of this stock, was apparently and clearly within the corporate powers of the company. Under such circumstances it appears to me that a bona fide purchaser of the stock could enforce a transfer of it on the books of the company.

The agents of a corporation have no license for the commission of wrongs. Their powers are limited, but when they circumvent and mislead to his injury an innocent individual, without knowledge to awaken his suspicion, the corporation is liable.

But the right to the six hundred shares of stock by Fosdick was admitted by the directors, and a regular transfer of it to him was entered on their books. And this, it is said, was a consummation of his right, by which he acquired all he contracted for, and all that he expected to receive.

It is true the prospective completion and business of the road have not been realized. But this is a disappointment common to all persons who have engaged in such enterprises. They have given their time and money to objects which have advanced beyond all other improvements the agricultural, the commercial, and the social interest of the country; but they have generally realized heavy pecuniary losses. But these constitute no ground for the rescis-

sion of contracts, or of equitable relief, unless fraud be established.

In the illegal issue of the stock, Sturges and the company participated, and they may be equally responsible, to a bona fide purchaser. But if it be admitted that the company, under the circumstances, may be liable to Fosdick, does it follow that he may not exercise his own discretion in regard to the remedy? This seems to be a matter for the determination of the party rather than the court.

The frauds charged against Sturges consist in his participation in the fraudulent issue of the stock, declaring that it had been lawfully issued; in his false and fraudulent representation to Fosdick that he was the lawful owner of the stock, through which false and fraudulent assurances Fosdick was induced to purchase the six hundred shares. These averments of fraud, are all admitted by the demurrer, and must be taken as true.

But, if the frauds alleged do not materially affect the rights of the plaintiff, he is not entitled to a remedy against the company or Sturges. Of the fifteen thousand shares of stock, subscribed by Sturges, at the par value, he paid for only ten thousand four hundred thirty-three and a-half shares; leaving four thousand five hundred sixty-six and one-half shares, for which he paid nothing. These amount much nearer to the one-third than the one-fourth of the fifteen thousand shares subscribed, and, at the par value of these shares, they amounted to the sum of two hundred and twenty-eight thousand six hundred and seventy-seven dollars.

It was held in Stetson's Case, that although the directors in receiving subscriptions for shares of stock, were bound by the price per share fixed in the charter, yet stock when once subscribed became property, and could be sold at any price fairly agreed upon, and that the assignment would convey the shares in full. The six hundred shares of stock were purchased by Fosdick at forty dollars per share, but each share was transferred, at its par value of fifty dollars. On the payment of twenty-four thousand dollars, Fosdick received in stock thirty thousand dollars, and any sum short of that amount will be so much less than he purchased and paid for.

There can be no question that any stockholder, prior to the subscription of Sturges, could, by legal coercion, reduce the stock subscribed by him to the number of shares he paid for, at their par value. And the same principle would apply to all the assignees of the stock, by Sturges, who had notice. This rule applied to Fosdick, would reduce his stock some one hundred and seventy-five shares.

But, if the rule should not apply to Fosdick, he being a bona fide purchaser, still the shares not paid for by Sturges must be distributed and apportioned among the prior stockholders, lessening the stock in value near one-quarter of a million of dollars.

In whatever light this question may be considered, it appears to me, there can be no escape from the conclusion, that the frauds complained of in the declaration are so material in their effect upon the rights of the plaintiff as to entitle him to a rescission of the contract, for the purchase of the six hundred shares of stock, and an action against Sturges for the money paid. The frauds, as alleged, are admitted to be true.

New issues may be raised, and a new aspect given to the case, in its future progress. But, as it now stands on the demurrer, with all the averments of the declaration admitted to be true, I feel bound to overrule the demurrer.

Consult, also, Sturges v. Stetson [Cases Nos. 13,568 and 13,569].

FOSDICK, The FANNY. See Case No. 4,641.

FOSS (CLARKE v.). See Case No. 2,852.

Case No. 4,957.

FOSS et al. v. HERBERT.

[1 Biss. 121; 2 Fish. Pat. Cas. 31.] [1]

Circuit Court, N. D. Illinois. Oct. Term, 1856.

PATENTS—CLAIM FOR ENTIRE MACHINE AND SEPARATE PARTS—INFRINGEMENT—IMPROVEMENT OF PATENTED MACHINE BY STRANGER—MECHANICAL EQUIVALENTS.

1. A claim in a patent for an entire machine does not deprive the patentee of his right to claim the parts also.

[Cited in Leach v. Dresser, 69 Me. 132.]

2. It is not necessary, to constitute an infringement, that the whole machine should be used. If either one of the parts claimed is used in substantially the same manner in a similar machine, it is an infringement.

3. It is not material what the theory of the patentee, in regard to his invention, may be; but, the question is, do the tools used by the defendant act substantially in the same manner, and produce substantially the same result as those of the plaintiff?

[Cited in Hamilton v. Ives, Case No. 5,982.]

4. The drawings are a part of the description of the thing patented, and are to be considered with the specification.

5. A man may improve a patented machine so as to entitle him to a patent for his improvement; but that will not give him the right to use the invention of the first patentee without his license.

6. The question to be determined on the issue of infringement, is, whether under a variation of form, or, by the use of a thing which bears a different name, the defendant accomplishes, in his machine, the same purpose or effect as that accomplished by the patentee, or

[1] [Reported by Josiah H. Bissell, Esq.; reprinted in 2 Fish. Pat. Cas. 31; and here republished by permission.]

whether there is a real change of structure and purpose.

7. If the change introduced by the defendant (as, for instance, the substitution of the spring for the roller) constitutes a mechanical equivalent in reference to the means used by the patentee; and if besides being an equivalent, it accomplishes something useful beyond the effect or purpose accomplished by the patentee, (as, for instance, the effect claimed in its action on winding or warped boards,) it will still be an infringement, as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention.

[Cited in Converse v. Cannon, Case No. 3,144.]

8. It is of no consequence, with respect to the question of infringement, whether the cutters of the defendant are like or unlike the plaintiffs' in respect to their cost, adjustability, mode of sharpening, or any other peculiarity of construction, provided that, notwithstanding such difference of construction, they are in their mechanical action, operation, and effect in the combination, the same with those of the plaintiffs.

This was a special issue out of chancery [in the suit of Robert H. Foss and others against George Herbert], tried by Judge DRUMMOND and a jury, to determine the question of the infringement of the tonguing and grooving combination set forth in letters patent granted to William Woodworth, December 27, 1828, for a "new and useful improvement in the method of planing, tonguing, grooving, and cutting into mouldings, of either plank, boards, or any other material, and for reducing the same to an equal width and thickness, and also for facing and dressing brick and cutting mouldings on, or facing metallic, mineral, or other substances;" extended by the board of commissioners for seven years, from December 27, 1842, extended by special act of congress passed February 26, 1845 [6 Stat. 936, c. 27], for seven years from December 27, 1849, and reissued July 8, 1845. The defendant's machine was known as the "Norcross Tonguing and Grooving Machine," employing a pressure spring, bearing down upon the face of the board at points between the axes of the tonguing and grooving cutter wheels, together with front and rear rollers for feeding, which rollers were pressed down with adjustable springs or screws. The cutter wheels consisted of circular plates cut as one plate out of the solid metal, and secured together upon the spindle with four, six, ten, and twelve teeth projecting from the periphery of the plate, (called, by the defendant, circular saws) and designed for cutting the tongue and groove.

S. A. Goodwin and E. C. Larned, for plaintiffs.

George Herbert and Grant Goodrich, for defendant.

DRUMMOND, District Judge (charging jury). This case comes before you on an issue from the chancery side of the court, to determine a question of infringement. Only one question is submitted to you by the court.

This is the sole question you have to consider, and in this respect you have no discretion. It is whether the machine of the defendant is an infringement on the machine of the plaintiffs', and if so, in what particular? You will therefore throw out of view all questions as to the originality or novelty of the Woodworth machine. These questions are not before you, and are not left to you, and you must pay no regard to them. They were not left to you, because they had been tried over and over again in nearly all the circuits of the United States, and as far as the novelty and originality of the patent are concerned, have been in every instance decided in favor of the patent, and it seemed an unnecessary consumption of time to investigate these matters again.

The defendant has used a machine which the plaintiffs allege is an infringement in whole or in part of the Woodworth patent. The first point to determine is the proper construction of the patent and specifications. This is matter of law, and you are to take the law as laid down by the court, as obligatory and controlling upon you whatever your own opinions may be in regard to it. The original patent was granted in 1828. In the original specifications, Woodworth disclaims the invention of circular saws or cutter wheels. He claimed his improved method of cutters for tonguing and grooving. In 1845, the patent was re-issued with amended specifications.

It is this amended patent which governs the rights of the plaintiffs and defendant. In this re-issued patent the invention is described as a machine for planing, tonguing, and grooving boards. The patentee claims as his invention: First. The planing cylinder in combination with the pressure rollers. Second. The combination of the planer with the revolving cutter wheels for tonguing and grooving. With these two claims we have nothing to do, as it is admitted that the planer is not used by the defendant in his machine. Third. The combination of the tonguing and grooving cutter wheel with the pressure rollers, so as to tongue and groove boards in one operation, as described. Fourth. The combination of either the tonguing or grooving cutter wheel with the pressure rollers as described. It is in relation to these two claims that the controversy arises. My views of the law governing the construction of this patent are expressed in Moody v. Fiske [Case No. 9,745.]

I understand that Woodworth claimed an entire machine, and certain combinations of parts of it, which went to make up the entire machine. And for the purpose specified, it is a valid claim. The third and fourth claims are valid claims under this issue, being parts of the combined machine specifically claimed, and a claim of the whole did not deprive him of his right to claim the

other parts also. He claims combinations of different things which go to make up the entire machine, which entire machine consists of various parts, and each and all of which he claims as his invention.

Now, it is not necessary that the entire machine should be used to constitute an infringement of the patent; if any one of the parts claimed is used in substantially the same manner in a similar machine, it is an infringement. No person could take out the planer and use the rest, and thereby escape a violation of the patent.

There still remains, after the planer is removed, combinations which Woodworth claims to have invented, and although the planer is gone, it is still the Woodworth machine, shorn only of its planer, and the Woodworth combination for tonguing and grooving, remains.

Is the defendant's machine substantially like the plaintiffs' after the planer is removed from the latter? If it is, it is an infringement. In a patent for a combination there can be no infringement, unless all the material parts entering into the combination are used. You may use the parts provided you do not use the combination.

Thus there is in this case no infringement by using the cutters or the rollers alone, but they must be used in the same combination as in the Woodworth machine, as described in the patent,—that is the one in combination with the other,—to constitute an infringement. There are two particulars in which the alleged infringement consists. I do not see that there can be any controversy in regard to the two outside rollers, in either machine.

The fact that one is weighted with levers, and the other with springs, makes no difference,—they both operate as feed and pressure rollers. The two particulars in which the alleged infringement is claimed to consist are: First. In the use of cutter wheels. Second. In the use of the spring.

Now it is not necessary that the defendant should use the entire machine. It is only necessary that he should use the combination as it is described in the patent, but it must be the identical combination described. With this view other machines have been admitted in evidence. If prior machines were in existence at the time of the Woodworth patent, the only ground on which that patent could be good would be that it was different from such prior machines. It is for you to say whether the machine of the defendant is identical with those prior machines or not. Woodworth does not claim the art or result of tonguing and grooving boards, but only the mode in which he did it. Any person can use any other machine not identical with Woodworth's.

His claim is limited to the method described. The patent claims that the pressure rollers in this combination have the effect to hold the board steady and prevent its being drawn into the axes of the cutters. It is not material what the theory of the patentee was on this point.

Do the tools used by the defendant act substantially in the same manner, and produce substantially the same result as those of the plaintiffs? If the springs do produce substantially the same result, so that one is a mechanical equivalent for the other, then they infringe, and the same rule applies to the cutters. If the cutters of the defendant produce substantially the same result, in substantially the same way, so that the one is a mechanical equivalent for the other, then it is an infringement.

If you believe that the defendant's cutters operate differently on the boards from the Woodworth, that is an important consideration with reference to the question of their identity with those of the plaintiffs. They must not only produce the same result of tonguing and grooving, but they must do it in substantially the same way. You will determine: First. Whether these springs are mechanical equivalents for the pressure rollers of the plaintiffs. Second. Whether the cutters or saws of the defendant are mechanical equivalents for the cutter wheels of the plaintiffs, and whether the two are used in combination with each other in substantially the same manner as in the Woodworth machine. The drawings are a part of the description of the thing patented, and are to be considered in connection with the specifications.

An infringement of a patent takes place whenever a party avails himself of the invention of the patentee without such variation as will constitute a new discovery. A man may improve a patented machine so as to entitle him to a patent for his improvement, but that will not give him a right to use the invention of the first patentee without his license.

A machine is an infringement of another if it incorporate in its structure and operation the substance of the invention,—that is, by an arrangement of mechanism which performs the same service, or produces the same effect in the same way, or substantially the same way. Mere colorable alterations, or adroit evasions, by substituting one mechanical equivalent for another in the combination which constitutes the machine, should never be allowed to protect a party.

The question whether one thing is a mechanical equivalent for another is a question of fact, depending on the testimony of experts, on an inspection of the machines, and it is an inference to be drawn from all the circumstances of the case by attending to the consideration, whether the contrivance used by the defendant is used for the same purpose, performs the same functions, or is applicable to the same object as the contrivance used by the patentee.

The question to be determined is, whether, under a variation of form, or by the use of a

thing which bears a different name, the defendant accomplishes, in his machine, the same purpose, object or effect, as that accomplished by the patentee, or whether there is a real change of structure and purpose.

If the change introduced by the defendant (as, for instance, the substitution of the spring in the place of the roller) constitutes a mechanical equivalent in reference to the means used by the patentee, and if besides being an equivalent, it accomplishes as is claimed, some other advantage beyond the effect or purpose accomplished by the patentee,—as for instance the effect claimed in its action on winding or warped boards, it will still be an infringement as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention. It is of no consequence with respect to the question of infringement, whether the cutters of the defendant are like or unlike the plaintiffs' in respect to their cost, adjustability, mode of sharpening, or any other peculiarity of construction, provided that, notwithstanding such difference of construction, the cutters of the defendant's machine are, in their mechanical action, operation and effect in the combination, the same with those of the plaintiffs.

The only question for you to decide is, whether there has or has not been an infringement on the principles laid down by the court. You can find that the defendant has not infringed, in any respect, or that he has infringed, and in what particulars he has infringed.

The jury found a verdict that the defendant infringed the combination of Woodworth for tonguing and grooving in the use of the pressure springs, and the rear rollers in combination with the cutters described.

[NOTE. For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

FOSSAT (UNITED STATES v.). See Cases Nos. 15,137–15,139.

FOSSATT (UNITED STATES v.). See Case No. 15,140.

Case No. 4,958.

FOSSITT et al. v. BELL.

[4 McLean, 427.] [1]

Circuit Court, D. Ohio. July Term, 1848.

BILLS AND NOTES—BONA FIDE HOLDER—INDORSEMENT AFTER MATURITY.

1. A bona fide holder of a negotiable note, indorsed before maturity, holds it free of any claim by the maker against the payee. If indorsed after maturity, the indorsee takes it at his risk.

2. L. being solvent, and the debtor of F. & Co. without their knowledge procures and indorses the note of B. his debtor, and places it in the hands of G. to be held for the benefit of F. & Co., and G. holds it in his hands till it is past due, and then delivers it to F. & Co.—*held*, that B. can not in a suit by F. & Co. on this note, set off the note of L. to H. indorsed by H. to B. after the maturity of the note held by F. & Co.

3. In the absence of all circumstances warranting a presumption of fraud, the indorsement to F. & Co. takes effect from its actual date, and not from the date of its delivery to F. & Co.

Mr. Taffe, for plaintiffs.
Mr. Brush, for defendant.

LEAVITT, District Judge. This suit is brought on a note drawn by the defendant for $1,174 41, payable to Britton Leming, or order, twenty days after date, dated 2d of February, 1847, and indorsed by Leming to the plaintiffs. The defendant has pleaded a set-off to this note, in substance as follows: That before the indorsement of the note to the plaintiffs, Leming was indebted to Bell, in the sum of $750, on a note dated 1st of May, 1847, payable to E. Holmes one day after date, and in the further sum of $750, on a note dated 1st January, 1847, payable to said Holmes, the 1st of June in that year, both indorsed to Bell by Holmes. The matter in controversy between these parties is, whether these notes constitute a legal set-off in the present action. And this depends wholly on the date of the indorsement of the note on which this action is brought. It is very clear, if the plaintiffs became the owners of this note for a good consideration, before its maturity, and without notice of any offset against it by the defendant, the latter can not avail himself in this action of Leming's note to Holmes, indorsed by Holmes to him. It is well settled, that the bona fide holder of a negotiable note, indorsed before it is due, holds it clear of any claim in favor of the maker against the payee, existing before or at the date of the indorsement. In such a case, the remedy of the maker is against the payee. The reverse of this principle obtains, if the note is indorsed after maturity. Then the indorsee takes it at his own risk, subject to any demand in favor of the maker against the payee.

It will be for the jury to decide the question of fact, involving the actual date of the indorsement of the note in question. It would appear from the evidence, that this note became the property of the plaintiffs under the following circumstances, as set forth in the deposition of Joseph R. Gitchell. He testifies, that in January, 1847, Leming sent for the witness; that he went to Leming's house, and found him sick and confined to his room. Leming expressed a wish to secure certain creditors, and especially the plaintiffs in this suit. And for this purpose transferred, for the special benefit of the plaintiffs, an account against the defendant, amounting to $1,300, executing at the same time an order for the payment of the account to them. The defendant, it seems, recognized this transfer, and on the 1st or

[1] [Reported by Hon. John McLean, Circuit Justice.]

2d of February, 1847, paid in cash on the account transferred for the security of the plaintiff, the sum of $135, and gave his note, payable to Leming, for the balance, $1,174 41. This is the note on which this suit is brought—it bears date 2d of February, 1847, and is payable in twenty days. Leming, on that day indorsed the note in blank and delivered it to Gitchell for the use and benefit of the plaintiffs. Gitchell acted as the friend and agent of plaintiffs, but without any previous understanding or conference with them in regard to this transaction. He states, that the note was delivered to the plaintiffs or their agent, in the beginning of May, 1847.

From the evidence before the jury, there seems to be nothing disclosed impeaching this transaction as fraudulent. Leming, who was a bona fide debtor of the plaintiffs, evinced a proper desire that they should be paid, and for this purpose transferred his claim against Bell, as before stated. Subsequently, on the 2d of February, 1847, Bell gave his note for the balance then due on that account, payable to Leming or order, in twenty days, and this note on the same day was indorsed by Leming, and placed in the hands of Gitchell, to be held by him for the benefit of the plaintiffs. There is no evidence that Leming was, at this time, insolvent or even embarrassed in his circumstances; and there is, therefore, no ground to presume an intention on his part, to give a fraudulent preference to the plaintiffs over the other creditors. Nor is there any pretense that he was not justly indebted to the plaintiffs to the amount of this note. If the jury are satisfied that the note on which this suit is brought, was fairly indorsed to the plaintiffs, on the 2d of February, 1847, and on that day became the property of the plaintiffs, through the agency of Gitchell, though not delivered to them till the beginning of May following, it will result, from the principles of law before laid down, that they are entitled to a verdict for the amount of the note and interest

The notes of Leming to E. Holmes, insisted on as a proper matter of set-off against the plaintiffs' claim, were indorsed by Holmes to the defendant on the 1st of May, 1847—more than two months after the maturity of the note indorsed by Leming to the plaintiffs. These notes can not, therefore, be set off in this suit. It would seem, from the evidence, that they were transferred to the defendant upon the condition that they could be set off against the note on which this suit is brought. From this, it is to be inferred that the defendant entertained doubts whether they could be so used, at the time they were transferred to him. He has no ground of complaint that they do not constitute a set-off in this action. By the terms of the agreement between the defendant and Holmes, the former has a clear right to return the notes to Holmes; or, if he prefers that course, he can seek his remedy by suit against Leming. In either case, he will not be a sufferer.

Verdict for the plaintiffs.

Case No. 4,959.

Ex parte FOSTER.

In re REMICK.

[5 Law Rep. 406; 1 N. Y. Leg. Obs. 232.]

Circuit Court, D. Maine. Dec., 1842.

BANKRUPTCY—PROOF OF DEBT—DENIAL BY BANKRUPT—TRIAL BY JURY.

1. In a proceeding in bankruptcy in invitum, the oath of the petitioning creditor is ordinarily a sufficient proof of his debt to sustain his right, but it is liable to be rebutted by counter proofs, and may be overcome by such proofs.

2. Thus, where the supposed bankrupt denies the existence of the debt, and offers prima facie evidence, that it is not due, the oath of the petitioning creditor to the debt, without further proof, is not a sufficient foundation for a decree of bankruptcy.

3. When the existence of the debt is denied, and the petitioning creditor desires a trial by jury, the court may grant it upon a proper issue framed for the purpose of ascertaining, whether the debt is due or not; but if the petitioning creditor does not desire it, the court may or may not, in its discretion, order a trial by jury.

In bankruptcy. On petition for review. This case was certified and adjourned from the district court of Maine, into this court, under the following circumstances. The petitioners proved, before a commissioner, a debt of $526.63, it being the balance of an account for goods sold. The goods were purchased by Remick, of the petitioners in Boston, April 14, and he returned to Portland the fifteenth. On the eighteenth, he sold out his whole stock of goods, exclusive of those he purchased of Foster and Taylor, to one Simeon Pease. The goods which he purchased of Foster arrived on the twenty-fifth of April, part of which were sold by Remick in the ordinary course of business, and on the twelfth of May, by auction bill of sale, he transferred all his stock of goods then remaining in his store, to Pease, including what remained unsold of the invoice purchased of Foster. On the twenty-first of May, Foster came to Portland and compromised the debt, amounting to $1,279.81, for the sum of $700.48, paid by Remick, and gave a receipt in these words: "$700.48. Received of John C. Remick, seven hundred dollars and forty-eight cents in full of all accounts now due up to this date. Foster and Taylor, Portland, May 21, 1842." Foster now contended, that the goods in the first instance were obtained by fraud, the purchaser intending, at the time, to transfer them to another and defraud the seller; and also that he was induced to compromise the debt by false and fraudulent representations made by Remick of his circumstances, and that, therefore, the settlement and receipt having been procured by fraud, were not binding, and that, consequently, they

were no bar to his right to recover the full amount of his debt. There were points admitted in the case and testimony offered, from which a jury might or might not infer that fraud was contemplated in the original purchase, and also that Foster was induced to settle and give a receipt in full by false and fraudulent representation. On the hearing in the district court, in Maine [case unreported], the district judge ordered the following questions to be adjourned into the circuit court for a final determination, namely: (1) If the petitioning creditor has sworn to a debt of five hundred dollars or more, and the supposed bankrupt denies the existence of the debt, and offers prima facie evidence that it is not due, is the oath of the petitioning creditor to the debt, without further proof, a sufficient foundation for a decree of bankruptcy? (2) When the existence of the debt is denied, and whether it is due or not, involves a question of fraud, is the fact, whether the debt is due or not, to be decided by the court, or is the existence of the debt to be established by the verdict of a jury on a proper issue to be framed for that purpose?

The case was submitted without argument.

STORY, Circuit Justice. The real controversy in this case, which is a proceeding in invitum by creditors to have the debtor declared a bankrupt, is, whether there is a good and sufficient petitioning creditors' debt to support the proceedings. Two questions are presented upon the facts. As to the first, under the particular circumstances, I am satisfied, that the oath of the petitioning creditors is not sufficient to establish the existence of their debt. In the ordinary course of proceedings of this sort, the oath of the petitioners is a sufficient proof of the debt to sustain his right; but it is liable to be rebutted by counter proofs, and may be overcome by such proofs. In this case, I think the primâ facie evidence of the debt from the oath of the petitioners is completely overcome by the proofs on the other side; and, therefore, the burthen of proof is on the petitioners to establish by evidence beyond the oath, that the debt is a true and subsisting one.

As to the second question, the case clearly does not fall within the proviso of the first section of the bankrupt act of 1841, c. 9 [5 Stat. 440]. But I think, that it either falls directly within the provisions of the fifth and eighth sections of the act, or, by a close analogy, ought to be governed by similar considerations. The fifth section declares, that "the district court shall have full power to set aside and disallow any debt, upon proof, that such debt is founded in fraud, imposition, illegality or mistake." Now, it seems to me, that the very case now before this court is within the purview of this clause; and that the court is to decide the whole matter, upon examination of all the proper evidence of itself summarily, and sitting as a court of equity, with full equity powers for the purpose. The seventh section, in its introductory provisions, applies, in terms, to cases of petitions by creditors in bankruptcy against a debtor in invitum, as well as to cases of a voluntary petition by the debtor for the benefit of the act. And after having provided that "All proof of debts or other claims of creditors, entitled to prove the same by this act, shall be under oath or solemn affirmation, &c." proceeds to declare: "But all such proof of debts and other claims shall be open to contestation in the proper court having jurisdiction in bankruptcy, and as well the assignee as the creditor shall have a right to a trial by jury, upon an issue to be directed by such court to ascertain the validity and amount of such debt or claims." Now, certainly, there is some difficulty in avoiding the conclusion, that this clause of the seventh section does apply to every case, where the creditor seeks to have the fact ascertained by a jury, of the validity and amount of his claim, whatever may be the case of the debtor, where no assignee has as yet been appointed. It strikes me, therefore, that if the creditors, in the present case, should desire a trial by jury, it ought to be granted; but if not desired, then the court may proceed to decide the case of itself, as a summary proceeding in equity. But if this conclusion admitted of some doubt, it seems to me, that it furnishes so clear an analogy, that the court may well follow it, as a guide in the exercise of its general equity jurisdiction in bankruptcy. I shall direct a certificate accordingly, to the district court, as follows: (1) That upon the first question, the oath of the petitioners to the debt, is not, under the particular circumstances, without further proof, a sufficient foundation for a decree in bankruptcy. (2) That upon the second question, if the petitioning creditors desire a trial by jury under the circumstances, the court ought to grant it upon a proper issue framed for the purpose of ascertaining, whether the debt is due or not, as a matter of discretion, if not of right; but that otherwise the court may proceed to decide the case, of itself, by evidence, in a summary proceeding in equity, or may, ex mero motu, in its discretion, require the fact to be tried by a jury.

Case No. 4,960.

Ex parte FOSTER.[1]

[2 Story, 131;[2] 5 Law Rep. 55.]

Circuit Court, D. Massachusetts. April 30, 1842.

BANKRUPTCY — JURISDICTION IN EQUITY—ACT OF 1841—LIENS AT LAW AND IN EQUITY — ATTACHMENT—EFFECT OF ADJUDICATION IN BANKRUPTCY—RIGHTS OF ATTACHING CREDITORS.

1. By the bankrupt law of 1841 [5 Stat. 440], the district courts of the United States are

[1] See Ex parte Abree, 3 Ves. 82, 83.

[2] [Reported by William W. Story, Esq.]

possessed of the full jurisdiction of courts of equity over all subject-matters arising in bankruptcy.

[Followed in Ex parte Martin, Case No. 9,149; Fiske v. Hunt, Id. 4,831. Quoted in Re Wallace, Id. 17,094. Cited in Re Mallory, Id. 8,991.]

2. By the common law, liens exist only in cases, where the party, entitled thereto, has either actual or constructive possession of the goods; but in the maritime law, and in equity, they exist independently of possession.

[Cited in Ex parte Waddell, Case No. 17,027; Packard v. The Louisa, Id. 10,652; Leland v. The Medora, Id. 8,237; The Alida, Id. 199; A Raft of Spars, Id. 11,528; The Young Mechanic, Id. 18,180.]

[Cited in Ex parte First Nat. Bank, 70 Me. 379; Shirk v. Thomas, 121 Ind. 150, 22 N. E. 976.]

3. A lien in equity is not a property in the thing nor does it constitute a right of action for the thing; but is a charge upon the thing.

[Cited in Sullivan v. Portland & K. R. Co., Case No. 13,596.]

[Cited in McAfee v. Reynolds, 130 Ind. 38, 28 N. E. 423.]

4. An attachment on mesne process does not exactly correspond to a lien, either in the sense of the common law, or of the maritime law, or of equity. It is only a contingent and conditional charge, until the judgment and levy.

[Cited in Re Bellows, Case No. 1,278; Re Fortune, Id. 4,955.]

[Cited in Hubbard v. Hamilton Bank, 7 Metc. (Mass.) 344; Davenport v. Tilton, 10 Metc. (Mass.) 326.]

5. A foreign attachment, like an attachment on mesne process, is a remedy, and, like every remedy, may be defeated by any act, that bars, or takes away the remedy or right to judgment under it.

[Cited in Taylor v. Irwin, 20 Fed. 617.]

[Cited in Ames v. Wentworth, 5 Metc. (Mass.) 296.]

6. Where the property of a bankrupt is attached on mesne process, before proceedings in bankruptcy are instituted, if he obtain a discharge before any judgment is rendered in such suit, it is pleadable as a bar to that very suit, and will prevent the attaching creditor from completing his attachment by a judgment.

[Applied in Ex parte Martin, Case No. 9,149. Cited in Smith v. Gordon, Id. 13,052; Humble v. Carson, 6 N. B. R. 84; Re Brinkman, Id. 1,884. Approved in Re Bellows, Id. 1,278.]

[Cited in Peck v. Jenness, 16 N. H. 528.]

7. By a decree of bankruptcy, all the property and rights of property of the bankrupt are devested from him, and vest in the assignee as soon as one is appointed; and such decree relates back to the time of the petition; consequently, pending the proceedings in bankruptcy, before or after the decree, an attaching creditor will not be permitted to proceed in his suit against the bankrupt to trial and judgment, because there can be no party defendant properly before the court.

[Cited in Ex parte Waddell, Case No. 17,027; Kinzie v. Winston, Id. 7,835; Young v. Ridenbaugh, Id. 18,173; Re Werner, Id. 17,416.]

[Cited in Talcott v. Dudley, 5 Ill. 436.]

8. If an attaching creditor, knowing that proceedings in bankruptcy have been instituted, should nevertheless proceed in his suit to get a judgment against the bankrupt, before an assignee was appointed, it would be a fraud upon the law; and if such creditor should obtain satisfaction of his judgment, it seems, that he would not be allowed to hold the money.

[Applied in Everett v. Stone, Case No. 4,577.]

9. While the bankrupt proceedings are in progress, no attaching creditor, by a mere race of diligence, will be permitted to overreach and defeat the just rights of the other creditors, or the right of the bankrupt, if entitled to a discharge, to plead the same in bar of a judgment in such suit. In such a case, the court will enjoin a creditor from proceeding further in his suit than is necessary to protect his ulterior rights, and will allow the writ and proceedings of the attaching creditor to be entered in the proper court and to be continued, if the creditor elect so to do, until the discharge of the bankrupt is obtained; but not to proceed in the mean time to trial or judgment.

[Explained in Re Cook, Case No. 3,152. Cited in McLean v. Rockey, Id. 8,891.]

[Cited in Hudson v. Maze, 4 Ill. 583; Kittredge v. Warren, 14 N. H. 527; Leighton v. Kelsey, 57 Me. 86.]

10. Where A. by a writ of attachment from the state court, attached the goods of B.; and soon afterwards B. petitioned for the benefit of the bankrupt act; and then fearing that A. might proceed to get judgment before he could be declared a bankrupt and obtain a certificate of discharge, and levy his execution upon the goods attached, B. applied to the district court for an order to stay further proceedings by A. in the suit, and for other relief; it was *held*, that the district court had authority to control the proceedings of A. in the suit; and that A. might be permitted to enter his action and continue it; but he had no right, during the proceedings in bankruptcy, to proceed to a trial and judgment in the suit.

[Distinguished in Parker v. Muggridge, Case No. 10,743.]

11. Whether, if the bankrupt fail to obtain his discharge, the attachment would be gone by the mere operation of the bankrupt act; or whether a judgment in personam may be rendered against him, quaere.

[Explained in Re Cook, Case No. 3,152.]

12. Where a suit has been commenced bonâ fide, and the defendant becomes a bankrupt, the actual costs are to be paid out of the estate, but no subsequent costs.

[Cited in Re Fortune, Id. 4,955.]

This was the case of a petition filed by John S. Foster, in bankruptcy, in the district court. [Case unreported.] The petition was, in substance, as follows: "To the honorable the district judge of the district aforesaid John S. Foster respectfully represents, that on the twenty-fifth day of the present month of March, he filed a petition in this honorable court to be declared a bankrupt, pursuant to the provisions of the statute of the United States in that behalf made and provided. And your petitioner further represents, that William Appleton, one of the creditors mentioned in the schedule marked A, annexed to his said petition, did, upon the fourth day of March aforesaid, sue out a trustee writ against your petitioner, from the court of common pleas for the county of Suffolk and commonwealth of Massachusetts, returnable to the next ensuing April term of said court; and did cause to be attached thereon certain of the goods and merchandise belonging to your petitioner, being a portion of his stock in trade mentioned in his sched-

ule marked B, annexed to his said petition; and your petitioner further states, that one Coburn, the deputy of the sheriff of the county aforesaid, to whom said writ was directed for service thereof, did, after notice that your petitioner was about to file his said petition to be declared a bankrupt, remove from the store of your petitioner, divers goods and merchandise of the value of about seven hundred dollars, and still holds and detains the same in his possession. And your petitioner further represents that certain other persons doing business respectively under the names of Davis, Bates and Turner, and Stephen Brownell, likewise creditors of your petitioner, mentioned in said schedule marked A, did, within the said month of March, and prior to the filing of said petition, sue out certain trustee writs against your petitioner from said court of common pleas, returnable at the April term thereof aforesaid, and that they and also said Appleton did cause the Boston Mutual Fire Insurance Company, a corporation doing business in said Boston, and a debtor of your petitioner, to be summoned as a trustee of your petitioner, and the debt due from said corporation to your petitioner to be attached upon said writs respectively. And your petitioner further states, that he is apprehensive that such creditors may obtain judgments in said several suits at an early date of the term aforesaid; and that they may procure executions to be issued thereon, and satisfied out of the property attached as aforesaid, and their several demands on your petitioner to be paid in full, and thereby greatly diminish and reduce the assets of your petitioner, and obtain an undue proportion thereof, to the great injury of the other creditors of your petitioner, and in direct violation of the spirit and true intent of the statute aforesaid, or expose the assignee of your petitioner to great risk and trouble in the recovery of the property attached as aforesaid. Wherefore your petitioner respectfully prays this honorable court, that an order of notice may issue on said petition, &c., and that an injunction may be granted against said attaching creditors, enjoining them from further proceeding against said property of your petitioner, and requiring them to surrender the same to such assignee as may be appointed by this honorable court in the premises; and that such other orders may be issued, and relief granted, as to this honorable court shall seem meet."

The answer of John G. Davis, Benjamin E. Bates, and John N. Turner admitted that on the fourth day of March, current, they had sued out a writ against said Foster, and one Locke, his former partner, upon a joint debt due from said Foster and Locke, returnable to the court of common pleas to be held at Boston on the first Tuesday of April next; upon which writ they caused the Boston Mutual Fire Insurance Company, a corportion, to be summoned as trustees of said defendants, or one of them, and certain goods, effects, or credits of said defendants, then in the hands of said corporation, to be attached. That said attachment was made, and the service of said writ completed, long before said Foster filed his petition in this court to be declared a bankrupt, and without notice to them that he contemplated such an act. And they claimed to hold the goods, effects or credits, so attached, as security for such judgment as they might recover in said writ, as a lien thereon, valid by the laws of Massachusetts. And these respondents further represented that they had incurred expenses and costs in and about said suit, which they prayed the court to consider in any decree which might be made in the premises. Wherefore they prayed that the petition of said Foster might be denied.

The answer of William Appleton was as follows: "And now William Appleton, who has been summoned in the said matter to show cause why he should not be enjoined from further proceedings against the property of said Foster, attached by him, as set forth in said Foster's petition, comes and represents to this honorable court, that he did, on or about the fourth day of March, current, sue out a writ from the court of common pleas for the county of Suffolk, against said Foster, returnable into the next April term of said court, upon a demand legally and justly due him from said Foster; and that on said fourth day of March one Daniel J. Coburn, then and ever since a deputy of the sheriff of said county, did, by virtue of said writ, attach thereon certain personal property of said Foster then in the store occupied by him. That said Coburn preserved said attachment on said goods by a keeper placed in said store, according to the laws and usages of this commonwealth, until the twenty-third day of said March, when, to avoid further expense of a keeper, the said Coburn removed said goods from said store into a place of safety, where he still hath them in custody under and by virtue of said attachment so made as aforesaid on the fourth day of said March, and long before the filing of said Foster's petition to be declared a bankrupt. And said Appleton doth not admit that any notice of an intention on the part of said Foster to file a petition to be declared a bankrupt was given to said Coburn, as set forth in said Foster's petition, and require said Foster to prove that fact, if it be deemed material. And said Appleton further represents, that he has expended large sums of money in making and preserving said attachment, and keeping said property, and that said demand is still due him from said Foster. Wherefore said Appleton prays that said Foster's petition for said injunction against him the said Appleton, and for the surrender of said attached property, be dismissed for his costs. But if said court shall be of opinion that said injunction shall issue and said attached goods be surrendered as prayed for, then said Appleton requests

that such orders be passed only on condition that said Appleton be first paid the sums expended by him in making said attachment, and in the keeping and preservation of said property."

The case came before the district court on the petition and answers, and the district judge ordered the following questions to be certified to the circuit court: 1. Whether, upon the facts stated in said petition, and admitted by the answer of William Appleton, one of said attaching creditors, the injunction prayed for, enjoining the attaching creditors from further proceeding against the property of the petitioner, and requiring it to be surrendered to such assignee as may be appointed by the court, shall be granted? 2. Whether any, and if any, what relief shall be granted to the petitioner?

The case was argued by C. G. Loring and Dehon for petitioner, and by J. L. English and E. D. Sohier, Jr., for attaching creditors of Foster. And the same question, being for argument upon other petitions, was argued by Mr. Rand for the attaching creditors. The case of another petitioner was argued by Mr. Goodrich.

Mr. English, for the attaching creditors, argued as follows: It is admitted, that the doctrine contended for by the petitioner is in accordance with the general principles of equity, and if established, would effect a more equal distribution of the property than our construction of the law would do. But the question is upon the true construction of the last clause of the second section of the bankrupt law, and the language seems to be quite explicit. It is clear, that congress meant to preserve and uphold certain securities existing on the property of the bankrupt at the time of his bankruptcy; and it is equally clear, that they did not mean such securities only as are valid every where, but had reference to the special legislation and local law of the respective states. It is submitted, that the property attached in the present case passes to the assignee, subject to, and not discharged from, the attachment, because:

1st. An attachment does constitute a lien or other security upon the property attached, which is valid by the law of Massachusetts. This seems clear both from the language and object of the statutes on the subject, as well as from the established doctrine and express decision of the courts. Rev. St. c. 90, §§ 23, 24; Ladd v. North, 2 Mass. 514; Grosvenor v. Gold, 9 Mass. 209; Bigelow v. Willson, 1 Pick. 492; Denny v. Willard, 11 Pick. 524; Smith v. Bradstreet, 16 Pick. 264. In Smith v. Bradstreet the court say in so many words, "An attachment constitutes a lien, a real interest in the land, which may be followed up to a perfect title."

2d. The upholding such a security would not be inconsistent with the provisions of the second and fifth sections of the bankrupt law, whether taken by themselves, or construed by the other parts of the act. This attachment was made bona fide, before petition filed, and without notice of any contemplation of bankruptcy. It does not come within the class of fraudulent preferences declared void by the second section. The equal distribution provided for in the fifth section, does not extend to all the creditors, but only to such as prove their debts. It is left optional with the creditor to prove or not. If he proves, he thereby disables himself to prosecute further any suit then in progress, and all his proceedings are deemed to be voluntarily surrendered by the act of proving. Why was it left optional with the creditor to prove, and thus surrender his proceedings at law, if, whether he proves or not, he is to lose all benefit of his proceedings? It can hardly be said to be optional with a creditor, whether or not to surrender his proceedings, if he is restrained by injunction, and so compelled to lose all benefit of his proceedings. It is admitted that the lien or security created by an attachment is a conditional security only, dependent on the recovery of judgment, and due proceedings on the execution. A mortgage also is a conditional security, and depends both for its validity and extent upon the establishment of a debt secured. If the discharge, if and when obtained, may be pleaded in bar of the suit, and therefore, and thereby, the attachment would be discharged, why is not the same argument equally good in relation to the validity of a security by mortgage? So an attachment may in strictness be called only an inchoate lien. But it is still a security. Whatever its precise nature may be, the statutes and courts of Massachusetts call it and hold it to be a valid lien and security. In Connecticut, under the old bankrupt law of the United States, it was expressly decided that an attachment created a lien on the property, attached within the meaning of the sixty-third section, and that when the discharge was pleaded in bar of the suit, judgment would be rendered against the bankrupt, but execution issued against the property attached only. Ingraham v. Phillips, 1 Day, 117; Barber v. Minturn, Id. 136. If the property attached is more than sufficient to pay the attaching creditor, the assignee may relieve it. This is provided for in section eleven of the law. Or if the property is sold on execution, the surplus would be paid to the assignee, who stands in place of the debtor.

STORY, Circuit Justice. This is the case of an application by Foster, a petitioner for the benefit of the bankrupt act of 1841, c. 9, against William Appleton and others, who were severally attaching creditors, some of whose attachments were made upon his personal estate and others upon his effects in the hands of his debtors under the trustee process, before the date of the petition, Fos-

ter not having as yet been declared a bankrupt, because the time has not yet arrived, when the petition is to be heard in the district court. The petition, which is on the equity side of the court, seeks relief against these attachments by a decree of the district court, for an injunction enjoining the creditors from further proceedings against the property attached, and requiring them to surrender these attachments, or for an injunction and other relief against these attaching creditors, according to the view, which the court shall take of the matter. The discussion has taken a very wide range, and the questions arising in the case have been argued with great ability and learning. In the view, which I have taken of the questions, I do not deem it necessary to go into a minute examination of the weight and bearing of the numerous authorities cited at the bar, some of which certainly seem open to much juridical criticism and doubt, from the looseness of the language used, as well as from the extraordinary nature and extent of some of the propositions asserted in them. And, after all, the questions must mainly depend for their decision upon the true character and effect of an attachment upon mesne process under the laws of Massachusetts, and the extent to which such an attachment is recognized and protected, or is maintainable under the bankrupt act of 1841, c. 9, either by the express savings of the act, or by the policy and general provisions thereof. The attachments under the trustee process must be governed by similar considerations, and therefore they will require no separate notice.

Before proceeding to consider the questions, which have been argued, I wish to say a few words as to the jurisdiction of the district court in the premises. And here I lay it down as a general principle, that the district court is possessed of the full jurisdiction of a court of equity, over the whole subject-matters which may arise in bankruptcy, and is authorized by summary proceedings to administer all the relief which a court of equity could administer under the like circumstances, upon a regular bill and regular proceedings, instituted by competent parties. In this respect, the act of congress, for wise purposes, has conferred a more wide and liberal jurisdiction upon the courts of the United States than the lord chancellor, sitting in bankruptcy, was authorized to exercise. In short, whatever he might properly do, sitting in bankruptcy, or sitting in the court of chancery, under his general equity jurisdiction, the courts of the United States are by the act of 1841 competent to do. So that the question resolves itself, so far as the exercise of jurisdiction for relief in this case is concerned, into this, whether it is a fit case for interposition and relief by a court of equity.

Having disposed of this preliminary matter, let us now proceed to the consideration of the questions raised at the bar. And in the first place, what is the nature and effect of the common writ of attachment, as mesne process (for the case which I mean here to consider is that of William Appleton, by an attachment upon mesne process, and not of the other attaching creditors and trustees, under the foreign attachment act), under the laws of Massachusetts. It contains a command to the sheriff, or other proper officer, to attach the goods or estate of the defendant, and for want thereof, to take his body. The officer is at liberty, under that precept, to take the goods and chattels, or the lands and other hereditaments of the defendant, or both, to answer the exigency of the writ. If the officer attaches the goods and chattels of the defendant, he takes them into his possession, and they are then deemed to be in custody of the law, and are to remain under his care and possession, to abide the final judgment in the suit. If lands or other hereditaments are attached, they are not taken possession of by the officer; but they are bound by the attachment from the time, when it is made, if all the regular proceedings are had. And in such a case, the creditor is at liberty, if he obtains judgment in the suit, to levy his execution upon the goods and chattels, or lands, or either of them, until he has obtained satisfaction; and his attachment gives him a priority of right of satisfaction, out of the property attached, over all other creditors, for thirty days after his judgment, and no longer. If the judgment is for the defendant, the attachment is forthwith dissolved by mere operation of law. Such is the general character and operation of the common process of attachment (for I need not go into minor particulars); and by the very language of the laws of Massachusetts, the property so attached, whether real or personal, is "held as security to satisfy such judgment as the plaintiff may recover." Rev. St. 1836, pt. 3, tit. 2, c. 90, §§ 23, 24. But whether it be such a security, as is within the savings of the bankrupt act of 1841, c. 9, is quite a different question, and will come more directly under consideration hereafter. The supreme judicial court of Massachusetts have (as I think) taken the true view of it, in the case of Atlas Bank v. Nahant Bank, 23 Pick. 488, where they declared, that an "attachment on mesne process is to be considered as a remedy merely given and regulated by law, to enable one creditor, who is proceeding for himself alone, to obtain satisfaction of his debt; and when several are so proceeding, he who is first in time is prior in right." But the court immediately adds: "But in equity, all these priorities give way to a general proceeding which has for its object to distribute all the effects of a debtor, by paying the whole, if there be assets, and then proceeding for a ratable

distribution. If the property turn out to be sufficient to pay the whole, any priority by attachment would be useless; if not, it would be unjust." Now, this latter language is exceedingly pointed, and applicable to the case now before the court; for the bankrupt act has for its object and policy a distribution of all the assets of the debtor equally among all his creditors; and it positively prohibits any preference to be made by the debtor in favor of any creditor, in contemplation of bankruptcy. And hence a commission and decree, declaring a man to be a bankrupt, has been emphatically said to be a statute execution for all the creditors. See Barker v. Goodair, 11 Ves. 78-80; Cook, Bankr. Law (Ed. 1799) p. 5, c. 1; Twiss v. Mussey, 1 Atk. 67; Ex parte Knott, 11 Ves 608, 619.

But it is said, that an attachment under our law constitutes a lien upon the property attached; that it is a perfect, fixed, and vested lien, as much so as a lien by a mortgage upon personal estate; that it gives a vested interest in the real estate attached, so that the creditor may dispute the validity of a will thereof; and that it is deemed equivalent to a title by purchase for a valuable consideration. And certain authorities are relied on to establish and confirm these positions. One of these authorities, I own, is very direct to the position, that an attaching creditor of real estate has a right to contest the validity of a will of that estate before he has obtained judgment, and levied his execution thereon; that is, before it is ascertained, whether he has any debt due to him, or any right to make an attachment. If this be so, I can only say, that I am unable exactly to comprehend the grounds of the decision, and bow to it solely as a decision founded upon the local law, that is binding upon this court. But I must treat it as an exception to the general rule, and I am not called upon to give it a more enlarged operation. It seems to stand (as may be respectfully submitted) upon the very verge of the law, inter apices juris; and may enable any stranger, however remote, and without any just debt or claim, by a mere attachment, to interpose himself as a party to contest the most solemn and well-authenticated will. It asserts directly, that a creditor acquires an interest in real estate by a mere attachment, although never consummated by a judgment, and although he may never levy thereon, nor indeed have any right to levy thereon. It appears to me, that most, if not all, the other cases cited at the bar, have been pressed beyond their fair and reasonable bearing, into the service of the argument, at least since the alterations of our law under the provisions of the Revised Statutes of 1836.

It is true, as asserted at the bar, that an attachment upon mesne process is constantly spoken of in our Reports as a lien; and doubtless it is so, in a very general sense of the term, adopted by way of analogy and illustration, rather than from a very exact resemblance, which it bears to liens, generally recognized, as such, at the common law, or in equity, or in maritime jurisprudence. But, as has been truly said by Lord Coke, no simile holds in every thing ("Nullum simile quatuor pedibus currit"). Co. Litt. 3a. Lord Tenterden has said, that the word "lien," in its proper sense, in the law of England, imports that the party is in possession of the thing which he claims to detain; and that where there is no possession, actual or constructive, there can be no lien. Abb. Shipp. (Am. Ed. 1829) p. 171, pt. 3, c. 1, § 7; Id. (6th Ed., by Shea, 1840), p. 220, pt. 4, c. 1, § 8; 1 Story, Eq. Jur. § 506; 2 Story, Eq. Jur. §§ 1215-1254. And this is generally true, perhaps universally true at the common law, independently of statutable provisions, or of special contract. The doctrine was explicitly asserted by Mr. Justice Buller in delivering his opinion in the great case of Lickbarrow v. Mason (before the house of lords) 6 East, 21, note; Id. 25,—where he says: "Liens exist at law only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone." Mr. Justice Grose, in delivering the opinion of the court in Hammonds v. Barclay, 2 East, 227, 235, said: "A lien is a right in one man to retain that which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied." The same thing has been often insisted upon by other judges. Wilson v. Balfour, 2 Camp. 579; Ex parte Heywood, 2 Rose, 355; Heywood v. Waring, 4 Camp. 291; Gladstone v. Birley, 2 Mer. 404; Hallet v. Bousfield, 18 Ves. 188; Giles v. Grover, 6 Bligh (N. S.) 340. But in the maritime law, liens are recognized, independently of possession, actual or constructive; such as in cases of seamen's wages, and bottomry bonds and liens by material-men upon foreign ships. But in such cases, there is no pretence of a vested lien, until the labor or service is complete, or the voyage ended, and the contract become absolute. Until that period, it is merely inchoate, and conditional, and imperfect. In equity, also, liens exist independent of possession, either actual or constructive; as, for example, the lien of a vendor on the land for the unpaid purchase-money. But it has been long the established doctrine in equity, that a lien is not, in strictness, either a jus in re, or a jus ad rem; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. See Brace v. Duchess of Marlborough, 2 P. Wms. 491; 1 Story, Eq. Jur. § 506; 2 Story, Eq. Jur. §§ 1215, 1216, and the cases there cited; Ex parte Knott, 11 Ves. 617; Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386, 441, 442. It is, therefore, at most a simple right to possess and retain property until some charge attaching to it is paid or dis-

charged; or a mere right to maintain a suit in rem to enforce payment of the charge. Id. Mr. Justice Buller, speaking of liens at the common law, is equally expressive. He says: "Liens are not founded on property; but they necessarily suppose the property to be in some other person, and not in him, who sets up the right. They are qualified rights." Lickbarrow v. Mason, 6 East, note, pp. 21, 24.

Now, an attachment does not come up to the exact definition, or meaning of a lien, either in the general sense of the common law, or in that of the maritime law, or in that of equity jurisprudence. Not in that of the common law, because the creditor is not in possession of the property; but it is in custodiâ legis, if personal property; if real property, it is not a fixed and vested charge, but it is a contingent, conditional charge, until the judgment and levy. Not in the sense of the maritime law, which does not recognize or enforce any claim as a lien, until it has become absolute, fixed, and vested. Not in that of equity jurisprudence; for there a lien is not a jus in re, or a jus ad rem. It is but a charge upon the thing, and then only, when it has, in like manner, become absolute, fixed, and vested. In truth it bears a closer resemblance to the lien created by a judgment upon the real estate of the debtor. But that is only a general lien or charge over all the real estate of the debtor, to be enforced by an elegit, or other legal process, upon such part of the real estate of the debtor as the creditor may elect. And it is not a common law lien; for it had its origin in the statute of 2 Westm. (13 Edw. I. Stat. 1, c. 18), giving the right to an elegit. But there is, however, this strong and clear distinction between the case of a lien by judgment, and a lien by an attachment, that the former takes place only when the debt is ascertained and fixed by the judgment; whereas the latter is before the debt is ascertained, and is altogether future, and contingent upon a judgment being rendered in the suit in favor of the creditor. Yet a judgment creditor has never been held in England to have any interest in the land; but only a sort of preëmptive right or lien to acquire it by an extent upon an elegit; and then his title relates back to the time of the judgment, so as to cut down all intermediate incumbrances, sales, and other puisne titles. Yet a judgment creates no interest in the land; and therefore, though the creditor should release all his right to the land, he might extend it afterwards. Brace v. Duchess of Marlborough, 2 P. Wms. 491. It was very justly observed by the master of rolls (Sir Joseph Jekyll) in Brace v. Duchess of Marlborough, Id., that all that the creditor has by the judgment, is but a mere lien upon the land; but non constat, that he will ever make use thereof. If, then, a lien be not, in the sense of the law, founded in property; if it be not an interest in property, nor even a jus ad rem; upon what ground can it be argued, that it is equivalent to a mortgage or a pledge? In the former of those cases, the immediate right and title to the general property passes at law to the mortgagee, who becomes and is the positive owner, liable to have it devested by a condition subsequent. In the latter, a special property passes to the pledgee, accompanied and conferred by the possession thereof. There is no ground to assert either of these considerations to be true in respect to the lien of an attaching creditor. The possession is not in him to any intent or for any purpose. The property of the debtor is not devested; and the possession thereof is in the attaching officer, holding it sub modo, and merely as bailee, for the purposes of the law; that is, the possession is in custodiâ legis.

The nature and character of a lien on lands, created by a judgment, were very fully expounded by the supreme court of the United States, in the case of Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386, 441, 443; and, on that occasion, the court took the distinction between the rights acquired by a mortgage, and those acquired by a judgment; and, among other things, said: "Now it is not understood that a general lien, by judgment on land, constitutes, per se, a property, or right, in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances. But, subject to this, the debtor has full power to sell, or otherwise dispose of the land. His title to it is not devested or transferred by the judgment to the judgment creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person except such judgment creditor: and even against him, unless he consummates his title by a levy on the land, under his judgment. In that event, the prior levy is, as to him, void; and the creditor loses all right under it. The case stands, in this respect, precisely upon the same ground as any other defective levy, or sale. The title to the land does not pass under it. In short, a judgment creditor has no jus in re, but a mere power to make his general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale into the hands of the vendor or vendee; or to claim the purchase-money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold and he can trace the proceeds, and waiving the tort, chooses to claim the latter. The only remedy of the judgment creditor is against the thing itself, by making that a specific

title which was before a general lien. He can only claim the proceeds of the sale of the land, when it has been sold on his own execution, and ought to be applied to its satisfaction."

The case of an attaching creditor is not near so strong as that of a judgment creditor, who has obtained a fieri facias, under which the sheriff has actually seized the goods of the judgment debtor to satisfy the same. And yet in this very case, it is perfectly clear, that before a sale, the general property of the debtor is not devested, and that the creditor does not, under the levy upon the fieri facias, acquire any interest or right in the property. The subject underwent a very elaborate consideration of all the judges, in the case of Giles v. Grover, 6 Bligh (N. S.) 279, where the main question was, whether the crown, upon an exeat issuing on behalf of the crown, after a levy on the goods of the crown debtor, under a fieri facias, against him in favor of a private creditor, but before a sale under the fieri facias, was entitled to a priority of satisfaction before the private creditor, or not. It was held by all the judges, who delivered their opinions in the house of lords (except Mr. Justice Gaselee and Mr. Justice Littledale) that it did. The two latter judges held the contrary opinion. But upon that occasion, all the learned judges concurred in opinion, that the general property of the debtor in the goods was not devested by the levy on the fieri facias, but only when a sale thereof had taken place; that the creditor had no interest or title whatsoever, nor even a lien in the property; but, at most, that the sheriff had, for his own protection, merely a special property, (as some of the judges thought), or a lien, (as others thought), or (as a majority of the judges thought), that the goods were in the custody of the law, and the sheriff held them as bailee, and in that character virtute officii. Lord Chief Justice Tindal has expressed the true position of the sheriff, in delivering his opinion in the case above cited, in the house of lords. Speaking of the case of the goods seized under the fieri facias before the sale, he said: "The goods are not sold; they are only on the way to be sold. It would be a better definition of the sheriff's relation to these goods, to say, he has them in his custody, under a power to sell them, than any actual interest or property in them. His situation, indeed, cannot be better defined, than by saying, the goods are, in custodiâ legis, a phrase, which plainly distinguishes a mere custody and guardianship of the goods from a change of property; so far, therefore, as a special property in the goods is necessary for their safe custody against wrong-doers, and to render the execution of his public duty useful to the judgment creditor, so far he may be said to have property. But beyond this, as against the rights of adverse claimants, there is no authority for saying, that he has any property at all." Lord Tenterden, in the same case said: "It has been argued that the property is vested in the sheriff, because there are authorities to show, that the sheriff, if the property be taken out of his hand, may maintain an action of trover against the wrong-doer. Now, actions are maintainable upon a ground perfectly distinct from the right of property. They are maintainable upon the ground of possession. Any man in the possession of goods, whether as bailee, or otherwise, may, in his own name, maintain an action. The power, therefore, of bringing an action of this kind, does by no means prove, that the property is in the sheriff." His lordship immediately added: "It is supposed by some, that the property is in the judgment creditor. But it is perfectly clear, upon consideration of the subject, that the judgment creditor has no property in the goods, while they remain in the hands of the sheriff. If the sheriff executes the process of the court, and serves a bill of sale to the plaintiff in the action, then the judgment creditor obtains the property; but until that is done, while the goods are in the possession of the sheriff, they are in the custody of the law, but still remain the property of the debtor, to whom they originally belonged." This last doctrine, that the creditor has no property by the seizure, was (as has been already stated) unanimously affirmed by all the judges; and the doctrine, maintained by Lord Chief Justice Tindal and Lord Tenterden, and the majority of the judges, was adopted by the house of lords. See Giles v. Grover, 6 Bligh (N. S.) 289–292; Id. 312–314, 317–319, 322; Id. 333–341; Id. 367, 368, 371, 372; Id. 374–376, 384; Id. 404–406; Id. 421, 431. Mr. Justice Patterson said: "The goods are in substance in custodiâ legis; the seizure made by the officer of the law is for the benefit of those who are by law entitled. It is made against the will of the debtor, and no property is transferred, by any act of his, to the sheriff. In this respect it differs from all cases of special property, and of charges on goods, created by the debtor, while he has the absolute dominion over the goods." Id. pp. 292–317. Here we see clearly stated the distinction between a title by conveyance, or contract of the debtor, and a seizure under process of law. In confirmation of this view, Mr. Baron Alderson said: "The true description of the state of the property is, that it is in the custody of the law where, as in the case of the factor, wharfinger, pawnee, or equitable mortgagee, it is in the custody of the party himself, being a beneficial interest under a valid contract." Id. p. 318. Lord Chief Justice Tindal took notice of the same distinction between the case of a seizure in execution, and goods being pledged, or lands mortgaged; that the one amounted to an alienation of the property pro tanto, the other gave only an inchoate claim on the goods; or, to use his own expression, the goods "are on their way to be sold." Id. p. 437.

Mr. Justice Taunton, in answer to the argument urged at the bar, that by the seizure on the execution, the judgment creditor had a lien on the goods, or a special property therein, and, therefore, that the crown could only take, subject to that lien or special property, peremptorily denied the doctrine; and said, "This special property is in the sheriff, not as trustee for the judgment creditor; but for the purpose of his own protection. Neither had the judgment creditor in this instance any lien on the goods." Id. p. 340. And he added: "How can the doctrine of lien to retain these goods be applied to this judgment creditor, who had no possession; the goods being in the possession of the sheriff?" Id. 341. And again, in answer to the argument, that the judgment creditor had by the seizure at least a security for his debt, he admitted that, as it had been stated by the court, in Morland v. Pellatt, 8 Barn. & C. 822; but immediately added (what is most important to be here noticed) that "the security may be vested and certain, or it may be contingent and defeasible. It does not necessarily import present property, nor even beneficial interest." "A jus tertii might interpose, and destroy it." Gilb. Exch. Pr. 89. The truth is, that goods were, at the common law, bound from the teste of the writ of execution, whether it was a levari facias, or a fieri facias, because otherwise the debtor, by an alienation of the chattels, might disappoint the execution. Giles v. Grover, 6 Bligh (N. S.) 315, 316; Id. 367, 435, 436. But this has been since altered by statute, so that on a levari facias, or fieri facias, the goods are bound only from the time of the delivery of the execution to the sheriff; and as to real estate, it is bound for the time of the judgment, upon the construction of the statute of Westminster. Id.; Lowthal v. Tonkins, 2 Eq. Cas. Abr. 381; Smallcomb v. Cross, 1 Ld. Raym. 251; Philips v. Thompson, 3 Lev. 191; Payne v. Drewe, 4 East, 523. When therefore, the word lien is used in cases of this sort, it is used in a peculiar and general sense, and indicates no more, than that the goods or lands are bound by the judgment, and not that the judgment creditor has any interest or property therein. As to the goods, they are bound only from the delivery of the execution to the sheriff, as against the debtor himself; but still a sale by him in market overt would be good.

I have dwelt the more upon these authorities, because if they present, as I think they do, the true state of the law, even in the case of a seizure under execution, they necessarily apply with vastly greater force to the case of a mere attachment, which, at most, can be no more than a contingent, conditional, lien or security, to satisfy the judgment of the creditor, if he ever obtains one; whereas, on an execution, the debt has been already ascertained and fixed by the judgment. Nor do I think that the decisions in the Massachusetts Reports (except that of Smith v. Bradstreet, 16 Pick. 264), construing them reasonably, and with reference to the case before the court, inculcate a different doctrine. In the very case of Grosvenor v. Gold, 9 Mass. 209, 210, Mr. Justice Sedgwick admitted the lien by an attachment to be merely a conditional security. He said: "By an attachment the plaintiff has a lien upon the subject provisionally, that is, to the amount of the judgment he may finally recover." In Denny v. Willard, 11 Pick. 524, Mr. Justice Morton, in delivering the opinion of the court, said: "The special property (after the attachment) was in the officer making the attachment, unless he had lost the lien by giving up the possession to the general owner." In Fettyplace v. Dutch, 13 Pick. 388, 392, the court said, that an attachment constitutes a lien; but the general property remains in the owner, subject to that lien; and he may sell the same subject to the lien. In Arnold v. Brown, 24 Pick. 89, 95, the court said: "An attachment constitutes a mere lien on the property, and the general owner may as well sell, subject to that lien, as any other. The effect of the sale will be to pass the general property, incumbered by the attachment. If that be extinguished by the settlement or failure of the suit, or the neglect to levy an execution in thirty days after the judgment, the sale of the property will become absolute, and the purchaser will hold it free of the incumbrance." Now, here we have admitted, in the most explicit terms, that the lien or security, call it whichever you may, is merely conditional, and depends upon the event of the suit. It is not a present, fixed, vested interest in any one; and certainly not in the creditor.

But it has been said, that in cases of foreign attachment under the custom of London, the attaching creditor had a lien or pledge of the goods attached in the hands of the garnishee; and although they were but a pledge to draw the defendant to answer, yet that before the statute of 21 Jac. I. c. 19, § 9, it was deemed such a security of the debt, that if the defendant became bankrupt after the attachment, and before the recovery of judgment, the commissioners could not take or assign the goods, except subject to the lien and security of the attaching creditor. For this position great reliance is placed upon Goodinge on the Bankrupt Law (1726 Ed. p. 107). Now, I know of no authority for that position; and the case of Bingly v. Warcop, 3 Keb. 480, cited by Goodinge in his text, does not support it; nor, as far as I can trace it in the Reports, has any such doctrine ever been established by the courts of law in the construction of the statute of Jac. I. c. 19, § 9, although that clause of the statute has on various occasions received ample commentary from the courts. Its construction was a good deal considered in the case of Giles v. Grover, 6

Bligh (N. S.) 277; and, indeed the whole train of reasoning in that case is against the doctrine. If it be true, that a foreign attachment is but process to draw the party to answer, still, if he does not appear and answer, or give security, the suit proceeds against the garnishee. The truth is, that a foreign attachment is like a common attachment on mesne process, as the supreme judicial court of Massachusetts have declared it to be, a remedy, merely given and regulated by law, to enable a creditor to obtain satisfaction of his debt (Atlas Bank v. Nahant Bank, 23 Pick. 488); and, like every other remedy, it is liable to be defeated by any act, that bars or takes away the remedy or right to judgment under it. Ever since the statute of Jac. I. c. 19, there could be no possible doubt; for that defeated all executions not actually executed, as well as all foreign attachments, after the act of bankruptcy, if a commission issued thereon, down to the latest statute in England. The policy, therefore, upon this subject, for at least two hundred years, has been uniform; and I doubt not was so from the earliest period of the bankrupt laws.

I have gone over the grounds thus suggested, not because my judgment rests upon them, but because they were mainly relied upon at the argument to support the title of the attaching creditor, and to defeat the petition. My judgment turns, however, upon other and distinct grounds. Assuming, for the purposes of the argument, that the attachment constitutes a lien or security to or for the benefit of the attaching creditor, still it is but a contingent or conditional lien or security, arising under a mere remedial process, and, therefore, the question must still remain for consideration, whether it is such a lien or security, as is within the savings of the bankrupt act of 1841. And if it be within the savings, then there still remains the ulterior question, whether the attaching creditor has a right to go on, without any interposition of the district court, sitting as a court of equity in bankruptcy, and obtain a judgment in his suit, before the bankrupt can obtain his discharge, which discharge, if obtained before a trial, would constitute a complete bar to the suit; and thus the attaching creditor, by a race of diligence, be allowed to obtain and to complete a preference in violation of the whole policy of the bankrupt act, which is an equal distribution of the assets among all the creditors.

Now, the saving, in the second section of the bankrupt act of 1841, which has been pressed so much at the argument, is in the following words: "That nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." Now, certainly, the natural interpretation of these words "liens, mortgages, and other securities on property real or personal," would seem to be, that they referred to things of a like nature; or, as the maxim of law is, each may be known from its associates ("Noscitur a sociis"). The words may all be perfectly satisfied by treating them, as referring to liens fixed and vested in the party by a consummate title, such as liens by contract, resting on possession, or absolute by law, such as pledges, and not merely inchoate and conditional liens, dependent upon a mere remedial process. The term "securities" follows "mortgages," which are clearly vested rights under the grant of the party, defeasible only upon a future fulfilment of some condition subsequent. Securities of this nature may be by a deposit of title deeds, or conditional assignments of choses in action or the lien of a vendor for unpaid purchase-money. If we look back to the words of the enacting clause of this same section, to which the saving is appended as a proviso, we shall see, that there, the enumeration is confined to "securities, conveyances, or transfers of property or agreements made or given" by the bankrupt for the purpose of giving a preference or priority of a creditor, or indorser, or surety, &c. over the general creditors, and which are therefore declared fraudulent. Now, the natural inference certainly would seem to be, that the proviso is carved out of the enacting clause, and saves things ejusdem generis. The fifth section, to which also reference is made in the proviso, provides for an equal distribution of all the bankrupt's effects among all his creditors, with one or two exceptions, unimportant of this connection; and it declares, that creditors, proving their debts under the bankruptcy shall be deemed thereby to have waived all right of action therefor, and all unsatisfied judgments obtained thereon. So that the policy of the act, as to an equal distribution, is here made most manifest and positive. The 14th section of the act contains a provision, that the assignee may redeem, under the order of the court, "any mortgage or other pledge or deposite or lien upon any property real or personal, whether payable in presenti, or at a future day, and to tender a due performance of the conditions thereof." The words "mortgage or other pledge, or deposite or lien" in this clause clearly can mean nothing else, than such as arise from contract, and are of a present, fixed, vested, and ascertainable value. And it would be impossible to strain them, so as to include liens or securities by an attachment upon mesne process or other remedial process. And yet they certainly reflect great light upon the meaning of the like words in the proviso of the second section. But I do not propose to rest my present judgment upon any construction of the words, limiting them, so as to exclude in-

choate, conditional liens, arising, not under contract, but under remedial mesne process. Assuming such liens to be within the protection of the proviso (which is an admission, which I make merely for the sake of argument, and I am by no means satisfied, that it is a correct exposition of the words or intent thereof), still there remains behind a much more grave and pressing difficulty, to which I have heard no sufficient answer at the bar.

It is conceded on all sides, that unless the attaching creditor obtains a judgment in his favor in the suit, his attachment is gone. It is plain, therefore, that it gives no absolute right of any sort. It merely puts the remedy in progress. It is to my mind as perfectly clear and incontrovertible, that if the bankrupt, before any trial or judgment in that suit, obtains a discharge, that discharge is by the express terms of the bankrupt act (section 4), a full and complete discharge from all his debts provable under the bankruptcy, of which the debt sued for must be one; and of course, that it is pleadable as a bar to that very suit of the attaching creditor, in the nature of a plea puis darrien continuance. There is another provision in the third section of the act equally important to be considered, namely, that from the time of the decree in bankruptcy, all property and rights of property, of every name and nature, of the bankrupt, are devested out of the bankrupt, and become vested in the assignee upon his appointment; and it is further declared, "that all suits in law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion in the same way and with the same effect, as they might have been by such bankrupt." And it goes on further to provide that "the assignee so appointed shall be vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the property and rights of property of the bankrupt, and to sue for and defend the same, &c., as fully to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid." The act, therefore, manifestly contemplates, that as to all property and rights of property of the bankrupt, and as to all suits in law or equity pending, in which the bankrupt is a party, the bankrupt is to be treated, as if he were civiliter mortuus, and all his property and rights of property were vested in the assignee, as his executor or administrator. The moment that the decree in bankruptcy is passed, it relates back, for all the purposes of the act, to the time of the petition; and as soon as the assignee is appointed, all the rights, titles, powers, and authorities of the bankrupt vest in him by relation from the same period. How then, pending the proceedings in bankruptcy, before or after the decree, can the attaching creditor be permitted to go on with his suit, and proceed to trial and judgment, when there is, and can be, no party properly before the court to appear and defend the suit? If the attaching creditor had knowledge of the facts, it would be a fraud upon the bankrupt act for him to proceed in his suit, and to get a judgment before an assignee was appointed, or was in a situation to appear and defend the suit. Nor could the court, where the process should be pending, properly proceed in the cause, until it had been ascertained, whether the bankrupt was entitled to, and had received his discharge or not. If the bankrupt should receive his discharge, he would be instantly entitled to plead it in bar of the suit. And if the attaching creditor should forthwith proceed to judgment without waiting for the time when such discharge would or might be obtained, and be properly pleaded, either by the bankrupt, or by the assignee, or by both, in bar of further proceedings in the suit, and should obtain satisfaction of his judgment, I do not perceive, how, consistently with the principles of a court of equity, the creditor could be entitled to enforce the judgment, or to hold the money. The judgment must, to all intents and purposes, be treated as a fraud upon the bankrupt act, and as intended to defeat the just rights of the other creditors of the bankrupt.

It is precisely in this view, that it has struck me during the whole course of the argument, that no attaching creditor could be thus permitted by a court of equity, by a mere race of diligence, while the bankrupt proceedings were in progress, to overreach, and defeat the just rights of the other creditors, or the right of the bankrupt, if entitled to a discharge, to plead the same in bar of a judgment in the suit. I agree, that the court ought not to dissolve the attachment, or to take away the inchoate rights of the creditor to the security thereof, until it is ascertained by a decree, whether the party is a bankrupt, and whether he is entitled to a discharge from his debts. The court may, and, indeed, ought to allow the proceedings to be entered in the proper court, and to be continued, if the creditor elects so to do, until the discharge is obtained; but not to proceed in the mean time to trial or judgment; for if the petitioner should never be declared a bankrupt, or should not obtain any discharge, it may be, that there may be a judgment against him in personam, even supposing, (which I do not decide), that, in such an event, the attachment would be gone by the operation of the bankrupt act of 1841. But if a discharge should be obtained, I can entertain no doubt, that no judgment whatsoever could be had in the suit against the bankrupt, and that he and the assignee might each plead the discharge in bar of further proceedings. It strikes me, therefore, as perfectly clear, that, under such circumstances, it is the duty of the district court, as a court of equity, sitting

in bankruptcy, in order to prevent irreparable mischiefs, and the defeating of the true objects and policy of the act, to interpose by way of injunction to control the attaching creditor from proceeding further in his suit, than is necessary to protect his ulterior rights, and that he must act in the suit under the direction of the district court in the premises. See Ex parte D'Obree, 8 Ves. 82.

There is no novelty in this course. On the contrary, it is the common course in all cases, where upon the application of any creditor, or of an administrator or executor, a court of equity takes upon itself the administration of the assets of a deceased debtor. As soon as the decree for the administration is passed by the court, taking upon itself the administration of the assets, the executor, or administrator, or any creditor, is entitled to an injunction to prevent any other of the creditors from suing the executor or administrator at law, or further proceeding in any suit, already commenced, except under the direction and control of the court of equity, by which the decree is passed; for, under such circumstances, the court will not suffer a race of diligence by different creditors, each striving for an undue mastery, or preference, or priority of payment out of the assets, to prejudice the rights of the others. Jeremy, Eq. Jur. bk. 3, pt. 2, pp. 538–543, c. 5; 1 Story, Eq. Jur. § 549, and note 3; 2 Story, Eq. Jur. § 890; Drew. Inj. pt. 1, pp. 109–122, c. 4, §§ 2–7; Thompson v. Brown, 4 Johns. Ch. 619; Lee v. Park, 1 Keen, 714; Kenyon v. Worthington, 2 Dickens, 668; Brooks v. Reynolds, 1 Brown, Ch. 183. The decree in such a case is treated as a judgment for all the creditors. But it is not necessary to put it upon that ground; for when once the administration of the assets is taken by the court upon itself, as a matter of duty, it must be of course, that it cannot and ought not to permit any creditor to defeat, or to obstruct, or to interfere, with its own proceedings. Now this is precisely the situation of the district court, as to proceedings in bankruptcy, after a decree in bankruptcy. The court necessarily takes upon itself the administration of all the assets; and it is its duty to protect the property against all claims of creditors, which are inconsistent with the objects and policy of the act. I have no doubt, therefore, that it is the duty of the district court to issue an injunction in this case to the attaching creditor, directing him not to proceed in his suit, except under the order and direction of the court, until it shall be ascertained, whether there is a decree in bankruptcy, and a discharge of the bankrupt, which may be pleaded in bar of farther proceedings. If, indeed, I entertained any doubt upon this subject, (which I certainly do not) I should not entertain any doubt as to the jurisdiction of the circuit court upon a bill, filed by the assignee, after his appointment, to overhaul and control, or set aside all the proceedings, had in the intermediate time by the attaching creditor against the rights of the other creditors, and in subversion of the policy and objects of the bankrupt act of 1841. It would, therefore, after all, be but a postponement of the evil day, and a mere change from the equity jurisdiction of one court to the like jurisdiction of another court having full authority to act in the premises. It appears to me, that the reasoning of the supreme judicial court of Massachusetts in Atlas Bank v. Nahant Bank, 23 Pick. 480, is very strong in favor of the doctrine, which I hold upon this subject.

In the opinion here expressed I have not thought it necessary to advert to cases, where the right of the United States to a priority of satisfaction would attach under the laws of the United States. I have no doubt, that that priority would overreach any attachment under mesne process by any private creditor in a case of bankruptcy of the debtor. But it has seemed to me better to rest the whole case upon general principles, applicable to all cases of creditors.

It was asked, at the argument, what is to be done, as to the costs already incurred under the attachments? I answer unhesitatingly that all the costs already incurred are to be borne by the bankrupt's estate; for they must be deemed to have been fairly incurred. But as to future costs, there can be no claim upon the bankrupt's estate; and the creditor, if he chooses to pursue his suit, must do so at the peril of losing all his costs, if the bankrupt obtains his discharge. But if the creditor chooses at once to come in under the bankruptcy, and to prove his debt, I should not hesitate to decree him a priority of satisfaction of the costs already incurred out of the assets before the debts of any of the creditors. I shall direct a certificate to be accordingly sent to the district court in answer to the question propounded for the consideration of this court.

The following order was accordingly sent:

Circuit Court of the United States, Massachusetts District. In Bankruptcy. In the Matter of John S. Foster, Petitioner. April 30th, 1842. Upon the question certified and ordered to be adjourned into this court by the district court, to be heard and determined in this court. It is hereby ordered and decreed to be certified to the district court, as follows: That the said William Appleton ought not to be permitted to proceed further upon and under his suit and attachment named in the petition and answer, except subject to and under the directions of the district court, until the further order of the district court, after it shall have been ascertained by a decree therefor, that he, the said Foster, is a bankrupt, entitled to the benefit of the bankrupt act; and after it shall also have been ascertained, whether the said Foster is or shall, as such bankrupt, be entitled to a certificate

of discharge from all his debts provable under such bankruptcy. And that an injunction ought forthwith to issue from the district court against the said Appleton, and his agents for this purpose. And that in the intermediate time, and until the further order of the district court, the said Appleton is to be at liberty to enter his said suit in the proper state court, and to continue the same therein, taking no step, that shall prejudice the rights of the said Foster, or of his creditors, until the further order of the district court, so as to preserve, if he elects so to do, his attachment in the premises, to abide the final event of the proceedings in bankruptcy, as to the certificate of discharge of the bankrupt.

Case No. 4,961.

In re FOSTER.

[2 N. B. R. 232 (Quarto, 81);[1] 1 Am. Law T. Rep. Bankr. 127; 1 Chi. Leg. News, 103.]

District Court, S. D. New York. Nov. 11, 1868.

BANKRUPTCY—FRAUDULENT PREFERENCE.

An assignment of a claim to secure a pre-existing indebtedness made when the bankrupt was insolvent and not as a pledge of security, made at the time the indebtedness was contracted, and not as a part of the transaction, is a fraudulent preference, and a good ground for refusing a discharge.

[Distinguished in Parker v. Muggridge, Case No. 10,743. Cited in Re Warner, Id. 17,-177.]

[This was a petition for the discharge of B. N. Foster, a bankrupt.]

Cooley, Hatch & Beneville, for bankrupt.

Samuel G. Jelliffe, for creditors.

BLATCHFORD, District Judge. On the evidence in this case, as it now stands, I think the sixth and eighth specifications filed by the creditor, William P. Dixon, in opposition to the discharge of the bankrupt, are substantially proved in part. The sixth specification states, among other things, that the bankrupt gave a fraudulent preference, contrary to the provisions of the bankrupt act, by assigning to William P. Dixon a third of his claim against the National Ice Company of the city of New York. The eighth specification states, among other things, that the bankrupt, in contemplation of becoming bankrupt, made a conveyance of part of his property for the purpose of preferring a creditor and preventing the property from coming into the hands of the assignee and being distributed under the bankrupt act, by assigning to William P. Dixon, for such purpose, one-third of his claim against the National Ice Company, such assignment having been made after the bankrupt was insolvent, and after he had made up his mind to take the benefit of the bankrupt act.

There is no oral testimony in the case but that of the bankrupt himself. On the 30th day of July, 1868, he testified that whenever he borrowed money he generally gave security; that there were several notes protested against him in 1866; that during the winter of 1866 and the spring of 1867 he found himself unable to meet his current engagements; that during the year 1867 he gave a number of notes for borrowed money, trusting to something to turn up in order to pay them; that he did not recollect having paid any borrowed money, during the year 1867, and that he made up his mind that he should be obliged to take the benefit of the bankrupt act in the summer of 1867. On the 18th of August, 1868, he testified that between November, 1866, and July, 1867, he received at least three thousand dollars from William P. Dixon, which was not repaid or expended for Dixon, and which now constituted his indebtedness to Dixon. On the 25th of August, 1868, he testified that it was during and after the summer of 1867 that he found himself unable to meet his current engagements; that he was sure he paid no borrowed money after the 1st of August, 1867; that although some days usually elapsed between his borrowing money and pledging the securities mentioned in Schedule A No. 2, to his petition, the securities were always agreed upon at the time the money was borrowed, but were not always given then, and not until a few days afterwards; that he desired to withdraw the statement so made on his former examination, that between November, 1866, and July, 1867, he received at least three thousand dollars from William P. Dixon, which was not repaid or expended for Dixon, and which now constituted his indebtedness to Dixon, and to state in substitution that between November, 1866, and February, 1867, he and Mr. Dixon had many money transactions together, amounting in the aggregate to fifty thousand dollars or more; that sometimes Dixon would borrow money from him and pay him by checks, that sometimes he would borrow money of Dixon on his checks without security, and sometimes on notes of other persons, and for other persons endorsed by him, and that these notes were sometimes secured by stock collaterals.

The proof of debt filed in this matter by Dixon, and which was sworn to and filed on the 28th of July, 1868, two days before the first examination of the bankrupt, and is part of the testimony in the case, shows an indebtedness of the bankrupt to Dixon, amounting to four thousand two hundred and ninety-five dollars and thirty-three cents, and states that the indebtedness arose out of loans of money made by Dixon to the bankrupt, evidenced by a note and due bill made by the bankrupt, and out of the discount by Dixon of six notes made by other parties and endorsed by the bankrupt, and that to secure that indebtedness the bankrupt executed to Dixon the assignment hereafter mentioned. Copies of the note and bill made

[1] [Reprinted from 2 N. B. R. 232 (Quarto, 81), by permission.]

by the bankrupt and of the other six notes above referred to are annexed to the proof of debt. The note made by the bankrupt is dated March 4th, 1867. The due bill is dated April 27, 1867. It must be assumed on the evidence, that the loans on the note and the due bill respectively were not made after their respective dates. The six notes discounted matured between April 30, 1867, and July 22, 1867. At how late a period any of them were discounted does not distinctly appear. A copy of the assignment before referred to, executed to Dixon by the bankrupt, is set forth in the proof of debt. It is dated August 24th, 1867, and by it the bankrupt, in consideration of one dollar to him paid by Dixon, for the purpose of securing to Dixon one thousand dollars, assigned to Dixon all his claim against the National Ice Company of New York, except one thousand two hundred and fifty dollars assigned to Louis S. Robbins, of New York, August 24th, 1867, growing out of the various notes of said company, for pay as its secretary and treasurer, said claim amounting, by estimation, to the sum of three thousand dollars. The proof of debt states the estimated value of the security so assigned to Dixon as being two hundred dollars.

On all the testimony the assignment of August 24th, 1867, to Dixon, must be regarded as a transfer to secure a pre-existing indebtedness, and not as a pledge of security made at the time the indebtedness was contracted, and as a part of the transaction. All transactions of borrowing money from Dixon, or obtaining discounts from him, seem to have been at an end by July 1, 1867. The assignment of the claim to Dixon was a fraudulent preference contrary to the act, made when he was insolvent and was contemplating bankruptcy, within the causes for withholding a discharge specified in the twenty-ninth section, and within the sixth and eighth specifications. The testimony of the bankrupt is very confused and unsatisfactory. It may be that the points on which the discharge is now refused may be explained. If so, I am disposed to allow an opportunity for making the explanation, if such a favor shall be asked, the creditor to be at liberty also to introduce such testimony as he desires. I do not pass upon any other points raised by the specifications, but refuse the discharge at present on the grounds above stated.

Case No. 4,962.

In re FOSTER.

[3 Ben. 386;[1] 3 N. B. R. 236 (Quarto, 57).]

District Court, S. D. New York. Sept. 1869.

JURISDICTION — PLACE OF FILING PETITION IN BANKRUPTCY—CARRYING ON BUSINESS.

Where a bankrupt, during the six months previous to filing his petition, carried on business for two months in the Southern district of New York, and, for the same two months, in the district of Massachusetts, and carried on business no where else, during such six months: *Held*, that his petition was properly filed in the Southern district of New York.

[Cited in Re Goodfellow, Case No. 5,536.]

In bankruptcy.

J. M. Ball, for petitioner.
D. S. Riddle, for Day.
S. E. D. Currier, for Pratt.

BLATCHFORD, District Judge. On the 4th of December, 1868, Elisha Foster filed a petition in this court, describing himself therein as of the town of Franklin, in the state of Massachusetts. The petition sets forth, that the petitioner and Charles C. Day, of Jersey City, New Jersey, and William W. Pratt, of Medfield, Massachusetts, formed a copartnership in November, 1866, for the transaction of the business of manufacturing and dealing in straw goods, at said town of Franklin and the city of New York, and have carried on said business as such copartners for the longest period during the six months next immediately preceding the filing of the petition, at the city of New York; that the members of said copartnership owe debts exceeding the amount of $300, and are unable to pay their debts in full; that the petitioner is willing to surrender all the estate and effects of said copartnership, and all his separate estate and effects, for the benefit of the creditors of said partnership, and of his separate creditors; that the said Day and Pratt are respectively unwilling to join in the petition; that the petitioner desires to obtain the benefit of the bankruptcy act [of 1867 (14 Stat. 517)]; that Schedule A to the petition contains a statement of all the debts of the copartnership; that Schedule B thereto contains an inventory of all the estate of said copartnership; that Schedule C thereto contains a statement of the petitioner's individual debts; and that Schedule D thereto contains an inventory of his individual estate. The prayer of the petition is, that the petitioner and Day and Pratt may be adjudged to be bankrupts, and that the petitioner may have a certificate of discharge. On the filing of this petition, an order was made requiring Day and Pratt to show cause why they should not be adjudged bankrupts. On the return day of such order, each of them put in an answer, denying the allegation of the petition that Foster, Day and Pratt had carried on business as copartners, as alleged, in the city of New York, for the longest period during the six months next immediately preceding the filing of the petition, and denying the jurisdiction of this court to grant the prayer of the petition. Evidence has been taken on the issue thus raised.

The copartnership of Foster, Day and Pratt was formed in November, 1866, and thenceforth, until the 4th of August, 1868, carried on the business of manufacturing

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

and buying and selling straw goods, the manufacturing being done in Massachusetts, and the buying and selling in the city of New York, and in Massachusetts, the largest portion of the sales being made in the city of New York. The copartnership was dissolved on the 4th of August, 1868, and thenceforward ceased to carry on business. Consequently, it carried on business in the city of New York for only two months of the six months next immediately preceding the time of the filing of the petition. By section 11 of the act, it is necessary to jurisdiction, that the petition be addressed to the judge of the judicial district in which the debtor has resided or carried on business for the six months next immediately preceding the time of filing the petition, "or for the longest period during such six months." The sole question in this case is, whether this court has jurisdiction to entertain the petition of Foster, and, under it, to adjudge Foster, Day and Pratt to be bankrupts. Schedule B to the petition shows that there are assets of the copartnership. The members thereof continue, therefore, for the purposes of section 36 of the act, to be partners in trade quoad their creditors, and they may, under that section, be adjudged bankrupt on the petition of any one of them, the others, if they refuse to join in the petition, being brought into court by proper process, under the provisions of general order No. 18. As the petition of Foster, filed in this court, that the three copartners may be adjudged bankrupt, was the first petition filed in any court for that purpose, it follows, under section 36 and general order No. 16, that this court, if it has jurisdiction of such petition, is entitled to take and retain exclusive jurisdiction over all proceedings in regard to the bankruptcy of all three of the copartners until the same shall be closed. The question then recurs, whether this court has jurisdiction of the petition of Foster. It has such jurisdiction, if the three copartners have carried on business in this judicial district for the longest period during the six months next immediately preceding the 4th of December, 1868. This involves a determination as to the meaning of the expression, "the longest period" during such six months. It is contended, on the part of Day and Pratt, that the longest period during the six months must be more than three months in duration, and that, therefore, the two months in this case, from the 4th of June, 1868, to the 4th of August, 1868, during which the copartnership carried on business in this judicial district, is not such longest period. It is urged, that two months can never be the longest period during the six months; that three months and a day is the shortest time that will answer the requirement of the longest period during the six months; and that the expression, "the longest period during such six months," means, the longest part of such six months. I cannot assent to this view. The meaning of the 11th section is, I think, that the debtor may file his petition in the district in which he has resided or carried on business for the six months next immediately preceding the time of filing the petition, or for the longest period during or within such six months that he has resided or carried on business in any district. Any other interpretation would wholly exclude a class of debtors from the operation of the act. Every debtor who has changed his residence and his place of carrying on business so often during the six months, as not to have resided or carried on business in any one district for more than three months thereof, would be wholly excluded from the operation of the act. It is not to be presumed that such an effect was intended. The object of the provision is to bring within the operation of the act every debtor who has resided or carried on business in any district for any length of time, provided the proceedings are instituted in the district in which his residence or carrying on of business has continued so long as to cover the longest space of time that he has resided or carried on business in any district during the six months next immediately preceding the time of filing the petition. The idea manifestly is, to select as the forum the district where, by reason of the longest residence or the longest duration of carrying on business, the debtor is likely to be best known, or to have had the largest number of business transactions, with the proviso, that such residence or carrying on of business need not have continued for a longer period than for the six months next immediately preceding the time of filing the petition. Thus, during or within such six months, the debtor may have resided or carried on businees in one district for two months, in another for one month and three quarters, in another for one month and one quarter, and in another for one month. In such case, the proper district in which to file the petition is the one in which the debtor has resided or carried on business for the two months. So, if, as in this case, business has been carried on in one district for two months during such six months, by the debtors, as copartners, and has not been carried on by them as copartners, in any other district, for any other portion of such six months, such district is the proper district in which to file the petition.

The fact, that the three copartners carried on business as such, in Massachusetts, for the same period, during the six months, that they carried it on in New York, does not deprive this court of jurisdiction, it not appearing that they carried on business in Massachusetts for a longer period during the six months than they carried it on in New York. Two months is the longest period during or within the six months, that the three copartners carried on business as such in any district, and they so carried it on for that length of time in this district. Their

carrying on of business in this district, as copartners, having continued so long, during the six months, as to cover the longest space of time that they carried on business as copartners in any district during that period, this court has jurisdiction, notwithstanding they carried on business, as copartners, in Massachusetts, for the same time, during the same period.

The jurisdiction of this court is sustained, and Day and Pratt must answer to the merits of the petition.

Case No. 4,963.

In re FOSTER.

[6 Ben. 268;[1] 10 N. B. R. 523.]

District Court, E. D. New York. Nov., 1872.[2]

MORTGAGEE—RENT OF MORTGAGED PREMISES—TAXES—LIEN.

An assignee in bankruptcy received, as property of the bankrupt, real estate subject to mortgages, and collected rent due on a lease of the same made by the bankrupt. Proceedings were taken to foreclose the first mortgage, in which a decree was had, and the property sold and bought by the second mortgagee. The taxes on the property were paid by the second mortgagee out of his purchase money. He then petitioned the bankruptcy court to direct the assignee to pay him the amount of the rent and of the taxes, out of the bankrupt's estate: *Held*, that there was no ground on which he could claim either the rents or the taxes.

This was a petition by William Foster for an order that the assignee of James F. Rhodes, a bankrupt, pay to him the amount of certain rents collected by the assignee, and of certain taxes paid by the petitioner. The petition set forth that, when Rhodes became a bankrupt, he was the owner of certain real estate which was subject to a mortgage to one Pearless, and a second mortgage to the petitioner; that the assignee had collected rents for the premises due on leases executed by Rhodes for a period subsequent to the adjudication in bankruptcy, and to the becoming due of the petitioner's mortgage; that a suit was commenced to foreclose the Pearless mortgage, and a decree entered in that suit, under which the premises were sold and were bought by the petitioner, who received a small sum on his mortgage out of the surplus moneys arising out of such sale; and that he had paid the taxes on the premises out of the purchase moneys. The petitioner claimed to have an equitable lien on the premises and on the rents, and prayed for an order that the assignee be directed to pay them to him.

Jesse Johnson, for petitioner.

Wm. W. Bliss, for assignee.

BENEDICT, District Judge. I do not at present see how any proceeding, no matter when taken, can entitle a mortgagee to collect the rents of mortgaged property, which had passed into the possession of an assignee in bankruptcy before the rents became due. An application by a mortgagee for the appointment of a receiver to collect, for his benefit, rents of the mortgaged premises accruing during the pendency of a foreclosure suit is not based upon any absolute right.

It is, in legal effect, a proceeding to acquire immediate possession of the mortgaged premises, and it may be defeated by the intervention of superior equities, or by the collection of the rents by the mortgagor. It is addressed to the discretion of the court; when granted, the rents secured thereby arise from the possession of the property at the time the rent became due, such possession being acquired by means of a receiver.

But if some proceeding, intended to divert the rents from the hands of the assignee, could avail when taken in time, it seems clear that there remains no ground on which to base a claim like the present, where a second mortgagee petitions to be paid rents which, before the filing of his petition, had been collected by the assignee in bankruptcy, as owner in possession of the mortgaged property at the time they became due. Moneys so collected by an assignee in bankruptcy are assigned by the law to be distributed equally among all the creditors, unless shown to be subject to some prior specific lien.

It has been claimed that the petitioner has a specific lien upon these rents by the terms of the mortgage, which contains, as part of the description, the words "together with all, and singular, the tenements, hereditaments and appurtenances thereto belonging, and the reversion, remainder, rents, issues and profits thereof."

This is the usual form of a mortgage; these words are intended simply to give a full description of the property; they do not entitle the mortgagee to collect the rents, nor do they create a lien upon rents accruing and collected before the possession of the property passes away under foreclosure proceedings.

The petitioner also prays that the assignee be directed to pay him the amount of certain taxes upon the mortgaged property, paid in course of the foreclosure proceedings taken by a prior mortgagee, whereby the surplus was by so much diminished to the detriment of the second mortgage held by the petitioner.

But I see no principle by which the rents in the hands of the assignee can be held to be charged with the taxes so paid.

The prayer of the petition must therefore be denied.

[NOTE. On appeal to the circuit court, the order of the district court was affirmed. Case No. 4,981.]

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 4,981.]

Case No. 4,964.

In re FOSTER.

[18 N. B. R. 64;[1] 10 Chi. Leg. News, 315.]

District Court, S. D. Illinois. June 17, 1878.

ACT OF BANKRUPTCY—PREFERENCE.

On the 11th of January, 1878, the bankrupt, a druggist, executed a chattel mortgage on all his stock of drugs, etc., constituting his stock in trade, to his father-in-law, to secure him as surety on a note given by the bankrupt. The mortgage was taken with the understanding that the bankrupt was to go on and sell at retail in the ordinary way, which he accordingly did. On the 20th of May the mortgagee, having become dissatisfied with the way in which the business was being conducted, took possession of the property under the mortgage. On the 4th of June the petition in this case was filed. *Held*, That the mortgage and the seizure of the property thereunder were both acts of bankruptcy, the first as being a fraudulent conveyance, and the second as operating as an unlawful preference.

[On certificate of register in bankruptcy.]

By N. W. Branson, Register.

To Honorable Samuel H. Treat, District Judge: The petition of Richardson & Co. and Clarke M. Smith, creditors of William A. Foster, praying for the adjudication of said debtor as a bankrupt, which was filed on the 4th of June, 1878, and the answer of said debtor denying the alleged acts of bankruptcy, and the testimony heretofore taken in this matter, having been referred by order of the court to the undersigned register, to consider the same and make report of his conclusions thereon, I would respectfully report that, after examining the evidence in this matter and hearing the arguments of Honorable J. W. Patton, attorney for the petitioning creditors, and Honorable A. L. Knapp, attorney for the debtor, I have arrived at the following conclusions: The debtor is a retail druggist, doing business at Springfield. On the 11th of January, 1878, he executed a chattel mortgage to his father-in-law, Isaac L. Ewell, to indemnify said Ewell as surety for Foster on his note to H. B. Buck, for two thousand dollars, of even date with the mortgage, and payable eighteen months after date. This two thousand dollar note was partially in renewal of a former note to Buck, signed by Ewell, as surety for Foster, for one thousand two hundred dollars, which was taken up on the execution of the new note. The mortgage was acknowledged and recorded on the 14th of January last. By this mortgage Foster conveyed to Ewell, among other things, all the stock of drugs, chemicals, medicines, wines, etc., constituting his stock in trade. The mortgage is in the usual form, and contains the usual privilege to the mortgagee to seize the property whenever he shall feel himself unsafe or insecure.

It is charged by the petitioning creditors that this mortgage was fraudulent and void as to creditors, because made to delay and hinder creditors. On this point I quote the testimony of Mr. Ewell literally as follows: "When I took this mortgage it was the understanding that he was to go on and sell at retail until I became dissatisfied. I knew that he had been selling at retail, and I also knew that since I took the mortgage, and up until I took possession, he had been selling as before." Mr. Foster testifies: "I have done a retail trade since the mortgage was given, the same as I did before." "I have bought goods such as our business demanded since the mortgage was given." On the 20th of May last Mr. Ewell took possession of the property under the mortgage. He says he took possession because he was dissatisfied with the way the store was running. C. M. Smith had told him Foster was some two or three hundred dollars behind on rent. On inquiry, he found indebtedness of Foster of seven or eight hundred dollars to six or seven persons, besides the debts on which Ewell was liable as surety. Ewell had also gone Foster's security on a debt of seven hundred dollars to First National Bank, for money borrowed in February or March last, which has not been paid. He further says: "At the time I took possession under my mortgage, I thought it was necessary to protect my interest, and, in my view, that necessity arose when I learned of the indebtedness of Foster, and because of Foster's failure to make deposits to meet the notes in the bank. Foster told me before I took possession under my mortgage, that times were so hard that it was impossible to make the payments to meet the bank notes and Buck's note. That information contributed towards my action in taking possession of the stock of goods under my chattel mortgage."

Mr. Foster testifies: "At the time Mr. Ewell took possession under his mortgage I could not pay C. M. Smith what I owe l h'm, and one of the notes to the First National Bank had become due and had been renewed because I could not meet it when due. The failure to meet these debts when the same became due was because of the dullness of the times." There is no evidence tending to show that Foster was insolvent at the time he executed the mortgage; but at the time possession was taken by Ewell under the mortgage, Foster, being a merchant or trader, was unable to pay his debts in the ordinary course of business, and was, therefore, within the meaning of the bankrupt law [of 1867 (14 Stat. 517)], insolvent.

The questions presented for determination in this matter are, whether the chattel mortgage, with the continued exercise of the right of sale of the mortgaged property by the mortgagor, constitute a fraudulent conveyance, and whether the seizure of the property by the mortgagee constitutes an unlawful preference. In the case of Robin-

[1] [Reprinted from 18 N. B. R. 64, by permission.]

son v. Elliott, 22 Wall. [89 U. S.] 513, it was determined by the supreme court of the United States that a chattel mortgage of a stock in trade, which permits the mortgagor to dispose of the mortgaged goods in due course of trade, is fraudulent in law as to other creditors, and is null and void as to them, without reference to the good faith of the mortgage debt, or the intentions of the mortgagor as to fraud. The same doctrine was announced many years ago by the supreme court of this state, in Davis v. Ransom, 18 Ill. 396. In that case the court say: "The law gives no sanction to such arrangements, and, however well intentioned in fact, will hold them void as against creditors as tending to encourage and sustain frauds, and to hinder creditors in the collection of their just demands." This rule has been adhered to in several subsequent decisions of that court, and I understand this to be the doctrine established by the general current of authorities, both in this country and in England, though in some few states, a different rule has obtained. And it has also been held by many courts of high authority, that when the agreement permitting the mortgagor to sell does not appear on the face of the instrument, but appears by proof aliunde, the instrument is equally fraudulent and void as if the agreement had appeared on its face. Gardner v. McEwen, 19 N. Y. 123; Russell v. Winne, 37 N. Y. 591; Putnam v. Osgood, 52 N. H. 148; Collins v. Myers, 16 Ohio, 547; Freeman v. Rawson, 5 Ohio St. 1; Horton v. Williams, 21 Minn. 187; Steinart v. Deuster, 23 Wis. 136; Bank of Leavenworth v. Hunt, 11 Wall. [78 U. S.] 391; In re Manly [Case No. 9,031]; In re Kahley [Id. 7,593]. And the supreme court of this state in case of Barnet v. Fergus, 51 Ill. 352, use the following language: "It was held by this court, in Davis v. Ransom, 18 Ill. 402, and in Read v. Wilson, 22 Ill. 377, that a mortgage of a stock of goods, containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, was fraudulent and void as to creditors. This was held to be fraud in law. It is a necessary consequence of these decisions that where the mortgage contains no such provision, but the mortgagee nevertheless knowingly permits the mortgagor to make use of the property in the ordinary course of trade, and in the same way as before the mortgage was made, this would be such a perversion of the mortgage from its legitimate purposes as to withdraw from its protection, and place within the reach of other creditors, all the property which the mortgagee had permitted the mortgagor to hold for sale in the ordinary course of business. This principle has been recognized in Griswold v. Sheldon, 4 Comst. [4 N. Y.] 581, and Delaware v. Ensign, 21 Barb. 85." And in the case of Edgell v. Hart, 9 N. Y. 213, Denio, C. J., held that the existence of a provision permitting sales by the mortgagor, out of the mortgage or in it, would invalidate it as matter of law, and that where the facts are undisputed the court should so declare.

In view of the authorities above cited it would seem to be clear that the mortgage in question, which the mortgagee took (as he himself testifies) with the full understanding that the mortgagor was to go on and sell the mortgaged property at retail, was fraudulent in law and void as to creditors. But counsel for the debtor insist that while the mortgage may have been void as to creditors, yet it was good as between the mortgagor and mortgagee, and that as the mortgagee took possession of the property before any execution or other lien was obtained on the part of any of the creditors, and before the filing of the petition in bankruptcy, that the mortgage, or at least the seizure of the property under it, is now valid as against the creditors. Under the state law this position is doubtless well taken. The law of Illinois permits a debtor to prefer some of his creditors to others. But the bankrupt act was intended to prevent such preferences; and the question is thus presented as to whether the seizure of these goods by the mortgagee was such a transfer of the property as to make an unlawful preference within the meaning of the bankrupt act, and consequently to constitute an act of bankruptcy. If, as I think is clear, the mortgage in question was void as to creditors up to the 20th of May, 1878, when the mortgagee seized the property, then the seizure was the first act which gave it validity as against the creditors, and this was only fifteen days prior to the filing of the petition in bankruptcy. The seizure operated as a transfer of the property to the mortgagee, and enabled him to apply the proceeds of the property to his individual use, and thus gave him a preference over the other creditors. This question is incidentally passed upon by the supreme court of the United States in the case of Robinson v. Elliott, 22 Wall. [89 U. S.] 513. In that case the debtor had given a chattel mortgage which permitted the mortgagors to remain in possession of the mortgaged goods, and sell them as before, and supply their place with other goods. The mortgagees seized the goods under the chattel mortgage, and twelve days after such seizure a petition in bankruptcy was filed against the surviving mortgagor. The mortgagees filed a bill praying that an account be taken of the amount due them, and for a sale of the goods.

The supreme court held that the mortgage was constructively fraudulent, it appearing upon its face that the legal effect of it is to delay creditors. It was insisted by the mortgagees that if the mortgage is held void in law, still, the delivery of the goods to the mortgagees vests a sufficient lien prima facie to enable the mortgagees to enforce their lien in equity. On this point Mr. Justice Da-

vis, delivering the opinion of the court, says: "The answer to this is, that the case made by the bill does not proceed upon such a delivery at all, but upon the mortgage and seizure under it. Besides, if the appellants (mortgagees) could turn the proceedings into a voluntary pledge by the debtors, it would not help them, for it would violate the preference clause of the bankrupt act, as they got the goods only twelve days before the petition in bankruptcy was filed."

If the principle held in the numerous decisions above cited is correct, that a mortgage of goods is fraudulent in law where the intention appeared aliunde to permit sales of goods in the usual course of trade, then the fact that such permission appears on the face of the mortgage in question in Robinson v. Elliott does not make that case, so far as it refers to the preference clause of the bankrupt act, distinguishable in principle from cases where such permission is proven aliunde. The decision of Judge Drummond in Harvey v. Crane [Case No. 6,178] appears to be in point in this case. In that case the chattel mortgage in question was executed on the 20th of March, 1869, but not recorded until the 5th of March, 1870. It had not been acknowledged as it stood when the decision was rendered, and included after purchased goods, and permitted the mortgagor to go on and sell in the usual course of business, and was void as against creditors under the law of this state. On the 7th of March, 1870, the mortgagee took possession of the property under the mortgage, knowing, or having reason to believe, that the mortgagor was insolvent. On the 30th of the same month a petition in bankruptcy was filed against the mortgagor. The mortgage was given for a bona fide loan. After reciting these facts in his opinion, Judge Drummond says: "But in this case it is claimed that a mortgage, not valid as against creditors under the laws of this state, has ripened into an effectual lien or transfer by virtue of the possession taken on the seventh of March, because, though the mortgagor was then insolvent, and the mortgagee knew it, proceedings in bankruptcy were not commenced until the thirtieth of March, and the assignee took as a purchaser, with notice of all equities. But there was nothing operative as against creditors until the defendant took possession. As against them, until then, the defendant had no security for his loan. A creditor may obtain a preference from an insolvent debtor with knowledge of the insolvency, if within the limitation prescribed by the law. Bean v. Brookmire [Id. 1,168]. But the possession must be obtained by a complete act within the limitation. Here the mortgage did not create the preference as against creditors that was invalid; neither did the record. It was still, when recorded, an invalid mortgage as against creditors under the law of the state, among other reasons, because as it stood it was an unacknowledged mortgage. That which operated against creditors, if at all, was the taking possession on the 7th of March. It is true it was authorized by the mortgage, and it was, in that sense, the joint act of the mortgagor and the mortgagee, possession being the consummation of the act. The assignee represents the creditors, and any claimed lien which would be void as against creditors generally, would also be void as against the assignee. In this case the defendant cannot rely upon the mortgage, because it is invalid as to creditors under the law of the state. He cannot rely on the possession, because it was taken under authority from an invalid mortgage, and because, further, the mortgage was wrongfully used by the defendant to obtain possession, he, at the time, knowing the insolvency of the mortgagor."

This decision then seems to announce the principle that a chattel mortgage, void as to creditors under the law of this state, and under which the mortgagee has taken possession, having at the time reasonable cause to believe the mortgagor to be insolvent, is also void as against the assignee in bankruptcy, appointed under bankruptcy proceedings commenced against the mortgagor within two months after possession has been taken by the mortgagees; that such taking of possession operates as a preference, and is, therefore, void as against the other creditors, and does not remit the mortgagee to his rights as of the date of the mortgage. The decision of Justice Woodruff, of the United States circuit court for the Northern district of New York, in Smith v. Ely [Case No. 13,044], also appears to be in point. Of the mortgages in question in that case, Justice Woodruff says: "Although it is not in terms so expressed in the mortgages, yet it is clear upon the evidence that the understanding of all parties was, that the mortgagors should continue their business as merchants, as such sell the goods then on hand, buy others, and sell them in turn in their discretion, for the purposes of gain." On the 12th of November, 1870, the mortgagees took possession under the chattel mortgages, and on the 13th of January, 1871, a petition in bankruptcy was filed against the makers of one of the mortgages. As to the effect of such possession, the court says: "Under these views of the rights of the parties and of the validity of the mortgages, how did the delivery or surrender of possession by the bankrupts to the defendants on the 12th of November, 1870, affect the right of the assignee in bankruptcy? If, as against creditors, the mortgages and the alleged title of the defendants to the property was fraudulent and void, their taking possession in the mere exercise of their claim of the title would not aid them. Their title remained fraudulent and void still, as against creditors. If, on the other hand, the assent of the bankrupts to their taking possession, the delivery of the property, and surrender of the keys, were of them-

selves an appropriation of the property to the payment of the mortgage debt, then the bankrupt law pronounces it void, for this reason—both parties then knew that the bankrupts were insolvent; it swept the entire partnership property into the hands of the defendants; it operated, and was clearly intended to operate, to give them security and payment to the exclusion of their creditors, and it was within four months next preceding the filing of the petition upon which the defendants were adjudged bankrupts. The defendants can, therefore, gain nothing from this latter view of the transactions." See, also, Smith v. McLean [Id. 13,074]; In re Kahley [Id. 7,593]; In re Eldridge [Id. 4,330].

This last case was also decided by Judge Drummond, and grew out of chattel mortgages executed in Wisconsin, in March and May, 1868, under which the mortgagees took possession on the 15th of October, 1868. The petition in bankruptcy against the mortgagor was filed on the 19th of October, 1868. The court held that, as to the property afterwards acquired under the law in Wisconsin, there was not a valid mortgage, but only authority to take possession, and the rights of creditors, under the bankrupt law, must depend upon its effect upon the property at the time the act was done which might be supposed to operate as a transfer. This was the taking possession under the license contained in the mortgage. At that time the mortgagor was insolvent, and the mortgagees had reason to believe it. The court says: "It is true in this case there was not, in one sense, a transfer made on the 15th of October, 1868, because the instruction or authority to take possession of after-acquired property, as the supreme court of Wisconsin construes it, was given in the mortgages executed some months before. But it is not competent for a party to give this authority in relation to property which he may afterwards acquire, and thus prefer a creditor who shall take possession when he is known to be insolvent, and thus avoid the effect of the bankrupt law, because literally he has not made a transfer. That, certainly, would be a facile method of evading the scope and spirit of the law. In legal effect it was a transfer within the meaning of the law. It was a continuing act from the date of the authority to the taking possession, the last act being the consummation of the transfer, and in this instance the transfer giving a preference, the mortgagor being insolvent, and the mortgagees knowing the fact. It must be treated as if a mortgage were made of the after-acquired property at the time the mortgagees took possession. It was in substance, then, the case described in the 35th section, and as against the assignee of Eldridge, representing the general creditors, was void."

In view of the authorities above referred to, my conclusion is, that the mortgage in question, and the seizure of the property thereunder, were both acts of bankruptcy, the first as being a conveyance with intent to delay or hinder creditors; the second as operating as an unlawful preference.

TREAT, District Judge. Decision of register affirmed.

FOSTER, The. See Case No. 2,981.

Case No. 4,965.

FOSTER et al. v. AMES et al.

[1 Lowell, 313,[1] 2 N. B. R. 455 (Quarto, 147); 2 Am. Law T. Rep. Bankr. 65.]

Circuit Court, D. Massachusetts. March, 1869.

CHATTEL MORTGAGES—SALE OF MORTGAGED PROPERTY BY ASSIGNEE IN BANKRUPTCY—TRANSFER OF LIEN TO PROCEEDS — JURISDICTION OF FEDERAL COURTS.

1. The circuit and district courts of the United States have jurisdiction of a bill by an assignee in bankruptcy, to redeem a chattel mortgage made in Massachusetts.

[Cited in Giveen v. Smith, Case No. 5,467, Olney v. Tanner, 10 Fed. 104. Distinguished in Goodall v. Tuttle, Case No. 5,533.]

2. The district court has power to order chattels in the possession of the assignee, and on which there is a mortgage, to be sold free of the incumbrance, and the mortgagee's lien is then transferred to the proceeds of sale.

[Cited in Re Kahley, Case No. 7,593; Markson v. Heaney, Id. 9,098; Re Brinkman, Id. 1,884; Sutherland v. Lake Superior Ship Canal Railroad & Iron Co., Id. 13,643.]

[Cited in Clifton v. Foster, 103 Mass. 236; Markson v. Haney, 47 Ind. 35; Marston v. Stickney, 55 N. H. 385; Munson v. Boston, H. & E. R. Co., 120 Mass. 85.]

3. This power depends upon the true construction of the first section of the bankrupt act; and may be exercised notwithstanding the mortgagee has by his contract a right of immediate possession of the goods, and desires to avail of that right.

[Cited in Re Kahley, Case No. 7,593; Davis v. Anderson, Id. 3,623; Goodall v. Tuttle, Id. 5,533; Taylor v. Robertson, 21 Fed. 215.]

4. Such an order ought not to be passed when a mortgagee, whose title is admitted to be valid, would be injuriously affected, as where there is clearly no market value for the property, or not more than the amount of the mortgage.

5. The bankrupt court may in some cases order the assignee to expend money in finishing goods for sale, when it is clearly shown that a benefit must result to the estate, and that the work can be done within a reasonable time.

[Cited in Markson v. Heaney, Case No. 9,098.]

Bill in equity by the assignees of McKay & Aldus to restrain the service of a writ of replevin by mortgagees of machinery and other personal property. The bill charged

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

that the bankrupts were largely engaged as makers of locomotives, machinery, and other like articles, in Boston, and being insolvent, mortgaged all their personal property to the defendant Ames, as trustee for himself and the other defendants composing the firm of Page, Richardson & Company, October 17, 1868, to secure an antecedent debt, as well as future advances, and with intent to prefer the mortgagees who had reasonable cause to believe them insolvent; that the defendants laid claim to all or nearly all the assets from which a dividend could be realized, including unfinished locomotives, which in their present state were of little value, but which could be finished in a short time and at comparatively small cost, and would then be worth a large sum; that if carefully managed the assets would probably realize a handsome dividend, but if pressed for sale under the power in the mortgage would be sacrificed; that the said McKay & Aldus filed their petition in bankruptcy, December 15, 1868, and that on the day the plaintiffs were appointed assignees, the defendant Ames sued out of the circuit court the writ of replevin now sought to be enjoined, with intent to obtain immediate possession of the property, and forthwith to dispose of the same, which suit is irregular, because twenty days' notice thereof was not given to the assignees. On the same day that this bill was filed in the circuit court, the assignees filed a petition in the district court, praying that the unfinished locomotives might be finished and sold for the benefit of all parties interested, and that the mortgage to Ames might be declared void, &c. By consent, both cases were heard together upon affidavits addressed to the motion for a preliminary injunction. It appeared that the mortgagees had made advances in cash and by accommodation acceptances to the amount of about one hundred and fifty thousand dollars; that for the debt alleged to have been incurred before the mortgage was given, there was collateral security taken at the time it was contracted, which, at its supposed value, exceeded the amount of that part of the debt; and that all the advances were made under a written promise of full security by way of mortgage.

D. Foster and T. K. Lothrop, for plaintiffs.

1. The district court has jurisdiction to settle all controversies between the assignees of a bankrupt and persons claiming any lien or adverse interest whatever, and to order the property to be disposed of, leaving all incumbrancers their just claims against the proceeds. Ex parte Christy, 3 How. [44 U. S.] 292; Bill v. Beckwith [Case No. 1,406]; McLean v. Lafayette Bank [Id. 8 888]; In re Stewart [Id. 13,418]; In re Salmons [Id. 12,268].

2. The power should be exercised in this case, because it is clearly for the benefit of all parties that the property should not be sold in its present condition; and because it must be assumed on the hearing that the title of the mortgagees is at least doubtful.

3. The mortgagees have no right to foreclose excepting under the orders of the court of bankruptcy, nor to bring a writ of replevin without twenty days' notice.

B. F. Thomas and J. D. Ball, for defendants.

1. The affidavits show that our mortgage is valid. All the advances were made under a written promise for security, and we actually took it contemporaneously with each advance.

2. By the terms of the mortgage we have the right of possession; and section 25 of the bankrupt act gives the court power to order a sale of property in dispute only when it shall not have been taken from the possession of the assignee by process of law.

3. The court has no authority to permit the goods to be finished. They can only be sold. No section of the statute, and no rule of court, contemplates that the assignees shall carry on the business of the bankrupt. In England there was such a power, and it has been purposely omitted by those who drew up our bankrupt act. See 1 and 2 Wm. IV. c. 56, § 35; 12 and 13 Vict. c. 106, § 150, under which it has been decided that the objection of any creditor will avail to prevent the exercise of this right by an assignee.

4. Replevin is not one of those actions of which notice must be given, as is seen by comparing sections 14 and 25 of the bankrupt act and the law of Massachusetts, from which section 25 is taken. Gen. St. c. 118, § 54.

5. This cannot be a bill to redeem, because there is no equity of redemption in chattels. Gen. St. Mass. c. 151, §§ 4, 5: Taber v. Hamlin, 97 Mass. 489.

LOWELL, District Judge. It is admitted that either the circuit or the district court may entertain a bill by an assignee to redeem property mortgaged by the bankrupt. It is said, however, that there is no equity of redemption in chattels, but that the title becomes absolute immediately upon a breach, unless some remedy is given by statute; that in this case there should have been a tender of the amount due, according to sections 4 and 5 of chapter 151 of the General Statutes of Massachusetts, which is the sole mode of preventing a forfeiture. I am of opinion that there is such an equity: 2 Story, Eq. Jur. § 1031; Patchin v. Pierce, 12 Wend. 61; Slade v. Rigg, 3 Hare, 35; Wayne v. Hanham, 15 Jur. 506; Whitfield v. Parfitt, Id. 852. Nor does it appear to me that the statute remedy is exclusive. If the tender is not made, the legal estate is not revested in the mortgagor, but he may still

come into equity, at least when a tender was impossible, or when for any other reason, the remedy at law is inadequate, as in this case, in which the assignees show a necessity for marshalling the securities, even if the mortgage is wholly valid. See Dunn v. Massey, 6 Adol. & E. 479. Upon the remedy which may be had in the state courts, I speak with diffidence, but there is direct authority in this court to the point that the want of a tender required by statute is no bar to equitable relief here. Gordon v. Hobart [Case No. 5,609]. By section 14 of the bankrupt act [of 1867 (14 Stat. 517)] the assignee has all the rights of redemption which the debtor had; and it has been thought that he has more, and may redeem before the debt is payable, as the law of England has been held to be under the words "whenever payable." But that point does not arise in this case.

Taking this merely as a bill to redeem, a court of equity would hesitate to permit the mortgagee to sell the property immediately, since the delay will largely benefit the assignee, with no risk to the mortgagee, who in the mean time can diminish his debt by the application of other securities.

But the assignees contend that bankruptcy so far changes the remedies of the respective parties that they ought to have the right, which they deny to the other side, of selling the property under the direction of the court, holding the proceeds to answer the lien of the respondents; and that this is a case in which the court should give such a direction. Both the power and the expediency of its exercise are denied by the mortgagees.

Under the bankrupt law of 1841 [5 Stat. 440], the district court had power upon the petition of the assignee and notice to the mortgagees, to order a sale by the assignee which should pass an unincumbered title to the bankrupt's land, and the several mortgagees, whether assenting or not, were bound by the sale, and remitted to their rights against the proceeds. Houston v. City Bank of New Orleans, 6 How. [47 U. S.] 486; Ex parte Christy, 3 How. [44 U. S.] 292; Norton's Assignee v. Boyd, Id. 426. In the circuit court for Ohio, a bill was maintained by an assignee against several mortgagees of distinct parcels of land, and against persons claiming title to bank stock, to ascertain which transfers were valid and which voidable, and to redeem the former and annul the latter, all which was done; and when the case came to the supreme court the objection of multifariousness, which had been overruled in the court below, does not seem to have been brought up. McLean v. Lafayette Bank [Cases Nos. 8,885-8,889]; Buckingham v. McLean, 13 How. [54 U. S.] 150. The sixth section of the act under which these decisions were made is nearly identical with the first section of the present law, excepting that the latter adds words which seem to have been adopted for the purpose of recognizing those decisions, namely, that the jurisdiction shall extend "to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of the various funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors." And the cases cited in argument accord with this construction. It is urged that it is only on the application of the mortgagee that the property can be sold, and such appears to have been the practice in Massachusetts and in England. But in the latter country, it is merely a matter of practice which the courts can change at any time; and in the former, the language of the statute is that when a creditor holds a mortgage the property shall, "if he requires it," be sold, &c. These words are not found in our statute, section 20, and though the variation is slight, it is not unimportant in view of the practice under the act of 1841, by which the assignee might apply for the order of sale. Besides, section 20 must be construed with section 1, which, as we have seen, gives the district court power to order the sale, and to require the incumbrancers to follow the proceeds only. Of course such a sale ought not to be ordered when the mortgagee's title is admitted to be valid, and the sale will injure him, as where there is no market value, or not value enough for his own security. In such a case he ought to have the right to foreclose. In this case there appears to be both a serious dispute of title, and reason to believe that the mortgagee's rights will not be injuriously affected by the sale.

It was strongly urged that whatever power might otherwise exist, the 25th section clearly indicates that an adverse claimant may sue out replevin at any time before the court has ordered a sale. Such appears to be the effect of the latter part of that section, but it may perhaps be neutralized by the earlier part which gives the power to the court to order the sale, not only of property in possession of the assignee, but of all "which is claimed by him," and Mr. Justice Swayne has held, in the case cited in the argument, that the power does extend to property in the possession of an adverse claimant. Bill v. Beckwith [Case No. 1,406]. It may be observed in support of this view, that the Massachusetts statute, from which section 25 of our act is evidently taken, has not the words "or which is claimed by him," so that that law only authorizes the sale of property in the possession of the assignee; and then the proviso that the possession may be recovered by replevin at any time before the order of sale, is harmonious with the remainder of the section, and perfectly intel-

ligible, and these additional words may have been inserted in the bankrupt law for the very purpose of effecting a change. I do not decide this point, and have considerable doubt upon it. But I am clear that under the full powers given by section 1, I can order the sale of mortgaged property which is in the possession of the assignee, whether there is any dispute of title or not, and that section 25 does not take away this power, and that when the assignee has applied for such an order it is too late for the mortgagee to avoid it by replevin. What I doubt is, whether when the case is not one concerning liens and incumbrances upon property in the assignee's possession, but a mere adverse title asserted by a third person, the assignee can force a sale against the will of the adverse claimant.

Another important question which was very strenuously debated, was, whether the court can authorize the assignee to finish the locomotives at the expense of the estate. There is no express provision of the statute touching this point, but, upon careful reflection, I am satisfied that where a great advantage will result to the estate, and within a reasonable time, the assignee may be permitted to expend money in this way. I do not refer to trading; I cannot see that buying and selling as a trader can come within the scope of the assignee's duty, but his office being to sell and collect the assets, he may, by order of court, put the assets into a merchantable form, as by cutting timber, harvesting crops, and the like, and so of finishing unfinished goods, though not, perhaps, working up mere raw materials, unless under very peculiar circumstances. I yield to the argument that the necessary delay must not be at the risk of the mortgagee, and due order can be taken for his protection, by a deposit of money, or in some other way, if necessary.

Temporary injunction ordered in the suit in the circuit court. Reference of the petition in the district court to ascertain what part of the goods can be sold at once; what part, if any, can be advantageously finished, and within what time, and at what expense; what part of the goods is covered by the mortgage, and the consideration and validity of the mortgage. Leave given to all parties to apply to the court from time to time as they may be advised; and to the mortgagee to apply to have the proceeds of sales of goods embraced in his mortgage, paid over to him from time to time, on proper terms.

[NOTE. At a subsequent hearing in the district court, on the petition of the mortgagee, several questions were passed upon touching the validity of the mortgage, and the amount of the property conveyed by it. Case No. 323.]

FOSTER (BOSTWICK v.). See Case No. 1,682.

Case No. 4,966.

FOSTER v. The BRITISH OAK.

[7 Leg. Int. 203.]

District Court, E. D. New York. Dec. 20, 1850.

CARRIERS—DAMAGE TO CARGO—MEASURE OF DAMAGES.

[The measure of damages for negligence causing injury to cargo is the difference between the cost of the damaged goods and the proceeds received from the sale thereof.]

[This was a libel by Foster against the bark British Oak for damage to cargo.]

Plaintiff shipped on board the Sligo, in June, 1849, 8,075 empty corn bags, to be delivered at New York. He charges gross waste on the part of the master, both in the storage and transportation, and that in being discharged in New York the bags were wet, filthy and rotten, requiring immediate sale at auction. The owners of the vessel take issue only as to the extent of damages, and say they tendered $250, together with costs. The libellants being dissatisfied, went on with the suit.

It is clear, THE COURT said, that the master has been grossly negligent, and not only that, but the violation of contract was accompanied by indecent and aggravated misconduct, which can receive no countenance from the court; and there is no special claim to any abatement from actual damage. The cost was $706.55, from which deduct the proceeds at auction, $344.98; the amount tendered, $250,—leaving $111.57; for which, with interest after date of sale, decree ordered.

Case No. 4,967.

FOSTER v. CALLAWAY COUNTY.

[3 Dill. 200;[1] 1 Cent. Law J. 263.]

Circuit Court, W. D. Missouri. 1874.[2]

RAILWAY AID BONDS — CHARTER PRIVILEGE OF RECEIVING SUBSCRIPTIONS WITHOUT A VOTE OF THE PEOPLE.

1. The power conferred upon counties along the route of the Louisiana and Missouri River Railroad Company by the charter of that company of March 10, 1859, to subscribe for its stock without a vote of the people, was not taken away, as respects Callaway county, by the amendatory act of March 24, 1868 [Laws Mo. 1868, p. 97].

[See note at end of case.]

2. The provisions of the state constitution as to aid to railways, amendatory acts and titles to acts, discussed.

[Cited in Merriwether v. Saline Co., Case No. 9,485.]

This is an action upon coupons attached to bonds issued by the defendant to the Louisiana and Missouri River Railroad Company,

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 93 U. S. 567.]

or bearer, dated January 1, 1869. The answer denies the authority of the county court of Callaway county to issue the bonds, and this denial rests upon the grounds mentioned in the opinion of the court. The cause was submitted to the court upon the pleadings, an agreed statement of facts, and the record of the county court of Callaway county in relation to the issue of the bonds. The plaintiff [Thomas J. Foster] is admitted to be the owner of the bonds for value, without notice. The defendant insists that the bonds were issued to the south branch of the Louisiana and Missouri River Railroad Company, under the act of March 24, 1868, and not under the act of March 10, 1859, both of which are referred to in the opinion of the court; and the defendant further insists, as there was no vote of the people as required by the constitution of 1865, and as no part of what is claimed to be the "main line" of the road is within the county of Callaway, that the bonds were issued without authority of law, and are void. It is admitted that the county has paid interest on the bonds for 1870 and 1871, and has also paid a small part of the principal. It is also admitted that no vote of the people of the county was had authorizing the subscription by the county court. The bonds were made payable to the Louisiana and Missouri River Railroad Company or bearer, and contain the following recital: "This bond is issued by Callaway county by authority of an act of the general assembly of the state of Missouri, approved March 10th, 1859, as amended by an act approved March 24th, 1868."

J. D. Stevenson and Ewing & Smith, for plaintiff.

O. Guitar, T. C. Reynolds, Lay & Belch, Jeff. Jones, and Boulware & Flood, for the county.

PER CURIAM (DILLON, Circuit Judge, and KREKEL, District Judge, concurring). On the 10th day of March, 1859, the general assembly of the state of Missouri passed an act authorizing the organization of a railroad company under the name of the Louisiana and Missouri River Railroad Company, with a capital stock of three million dollars, and granting it power to "mark out, locate, and construct a railroad from the city of Louisiana, in the county of Pike, by the way of Bowling Green, in said county, to some suitable point on the North Missouri Railroad, intersecting said road between the southern limits of the town of Wellsville, in Montgomery county, and the northern limits of the town of Mexico, in Audrain county, thence to the Missouri river, at the most eligible point on the line the most suitable and advantageous as regards distance, grade, cost of road, and permanent value of same."

In this act of incorporation power was given "the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, and to invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county." No popular vote was required as a condition to the exercise of this power by the county courts. Before any subscription by Callaway county to the stock of the company, a number of the surveys of the route of the road had, according to the agreed statement of facts, been made, some of them running through Callaway county and others through Boone and Howard, and not touching any part of Callaway county. On the 16th day of January, 1868, the county court of Callaway county appointed Thomas B. Harris "commissioner and agent of the county of Callaway to take stock in and subscribe to the capital stock of the Louisiana and Missouri River Railroad Company the sum of five hundred thousand dollars, being five thousand shares of one hundred dollars each, of said capital stock, said subscription to be paid by the issue of county bonds, * * * as may be required by said company during the progress of the construction of said railroad from some point west or southwest of the North Missouri Railroad, on either the Wellsville or Jefftown routes, as surveyed through said county through the city of Fulton (in said county), and by way of New Bloomfield (in said county), as near as practicable to the Missouri river." This subscription of five hundred thousand dollars by the commissioner thus appointed by the county was made by him on the books of the company on the same day (January 16, 1868), as appears by a recital on the records of the county. Three smaller subscriptions were afterwards made by the order of the county court to the stock of the Louisiana and Missouri River Railroad Company. The Louisiana and Missouri River Railroad Company, it is agreed, subsequently to the said 16th day of January, 1868, "located and built the road now operating, running from Louisiana, in Pike county, to Mexico, in Audrain county, and located and graded throughout, and partially completed, the road running from Mexico to Glasgow (in Howard county), on the Missouri river, and completed the road now running and operated from Mexico, in Audrain county, by way of Fulton, in Callaway county, through Callaway county, to a point therein on the Missouri river opposite Jefferson City."

The constitution of the state of Missouri in force at the time of the passage of the act of incorporation of the Louisiana and Missouri River Railroad Company, on the 10th day of March, 1859, contained no provision restraining the legislature from authorizing subscriptions to railroads in any manner it saw fit, but the present constitution, which went into effect on the 4th day of July, 1865, contains this provision: "The

general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall consent thereto."

In reference to laws in force at the time of the going into effect of the present constitution of the state, it has this provision: "All statute laws of the state now in force, not inconsistent with the constitution, shall continue in force until they shall expire by their own limitations, or be amended or repealed by the general assembly."

In reference to the subject and title of laws, the present constitution has this provision: "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed."

A further provision of the constitution is: "No act shall be revised or re-enacted by mere reference to the title thereof, nor shall any act be amended by providing that designated words thereof shall be struck out and others inserted in lieu thereof; but in every such case, the act revised or re-enacted, or the act or part of the act amended, shall be set forth and published at length, as if it were an original act."

With these constitutional provisions in force, the legislature, on the 24th day of March, 1868 (Laws 1868, p. 97), which was after the subscription of $500,000 by the defendant, undertook to amend the original act of incorporation of the Louisiana and Missouri River Railroad Company, by increasing its capital stock, fixing the terminus of the road, authorizing the location and construction of a branch road, and granting power to carry into effect the provisions of the act. It may be proper, although not strictly necessary, to notice here one question discussed by counsel and by the state supreme court in the Saline county case (State v. County Court Saline Co., 51 Mo. 350), as to whether the act of March 24, 1868, is an amendatory act; and as to this point, it seems to us only necessary to state that the amendment of 1868, aside from the title, repeats nearly the whole of the original charter, verbatim, embodying in it new provisions only, thus literally complying with the constitutional provision cited, requiring an amendment to be "set forth and published at length, as if it were an original act."

Looking thus at the amendatory act, it cannot, as we think, be held that the legislature undertook thereby to create by special act a new corporation, which, under the constitution (article 8, § 4), it was prohibited from doing.

As to the constitutional provision requiring that an act shall not relate to more than one subject, and that expressed in its title, our opinion is that the mischief sought to be provided against was the passage of acts having no title at all, a false title, or mixing up matters incongruous and having no relation to each other. The whole of the amendatory act embraces but one subject when viewed with reference to the matter in hand, viz.: the building of a railroad, and this is sufficiently expressed in the title. With the question of the validity of the amendatory act, so far as it relates to counties south of the Missouri river, we have no concern, and pass no opinion, having to deal here with Callaway county, on the north side of the river, and in which a part of the Louisiana and Missouri River Railroad might, by the original charter of March 10, 1859, be located and built.

The question as to whether the legislature in 1868 had authority to amend the charter of 1859 would seem to be settled by the constitutional provision above cited in respect to amending statute laws, as expounded by the supreme court of Missouri in the case of State v. Cape Girardeau & S. L. R. Co., 48 Mo. 468, and the late case of State v. Greene Co., 54 Mo. 540. But we do not mean to be understood as holding that the power of amendment of charters would exist to the extent of conferring, by way of amendment, powers prohibited by the express provisions of the constitution of 1865.

Callaway county is undoubtedly on the line of the railroad as contemplated in the original charter, and hence the county court had the right to subscribe, provided any part of the road was within it. At the time of the county's subscribing the $500,000 stock under the original charter and prior to its amendment, some of the lines of the route of the railroad had, in fact, been run through Callaway county, as admitted by the agreed statement of facts.

The order of subscription speaks of paying out the bonds as the work of construction progresses through the county. The supreme court of Missouri has so repeatedly decided, under provisions such as those contained in the charter of the Louisiana and Missouri River Railroad, that the county courts had the right, unaffected by the constitution of 1865, to subscribe without submitting the question to the people, that it is not necessary to dwell upon the point, or do more than to refer to the late case of Smith v. Clark Co., 54 Mo. 58, in which the former decisions are cited and affirmed; and to the still more recent case of State v. Greene Co., 54 Mo. 540.

Another question discussed by counsel relates to the effect of the recital in the bonds, which were made payable to the "Louisiana and Missouri River Railroad Company," or bearer, that the same were issued in conformity to the act of the 10th day of March, 1859, and the amendatory act of March 24,

1868. Under our view, the amendatory act did not create a new corporation, and we are inclined to think that it did not take away the power of the county court to subscribe for the stock as conferred in the original charter of the company, and that it should not be held to do so as respects the bona fide holder of bonds which purported on their face to be issued under the authority of the charter. And this view finds a very strong support in the decisions of the supreme court of the state affirming the power of the counties along both the main line and branches, to subscribe for the stock under the provisions of charters antedating the present constitution, in the Macon, Sullivan and Greene county cases.

As to the amendatory act calling the road running through Callaway county the "South Branch," after the main subscription had been made to the Louisiana and Missouri River Railroad to aid in building a road surveyed and afterwards built through Callaway county, this cannot affect the bona fide holders of the bonds.

From the evidence and the original charter of 1859, it would appear that the road, as now built through Callaway county, was the main line, or, at least as much the main line as the line farther west, which does not touch Callaway county. The limitation in the charter of 1859 of the capital stock to three millions, scarcely sufficient to build a road of a hundred miles, the direction of the road from Louisiana by way of Bowling Green, crossing the North Missouri Railroad west of Wellsville and east of Mexico, thus narrowing down as it were the objective points, all indicate that the nearest place on the Missouri river was in the minds of the originators of the road, as well as of the legislature when it passed the charter.

We have adverted to the nature and effects of the amendatory act because these subjects have been largely discussed by counsel, and not because they are absolutely necessary to reach a conclusion in the present case. We place our judgment on this ground: The plaintiff is a bona fide holder of the bonds issued by the county. These bonds recite that they are issued by virtue of the power conferred upon the county by the original charter of the company of March 10, 1859, as amended by the act of March 24, 1868. The act of March 10th, thus recited, did give the power, and that power is not taken away by the amendatory act of 1868, but according to the decisions of the supreme court of the state, above mentioned, remains unaffected by the provisions of the constitution of 1865, requiring a popular sanction to such subscriptions. All of the subscriptions were made to the "Louisiana and Missouri River Railroad Company," the original corporation, and not to the branch mentioned in the amendatory act.

As there was legislative power in the county to make the subscription and to issue the bonds, and as the county court has exercised this power and issued the bonds which have found their way into the hands of the plaintiff, a bona fide holder for value, the decisions of the supreme court of the United States conclude the county from making the defense here attempted, and this whether the amendatory act be or be not void, and whether the county was or was not authorized to transfer the subscription to what is called the "South Branch," or to apply the money raised by the sale of the bonds to the building of that branch.

It may be further remarked that the record of the county court shows that the proceeds of the bonds issued by the county were applied to the building of a road substantially along the line to which the subscription was made on the 16th day of January, 1868; that the work progressed thereby and the bonds issued from time to time; that the minor changes in the line of the road were assented to by the county court; that the road passes through the entire body of the county, and is in full operation, and that two years interest and part of the principal of the bonds had been paid. Under these circumstances it seems to us that no one, familiar with the decisions of the supreme court of the United States upon the general question, and of the supreme court of Missouri to the effect that the power of the county court to subscribe without a vote of the people survived, unaffected by the constitution of 1865, can reasonably anticipate any but one result.

The case, in the aspect in which it is viewed by the defendant's counsel, presents some new questions, and it is certainly one of great moment to the county, as it involves in its consequences a liability of over half a million of dollars. We are relieved of much of the weight of responsibility we would feel by the consideration that our judgment is not final, and that the record can so easily be put in a shape to present the merits of the case for the decision of the supreme court of the United States. In our opinion the plaintiff is entitled to judgment.

Judgment accordingly.

NOTE. In the case of City of San Antonio v. Gould, 34 Tex. 49, it was held that the charter of a railroad company, which contained a provision that the city of San Antonio might subscribe to the capital stock of the road, and issue its bonds in payment of the same, was obnoxious to that provision of the Texas constitution (article 7, § 24) which provided that "every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title." But the ruling is in direct conflict with City of San Antonio v. Lane, 32 Tex. 405,—a suit upon the same securities,—where the reverse was held in a well-considered opinion. And in order to reach the result arrived at, it was necessary to overrule not only City of San Antonio v. Lane, but also the still earlier case of City of San Antonio v. Jones, 28 Tex. 19, where the same securities were likewise sustained.

[NOTE. On writ of error the judgment of the circuit court was affirmed by the supreme

court, Mr. Justice Hunt delivering the opinion, in which it was held that upon any reasonable construction of the language of the statute it embraces Callaway, which was one of the possible sites, and a site ultimately occupied in fact. Continuing, the learned justice remarked: "We are of the opinion, therefore, that the subscription actually made by the county of Callaway in January, 1868, was legal, and that the circumstance that the bonds were issued at a later date is an immaterial one. We are of the opinion, also, that the amendments of the charter, and the subsequent action by which the portion of road from Mexico through Callaway county, and under such amendments was made a branch road, and the portion from Mexico to Glasgow was called the 'main road,' and that the bonds were issued both under the act of 1868 and the act of 1859, if such were the fact, do not affect the case. The latter act is an amendment and continuation of the former, and refers to what was then termed a 'branch road.'" Mr. Justice Miller dissented. Callaway Co. v. Foster, 93 U. S. 567.]

FOSTER (CATLIN v.). See Case No. 2,519.

FOSTER (DRURY v.). See Case No. 4,096.

Case No. 4,968.

FOSTER v. ELLIS et al.

[5 Ben. 83.] [1]

District Court, E. D. New York. March, 1871.

CONTRACT FOR BUILDING A SHIP.

A contract for building a ship, or supplying materials for her construction, is not a maritime contract.

[This was a libel in admiralty by Charles H. Foster against Jacob H. Ellis and others.]

BENEDICT, District Judge. The decisions of the supreme court, in the cases of People's Ferry Co. v. Beers, 20 How. [61 U. S.] 400, and Roach v. Chapman, 22 How. [63 U. S.] 129, which hold that a contract for building a ship, or supplying materials for her construction, is not a maritime contract, furnish the law of this case. These decisions are binding authorities, which must be accorded their full and legitimate effect by the courts below, and they make it my duty to dismiss the present libel, with costs.

FOSTER v. GARDNER. See Case No. 1,673.

Case No. 4,969.

FOSTER v. GODDARD.

[Cited in The Alexandria, Case No. 178. Affirmed in Goddard v. Foster, 17 Wall (84 U. S.) 123. Nowhere reported; opinion not now accessible.]

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

Case No. 4,970.

FOSTER v. GODDARD.

[1 Cliff. 158.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1858. [2]

CONTRACTS — CONSTRUCTION — ACCOUNTING BETWEEN TRADERS—EXPENSES — TERMINATION OF CONTRACT — EFFECT ON EXISTING BUSINESS RELATIONS.

1. Under a written contract to pay one tenth of the net profits after deducting expenses "that may appertain to the goods themselves," the expenses of clerk-hire, advertising, and taxes were properly deducted from the gross amount. [See note at end of case.]

2. Under this contract the respondent, who had the exclusive control of the accounts of the business, refused to receive a sum less than he considered due from a debtor of the concern, after the claim was barred by the statute of limitations, declined to allow the complainant to receive his proportion of the sum offered, and withheld from him the means of adjusting such proportion. *Held*, that respondent must account for complainant's proportion of the sum thus offered.

3. Where, by the terms of a contract, the respondent had the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit to be charged or credited in the general account, *held*, that respondent should account to the complainant for the profits made by him on the sale of a vessel built expressly for the business, though never used in it, but sold for a large profit soon after being launched.

4. When the agreement under which a vessel was employed expired two months before her return, and while she was at sea, *held*, that her value must be computed, in determining the respective shares of the parties to the agreement, at what she was worth at the time of arrival, and not at the date of the expiration of the agreement, such appearing to be the intention of the parties, and that the burden was on the party contracting to pay a certain proportion of the value, to show that she was worth less at the time of her arrival than she was actually sold for two months after.

5. At the expiration of an agreement, by its own limitation, claims to a large amount arising from transactions under the agreement were still outstanding and uncollected. The respondent, one of the parties to the agreement, claimed that the master, in making up the account under it, should deduct the discount necessary to make the debts due equivalent to cash on the day the agreement expired, and that henceforth they were to be regarded as his property, and at his risk. *Held*, that the master properly declined to adopt this theory, and justly allowed the complainant his portion of the profits made after the agreement expired.

This was a bill in equity praying for an account of all the dealings between the parties, under two agreements, dated June 24, 1843, and May 7, 1849, respectively. The first agreement was set forth in the bill as follows:—

"This memorandum of an agreement entered into this 24th of June, 1843, by and between William W. Goddard, on the one part, and George J. Foster, on the other part, witnesseth: That said Foster engages to proceed at once in the ship Robin Hood direct

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 1 Black (66 U. S.) 506.]

to Valparaiso, and that he will there remain for the term of five years, and devote himself for the whole time exclusively to the management of said Goddard's business, such as the sale and purchase of cargoes, collecting freight moneys, procuring return freights, eliciting orders for the purchase and shipment of goods for the coast, effecting the sale of vessels, when wished, and collecting and forwarding all the information that may be obtained respecting the trade. In fine, to transact any and all business that may be required of him by said Goddard, in strict accordance with his instructions, whose interest he is to care for and protect from frauds, impositions, false and unjust charges, and also extravagant expenditures of the shipmasters, to the best of his ability; he is also to give to each vessel the greatest possible despatch that may be consistent with the owner's interest. In consideration of which, said Goddard engages that said Foster shall, at the expiration of five years, be entitled to one tenth of the net profits of his business in that trade, after deducting interest at the rate of six per cent. per annum on the capital invested, and all costs and expenses of whatever name and nature that may be incurred, both at home and abroad, in sailing, victualling, manning, and keeping in repair the vessels employed, including all port charges, as also the actual expenses that may appertain to the goods themselves, including the cost of said Foster's living, which is not to exceed six hundred dollars per annum. And, furthermore, said Goddard has the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit attendant thereon to be charged or credited in the general account. The vessels now designed for the trade are the ship Robin Hood and bark Roscius, and are valued, the Robin Hood, at ten thousand five hundred dollars, cash, at the completion of her last voyage; and the Roscius, at eight thousand dollars, cash, on the completion of her present voyage. It is also understood that said Foster's interest of one tenth is liable to the full extent for all the risks and casualties in the business attendant upon the goods and vessels. It is furthermore agreed that said Foster shall be entitled to a compensation of one thousand dollars per annum, in lieu of his share of the profits, should it fall short of that amount; it is understood, however, that this is not in addition to his share of the profits, and that the profits of the business are not to be abstracted until the expiration of the five years agreed upon. Said Foster is also hereby authorized to call to account and to displace any and all masters of vessels that may be sent out by said Goddard, and replace them with others, should he find it expedient so to do. In witness whereof we have hereunto set our hands and seals."

Under this agreement the complainant alleged that he proceeded to Valparaiso, where he continued to reside during the time limited therein, and well and truly performed all things in said agreement provided to be done by him. The general mode of conducting the business was by adventures and shipments of merchandise, procured at Boston by defendant, and consigned to complainant, by whom the merchandise was sold, and the proceeds invested in other merchandise which was consigned to defendant, who sold the return cargoes; by whom, also, books and vouchers were kept, showing the exact profit and loss on each adventure. At the time limited for the existence of said agreement there was due the complainant, and in the hands of the respondent, as alleged in the bill, a large sum, which, for the accommodation of the respondent, was allowed to remain in his hands, without the rendition of any account. The second agreement entered into between the parties was set forth as follows:—

"This memorandum of an agreement entered into this 7th of May, 1849, by and between William W. Goddard, on the one part, and George J. Foster, both of Boston, on the other part, witnesseth: That said Foster engages to proceed at once to the west coast of South America, and that he will devote his whole time in those parts, as also in Mexico and California, exclusively to the management of all said Goddard's business in those countries, such as sale and purchase of merchandise and any other property, collecting freight moneys, procuring freights and consignments of goods, eliciting orders for the purchase and shipment of property, investing money, drawing and negotiating bills of exchange, and forwarding all the information that can be obtained respecting the trade; in fine, to transact any and all business that may be required of him by said Goddard, in accordance with his instructions and best interests, which he is also to care for and protect from impositions, unjust charges, and also extravagant expenditures of the shipmasters, to the best of his ability. In consideration for which, said Goddard engages that said Foster shall on his return be entitled to one fourth part of the net profits of his business in that trade that he (said Foster) shall have conducted to completion, after deducting interest on the capital furnished by said Goddard, as also all costs and expenses of whatever nature that may be incurred both at home and abroad in prosecuting the business, including the expense of sailing and keeping in repair the vessels employed, together with the port charges, as also the cost of said Foster's living, which is not to exceed one thousand dollars per annum; and, furthermore, said Goddard has the right of purchasing, chartering, freighting, and selling the vessels designed for the trade at his option, the profit or loss attendant thereon to be charged or credited in general account. The vessels

now designed for the trade are the ships Crusader and Harriet Erving, which are to be charged in account, the former at the value that may be agreed upon between William W. Goddard and Samuel Goddard, in settlement of their account; and the latter, at the cost of construction and equipment when new, abating nothing for the use of the ship for her present and first voyage. It is understood that said Foster is to leave in hands of said Goddard, bearing interest, what funds he may have,—less two thousand dollars, to be paid him before leaving this country,—and that neither the same nor any portion of his profits shall be abstracted until he shall see fit to withdraw from the present arrangement, which he is at liberty to do at any time, by giving said Goddard so much notice, that any voyage he may have commenced previous to receipt of such advice shall receive the full benefit of all said Foster's services to its final accomplishment, and not otherwise. It is also understood, that said Goddard has the right to annul this agreement whenever he may choose to do so; and, furthermore, that said Foster is liable to the full extent of his interest and means for all the losses that may be made in this business, as also for all the risks and casualties attendant thereon. Said Foster is hereby authorized to call to account, and to displace, any and all masters of vessels that may be sent out by said Goddard, and to replace them with others, should he find it expedient so to do."

Under this second agreement the complainant proceeded to the west coast of South America, and there conducted the portion of the copartnership business provided for him to do, until the 31st of September, 1850, when he terminated the agreement in the manner therein provided. The business under this contract was conducted in the manner similar to that under the first, the accounts and vouchers being in the hands of the respondent, who had been, by the complainant, repeatedly requested to effect an adjustment, and furnish the complainant an account of the profits of the business. The cause was referred to a master, to take an account of the dealings and transactions of the parties under the agreements, and to state balances. After the reference to the master, the complainant, by leave of court, filed an amendment to the bill, and the respondent filed his answer to the same. An order was also passed by the court, that the amendments to the pleadings should be submitted to the master to whom the cause had been previously referred, to state the accounts with the same powers, and in as full and perfect a manner as if the amendment had been introduced prior to the first order of reference.

The material portions of the master's report were as follows:—

"The first disputed item is a claim made by the complainant to a share in the profits realized by the respondent upon a sale of the ship Valdivia. This was a new ship, built under a contract made by the respondent, and she was launched on the 15th of October, 1846, and was sold by the respondent to the United States government the 7th of December, 1846, at a profit. The validity of this claim depends upon the construction to be given to the particular stipulations upon the subject in the first agreement. She was never actually employed in the business of this trade. On the other hand, there is evidence tending to prove that she was originally contracted for, built, and designed for this trade; that the respondent had engaged a part of her outward cargo; that these facts were communicated by him to the complainant; and that, under instructions from him, the complainant had procured a portion of her first return cargo. But she was sold before any cargo had been laden on board of her at Boston. It is contended by respondent, that complainant is only entitled to a share of the profits of such vessels as were actually employed in the trade, and not of those which might have been designed for the business, but not actually employed in it; that, although the respondent may have intended the Valdivia for this trade, yet he abandoned that intention before carrying it into effect, and that the agreement of June 24, 1843, did not restrict him from pursuing business on his private account. The language of this contract is, that the respondent may purchase, sell, or charter any vessel designed for this trade, and any profit or loss attendant upon such purchase, sale, or charter is to be credited or charged in the general account. If the respondent purchased or sold any vessel designed for this trade, an interest was expressly given to the complainant in the results of that transaction. Whatever was designated for use and sale, and set apart, became a part of the common stock. That this language was here used in its natural and obvious sense will appear from a reference to the succeeding provision in the agreement, viz.:—'The vessels now designed for the trade are the ship Robin Hood and bark Roscius, and are valued, the Robin Hood at $10,500 cash, at the completion of her last voyage, and the Roscius at $8,000 cash, on the completion of her present voyage.' At this time, the Roscius, so far from being actually employed in the joint business, was then absent upon a different voyage. She was, however, agreed upon and designated for this trade, and her value was fixed upon the completion of her then present voyage. It seems to me, therefore, upon every view of this contract, that the construction for which the respondent contends that the complainant had an interest only in the vessels actually employed cannot be maintained.

"Crusader's second voyage.—Complainant claimed, in the next place, that he should be

credited with a share of the profits of the Crusader's second voyage. His engagement was for the term of five years after his arrival in Valparaiso, which expired October 3, 1848; he was to receive one tenth of the profits of the business for the same period, or the sum of $5,000, at his election. He in fact remained in Valparaiso until November 30 or December 1, 1848, employed, as he claims, in the business of the respondent. The agreement was for a fixed and definite period, and it makes no provision for compensatory services rendered after its expiration. If the complainant rendered any services after October 3, 1848, he did not render them under this agreement, for it expired by an express limitation at that date. It seems to me, therefore, that he cannot claim by virtue of this agreement an interest in a voyage which was not completed until more than three months after October 3, 1848, as compensation for any services rendered by him after that date. It was competent, however, for these parties to make an additional agreement covering a period not embraced within the original contract, and the evidence clearly shows that they have so done. It must be conceded that the respondent had no right to call upon the complainant for his services for a single day beyond October 3, much less for a period of two months; neither is it very probable that the latter would have gratuitously rendered such services. Upon this point, I find, as matter of fact, that the respondent did request and did receive of the complainant the benefit of his services after October 3, 1848, and particularly in reference to the second voyage of the Crusader, upon the agreement, if not express, yet clearly implied and well understood, that the latter was to share in the profits of this voyage. It was competent for the parties to make an additional agreement, and they have done so; but I cannot acquiesce in the suggestion of complainant's counsel, that it was competent for the parties subsequently to agree that a certain voyage begun before the agreement ended should be deemed to be within the original contract, which would not have been otherwise embraced in its terms,—thus giving to the contract a construction and effect which by law it would not have.

"The amount to be credited for the sale of the Charlotte.—The Charlotte was sold by the respondent, in February, 1849, for the sum of $23,000. In the first account filed by him in this case, he credited the business with that sum, and charged commissions on that sum for effecting the sale. The respondent now asks to reduce that credit to the sum of $16,000, which he alleges was the true value of the vessel on October 3, 1848, and alleges that the complainant is only entitled to a credit of her value upon that day, when the agreement of 1843 expired. On October 3, 1848, the Charlotte was upon her fourth voyage, having left Valparaiso, September 9, and arriving in Boston, December 5, 1848. In the accounts filed by the respondent in this case, he has credited the complainant with a share (one tenth) of the profits of this voyage. It has thus been treated by the respondent as embraced within the agreement, although the voyage did not terminate until December 5, 1848. I can draw no other inference, from the fact that the respondent himself has thus credited the profits of this voyage, than that, by common consent, this voyage was taken and agreed to be within the first agreement. On the 3d of October the Charlotte was at sea, engaged in this voyage for the common benefit, and her service was not ended until December. And therefore, until the completion of that voyage thus prosecuted for the joint benefit, she was by the express terms of the agreement at the joint risk. From this consideration it seems to me clear that the period for her valuation must be deemed to have been postponed until the termination of this voyage. The Charlotte arrived the 5th, and was probably discharged about the 20th, of December. According to the testimony the demand for California vessels began in December, 1848, and the witness advertised one about the 10th of December. The Charlotte was sold in February, 1849. There is no evidence before me that her value on December 5th or 20th was not about the same as in the succeeding February. Respondent credited the amount received on the sale in February, and charged commissions thereon. I am of the opinion, therefore, that no sufficient reason has been shown for disregarding the credit originally given for the sale of the Charlotte, and that this item must stand as originally credited in the first account filed by the respondent.

"New England Worsted Company's account.—The respondent in his account has charged the general account with a balance due from the New England Worsted Company, under date February 28, 1848, $2,173.04. The complainant objects to this item, and claims that there should be deducted from it the sum of $1,789.89, which, as he avers, the New England Worsted Company were willing to pay, and which the respondent was bound to receive.

"The facts proved are as follows:—The company were charged, on the books of the respondent, with the sum of $2,173.04 on the balance of an account due for wool; but the amount due was in dispute between them. In 1850 or 1851, the company tendered in payment about $1,500, which he declined to receive. Nothing further was done by either party, until January, 1857, after the claim had been outlawed three years, when the company offered the sum of $1,789.89, but the respondent refused to receive it, and also declined to permit the complainant to receive his proportion of that sum. It is contended by the respondent that he had a right

to conduct his own business, in his own way, being responsible only for a want of good faith, and that he was neither bound to accept a sum less than what he believed to be due, nor to institute a suit to recover what he claimed; and that, if any loss has thereby occurred, it is properly chargeable to the business. The management of the business, including the collection of the accounts, was under his absolute control; and in conducting it he was responsible, I think, only for the exercise of good faith and ordinary diligence. He was not bound to accept a sum less than what he believed to be due; and if he had instituted a suit to recover the full amount, the complainant would undoubtedly have been bound by the result. But was he at liberty to do neither? Moreover, in January, 1857, when the New England Worsted Company offered to pay the sum of $1,789.89, Goddard had no legal claim whatever upon them; for he had already allowed his right to recover the original demand, or any sum, to be barred by the statute of limitations for three years. If under these circumstances he chose to decline the sum of $1,789.89, he voluntarily subjected himself to the loss; but he could not in good faith compel the complainant, against his expostulations, to share it with him. In my opinion, therefore, the sum of $1,789.89 should be deducted from the item in dispute.

"Rent, taxes, clerk hire, &c.—The respondent has charged in his account, under both agreements, certain items for store rent, taxes, clerk hire, and advertising, paid by him, as he claims, on account of the joint business, and which should be allowed. The complainant disputes these charges; and the first question is, whether they are to be considered in ascertaining the complainant's share of the profits. How far these charges are maintainable under the first agreement, I have found to be a question of difficulty in view of the provision upon that subject. By the terms of the contract the parties have, as it seems to me, expressly provided that, so far as the complainant's share is concerned, the profits are to be ascertained by deducting—1st. The interest on the capital invested (not the interest and taxes). 2d. All costs and expenses of sailing, victualling, manning, or repairing the vessels employed, including port charges. 3d. The actual expenses that may appertain to the goods themselves. 4th. The cost of the complainant's living, not exceeding $600 per annum; and that no expense which does not belong to one or the other of these clauses can be included. Under this view, I incline to the opinion and do report that the charges for clerk hire, for taxes on the capital employed, and for advertising the business generally, ought not to be allowed. As to store rent, so far as the store was procured or occupied for the storage of the goods, the charge is proper, but beyond this it must be disallowed.

"Third voyage of the Harriet Erving.—It is said by the respondent that the sales of this cargo were not completed until long after January 1, 1851; that they were made by Alsop & Co. after the complainant became a member of that firm; that one of its articles was, that no partner should be interested in any other business; and that he as such partner received his share of the commissions upon these identical sales. It is argued that the complainant never had any interest in this voyage, or, if he had, that he forfeited the same, because he was entitled only to a share of the profits of such business as he should conduct to completion. These suggestions deserved, and I have endeavored to give them, the most careful consideration. The duties which the complainant was to perform are stated in the agreement with considerable particularity. According to the arranged course of business, the merchandise shipped by the respondent to Valparaiso for sale was placed in the house of Alsop & Co., who made the sales upon a guaranty commission, with the assistance and under the general control of the complainant, who acted under instructions from the respondent. It thus appears, that, while aiding in the sales of the outward cargoes formed a material, it by no means constituted the main part of the duties devolving upon the complainant under the agreement. The evidence very fully shows that it was not the habit nor according to the intention of these parties to force immediate sales of the entire cargoes, either by auction or otherwise. So that, although the larger portion of each cargo was generally disposed of within a few months—often a few days—after its arrival, yet in most, if not in all cases, some portion of it remained undisposed of for one, two, or even three years. It must, therefore, have been perfectly well understood by them, that, whenever this agreement should be terminated, more or less would remain to be done in disposing of the outward cargoes. Respondent, in his letter of March 18, 1846, wrote thus: 'Do not, however, suffer our goods to be forced upon people at a sacrifice. My object is to supply the market at the highest point, and deeply mortified should I be to learn that another had afterwards obtained better prices.' The business seems to have been conducted subsequently in accordance with these instructions. Whether the respondent, under any circumstances, after the termination of the agreement upon notice, could have required the complainant to remain in Valparaiso and devote himself, to the exclusion of all other business, for one, two, or more years, as the case might be, in disposing of the residue of cargoes, at such prices as the former might prescribe, upon pain of forfeiting all his interest in such cargoes, may admit of grave doubt. He might, perhaps, reasonably have required that he should have the benefit of the complainant's services in substantially disposing of any such residues, and that the

latter should not engage in any other business which would conflict with his duty in this respect. Complainant was indeed bound to conduct to completion the business of this voyage, by superintending the sale of the cargo; but, their relations having terminated in all other respects, it is difficult to perceive why that duty might not have been fully performed by him, in letter and spirit, although he had become, without the assent of the respondent, a member of the house of Alsop & Co., or of some other firm. What remained for him to do under this agreement was this: to aid and superintend Alsop & Co. in effecting sale of the residue of the cargo. What the respondent had a right to require was, that he should perform this service faithfully, and that he should enter into no engagements that would be inconsistent with its performance; and therefore it is, that I do not perceive why the circumstance of his joining a mercantile house, after the termination of his agreement, although before the last cargo was entirely disposed of, would necessarily involve a violation of his agreement, or a forfeiture of his rights. If the respondent could have exacted more than this, it certainly was not practically necessary for the protection of his interest, and it is not strange that he should have waived it. That he did waive any such right, if it existed, is, I think, clearly proved. Upon the 13th of April, 1850, the third voyage of the Harriet Erving had been projected, and the respondent must have known then, as well as in June, July, and August, during which months the evidence shows much correspondence relating to this voyage, that, according to all former experience, some portion of her outward cargo would remain to be sold after December 31, 1850. Knowing this, on the 13th of April, in reply to the complainant's letter of February 22, announcing his intention to terminate the agreement, January 1, 1851, and then to join the house of Alsop & Co., he not only assented to this course but warmly approved of it. It was after this expression of assent that the voyage in question was undertaken, and that most of the services in reference to it were rendered. Let it be observed that under the agreement of 1849, then subsisting, the complainant could be called upon to transact no business of which he was not to share the profits. He was called upon by the respondent to transact this business, and he did it. I think that the cordial assent which the latter gave on April 13th to Foster's joining the house of Alsop & Co., January 1, 1851, fairly carried with it an assent that he might, after becoming a member of that firm, complete what would remain to be done under this voyage. It is now too late for him to object, especially as, after giving that assent, he required and accepted the services of the complainant as to this voyage,—services which he was not bound to render, and which the respondent could not require, except upon agreement that he was to share in the profits. The argument pressed against the complainant's right to share in the profits of the Harriet Erving applies as well to every preceding voyage, for the sales of none of them were completed on January 1, 1851, when he joined the house of Alsop & Co. But the same answer applies to all: either, 1st, that, after the termination of the agreement by notice, the complainant was at liberty to engage in other business, provided that he, at the same time, faithfully performed what remained for him to do in completing the sale of the residues of cargoes; or, 2d, if the agreement authorized the respondent to require of the complainant that he should abstain from all other business until the sales of all residues of cargoes were absolutely completed, yet that he waived this harsh and oppressive privilege, and consented to his joining the house of Alsop & Co. As to the suggestion that the complainant, after becoming a member of the firm of Alsop & Co., was not at liberty to engage in other business, that would seem to be a matter between him and his partners, rather than between him and the respondent; but a complete answer to it, as well as a sufficient reason for the respondent's ready assent to the arrangement, are found in the previous connection that had existed between all these parties in this business, and in the fact that, in effecting the best sales possible of this cargo, their interests were identical.

"Mode of making up the accounts, &c.—The respondent claims that the accounts are to be made up as cash on the 3d of October, 1848, the day when the first agreement terminated, and on the 1st of April, 1850, or the 1st of January, 1851, according as it may be determined upon which of said days the second contract terminated. Accordingly, to accomplish this, in crediting the account with the outstanding claims due under the two contracts, but running to maturity, he proposes to deduct the amount of discount necessary to make them equivalent to cash on the 3d of October, 1848, and April 1, 1850, or January 1, 1851, as the case may be, and then to charge the amount with interest ever afterwards on such discount, as if the cash had actually been paid by him. No such discounting of the claims for cash actually occurred. In my opinion this is not the proper mode of making up the accounts, for two reasons. 1st. The contracts do not provide for this mode of accounting and settlement, but, as it seems to me, contemplate the contrary. If the respondent may now make up the account on that theory, then certainly the complainant, on the days when these contracts severally terminated, had the right to require that the former should assume the risk that all debts due to the concern, amounting as it is said in the whole to over four hundred thousand dollars, would be paid, and he was then entitled to an absolute credit for these sums,

deducting the discount. So that if every dollar had been lost or uncollectible, the complainant would still have been credited with the full amount. The propositions cannot be dissevered. If the respondent may now assume that he took this risk, then certainly Foster could have required him to take it. But the written contracts, as well as the conduct of the parties, contradict this view. 2d. In the second place, if the respondent had the right, or was bound to assume and to give credit to the concern for all outstanding claims, as cash on the day when each contract terminated, and to settle on that basis, he did not do it, but refused so to do. He advanced no money, he discounted no credits. Having refused or neglected to come to an account, until all the claims had matured, and until the filing of this bill, I do not perceive upon what equitable or legal principle he can now assume that he has done what he refused to do, or be entitled to any such benefit as he now claims. The period to which the account must be made up under both contracts is the filing of the bill.

"Recapitulation.—The master finds and reports that under the original and amended bill the complainant is entitled to recover: 1st. The balance due him under the first and second agreements (exclusive of the second voyage of the Crusader and the third voyage of the Harriet Erving), as per item No. 1 ($41,581.56), $41,581.56. 2d. One tenth of the profits of the second voyage of the Crusader, as per item No. 3 ($4,005.72), $4,005.72. 3d. One fourth of the profits of the third voyage of the Harriet Erving, as per item No. 2 ($21,943.15), $21,943.15."

To which the respondent alleged the following exceptions:—

"First exception.—For that the said master has not allowed to the said respondent, and has not permitted him to debit the business of this respondent, carried on by him under the contract dated June 24, 1843, sundry sums of money paid by the said respondent in the regular and usual course of his said business, for clerk hire, taxes, and advertising, to wit, thirty-eight hundred and thirty-eight dollars and seventy-eight cents for clerk hire, seventeen hundred and eleven dollars and ninety cents for taxes assessed upon the property employed in said business, and three hundred dollars paid for advertising his said business; the said sums amounting in the aggregate to fifty-eight hundred and fifty dollars and sixty-eight cents, all which were proper expenditures in the course of the said business.

"Second exception.—For that the said master has erroneously charged this respondent with the sum of seventeen hundred and eighty-nine dollars and eighty-nine cents, the amount of a loss made in the prosecution of the business aforesaid, by a sale of goods to the New England Worsted Company, for which they have not paid, but refuse to pay.

"Third exception.—For that the said master has allowed to the complainant, under the contract of June 24, 1843, one tenth of the profits made by this respondent in the construction and subsequent sale of a vessel commonly called the Valdivia, which vessel was not employed in, or put into, the business of this respondent, carried on under the contract aforesaid.

"Fourth exception.—For that the said master, in taking an account of the business of this respondent to which the contract of June 24, 1843, refers, has fixed the value of a vessel called the Charlotte as it was at a period of time some six months subsequent to the expiration of the five years mentioned in the contract of June 24, 1843, whereas it should have been fixed at its value at the time of the expiration of said five years.

"Fifth exception.—For that the said master has allowed the complainant one tenth of the profits made by this respondent by the use and employment of a vessel called the Crusader, and its cargoes, during her second voyage, which was not sought to be recovered by the bill of the complainant as originally filed or as amended, and which was not and is not embraced by or in the contract of June 24, 1843.

"Sixth exception.—For that the master, in taking the accounts under the contract of June 24, 1843, did not ascertain the value of the assets which had been employed in the business to which the contract refers, at the expiration of the five years in the said contract mentioned, as should have been done in order to ascertain the profits in which the complainant under said contract was entitled to share, but, in taking the said accounts, erroneously allowed the complainant a portion of the profits made by the respondent in the prosecution of his business after the 3d of October, 1848, at which time the interest of the complainant in the business of the respondent altogether ceased.

"Seventh exception.—For that the said master, in taking the said accounts, has allowed the complainant a portion of the interest received by the respondent for the use of the money of this respondent subsequent to the 3d of October, 1848.

"Eighth exception.—For that the said master has allowed to the complainant, under the contract of the 7th of May, 1849, a portion of the profits made by the respondent in the prosecution of his business and trade connected with Valparaiso, which was transacted and carried on by this respondent after the relation established by said contract between the complainant and the respondent had ceased, and the rights and interest of the complainant in the business of this respondent had altogether determined, which rights and interest did determine on or about the 1st of April, 1850, which business and trade were not conducted to completion by the said complainant, and which did not receive the full benefit of all the services of the complainant to its final accomplishment.

"Ninth exception.—For that the said master did not ascertain the profits made by the respondent in his Valparaiso trade, to which the contract of the 7th of May, 1849, refers, by ascertaining the value of the assets which had been employed in the trade, as it existed at the expiration of the time during which the complainant had an interest in the business and trade of said respondent under the said contract, as the said master should have done.

"Tenth exception.—For that the said master has allowed the complainant one fourth of the profits made by this respondent in the use and employment of a vessel called the Harriet Erving, and its cargoes, during her third voyage, which was not sought to be recovered by the complainant in his original or amended bill, which vessel and cargoes, and the profits resulting therefrom during the said voyage, were not embraced in the contract of May 7, 1849, nor by any contract or agreement made by the respondent with the complainant, but were solely and exclusively at the profit and loss of the respondent.

"Wherefore the said respondent doth except to the said master's report, and appeals therefrom to the judgment of the court."

The argument was upon these exceptions.

C. A. Welch, and E. D. Sohier, for complainant.

Watts and Peabody, for respondent.

CLIFFORD, Circuit Justice. Ten exceptions are filed by the respondent to the master's report, which will be considered in the order in which they were made. In the first place, the respondent complains that he was not allowed by the master to debit the assets on hand, under the first contract, with the sums paid by him for clerk hire, taxes upon the property, and for advertising the business. Those expenses amount in the whole, as alleged by the respondent, to the sum of five thousand eight hundred and fifty dollars and sixty-eight cents, and it is insisted by the respondent that the decision of the master on this point was incorrect. Net profit was the basis prescribed by the contract, by which the amount of the complainant's compensation was to be ascertained. If there had been no net profit, then he would have been entitled to no compensation, except the six hundred dollars allowed for his support. As a general rule, the term "net profits" may be defined to be the gain made by the merchant in buying and selling goods after paying all costs and charges for transacting the business, and such it is insisted by the respondent is the sense in which the words are used in this instrument. By the terms of the contract, the complainant was entitled, at the expiration of five years, to one tenth of the net profits of the business in that trade, and by necessary implication the remaining nine tenths of the profits belonged to the respondent. Were this the whole of the contract, it would unquestionably follow, as is contended by the counsel for the respondent, that each of the nine parts of the profits belonging to the respondent ought to be equal to the one tenth part allowed to the complainant. On the part of the complainant it is insisted that the words "net profits," as used in this contract, must be understood in a special sense, and that they mean the gain made in the business after the expenses therein specially enumerated have been deducted. Suppose it to be so for the sake of the argument, it still remains to ascertain whether the charges in question are not properly embraced in the expenses appertaining to the goods themselves, which it is admitted are specially enumerated among those which are to be deducted. Unless clerk hire and expenses for advertising fall within that class of expenditures, it is difficult to see what terms short of the actual enumeration of those expenses could have been employed to accomplish that purpose. Expenses for clerk hire and advertising are as much incident to the transaction of mercantile business as those incurred for insurance, "freight," and storage, and the merchant might as reasonably calculate to procure goods without cost, as to expect to keep them on hand for sale without their being subject to taxation. Interest on capital was, doubtless, enumerated, on account of the special character of the arrangement, to exclude the conclusion that might otherwise follow, that the capital for the business was to be furnished by the respondent without any such allowance, and the same remark applies also to the costs and expenses in victualling, manning, and sailing the vessels employed, and keeping them in repair. Necessary expenses of that sort would arise at home as well as abroad, and hence it was provided that all such expenditures should be deducted from the gross proceeds of the business, in order to ascertain the net profits, to diminishing the usual signification of that term. For these reasons the first exception to the master's report is sustained.

Complaint is made, in the second place, by the respondent, that the master has erroneously charged the business with $1,789.89, being the amount of a loss made in prosecuting the same, for which payment has not been made. Credit had been given to the debtors owing this sum to the amount of $2,173.04 on the sale of a certain quantity of wool; but the amount actually due was in dispute. They tendered to the respondent, in 1850 or 1851, the sum of $1,500, which he declined to receive. Nothing further was done by either party until January, 1857, which was three years after the demand was barred by the statute of limitations. At that time the debtors offered to pay the sum charged by the master to the general account, but the respondent refused to accept it, and also declined to allow the complainant to receive the proportion belonging to him, although

the complainant was present and requested permission so to do. Mere omission to collect, without more, would not render the respondent liable for a claim of this description; but the claim in this case does not rest on that fact alone. He not only suffered the demand to be outlawed, but when the debtors voluntarily came forward after the limitation had taken effect, and offered to pay nearly the whole amount of the principal, he refused to receive it, and by virtue of his exclusive control over the accounts withheld from the complainant the means to adjust the proportion belonging to him. Suffice it to say on this point, that I am of the opinion that the decision of the master was correct, and for the reasons that he assigned for his conclusion. Both of the preceding exceptions refer to the business transacted under the first agreement, and so does the third, which will now be considered.

It is to the effect that the master has improperly allowed to the complainant one tenth of the profits made by the respondent in the construction and subsequent sale of the vessel called the Valdivia, which he alleges was sold by him for his own benefit. By the terms of the contract, the respondent had the right of purchasing, selling, and chartering the vessels designed for this trade, at his option; and it was expressly stipulated that the loss or profit attendant thereon should be charged or credited in the general account. According to the report of the master, the allegation that this vessel was never employed in the business is technically correct, but she was constructed under a contract made by the respondent, and was in fact built and designed for that purpose, and by the express words of the contract, the interest of the complainant to the full extent of his one tenth was made liable for all the risks and casualties in the business, whether attendant upon the goods or the vessels. As early as the 17th of March, 1846, and before the vessel was constructed, the respondent wrote to the complainant, informing him that he had made the contract for her construction, expressing the hope, at the same time, that she would make the outward passage in sixty-five or seventy days. On the 22d of August, 1846, he wrote again, to the effect that one of the masters employed in the business was waiting for this vessel, adding, in the same letter, that she would be despatched in November. His next letter is dated October 12, 1846, in which he informs the complainant that the vessel would be launched on the following day, saying, "She will be our next ship." In that letter he also informed the complainant that he had engaged a part of her outward cargo, and in a letter dated on the day following he instructed the complainant not to sell anything to arrive by this vessel. During the period covered by this correspondence, and before any intimation had been given by the respondent of any different arrangement, the complainant, on the faith of these letters, had procured a part of her return cargo. Another vessel, however, was sent in her stead, and on the 15th of January, 1847, the respondent wrote to the complainant to the effect that he expected the complainant would be surprised, and perhaps disappointed, in seeing another vessel instead of the new ship, and admitting that he had been tempted to sell her for some $9,000 or $10,000 advance above cost. On these facts, and others which need not be reproduced, the master in this case found that the vessel in question was built and designed for this trade, within the meaning of the contract. It appears to the court that the finding is correct, and for the reasons assigned by the master, which need not be repeated. Accordingly the exception is overruled.

In the first account filed by the respondent, he credited the business with the sum of $25,000 received by him, for the sale of the vessel called the Charlotte, and charged commissions on that sum for effecting the sale. That sale was made in February, 1849, as appears by the report of the master. Afterwards he asked to reduce that credit to $16,000, alleging that the last-named sum was the true value of the vessel, on the 3d of October, 1848, when the first agreement expired. His request was denied by the master. To that refusal he objected, and insists in his fourth exception, that, in taking the account, the master has fixed the value of the vessel at a period subsequent to the expiration of the five years mentioned in the contract, whereas it should have been fixed, as he contends, on the 3d of October, 1848, when the five years, from the time of the arrival of the complainant in Valparaiso, expired. When the agreement expired, as is assumed by the respondent, this vessel was at sea upon her fourth return voyage; and it appears, by the report of the master, that she did not arrive in Boston until the 5th of December, 1848. She was not sold until the following February; but the master reports that there was no evidence before him that the value was not about the same at the time of her arrival as at the time of her sale. If any such difference existed, as is supposed, it was certainly incumbent upon the respondent to prove it; and, in the absence of any such proof, it cannot be presumed that mere lapse of time had added anything to the value of the vessel. He gave the credit at the time of sale, and there is no evidence of any mistake or any sufficient reason offered why the correction should be made. On the contrary, it appears, from the report of the master, that he credited one tenth of the profits of the voyage to the respondent, although it did not terminate until two months after the agreement expired. From these facts the master draws the inference, and I think justly, that these transactions were understood and agreed between the parties to be within the first

agreement. For these reasons, as well as those assigned by the master, the fourth exception is overruled.

When the cause was first submitted to the master, he refused to allow the complainant for the profits made in the second voyage of the Crusader, for the reason that those profits were not claimed in the bill of complaint. Subsequently, an amendment to the bill was introduced into the cause, by leave of the court, alleging in substance and effect, that the complainant rendered the same service in relation to that voyage as that rendered by him in relation to the preceding voyages, and that it was well understood and agreed between the parties that this voyage also should be deemed within the original agreement, and that the complainant should be interested therein in the same manner, as if it had been completed within the five years. All these allegations were denied by the answer. In the fifth exception, the respondent complains that the master has allowed the complainant one tenth of the profits of this voyage, insisting, notwithstanding the amendment, that the claim is not embraced in the original or amended bill. Comment upon the objection that the claim is not embraced in the amended bill is unnecessary, as the amendment was introduced into the cause for the very purpose of obviating that difficulty; and its language is as well suited to accomplish the purpose for which it was drawn as could well be chosen. Suffice it to say, that so much of the exception as alleges that the claim is not within the amended bill cannot be sustained. Upon the question of fact put in issue by the pleadings, as amended, the master finds that the respondent requested and received the services of the complainant after the expiration of the five years, and particularly in reference to this voyage; and that the services were rendered by the complainant, with the understanding and agreement between the parties that he was to share in the profits. Such being the state of the facts, the master reported that, under the amended bill, the complainant was entitled to recover one tenth of the profits of this voyage. On an examination of the evidence, the finding of the master appears to be satisfactory, and accordingly the exception is overruled.

It was also contended by the respondent, before the master, that the accounts, under the first agreement, should be made up as cash collected on the day the agreement terminated; and the refusal of the master to adopt that theory constitutes the foundation of the sixth exception. It is to the effect that the master, in taking the account, did not value the assets at the expiration of the five years, but allowed the complainant a portion of the profits after the agreement expired. Claims were still outstanding and uncollected at that time to a large amount; and the respondent proposed and insisted that the master, in making up the accounts, should deduct the discount necessary to make the debts due equivalent to cash on the day the agreement expired, and calculate interest accordingly. In other words, he contended, and still insists, that the assets, so far as they consisted of unpaid balances, should be valued in the manner suggested as cash on hand; and that thenceforth they were to be regarded as his property, and at his risk. That theory the master declined to adopt, and, as it seems to me, for good reasons which need not be repeated.

Upon the expiration of each contract certain sums were due for goods already sold, and other goods belonging to the joint account were remaining on hand, which were subsequently sold, and the proceeds of both these classes of goods were collected by the house of Alsop & Co. On these sums while they remained in their hands they allowed interest. Remittances were not made by bills of exchange, but the proceeds of the outward adventure were invested in the purchase of return cargoes, and the remittances were made in that way. Interest paid by Alsop & Co., on the funds collected by them on the goods thus circumstanced, was charged by the master in the general account. To that allowance the respondent objected; and it constitutes the essence of his complaint as set forth in his seventh exception. Those funds were clearly at the joint risk, until they were received by the respondent, and no reason is perceived why the complainant is not entitled to his share of the interest accruing on the same. It is clear, therefore, that the seventh exception cannot be sustained.

Another position assumed by the respondent before the master was, that the second agreement terminated on the 1st of April, 1850, when the complainant gave the notice of his intention to withdraw from the business. His letter giving the notice was dated February 22, 1850; but it was not received until the 1st of April following. On the 13th of the same month the respondent replied, approving of the complainant's decision to join the house of Alsop & Co. at the time mentioned in his letter, and promising to comply with the complainant's request for an account as speedily as possible. He made no objection to his withdrawal, or to the time fixed for its accomplishment; and the case shows that the complainant remained and transacted the business as usual, up to the 31st of December, 1850, when he withdrew, and became a member of the house mentioned in his letter. On this state of facts, the master held that the relation between them, under the second agreement, did not terminate before the period when he joined that house. To that finding the respondent objected, and it constitutes the foundation of the eighth exception. It appears to the court that the finding of the master was correct; and the exception is accordingly overruled.

All that need be said concerning the ninth exception is, that it presents the same question, as to the mode of stating the account under the second agreement, as the one involved in the sixth exception, touching the same subject under the first agreement, and must be overruled for the same reasons.

More difficulty arises in disposing of the tenth exception, which is the only one that remains to be considered. It alleges in effect that the master has allowed the complainant one fourth of the profits of the third voyage of the Harriet Erving, which, it is insisted, are not claimed in the bill or the amendments to the same, and that the voyage was not the subject of any agreement between the parties. Some reference to the pleadings, so far as respects the second agreement, becomes necessary, in order that the precise nature of the question presented may be clearly understood. As contended by the respondent, the bill sets up the contract, alleges that the complainant entered upon and conducted the business until December 31, 1850, when the agreement was terminated, by the complainant's giving due notice to the respondent in the manner provided in the contract. In the answer, the agreement is admitted; but the respondent denies that it constituted a partnership, as alleged in the bill. He also admits the complainant's right to withdraw on giving the required notice, and avers that the notice given was received by him on the 1st of April, 1850, and that he acknowledged its receipt, and expressed his satisfaction with the same. No additional agreement was made in respect to this voyage; and if the complainant is entitled to recover this claim at all, he must do so under the pleadings as stated, and the written agreement set up in this part of the bill of complaint. This vessel sailed from Boston, on her outward voyage for Valparaiso, on the 21st of August, 1850, more than four months after the notice had been received by the respondent. She arrived out on the 8th of December, 1850, and sailed thence for Coquimbo on the 27th of the same month. On the 4th of January, 1851, she sailed for Talcahuano, and afterwards, during the same month, for Boston, where she arrived on the 7th of April, 1851. By the terms of the second contract, under which this claim arises, the complainant was entitled to have one fourth part of the net profits of the respondent's business in that trade, which he should have conducted to completion. He was at liberty to withdraw at any time, by giving to the respondent so much notice, that any voyage he had commenced prior thereto should receive the full benefit of the complainant's services to its final accomplishment, and not otherwise. This voyage had not been commenced when the notice was given, nor until more than four months after the respondent received it, and had signified to the complainant his satisfaction at learning the decision to which he had come. At the time the vessel sailed on her outward voyage, both parties understood that the complainant had complied with the terms of the agreement in giving the notice, and that he was under no obligations arising out of its terms and conditions to transact this business. Beyond question, the reply of the respondent must be understood as an assent to the sufficiency of the notice; and if so, then both parties knew, or ought to have known, that their relations under the second agreement would terminate at the time therein specified. That the complainant so understood it is manifest, not only from the terms of the letter in which he gave the notice, but from his subsequent conduct in joining the house of Alsop & Co. at the time therein designated. It is admitted that the complainant joined the house of Aslop & Co., on the 1st of January, 1851, agreeably to his intention, as expressed in the letter giving the notice, and that he did not go to Coquimbo in this vessel, on the 27th of December, 1850. Another fact is also admitted, of some importance in this investigation, and that is, that the business after the 1st of January, 1851, was transacted by the house of Alsop & Co., and that the new agent of the respondent reached Valparaiso on or about the 1st of November, 1851. As before stated, this vessel arrived at Valparaiso on the 8th of December, 1850. Net sales of the voyage amount in the whole to the sum of $205,620.74, as appears by the record. All of the sales were made by the house of Alsop & Co., who regularly rendered an account of the same to the respondent, for which they charged two per cent. for guaranty, and four and one half per cent. for commissions on sales. Sale of the cargo commenced on the 31st day of December, 1850, as appears by the account of sales, and was continued at different periods down to June 30, 1853. On each and all of these sales they charged the six and one half per cent. commissions, amounting to the sum of $9,736.26. During the whole of the period through which the sales were continued the complainant was a member of that mercantile house, and as such, of course, received his share of those commissions. Whenever he assisted in the business, as appears to the court from the evidence, he acted in virtue of the new relations he had contracted, and not under the agreement with the respondent, which he had previously terminated by the notice. But it is insisted by the complainant that the parties understood their relations otherwise, and that there is evidence in the case sufficient to warrant the conclusion that they had agreed that this voyage should be settled and adjusted within the principles of the written agreement. Suppose it were so, it is not perceived that it would benefit the complainant in this suit, as the difficulty would still remain in all its force, that there is no proper allegation in the bill, or in either of the amendments, to support any such new

agreement. After a careful examination of all the correspondence, I am of the opinion that it does not sustain that view of the case. On the contrary, it appears to me that both parties well understood that their relations, under the written agreement, so far as respects this voyage, had ceased. For these reasons, the tenth exception is sustained, and the accounts must be adjusted so as to conform to the opinion of the court. When that is done, the complainant will be entitled to a decree in his favor. Should any dispute arise in making the adjustment, the cause must be recommitted to the master, to make the necessary corrections.

[NOTE. Cross appeals were taken from this decree to the supreme court, and the decree of the circuit court was duly affirmed, Mr. Justice Swayne delivering the opinion. The charges for taxes, clerk hire, and advertising, under the clause, "actual expenses that may appertain to the goods themselves," were held to be legitimate, the learned justice remarking: "It was certainly not the intention of the parties that the defendant should make a donation by an expenditure in the business. The computation should be made as if he were engaged in no other business. The items in question are as much a part of 'the actual expenses,' appertaining 'to the goods themselves,' as storage, commission, or insurance. They rest on the same foundation, and the same language in the contract which affords a warrant for including the latter applies with equal force to the former." Foster v. Goddard, 1 Black (66 U. S.) 506.]

Case No. 4,971.

FOSTER v. HACKLEY et al.

[2 N. B. R. 406 (Quarto, 131);[1] 2 Am. Law T. Rep. Bankr. 8; 1 Chi. Leg. News, 137.]

Circuit Court, W. D. Michigan. Jan. 1869.

BANKRUPTCY—FRAUDULENT PREFERENCES—SUIT TO RECOVER ASSETS.

A. being insolvent, sold and transferred to a creditor, with knowledge of the fact, all his real and personal property. *Held*, that the sale was in fraud of the act, and the assignee could maintain an action of trover to recover the value of the personal property.

[Cited in Wilson v. Brinkman, Case No. 17,794; Graham v. Stark, Id. 5,676; Re Randall, Id. 11,551; Re Wells, Id. 17,388; Re Dole, Id. 3,965; Singer v. Sloan, Id. 12,899; Strain v. Gourdin, Id. 13,521.]

Alexander Blake was a lumberman, possessed of real and personal property valued at about one hundred and thirty thousand dollars, and owing about one hundred and forty thousand dollars. Nearly or quite one-half of his indebtedness was to the defendants, Hackley & Sons, of Muskegon. On the 25th of May last, Blake transferred all his personal and real estate to Hackley & Sons, in payment of his indebtedness to them. About the 1st of June, some of Blake's creditors filed a petition in bankruptcy, to have Blake declared a bankrupt, in pursuance of which the district judge of this district adjudicated Blake a bankrupt, and Wilder D. Foster was appointed assignee. The suit which has just been tried was brought by Foster, as assignee, to recover from Hackley & Sons, a portion of the personal property so transferred to defendants by Blake, seeking to recover some forty or fifty thousand dollars—the damage being laid at the last named sum. Under the rulings of Judge WITHEY, and his instructions to the jury, the plaintiff obtained a verdict of fifteen thousand five hundred and seven dollars and eleven cents. The requests made by counsel on both sides for instructions to the jury, embraced some forty points, all of which were fully covered by the judge, in the comprehensive charge given to the jury.

John W. Champlin, George Gray, and John T. Holmes, for plaintiff.

E. S. Eggleston, Emory A. Storrs, and D. Darwin Hughes, for defendants.

WITHEY, District Judge (charging jury). Gentlemen of the Jury: Since the commencement of this trial, on the morning of the 15th of December, ten days have been consumed by the introduction of evidence—one entire day in arguments to the court upon the construction of section thirty-five of the bankrupt act, on the question of the admissibility of testimony, and three days have been occupied by counsel in summing up the case. This is the twenty-third day since the commencement of the trial; of this time you have sat fourteen days to hear the evidence and arguments of counsel. You have evinced throughout the trial the utmost attention, and although there has been a large amount of testimony introduced, I can but hope you are so well possessed of the case, as to enable you to arrive at a satisfactory result to yourselves as well as to the parties concerned in your verdict. The cause is one of no common importance or magnitude—considering the amount and legal questions involved in the issue. It is your duty as well as mine to give to the case an unbiased and unprejudiced judgment. We are to know no party in the cause, to have no prejudices, but arrive at conclusions, solely from the law and testimony of the case, aided as we may be in so doing by the very able and exhaustive argument of the learned counsel. It is the duty of the court to instruct you in the law of the case, and it is your duty to take the law as the court shall declare it to be. In no other way can the rights of parties be protected. Should either party be dissatisfied with any ruling the court makes, his remedy lies in a court possessing power to review the decisions of this tribunal. But there is no way of reviewing your conclusions of law otherwise than by setting aside the verdict, as being contrary to the instructions of the court, and awarding a new trial. Such a calamity, I trust,

[1] [Reprinted from 2 N. B. R. 406 (Quarto, 131), by permission.]

will not fall upon the parties, the counsel, or the court, in this case. It belongs to you, gentlemen, to determine what the evidence proves and establishes. You are sole judges of the facts; but you are to consider only such testimony as has been admitted into the case. You are to know nothing of any facts bearing on the issue, except those which have been introduced in evidence. The entire testimony is to be weighed and considered by you, under and in accordance with the rule of law and the instruction which the court shall give to you.

To the evidence and the law of the case, thus placed before you, you shall apply such tests in reaching conclusions as your experience and intelligence shall enable you. The court will endeavor to avoid an argument of the facts. No further consideration of them is designed than shall be sufficient to illustrate and instruct as to the law which is to govern your deliberations. The plaintiff brings this action of trover, to recover damages which he alleges to have sustained by reason of certain personal property he claims to have owned at or before the commencement of this suit, having been by defendants appropriated to their use. The damages which the plaintiff is entitled to recover, if he is successful in this suit, is the value of the property owned by him as assignee and shown to have been converted by defendants, at the time of such conversion, with interest. The defendants, by their plea of the general issue, deny property in the plaintiff, and deny the conversion. The questions, therefore, which ultimately will be reached and constitute the result of all your enquiries, are, whether Foster, as assignee of the estate and effects of Blake, a bankrupt, was owner of any property described in the declaration, and what property; next, whether defendants appropriated or converted any and what of this property; and finally, the value.

In reaching these questions, several other questions of the first importance are to be settled in part by the court, and in part by the jury. At the outset, then, we find that Blake was possessed of a large amount of property, both real and personal. It has been valued at about one hundred and thirty thousand dollars; the defendants value it at much less. At the same time he was owing in the neighborhood of one hundred and forty thousand dollars, considerable of it due and about to come due, and he without money to meet even a small portion of such indebtedness. Blake realized his embarrassed condition, and impressed by the effects a falling market for lumber must have on his ability, he sought Charles H. Hackley, one of the defendants, and stated his inability to go on in his business, and that he should be obliged to make an assignment. He was advised by Hackley not to do this, but to make an absolute sale of his property. Blake acceded to this, and conveyed, by bills of sale and deeds, what Blake says was intended to cover all his personal and real estate—except lands mortgaged to Foster to secure him against endorsements for Blake. This was May 25th, 1868. At the time of this transfer defendants were creditors of Blake to a large amount, claimed by defendants to have been some seventy thousand dollars, and the sale by Blake to them was designed to prefer and pay defendants. A valuation was fixed on the property, which nearly or quite absorbed it in paying Blake's debt to defendants. The value fixed between the parties on Blake's interest in the logs and lumber was sufficient to reduce Blake's debt to defendants to some sixteen thousand dollars; and the stock of goods and other personal property, with the land, was designed to cover this balance, and enable defendants to pay two or more thousand dollars, part of which Blake wanted paid to certain home creditors; the residue of about one thousand dollars Blake was to receive, of which seven hundred and fifty, defendants paid to him. June 2d a petition was filed to have Blake declared a bankrupt.

Without intending to be at all minute in the statement of the transactions involved in the sale and transfer, but only in a cursory and general way giving the principal features, as a basis for instructions upon certain of the questions of law that have been urged, we will now proceed to state those questions and give you instructions. The arguments of learned counsel have been characterized by great clearness and directness, which no one more appreciates and approbates than a judge on the bench. These arguments, as forensic discussions, have not only been marked by great learning and ability upon the whole case, but exhaustive. The questions which have been discussed and require our ruling arise under a law which has been but a brief period in existence, and have not, as far as I am advised, been decided; so that for the most part the court must look to the statute alone for its construction. This I have done with that consideration and care which the magnitude of the case and the importance of the questions have demanded. The design of the bankrupt act [14 Stat. 517] is to relieve an insolvent debtor from his debts; and, in justice to creditors who are compelled to receive less than the debtor owes them in full satisfaction, the law also designs to give them, pro rata, all the estate and property of the debtor, not exempt to him. To this end congress has intended, as I understand the statute, to prevent preferences by the debtor for four months, and transfers for six months before the commencement of proceedings in bankruptcy, so far as reasonably may be, and not unjustly interfere with the business relations and dealings of men.

The first question is, whether there can be a recovery in this suit under any other than section 14 of the bankrupt act, and if not,

it is claimed that a recovery can only be had by showing that the bill of sale of May 25th was made to defraud creditors, and void by virtue of the statutes of Michigan against fraudulent conveyances. In this connection it is claimed also, that even though the transfers made May 25, and about that time, by Blake to defendants, to give a preference to them, was void by section 35, yet there exists no right of action at law in the assignee of the bankrupt, to recover the property so transferred, or its value; but that a recovery can only be had by a proceeding in a court of bankruptcy of a summary character. I have embraced in the claims now stated what covers several requests of defendants' counsel for instruction, because the view which I take enables me to best dispose of them together, in connection with my construction of section 14. The court is of opinion, and instructs the jury, that section 14 gives to the assignee in bankruptcy the right to bring this suit, as well as to recover, where the proofs establish a transfer made to defraud creditors within the state statute against fraudulent conveyances—otherwise known as the "Statute of Frauds"—as also to recover property, or its value, which by section 35 or 39 has been transferred in fraud of the bankrupt act. Section 14 provides that all the estate and effects of the bankrupt shall pass to the assignee in bankruptcy, and that the deed of transfer to the assignee shall relate back to the commencement of the proceedings in bankruptcy, and that he may sue for and recover all said estate, and such as has been conveyed in fraud of creditors. Now, although, at the commencement of the bankruptcy proceedings against Blake, the bankrupt's property was held by one who claimed it by transfer—still, if it be shown that such transfer is void by virtue of section 35 or 39 not by section 14; it follows that the bankrupt did own such property at the time when bankruptcy proceedings were commenced, and therefore the title to such property vested in the assignee under the deed of assignment, by virtue of section 14; and as this section expressly gives a right of action to the assignee to sue for and recover all the estate of the bankrupt, owned by him at the time of filing the petition in bankruptcy, it follows, logically and certainly, that the assignee is not confined to summary proceedings in a court of bankruptcy, though he may resort to that mode of enforcing his claims to recover property or its value, the sale or transfer of which is made void by sections 35 and 39, but may sue at law if he so elect. It becomes unnecessary, under this view, to determine whether, outside of section 14, the assignee could maintain an action at law by virtue of sections 35 and 39, when viewed with reference to the right to sue declared by section two; though I incline to the view, that under those sections the action could be maintained.

The plaintiff claims the right of recovery under the evidence, substantially upon two distinct grounds: First. That the transfers by Blake to defendants in May are void, under the statute of frauds, as fraudulent conveyances. Second. That those transfers are void, as a fraud on the provisions of the bankrupt act. The defendants insist that these grounds for recovery are in law but one ground, and that the proofs must, under either claim, satisfy you that the transfer, if fraudulent at all, is so by the statute against fraudulent conveyances; that the thirty-fifth and thirty-ninth sections of the bankrupt act mean and refer to such transfers as by the statute of Elizabeth are void, and to no other. In other words, that those transfers having been made by way of giving a perference by Blake to his creditors, the defendants, they are only void when it is shown that the design was to hinder, delay, or defeat other creditors, and not a mere preference in good faith of a bona fide indebtedness. The question is an important one; the views of the learned counsel are radically at variance as to the law. It becomes necessary in this connection to examine the thirty-fifth section of the bankrupt law, under which, as well as under section 39, the plaintiff claims the transfers in May last by Blake to defendants are void.

The section now under consideration, so far as affects the questions presented in this case, provides: First. "If any person, being insolvent, shall, within four months before the filing of the petition in bankruptcy, with a view to give a preference to a creditor, make any payment or transfer of any part of his property, and the person who receives such payment or transfer has reasonable cause to believe that such person is insolvent, and that such payment or transfer is made in fraud of the provisions of the bankrupt act, the same shall be void, and the assignee may recover the property or the value of it from the person receiving it." Second. "If any person being insolvent shall, within six months before the filing of the petition in bankruptcy, make any transfer of any part of his property to any person who then has reasonable cause to believe him to be insolvent, and that such payment or transfer is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or evade any of the provisions of this act, the transfer shall be void, and the assignee may recover the property or the value thereof, as assets of the bankrupt." The first provision is designed to defeat a preference to a creditor, while the second is designed to defeat any transfer of property. To defeat either the preference or transfer, it must appear that the act done was a violation of the provisions of the bankrupt law. What is it that renders a transfer void, under this section? First, the debtor making the transfer

must be insolvent; second, if the transfer gives a preference, it must have been made with a view to give preference to the creditor; third, in any event the person receiving the transfer must, at the time, have reasonable cause to believe the person making the transfer to be insolvent; and, fourth, must also have reasonable cause to believe that such transfer was in fraud of the provisions of the bankrupt act. You will notice that if the object was not to give a preference to a creditor, then the question whether a preference was intended is rendered wholly immaterial. That Blake was, in May, insolvent, is not denied; and that he made the transfer to the defendants, with a view to give a preference, is also admitted; thus two questions are disposed of, and but two remain for you to pass upon, so far as this section is involved, both of which must be found, from the evidence, to establish fraud on the provisions of the act.

The first, whether defendants had reasonable cause to believe Blake insolvent, is purely a question of fact. If you find that Hackley had good reason to believe that Blake was unable to pay his debts as they became due, and for that reason his business must be broken up or stopped, then defendants had reasonable cause to believe Blake insolvent.

The other question: Did Hackley have reasonable cause to believe that the transfer in May was in fraud of the provisions of the act? Neither question involves the inquiry whether defendants knew, but whether they had reasonable cause to believe. To aid you in forming a conclusion, you are instructed that the law conclusively presumes defendants knew the provisions of the bankrupt act at the time of the transaction in May. You are instructed, also, that it is entirely immaterial whether defendant, Charles H. Hackley, who carried on the negotiations for the transfer of property by Blake to defendants, had in contemplation the bankrupt law or not, and alike immaterial whether Blake had. Again, the court instructs you, that whether the defendants had reasonable cause to believe that the transfer was in fraud of the provisions of the bankrupt act, must be determined from the transaction, from the attendant circumstances, from the information he possessed of Blake's pecuniary affairs [see In re Blake, Case No. 1,492], from what was said and the conversation that passed between them, and from all that transpired at and about that time, in reference to the transfer and property. Further, if the defendants had reasonable cause to believe that the transfer was made with a view to prevent the property from being equally distributed among all Blake's creditors, then they did have reasonable cause to believe that the transfer was in fraud of the bankrupt law; for then it would impair, hinder, impede, and delay the operation and effect of the act, and would tend to evade the provisions thereof. Again, a conveyance by an insolvent debtor of all, or nearly all, his property and effects to a creditor, whereby his business is broken up, is a very strong proof as to the fraudulent character of the transfer. Or if, in making the transfer, there was a secret benefit to result to the insolvent debtor, it is evidence of fraud, and renders the conveyance void in favor of creditors.

Finally, on the question under consideration—if the transaction will, in fact, operate as a fraud on the provisions of the bankrupt act, all parties to it must be presumed to know the necessary consequences and result of their acts, with reference to the effect on the provisions of the bankrupt act. As requested by the plaintiff's counsel, the court instructs the jury that any bill of sale which was not accompanied by a delivery of the property, and followed by an actual and continued change of possession, is evidence of fraud, unless it be made to appear that the sale was made in good faith, and without intent to defraud the creditors of the vendor. The court also instructs you that it is wholly immaterial whether the preference given to defendants was voluntary or by reason of threats of legal proceedings or coercion. The voluntary or involuntary character of the transactions is not important under the present bankrupt act.

I shall now dispose of the question presented in reference to the contract of January 25, 1868, known as the log contract. It certainly presents some unusual features, and it may be difficult of construction, but the duty of the court is to tell you how you are to view it, however difficult the task may be of forming a correct judgment. Able counsel have entirely and widely differed as to its import. It is claimed to be a bill of sale with an agreement, with an appendage designed as a mortgage, but which is not a mortgage. It is claimed to be a contract embracing a mortgage clause which is valid. The plaintiff claims fourteen to eighteen million feet of logs by virtue of it, and the defendants likewise claim under it all the logs.

The court regards this contract as expressing all the evidence which you are to consider in reference to agreements between Blake and defendants about getting in logs and advances for logs, none other having been introduced in evidence, though referred to by a witness; and so far as oral agreements on the subject referred to existed prior to the date of the contract, this of January 28th must be regarded as doing away with, and to contain the entire agreements of, the parties at its date. The court holds the contract was not a sale of logs by Blake to defendants, but an agreement by Blake to furnish Hackley & Sons, to saw on shares, eighteen million feet of logs. Blake was to put the logs into Muskegon river during the winter of 1867 and 1868, and deliver to defendants in the booms of the booming company, in the spring, when the main drive of logs should be delivered at the booms.

Part of the logs were then in the river, on its banks, in the woods where cut, and others were being cut. The contract was executory. Hackley & Sons agree to take the logs when delivered as described, and saw them on shares, for one half the lumber they should make. The lumber was sent forward to market and sold to the best advantage. the net proceeds of sales to be equally divided between Blake, and Hackley & Sons. Hackley & Sons were to advance Blake four dollars on each thousand feet of logs, to enable him to put them in—on which, and other advances for rafting up and delivering to the mills, and other charges, Hackley & Sons were to receive interest. Both advances and interest were to be paid to them from the proceeds of the first lumber sold. Such is the contract, omitting the mortgage clause. Who was to ship the lumber and control its sale is not distinctly stated. But it is fairly inferable that Hackley & Sons were to do this, for the logs were to be delivered to them in the main boom, where they were to receive and saw them. The clause in reference to shipping and selling is incorporated among Hackley's agreements, and when shipping commenced in the spring, it appears Hackley shipped and controlled as to sales. This shows what the parties understood as to who was to have possession and sell. But outside of this fact, such the contract itself is held to be.

When the logs were in the booming company's booms, so as to be in defendants' possession, the defendants had possession. coupled with the right to saw the logs into lumber, and they could not be divested of that right, or of possession, either of the logs or lumber, by Blake or by his assignee, while defendants were in good faith proceeding on their part to execute and carry out the contract. They had made advances and were making other advances, and incurring expense so long as the logs were being sawed; and it is not the purpose of the bankrupt law to interfere with, or to avoid contracts made by the bankrupt with other parties, or to prevent their execution. Blake's interest and rights under that contract were, by the deed of assignment to Mr. Foster, transferred to him as assignee in bankruptcy. Whatever Blake's rights were under that contract, the assignee can claim and enforce. Blake cou'd not lawfully claim possession of either logs or lumber sawed from them, and therefore the assignee has no such claim. But one-half of the net proceeds of the sales he may claim, and may undoubtedly recover in any appropriate form of action. Those net proceeds cannot, however, be recovered in this suit, as it is not the proper form of action, this being a suit in trover.

Gentlemen, under the views I have expressed, you will have nothing to do with the contract of January 25th, so far as relates to the question of the amount which the plaintiff is entitled to recover, if anything. So far as the question of fraud is concerned, the contract is evidence, but for no other purpose. The mortgage clause of the contract does not change in any respect the views already announced as to the construction and effect of the contract, and therefore requires no consideration. It is claimed by plaintiff's counsel that the sale of May 25th, which embraced the logs and lumber cut under the contract of January 25th, being valid as between Blake and Hackley, cancelled the January contract. This would be so if the sale of May 25th is not void, but if void—as it is under the bankrupt act, should the jury find that transaction a fraud on the provisions of the act—then the court holds that the contract of January 25th is not affected by the fraudulent transfer of May 25th, but remains of force and effect, and the rights of both plaintiff and defendants are to be determined under it, without reference to the void bill of sale. Then, gentlemen of the jury, if you shall find the transaction of May 25th, between Hackley and Blake, fraudulent and void, and that plaintiff has a right to recover from the personal property covered by the bills of sale of Blake to defendants, still you will reject all claim made for the value of both logs and lumber, covered by the contract of January 25th, known as the log contract, in making up the amount which the plaintiff is entitled to have. But this log contract does not cover the "crown" marked logs, nor the rafted lumber, &c. As to all personal property covered by the bills of sale—which defendants are shown to have converted, other than the logs and lumber covered by the log contract—you are at liberty to take into account an estimating damage.

The amount of damages, as I have before said, if you find for the plaintiff, will be the value of the property covered by instructions already given, at the time of conversion, with interest to this time.

Case No. 4,972.

FOSTER v. HILLIARD et al.

[1 Story, 77; 3 Law Rep. 175.] [1]

Circuit Court, D. Massachusetts. May Term, 1840.

SALE OF REAL PROPERTY—DIVISION OF PURCHASE MONEY BETWEEN LIFE TENANT AND REMAINDER MEN — COMMON LIFE TABLES — DEATH OF LIFE TENANT—WHEN RIGHTS OF PARTIES WERE DETERMINED.

1. When a sale of real estate is made jointly by persons having independent interests, in the absence of other countervailing circumstances, the purchase money is to be divided according to their respective interests.

2. In the case of a tenant for life, remainder in fee, of lands under mortgage, the parties contribute to discharge the incumbrance according to the relative value of their respective in-

[1] [Reported by William W. Story, Esq. 3 Law Rep. 175, contains only a partial report.]

terests, calculated according to the value of the estate of the tenant for life by the common tables.

[Cited in Danforth v. Smith, 23 Vt. 256.]

3. The same principle applies where a mortgagee devises the mortgaged estate to one for life, remainder over in fee.

4. A court of equity will decline to interfere in adversum to change real estate, by a sale, into personal estate, without imposing conditions, by which the proceeds shall retain throughout the character of the original fund. Yet it would be different, if there had been a voluntary sale by the parties.

5. Certain real estate was devised to A. for life, remainder to certain minors in fee. A., with the consent of the guardian of the minors, sold the land, but died before receiving the whole of the purchase money, and the residue was received by his executors. *Held*, that the rights of the parties were absolutely fixed *at the very time of the sale;* and that the executors of the deceased and the remainder men were entitled to share in the proceeds, according to the interests of A., and the remainder men at that time.

6. The interest of the tenant for life was to be determined, not by the time when he actually died, but by the value of his life, as ascertained by the common tables at the time of the sale. And although he died within four years from the time of the sale, yet his interest was to be calculated for about twenty years, as that was the duration of his life, as ascertained by the common tables.

Assumpsit [by Samuel C. Foster against Abraham Hilliard and another, executors]. The case came before the court upon an agreed statement of facts, in substance as follows:—A devise was made by Thomas Foster of certain wild and uncultivated lands in Maine, to John Foster as tenant for life, remainder to his nephews, Andrew, Samuel C., James, and George Foster, then minors, under the guardianship of Mary Foster, their mother. In 1832, after the death of the testator, the tenant for life and the guardian of the remainder men, who were then still under age, sold the land to Jacob D. Brown, and the tenant for life received a part of the purchase money, and took from the purchaser a deed of mortgage of the same land, in his own name, to secure certain notes, made payable to him or his order, which were given for the balance of the purchase money, and certain other moneys due from the purchaser to him. Soon after the sale, the tenant for life brought a bill in equity and obtained an injunction against the purchaser to restrain him from committing waste on the mortgaged premises, and incurred great expenses in prosecuting this suit and in other legal procedures in the collection of said notes. The tenant for life, after receiving sundry sums of money on account of the mortgage and other securities, sold and assigned the same, and took, in payment therefor, other notes and securities, in like manner made payable to his order, and a sum in money. He subsequently died, and after his death, his executors sold the last mentioned notes and securities, and received payment therefor in money. The tenant for life, while he lived, had the possession, control, and entire use of the money and the securities and notes given in payment for said land, and the moneys and interest paid thereon; and neither the guardian nor the remainder men exercised or asserted any right of supervision, or interfered in any way, in the management and use of the said property by the tenant for life; nor were they knowing to, or ever consulted in reference to said legal procedures, or the transfers, sales, and investments made by the tenant for life or his executors, or any matter or thing concerning the property in his hands. John Foster died on the 1st of November, 1836, aged 54 years, 3 months, and 27 days; having been born on the 4th of July, 1782. At the time of the sale, on the 14th of November, 1832, his age was 50 years, 9 months, and 10 days, and at that time his expectancy of life, by Wigglesworth's tables, was 20.96 years; by the Carlisle tables, used at the life office in Boston, it was a fraction greater. The executors were requested to pay over to the devisees in remainder, the whole capital sum, retaining only the interest, as belonging to John Foster. They offered to pay only that portion of it, which would result from a calculation of the value of John's life estate, supposing the land to be converted into cash on the day of sale, and the money divided on that day, according to the rules for calculating the value of annuities. The case was submitted to the court upon the agreed statement of facts, with liberty to infer such other facts as a jury would be authorized to infer.

Mr. Dehon, for plaintiff.

The first question is, whether the change of the property from real to personal estate affected the relative rights of the parties making the conveyance. The mutual relative rights were settled by the will. The sale effected merely a substitution of personal for real estate, and the substitute, like the original, was dependant on the provisions of the will. To suppose any other result to be effected by the change is absurd; for otherwise no guardian could have consented to such a conveyance, as might injure the interest, or affect the estate, of the ward. In the absence of any agreement, it is the reasonable and natural inference, that the parties did not intend to vary their right. When, therefore, John Foster received from Brown the money, and notes, and mortgages from the sale of the estate, he was entitled to the interest and income thereof, for his life only, but to no part of the principal. He was further entitled to the exclusive possession and control of the fund and property, subject to restraint from any such use as would endanger the interests of the remainder men. As there was no division of the proceeds after the sale, the court should presume, that there

was an agreement between John Foster and the guardian, that he should have the same use and enjoyment of the proceeds, as he would have had of the estate, if it had not been sold; and that the remainder men should take no part till his decease, and then that they should take the whole. It will not be questioned, that John Foster actually received the whole proceeds, and held them within his entire control and management during his life; and there is no evidence to show, that either the guardian, or the remainder men, ever moved in reference to the estate, after it was sold, until the death of John Foster. The acts of all the parties, therefore, show what was their intent at the time of the sale. It is not, however, necessary to make out such an agreement. It is enough to show, that John Foster exercised the right of a tenant for life; that is, that he has received all that the testator intended, that he should have; and, it seems, that the representatives of his estate can, with little justice or equity, claim more. We contend, that John Foster has had the use and enjoyment of the estate in the only manner, in which he could legally have or enjoy it under the will. Had it remained real estate, it could not have been partitioned in 1832. The estate of John Foster was a life estate, and that of Andrew's children a remainder in fee simple conditional, disposable on the subsequent uncertain event of their death, before they arrived at the age of 21 years. Upon reaching that age the fee would become absolute. Lippett v. Hopkins [Case No. 8,380]; Sayward v. Sayward, 7 Greenl. 210. The statute of Massachusetts of 1817, c. 90, by which the power of partition of real estate is conferred on the probate court, is judicially construed in Wainwright v. Dorr, 13 Pick. 333, and Packard v. Packard, 16 Pick. 194. By these decisions it appears, that a division of remainders is not contemplated by the statute, and that no division can take place, until the several proportions of the parties are ascertained and made certain. The estate of the minors is a remainder, and their shares are uncertain and within the rule. No division of the realty, therefore, could have been made; and if the proceeds are to be considered as personal property, the same reasons exist against a division of them, as against a partition of real estate. If the conversion to personal property took it out of the jurisdiction of the court and left it in the hands of the parties, we say, that, as they made no division, an agreement is to be presumed, that the personal estate should stand just as the real estate did. 1 Story, Eq. Jur. § 487. But if the court decide, that the present fund should be divided, we are not content with the rule of apportionment. The rule of calculating the value of life estates by the tables is one of convenience, and only to be resorted to in cases of necessity, where it cannot be otherwise ascertained. The adoption of this rule, resulted from the necessity, under which courts were placed, of ascertaining the relative value of life estates and remainders, where some charge was to be borne by them pro rata; or where the tenant for life was to be paid a sum for his estate, equal to its value, the duration of his life being uncertain. But, how can the court be asked to resort to the tables to guess at the probable duration of a man's life, when his death has rendered it certain; more especially when the result must necessarily prove erroneous? It would be doing actual injustice to the remainder men. If the division was to have been made in 1832, the value of John Foster's share would properly have been calculated according to the tables; but not since his death; because we have no right to resort to approximation, where we can arrive at certainty. We contend, therefore, that the life estate should be calculated according to the time he actually lived after the sale, viz. 4 years, less by 14 days. Clyat v. Batteson, 1 Vern. 404; Nightingale v. Lawson, 1 Brown, Ch. 443.

S. Greenleaf, for defendants.

The general question is that of an apportionment between the tenant for life and the remainder man. The old rule, in case of incumbrances, of one third and two thirds, is now exploded. 1 Story, Eq. Jur. p. 465, §§ 487, 488. The modern rule is, that each shall contribute to the relief of the estate, according to the "benefit he derives" from the payment; which, of course, will depend on his age, and the present value of his life; and a reference will be directed to the master, to ascertain the proportion he ought to pay. 1 Pow. Mortg. (Rand's Ed.) 312, etc., note M; Allan v. Backhouse, 2 Ves. & B. 65, 79. In White v. White, 4 Ves. 33, it is said, that it shall be "according to his interest," that is, the value of his life. Lord Penrhyn v. Hughes, 5 Ves. 107. If the estate is sold, the proceeds shall be divided according to the interests. Clyat v. Batteson, 1 Vern. 404; 1 Pow. Mortg. 314a, note Q; 3 Pow. Mortg. 920, 923, note H; Id. 1043, note O; 1 Story, Eq. Jur. pp. 465, 466, and the cases there cited. The same principle is applied, when the mortgagee devises the mortgage to one for life, with remainder over; and the money is paid by the mortgagor during the lifetime of the devisee for life; viz. it is divided between them according to the present value of their interests. In Brent v. Best, 1 Vern. 69, the principle is correct; the rule of proportion only, that is, of one third and two thirds, is exploded. Thynn v. Duvall, 2 Vern. 117; Lord Penrhyn v. Hughes, 5 Ves. 107; 1 Story, Eq. Jur. 446, note 1. In Swaine v. Perine, 5 Johns. Ch. 482, the same principle is adopted in a bill for dower, brought by the widow of the mortgagor against the heir, who had paid off the mortgage. The same principle is applied in distributing the proceeds of an estate sold, as between ten-

ant by courtesy and reversioners. Houghton v. Hapgood, 13 Pick. 154. The parties here have turned the land into another species of property, subject to other rules, and have thereby reduced the question to one of a mere division of money. How is this division to be made? We say, according to the interest of the parties, and the rights vested in them at the moment of sale. The interest of John Foster was then equal to the value of an annuity for his own life, viz. the interest of the whole price for which the land was sold. Besides, it is better and safer for all parties, and even indispensable to the security of the remainder men, that a right to a present division should exist. But in this case, it was particularly desirable, because in Massachusetts, where the parties were all resident, there exists no chancery power, to prevent the tenant for life from expending the whole of the property. It was undoubtedly the intent of the testator, that, under the circumstances, there should be a sale and division of the proceeds. The will itself demands such an interpretation; because every devise imports a benefit intended. And in the present case, where the devisee was an only brother, and heir at law, and the property consisted of wild lands, from which no benefit could accrue, until they were sold, such a sale might be enforced at law. In Revel v. Watkinson, 1 Ves. Sr. 93, the tenant for life being heir at law, and otherwise unprovided for, was allowed maintenance out of the estate. The same was adjudged by Lord Harcourt, in the Case of Rutter of Woodhall, there cited. The rule of construction with regard to wills is, that every will must be expounded most favorably for the devisee (6 Mass. 169; 10 Mass. 303; 12 Mass. 546), and with equal favor to all the devisees. The rule, that the plaintiff insists upon, however, will not be equally beneficial to all, as it gives to John Foster no vested and present right to any part of the money.

STORY, Circuit Justice. The case may be shortly stated, upon which the arguments have been addressed to the court. A devise was made of certain wild and uncultivated land in Maine to A., as tenant for life, remainder to his nephews, who were minors, in fee. After the death of the testator, the tenant for life, with the assent of the guardian of the minors, sold the land, and received a part of the purchase money, and then died, and the residue of the purchase money has since been received by the executors of the tenant for life. The minors have since come of age; they do not seek to disturb the sale; but they claim the whole purchase money from the executors. The present action is brought by one of the remainder men, to recover his share. There is no proof of any agreement between the tenant for life and the guardian, as to the distribution or division of the purchase money between the tenant for life and the remainder men. On behalf of the remainder men, it is contended: (1) That the purchase money is to be treated as a mere substitute for the land on the sale; that the tenant for life was entitled to the income thereof during his life; and that the whole principal now belongs to them. (2) That if they are not so entitled, the apportionment of the purchase money is to be made between them and the executors, not according to the value of the life estate of the tenant for life, according to the common annuity and life tables, but according to the actual facts, he having died shortly after the sale. On the other hand, the executors contend: (1) That the tenant for life was entitled, and they, as his executors, are entitled, to hold so much of the purchase money as the value of his life estate, at the time of the sale, bore to the whole interest in fee. (2) That the apportionment between them is to be made according to the value calculated by the common annuity and life tables, at the time of the sale, without any reference to the actual duration of his life. It is admitted, that there is no case exactly in point; and, perhaps, considering the frequency of sales by a tenant for life and a remainder man, it is a matter of some surprise, that no such case should be found. The circumstance, however, may be reasonably accounted for, either upon the ground, that the sale usually takes place upon distinct and independent bargains; or, where there is a joint bargain, the shares of the respective parties are usually ascertained and apportioned by some private agreement Here, no such agreement can be traced; and the sale seems to have proceeded upon a mutual confidence, that the proceeds would ultimately be divided justly and equitably between the parties, according to their respective rights. What are those rights? It seems to me, that when a sale of real estate is jointly made by two or more persons, having independent interests, the natural, nay, the necessary conclusion, in the absence of all other countervailing circumstances, is, that they are to share the purchase money according to their respective interests. If three tenants in common should jointly sell an estate, they would certainly be entitled to share the purchase money according to their respective undivided interests. If one held a moiety, and the others one quarter part each, they would share in the like proportions. So, if three parceners should sell an estate, they would all share equally in the purchase money. What difference can it make, whether they have undivided interests in the fee, or separate interests, carved in succession out of the fee? Whether they are tenants in common of the fee, or tenants for life, and remainder men in fee? In contemplation of law, in each case, the sale is a sale of distinct and independent interests; and if the parties do not fix the amount of their respective shares in the purchase money by some positive agreement, the natural conclusion is, not

that any one of them surrenders his right to the other, but that they silently agree to apportion the same among themselves according to their respective rights. Now, if in the present case, the tenant for life had separately sold his life estate to the purchaser, there is no pretence to say, that he would not have been solely entitled to the principal of the purchase money. What difference can it make, except as to the means of ascertaining the value of his life estate, that he proceeds to make sale, or joins in a sale of the remainder in fee? It does not strike me, that there is any. Suppose A. and B., the several owners of two adjoining acres of land, should unite and sell them both in one deed, to a purchaser for a gross consideration; would not the purchase money be divisible between them according to the relative value of the two acres? I think it clearly would.

But it is said, that, upon the sale, the purchase money was substituted for the land, and it is therefore to be treated exactly, as if the land had remained in the parties; and hence, that the tenant for life had an interest for life in the purchase money, that is in its income, and, subject thereto, that the whole purchase money belonged to the remainder men, the present claimants. Now, this is assuming the very point in controversy; it is stating the difficulty, and not solving it. When a sale is made, the ordinary result is, that the vendor is entitled to the purchase money itself, and not merely to the income thereof. If a different appropriation takes place, it is a matter of private agreement, and not an inference of law. If (as I have already suggested) a tenant for life of land sells his life estate, he has a title to the whole purchase money, and not merely to the income thereof. He sells his own estate, and he is entitled to its full value at the time of the sale. Then, how stands the law in cases, bearing a close analogy. Suppose the case of a tenant for life, remainder in fee, of lands under mortgage, in what manner do the parties contribute to the discharge of the incumbrance? Exactly, as we all know, according to the relative value of their respective interests in the land, calculated according to the value of the estate of the tenant for life, by the common tables. I need not cite authorities to this point; they are familiar to the profession. See 1 Story, Eq. Jur. § 487, where many of the authorities are collected; 1 Pow. Mortg. (by Coventry & Rand) 312, note M; Id. 314, in note Q.; 3 Pow. Mortg. (by the same) 920, 923, note H; Id. 1043, note O. The rule is founded upon the obvious equity, that every one of the parties in interest shall contribute in proportion to the benefit, which he derives from the discharge of the incumbrance. The same principle applies to the case of a sale. Each party is to participate in the purchase money, in proportion to the beneficial interest he has in the land. The same principle applies, where a mortgagee devises the mortgaged estate to one for life, remainder over in fee; the tenant for life and the remainder man share the mortgage money, if paid by the mortgagor during their lives, according to the value of their respective interests at the time of the payment. See 1 Story, Eq. Jur. § 485, and note; 3 Pow. Mortg. (by Coventry & Rand) 1043, note O. This was indirectly admitted in Brent v. Best, 1 Vern. 69; and directly held in Thynn v. Duvall, 2 Vern. 117. That is certainly a case nearly approaching the present, where it might have been said, that the devisee for life of the mortgagee ought to be entitled only to the interest for life, and to no part of the principal. A doctrine somewhat different was asserted in the case of Lord Penrhyn v. Hughes, 5 Ves. 99, 107, where the master of the rolls said, that where there is a tenant for life and remainder men, entitled to an estate under incumbrances, the tenant for life and the incumbrancers have a right to have the estate sold to discharge the incumbrances, and the surplus of money, after discharging the incumbrances, is to be divided between the parties, in the proportion, that their interests bear to the estate; that is, as the master of the rolls afterwards explained, by putting the whole out at interest, and allowing the tenant the interest for his life. See White v. White, 9 Ves. 554, 4 Ves. 33; 3 Pow. Mortg. 1043, note O. It is not, perhaps, very easy to see the reason of this particular doctrine. It may be, that the tenant for life shall not, by his own act, compel the remainder men to submit to a sale, by which his interest in the remainder may be materially affected without his consent. But that case is unlike the present, where there is a voluntary joinder in the sale, or a confirmation of it. A court of equity may well decline to interfere in adversum to change real estate, by a sale, into personal estate, without imposing conditions, by which the proceeds shall retain throughout the character of the original fund, when it might not act in the same manner, where there had been a voluntary sale by the parties. The distinction is often acted on in courts of equity. See Story, Eq. Jur. § 1357. In the case of Houghton v. Hapgood, 13 Pick. 154, as far as I am able to gather from the report, (which, on this point, may be thought somewhat indeterminate,) a tenant by the curtesy of his wife's estate, which was sold by an executor improperly, but the sale was afterwards confirmed both by himself and by her heirs, was held entitled to share in the proceeds according to the value of his life estate, as tenant by the curtesy, calculated by the common tables of life annuities. If I take a right view of that case, it is in exact coincidence with the opinion, which I hold in the present case.

It appears to me, that the sale in the present case, having been confirmed and adopted by all the parties in interest, must be treated in the same way and manner, and have the same effect, as if it had been originally made

by the consent of all the parties in interest, and all of them were then competent to make the sale; and that the rights of all the parties were fixed at that time. And this leads me to say a few words on the second point, made at the bar, as to the rule of apportionment. I think it must be according to the value of the life of the tenant for life at the time of the sale, calculated according to the common tables. If I am right in the opinion already stated, that the rights of the parties were absolutely fixed at the very time of the sale, then it follows, as a necessary consequence, that they are entitled to share in the proceeds according to the relative values of their respective interests in the estate at the time of the sale. The case of Clyat v. Batteson, 1 Vern. 404, is not opposed to this doctrine. In that case lands in mortgage were devised to A. for life, remainder to B. in fee. B. bought up the mortgage, taking an assignment thereof in the name of trustees. A. died; and then B., the remainder man, brought a suit against the defendant, who was the representative of A., to redeem the mortgage, and insisted, that the representative ought to pay one third of the mortgage money, paid by B., by reason, that A. enjoyed the profits during his life. The court held, that if B. had brought the bill in A.'s lifetime, he would have been entitled to the proportion of the money according to the value of the respective estates of the tenant for life and the remainder man (that is, according to the old rule, now exploded, to one third); but that A. being dead, and having enjoyed the estate but one year only, the representative was bound only to allow for the time A. enjoyed the estate. This decision turned, therefore, upon the very point of the value of the estates of the tenant for life and the remainder man at the time, when the parties were charged with the payment of the money. But when the tenant for life sells his life estate, he sells it for what it is then worth, and of course his share of the purchase money does not depend upon the future event of his life or death, but upon its present value. It strikes me, therefore, that the true rule in the present case is to apportion the purchase money between the tenant for life and the remainder men, according to the relative values of their respective estates in the land at the time of the sale, unaffected by the subsequent events. It is said, that the duration of the life of the tenant for life, calculated according to the common tables, was over twenty years, whereas he died in a little less than four years after the sale. Be it so. The event has turned out unfavorably for the remainder men,—as contingent events sometimes do. But the tenant for life might have lived thirty years, and then the apportionment would have been favorable to them. The fact, therefore, does not shake the propriety of the rule of apportionment; but it only shows, that it has the common elements of uncertainty belonging to all calculations of contingencies. A tenant for life of a mortgaged estate may die within a year after he has been compelled to pay one third part of the mortgage money upon a decree for redemption, his life having been calculated as worth that proportion of the money. He may, on the other hand, live far beyond the period of average life. Yet this inequality has never been supposed to justify any departure from the general rule of contribution.

In the view, which I take of the case, the other points made at the bar are not material to be discussed. I think, that the remainder men are entitled to their proportion of the purchase money, according to the relative value of the life estate, and the remainder at the time of the sale; that the executors are liable for this amount to the remainder men, and that, upon so much of the money as either the tenant for life or the executors have received interest, they are entitled to receive their proportionate share of the interest.

Case No. 4,973.

FOSTER et al. v. INGLEE.

[13 N. B. R. (1876) 239.] [1]

District Court, D. Maine.

BANKRUPTCY — ALLOWANCE FOR TAXES ON REAL ESTATE TAKEN BY CREDITORS PRIOR TO FILING OF THE PETITION.

Where it appears that creditors have taken the real estate of the bankrupts by levy or execution prior to the filing of the petition in bankruptcy, and under attachments valid as against the assignee, and the collector of taxes makes proof against the bankrupt estate, for taxes due on such real estate, *held*, that it would be inequitable to allow the attaching creditors to escape the burden of the taxes on the estate they have acquired under their levy, if the taxes were at the time of the levy allowed and deducted from the valuation made by the appraisers.

[William] Inglee, the collector of taxes, having made his proof of taxes assessed on the real estate of the bankrupts [E. Longfellow and son], prior to the commencement of the proceedings in bankruptcy, asked for an order for their payment by the assignees [Jeremiah Foster and others]; thereupon the assignees applied to the register for a re-examination of the proof.

H. L. Mitchell, for assignees.

John F. Lynch, for deposing creditor.

FOX, District Judge. State taxes duly assessed have a preference over general creditors under the bankrupt act [of 1867 (14 Stat. 517)]; but under the laws of Maine a lien is created for taxes on real estate. This estate has been taken by creditors under attachments valid as against the assignees, and it would be inequitable to allow these creditors to escape the burden of the taxes on the estate they have acquired under their levy, if the taxes were at the time of the

[1] [Reprinted by permission.]

levy allowed and deducted from the valuation made by the appraisers. The proof is therefore suspended to ascertain that fact. If the creditors had them deducted from the value at the time of appraisal, the collector should in equity be required to assert his lien therefor against the estate levied upon. If they were not deducted and allowed, then the taxes should be proved as a preferred claim against the estate.

Case No. 4,974.

FOSTER v. JOICE.

[3 Wash. C. C. 498.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1819.

REAL PROPERTY—LIFE ESTATE—EJECTMENT—DEFENSE BASED ON OUTSTANDING TITLE IN THIRD PERSON.

1. A conveyance "to J. M. and his generation, to endure as long as the waters of the Delaware should run," passes no more than a life estate.

2. When the defendant, in an ejectment, opposes to the plaintiff's title a superior and outstanding title in a third person, under whom he does not claim, it must be subsisting and available; and on which the asserted owner might recover in ejectment, if he was plaintiff. If such a title is barred by the statute of limitations, or by a descent cast, the defendant cannot avail himself of it, to protect his mere possession; he being a perfect stranger to the title.

[Cited in Norcum v. D'Oench, 17 Mo. 100; Hulick v. Scovil, 9 Ill. 172; Ogden v. Brown, 33 Pa. St. 248; Wing v. De La Rionda, 131 N. Y. 429, 30 N. E. 243; Hardin v. Forsythe, 99 Ill. 318.]

In the year 1740, John Wells conveyed by deed, the land in dispute, lying in New-Jersey, to three Indian chiefs, of whom Jacob Mootes was the survivor, "to them, and their generation, and to endure as long as the waters of the Delaware should run," according to the usage of Indians. On the 15th of June, 1783, Jacob Mootes duly made his last will and testament; and thereby devised this land to his three children, Charles, Mary, and Hannah; and departed this life in 1784. Charles Mootes survived his sisters; and, on the 9th of September, 1797, he duly made his will; and thereby devised the land, except some small lots, to [Josiah Foster] the lessor of the plaintiff, in fee, and died seised, some time in 1798. The defendant [Clayton Joice] set up no other title, except a lease made to him in 1806, by certain commissioners, appointed in virtue of an act of the legislature of New-Jersey, to take care of this property for this tribe of Indians, called the "Cohaxen Indians," saving the rights of all persons to the same. The cause turned principally on the validity of the will of Charles Mootes; which was remitted by the surrogate to the orphans' court, for probate, in consequence of a caveat entered on behalf of this tribe of Indians. Probate was refused; but, on appeal to the surrogate-general, the decision of the orphans' court was reversed, and the will was duly admitted to probate. The plaintiff's counsel, after examining one of the subscribing witnesses to the will, offered to read the deposition of another subscribing witness, (since dead,) taken in the orphans' court, in the trial there, as well as all the depositions taken upon that occasion. It was contended, in support of this evidence, that it not only results from the provisions of the act of assembly, passed in 1813 (Patt. Laws, 5); but that it was the uniform practice in the state courts, to read the evidence given in the orphans' court, if the will was finally admitted to probate, in cases where its validity came into question in an ejectment. The 2d section of this law provides, "that all wills and testaments which shall be made in writing, signed and published by the testator, in presence of three subscribing witnesses, and regularly proved, and entered upon the books of record or register, in the proper office for that purpose, shall be deemed sufficient to devise and convey any lands, &c., or other estate whatsoever within the province, as effectually as if the testator had conveyed the same in his lifetime; and the books, in which they are registered, may be given in evidence; and shall be accepted as sufficient evidence, at all times and places, where the said wills may be requisite to be given in evidence." It was insisted, that the court was to decide, whether the will had been regularly proved, and recorded, so as to give it the effect of a conveyance; which could only be done by examining the proofs given in the orphans' court, upon which it was finally admitted to probate by the surrogate-general. Penn v. Allen, Penning. 35; 4 Bin. 204; 2 Bin. 40; Spencer v. Spencer [Case No. 13,233]; 3 Day, 318. The admission of this evidence was resisted, principally on the general ground, that the contest before the orphans' court respected personal property only, and was between different parties than those now before the court; and, consequently, that the evidence was ex parte as to the defendant.

Stockton, Griffith & Cox, for lessor of plaintiff.

Mr. Ewing and L. H. Stockton, for defendant.

Before WASHINGTON, Circuit Justice, and PENNINGTON, District Judge.

WASHINGTON, Circuit Justice. Upon what seems to me to be the reasonable construction of the act of assembly, I should have supposed, that the probate of a will, relating to land, before the orphans' court, or before the surrogate-general, would be conclusive in any other court, where the

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

validity of the will might incidentally come in question. But I understand, that a different opinion has prevailed in the courts of this state; and I submit to the authority of that opinion. But if this be the law, I am entirely at a loss to give any sensible interpretation of the 2d section of the act, if the court, in which the validity of the will is incidentally in issue, is precluded from examining the evidence taken in the orphans' court, that it may be seen whether the will was regularly proved or not. Suppose all the witnesses, whose depositions were taken, should die—how could it be decided on the trial of an ejectment, whether the will was regularly proved or not, unless the depositions are read? And if they cannot be read, then a will so proved and recorded, cannot be equivalent to a conveyance; because it never can be known, whether it was regularly proved and recorded, or not. I am therefore of opinion, that the evidence ought to be allowed.

PENNINGTON, District Judge, was against admitting the evidence.

A number of witnesses were then examined, and the depositions taken in the orphans' court were read, (the defendant's counsel having waived the objection,) which presented much contradictory testimony, as to the sanity of the testator, and the fairness of Foster's conduct in obtaining the will. The only question of law raised, was, whether the defendant could protect his possession, by the outstanding title in the heirs of John Wells; it being conceded on both sides, that the conveyance of 1740 passed only a life estate to the grantees.

The defendant's counsel relied upon the case of Roe v. Harvey, 4 Burrows, 2487, Bull. N. P., to show that the defendant may protect his possession, by a subsisting outstanding title in a third person, and that the plaintiff must recover upon the strength of his own title. 2. That the will of Jacob Mootes, passed only an estate for life to Charles Mootes; and, therefore, he had not such an estate as he could devise to the lessor of the plaintiff.

For the plaintiff, it was answered, that in no case can the defendant set up an outstanding title in a stranger, to defeat the plaintiff in ejectment, unless he shows that he himself claims under such title; and that the plaintiff may recover, even upon a prior possession, against a mere intruder or disseisor, who comes into possession without a colour of title. [Robinson v. Campbell] 3 Wheat. [16 U. S.] 224, note; 11 Johns. 509; 3 Bl. Comm. 167.

WASHINGTON, Circuit Justice. 1st. As to the outstanding title in the heirs of Wells. Without giving any opinion as to many of the cases referred to in the note to 3 Wheat., I feel no difficulty in saying, that wherever the defendant opposes to the plaintiff's title, a superior outstanding title in a third person, under whom he does not claim, it must be a subsisting and available title, on which the asserted owner of it might recover in ejectment, if he were the lessor of the plaintiff. If it be barred by the act of limitations, or by a descent cast, it would be quite absurd to contend, that the defendant, a perfect stranger to that title, can avail himself of it, to protect his mere possession.—That is precisely the present case. Upon the death of Jacob Mootes, in 1784, the right of this land reverted to John Wells, or to his heirs. The entry of Charles Mootes was that of an intruder, and adverse to the title of Wells. He continued in possession until his death in 1798, when, by force of the 6th section of the act of 1813 (Patt. Laws, 6), the possession vested in the lessor of the plaintiff, the devisee, (if the jury should establish the will,) without the necessity of an actual entry, although some evidence of such an entry has been given. This possession continued until 1806,—more than twenty years after the entry of Charles Mootes. But even if this were not the case, there has been an adverse possession to the title of the reversioner, more than twenty years,—sufficient to bar his right of entry. This outstanding title, then, cannot avail the defendant.

2d. As to this objection, there is nothing in it. It may be admitted, that the will of Jacob Mootes passed only a life estate to his son. In truth, it passed nothing, since Jacob did not hold adversely to, but under the reversioner, and had no estate in him which he could devise. Charles Mootes, on the contrary, gained, by his intrusion, a defeasible estate in fee, of which he died seised, and could dispose of by will; subject, however, to the better title of Wells.

PENNINGTON, District Judge, did not concur in the opinion on the first point.

The question, as to the validity of the will, was submitted to the jury on the evidence. Verdict for plaintiff.

Case No. 4,975.

FOSTER v. LINDSAY et al.

[1 Ban. & A. 605;[1] 7 O. G. 514.]

Circuit Court, E. D. Missouri. Dec., 1874.

PATENTS — SUIT TO REPEAL INTERFERING PATENT UNDER ACT OF 1870—PLEADINGS—ANSWER.

1. Section 58 of the patent act of 1870 [16 Stat. 207], authorizing a court, in a suit thereunder, to adjudge and declare either of the interfering patents void, in whole or in part, is broader, in its application, than section 16 of the patent act of 1836 [5 Stat. 123]; and under the act of 1870 the court may review both patents on their merits, and decree the cancel-

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

lation of either or both on the ground of want of novelty, or any other ground that would, in an action for infringement, affect the validity of either of the patents.

2. The case of Mowry v. Whitney, 14 Wall. [81 U. S.] 434, in which section 16 of the patent act of 1836 was construed, considered and distinguished.

3. In a suit brought under section 58 of the act of 1870, to repeal an interfering patent, a motion was made to strike out such part of defendants' answer as related to an alleged lack of novelty in the invention, covered by complainant's patent, on the ground that the object of the statute was merely to enable the complainant to determine the question of priority as between himself and his adversary, prior to going before the public to test the validity of the patent on its merits: *Held*, that this allegation of the answer was admissible, and the motion was accordingly overruled.

This was a bill in equity, brought under section 58 of the patent act of 1870, for the repeal of certain letters patent [No. 149,589] granted to the defendants [William M. Lindsay and another], April 14, 1874, which were alleged to be for the same invention as was covered by a patent granted to complainant [Alfred F. Foster], May 12, 1874, and, therefore, to constitute an interfering patent. The defendants, in their answer, besides denying that their patent was for the same invention as complainant's patent, and alleging that they were prior in date, asserted that complainant's patent was void for want of novelty, and set up alleged anticipations. The case came up upon a motion made by the complainant's counsel, to strike out that part of the answer which alleged want of novelty and the anticipations, as irrelevant and immaterial. In support of the motion, and in behalf of complainant, it was urged that the object of section 58, of the statute, was to enable the patentee to remove the cloud cast over his prima facie right, by the improper action of the patent office in granting two patents for the same invention, prior to going before the public to test the validity of his patent upon its merits, and to place himself in the same position, no better and no worse than he would have occupied had the interference been declared and determined, as it should have been, in the patent office; that it was the design of the section, to enable the patentees to determine, between themselves, which was prior in rights, before either should be put to the expense of ascertaining whether his patent was valid as against the world; that, if the construction was otherwise, the patentee would derive no advantage whatever from this section, as he could, without it, in an action for infringement, determine the validity of the respective patents; while, if he was obliged, in an action under the section in question, to establish the validity of his patent, he would be put to the same trouble and expense as in an action for infringement, and at the same time fail to obtain a decree for profits or damages; that the object of the statute was not to provide an additional mode of determining the validity of a patent, since, if it were, there was no reason why it should not apply to the repeal of other patents, as well of interfering patents; that the court could, under the statute, decree the cancellation of either patent, only on the ground that it was in conflict with the other, since the statute makes no provision for cancellation on the ground of want of novelty, or upon any other ground than the existence of the other patent; that the statute provides in terms for the repeal of either of the interfering patents, but not of both; that the statute provides in terms for the defence of want of novelty in an action for infringement, and the fact that it makes no such provision in this case, supports the presumption that it contemplated no such defence; and that the fact that an earlier patent was defective, on grounds extraneous to the patent office record, was no reason why a later patent, which was defective on the very ground, and the only ground to which this statute referred, should not, upon that ground, be cancelled. It was insisted, on behalf of the defendants, that the complainant's right of action, being founded upon the existence of his patent, they were at liberty to attack its validity upon any ground that affected it.

Hatch & Parkinson, for complainant.

Kellogg & Holmes, for defendants.

Before TREAT, District Judge.

The court delivered no written opinion, but after stating the nature of the motion, and the character of the suit in which it was made, referred to the 16th section of the statute of 1836 as analogous to the one it was called upon to construe. The case of Mowry v. Whitney, 14 Wall. [81 U. S.] 434, was referred to, as indicating the construction put upon that statute by the supreme court. That was a suit in equity for the repeal of a patent, on the ground of fraud in the extension of it, brought in the name of a party who had been sued for an infringement. The supreme court held that "no one but the government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the government has issued to an individual, except in the cases provided for in section sixteen of the act of July 4, 1836;" that under this 16th section the court was only authorized to try the conflicts of claim arising from two interfering patents, and only to annul or set aside one patent so far as is necessary to protect the rights of the other party; that the decree in such a suit, can have no validity, except between the parties to the suit, and that the general public is left to the protec-

tion of the government and its officers. The court, after a review of this case of Mowry v. Whitney [supra], held the statute of 1870 to be broader in its application than that of 1836; that under it the court was authorized to review both patents on their merits, and to decree the cancellation, not only of either, but of both; and that it might do so on the ground of want of novelty in either, or both, or any other ground that would, in an action for infringement, affect the validity of either.

The motion was accordingly overruled.

[NOTE. Subsequently, both patents were held void for want of novelty. Case No. 4,976.]

Case No. 4,976.

FOSTER v. LINDSAY et al.

[2 Ban. & A. 172; 3 Dill. 126; 8 O. G. 1032; 2 Cent. Law J. 769; 23 Pittsb. Leg. J. 107.] [1]

Circuit Court, E. D. Missouri. Oct. 28, 1875.

INTERFERING PATENTS—ACT OF JULY 8, 1870—FORM OF DECREE.

1. In a suit under section 4,918 of the Revised Statutes of the United States, concerning interfering patents, a court may declare either one or both of the interfering patents void on the ground of want of novelty, or any other ground which in a suit for an infringement of the patent would invalidate it.

[Cited in Lockwood v. Cleaveland, 6 Fed. 726; Same v. Cleveland, 20 Fed. 166; Holliday v. Pickhardt, 29 Fed. 861; Electric Accumulator Co. v. Brush Electric Co., 44 Fed. 608. Disapproved in Pentlarge v. Pentlarge, 19 Fed. 819.]

2. In a suit between parties owning interfering patents, if the court should hold that either one of the patents was void, a decree should be entered annulling the patent, and not merely dismissing the bill or entering judgment against the defendant.

3. The case of Mowry v. Whitney, 14 Wall. [81 U. S.] 434, commented on and distinguished.

[This was a suit in equity by Alfred T. Foster, patentee under patent No. 150,854, granted May 12, 1874, against William M. Lindsay and another, to repeal patent No. 149,589, granted to Lindsay & Kalb, April 14, 1874, and was instituted by virtue of the special provisions of the act of July 8, 1870 (Rev. St. § 4918).

[At a former term, a motion was made to strike out that part of the defendants' answer which alleged want of novelty of complainant's invention. The court overruled the motion (Case No. 4,975), and the case is now heard on the claims of the respective patents.]

Hatch & Parkinson, for plaintiff.

G. B. Kellogg and Mr. Holmes, for defendants.

TREAT, District Judge. This is a suit in equity under section 4918 of the Revised Statutes of the United States, concerning alleged interfering patents. The defendant's patent [No. 149,589] was prior in date to plaintiff's; also the application therefor. The plaintiff claims that the invention was by him; that he had, previous to any knowledge thereof by the defendant, not only invented the patented composition, but actually reduced it to a practical and successful test; that he had shown to the defendant the manufactured article, and when, as their foreman in the brick business, he was consulted thereafter about manufacturing fire-brick by means of which they could obtain a large and profitable order, he called their attention to the fact that he had exhibited to them before entering upon their service, a specimen brick of the needed quality; that thereupon he as their foreman directed various experiments to be made at defendant's brick yard; that when the defendant suggested subsequently that they proposed to obtain a patent for that mode of making an improved fire-brick, he remonstrated against their doing so, claiming that he was the original inventor, and alone entitled to a patent if one was obtainable.

On the other hand, the defendant claims that it was only after a series of experiments under his direction and supervision, in his own establishment, that the success of the mode patented was ascertained.

Without analyzing the testimony with the view of determining whether the plaintiff in his isolated experiment, prior to entering into the service of defendants, had invented the patented mode of securing the desired result, or had merely experimented so far as to ascertain that the use of sand-rock would furnish the needed glazing in his pottery business, and without enquiring further whether he had not abandoned all purpose of pushing his experiments to ultimate success for fire-bricks, and also without determining to what extent he and the defendant respectively suggested the experiments made in the defendant's establishment which first resulted in an ascertained and definite value from the compound, whereby the rights of the respective parties as employer and employé would arise, we will first consider the true construction of the act of congress. The language of the section is peculiar, and the object designed by it is not free from doubt. The section is as follows:

"Wherever there are interfering patents, any person interested in any one of them, etc., may have relief against the interfering patentee and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice, may adjudge and declare either of the patents void in whole or part, or inoperative or invalid in any particular part of the United States, according to the interest of

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. 23 Pittsb. Leg. J. 107, contains only a partial report.]

the parties, etc. But no such judgment or adjudication shall affect the right of any person except the parties to the suit," etc. Rev. St. § 4918.

So far as known this section has not received any express adjudication. In Mowry v. Whitney, 14 Wall. [81 U. S.] 434, an allusion is made to a somewhat similar provision in the act of 1836 [5 Stat. 123]. The latter act in the section referred to covered two distinct classes of cases, viz: 1st, where there were interfering patents; and 2d, where the examiners refused to issue a patent applied for, on the ground of interference with a prior patent. In each of those cases a bill of equity would lie at the instance of either of the parties, and the court could determine in the latter class of cases whether the applicant should have a patent issued to him; and in the former, might adjudge either of the patents void in whole or in part, etc.

In ordinary cases, where a patentee brings suit for infringement, the defendant can assail the validity of the patent in the manner prescribed; and the decree of the court is binding on the parties. It is contended that, inasmuch as this suit is not for an infringement, the defendant must be confined to the respective merit or claims of the patentees inter sese, irrespective of the validity of either. The defendant in this case, among other defences, has set up that the patented compound or process had been anticipated and in use before either of the interfering patents had been claimed or issued. The evidence fully establishes the fact. In a suit for an infringement, a defence for want of novelty would, under the evidence in this case, be successful, whether the one or the other of the interfering patents was the basis of the action. The case of Mowry v. Whitney [supra] goes no further than to hold that if a patent is to be annulled ab initio, the proceeding must be at the direct instance of the government, but it does not decide that the question between conflicting patents may not be fully and finally determined as to the parties to suit for interfering patents.

The plaintiff in this case contends that he has the prior and better right, although his application and patent are of subsequent date, and that the court is bound to adjudicate solely as between his and the interfering patent, leaving one of the patents to stand for subsequent adjudication when assailed in a proper suit.

The act of congress provides for a suit in equity against the owners of the interfering patent for such relief as equity would furnish. If the action stopped there, would a court of equity grant relief to a complainant who had no equity? If it would not, could not the court enquire through proper pleadings and evidence, into the equities of the complainant? But the section proceeds to authorize the court to adjudge either of the interfering patents void in whole or part. If it adjudged the plaintiff's patent void, should not a decree to that effect be entered, instead of a simple decree dismissing his bill? If it ascertains that the defendant's patent is void, and the plaintiff's also, must the decree be restricted to a judgment against the defendant's patent, leaving the plaintiff's patent as if in full force and of established validity; so that if a new suit were brought by the same plaintiff against the same defendant for an infringement of plaintiff's patent, the defendant would then for the first time be able to dispute the validity of plaintiff's patent for want of novelty, etc.? Why two suits between the same parties to adjust the controversies between them, when one suit would accomplish the end according to the well-known purposes of equity proceedings? Unless the terms of the statute restrict the court, sitting in equity, so that it can not do full and complete justice between the parties and end the litigation between them, it would seem to be its duty to pass upon the whole controversy when fairly and fully presented. The statute says that the court may adjudge either void in whole or part. How can it do so, consistently with law and equity, unless each of the patents is under consideration in all respects? It may conclude that in some respects there is an interference, and in others none, so that the decree would be only for an annulment in part; or it may decree that there is an interference in toto, and consequently annul one of the interfering patents, leaving the other to stand as valid. But what would be the position of one who had previously used the patent declared void, when suit was subsequently brought against him by the other patentee for an infringement? Could he assail the validity of the patent which had already, as between the same parties, been adjudged, at least impliedly, to be valid? It seems that the suits in equity authorized in cases of interfering patents should not be restricted to the narrow limits urged. The controversy is between two patentees or those claiming under them. If neither has a valid patent, the court should adjudge both void, and thus end the strife. It is on this theory that the defendant was permitted to set up in his answer the lack of novelty, not of plaintiff's patent alone, but of his own. True, he might voluntarily have surrendered his patent, and contested the plaintiff's right in a suit for infringement; but why should he not, when sued, insist upon a full defence, whereby a second suit could be avoided? The power vested in the court to adjudge either of the interfering patents void, in whole or part, is held to confer full authority, where the evidence justifies, on issues fairly made, to decree, not one of the patents alone, but both, to be void. The court so adjudges in this case, and the decree will be accordingly at the costs of the plaintiff. Decree accordingly.

FOSTER (McPHERSON v.). See Case No. 8,921.

Case No. 4,977.

FOSTER v. The MIRANDA.

[6 McLean, 221;[1] Newb. 227.]

District Court, D. Illinois. Oct. Term, 1854.

COLLISION BETWEEN SAILING VESSELS—NECESSARY LIGHTS ON THE GREAT LAKES—ACT OF MARCH 3, 1849—LOOK-OUT—DIVISION OF DAMAGES.

1. The 5th section of the act of congress of 3d March, 1849 [9 Stat. 382], required a vessel navigating the lakes in the night, while on the starboard tack, to show a red light, and a vessel having the wind free, a white light. It also required sailing vessels to have reflectors to their lights, and that they should be such as to insure a good and sufficient light, as well as propellers and steamers.

2. In a collision, in the night, between a brig and a schooner, at the foot of Lake Michigan, the weight of the evidence is that the brig, close hauled on the wind on the starboard tack, had a white light. This was in violation of the act of congress and was such a fault as to preclude the brig from recovering full indemnity for the damage done by the colllsion, which occurred while the brig carried such a light.

3. The act of 1849 did not intend to abrogate the rules which have been generally observed for the management of vessels: it only added a new one. But it once being established that the brig had the wrong light, the burden of proving that the loss was not the consequence of it, is thrown upon the brig. The proof clearly shows that, at the time of the collision, the schooner had not a competent look-out. The schooner also should have kept away and not held on her course. It cannot be said, therefore, within the meaning of the act of 1849 that the loss resulted entirely from the neglect of the brig to carry the proper light.

[Cited in The City of Washington, 92 U. S. 36; The Buckeye, 9 Fed. 667.]

4. Both vessels were in fault, and the loss was divided equally between them.

[Cited in The City of Hartford, Case No. 2,750; Vanderbilt v. Reynolds, Id. 16,839; The Pennsylvania, 15 Fed. 817.]

[This was a suit in admiralty by George Foster, owner of the brig S. F. Gale, against the schooner Miranda.]

Mr. Hurd, for libellant.

Mr. Goodrich, for claimant.

DRUMMOND, District Judge. This is a libel filed by the owner of the brig S. F. Gale, against the schooner Miranda, for damages sustained by the brig, from a collision with the schooner in the fall of 1849. The brig S. F. Gale from Chicago with a load of wheat, was proceeding down the lake on her way to Buffalo. When near the foot of Lake Michigan, off Point Wabbeshanks, not far from the light-ship stationed near that point, about three o'clock in the morning of the 11th of October, the collision took place. The wind was south-south-east. The brig was close hauled upon the wind with her starboard tacks above, steering nearly east. It was a clear star-light night, and a vessel could be discerned and a brig distinguished from a schooner a mile or more distant. Some time before the collision occurred, the light carried by the Miranda, was seen from the S. F. Gale, two points on her bow. The man at the helm was ordered to keep the brig clear to the wind, because the light of the Miranda indicated a vessel approaching from an easterly direction. The brig was accordingly kept as clear to the wind as possible. The Miranda was bound up the lake, on a voyage from Cleveland to Chicago, and was standing about west by north, and consequently had the wind free. Some time before the collision, those on board of the Miranda had seen the light of the brig, and, believing it a white light, supposed it was a vessel on the same course with themselves, and immediately preceding the collision, the watch on the deck of the Miranda had gone aft to lower the peak, with a view to haul round the light-ship—a usual and proper precaution—the captain being at the helm. As the two vessels approached, the mate of the brig shouted to those on the schooner, not to run into them. When this was done the helm of the schooner was put hard-a-port, and that of the brig put down; but the vessels ran so near that at that moment, when apparently for the first time those on each vessel entertained apprehension of a collision, it was impossible to prevent them from meeting, and the Miranda struck the S. F. Gale on the larboard bow near the fore-rigging. Both vessels were injured, but the brig suffered the most.

By the 5th section of the act of congress of 3d of March, 1849, making appropriations for light-houses, &c., and for other purposes (9 Stat. 382), vessels, steamboats and propellers navigating the northern and western lakes, are required to comply with certain regulations "for the security of life and property," among which are the following:—During the night, vessels on the starboard tack shall show a red light, and vessels going off large or before the wind, a white light; and it is provided, "if loss or damage shall occur, the owner or owners of the vessel, steamboat or propeller neglecting to comply with these regulations, shall be liable to the injured party for all loss or damage resulting from such neglect." This law is undoubtedly binding upon all the classes of vessels mentioned. It follows that it was the duty of the S. F. Gale to carry a red light, and of the Miranda to carry a white light at the time of, and previous to the collision. There was no point made as to the light of the Miranda. Those on board of the brig admit that the schooner showed a white light. The evidence, however, proves that it was an ordinary globe lantern without reflectors; and if so, it could hardly be said to come up to the standard required by the law; because I think the words in the act, "said light shall

[1] [Reported by Hon. John McLean, Circuit Justice.]

be furnished with reflectors, &c., complete, and of a size to insure a good and sufficient light," apply as well to the lights carried by vessels as to those carried by steamboats and propellers.

The libel alleges that the S. F. Gale carried at the time a red light. The answer of the claimant denies it, and asserts it was a white light. Of course, the dispute is to be determined by the proof. And here is to be found the conflict of evidence which so often occurs, in these cases between the persons on board of the different vessels. A brief examination will show where the weight of the testimony is upon this point.

Langley, the captain of the brig, merely says they had a red light. Scott, a seaman, states they had a red light on the pall bitts, but he did not notice the Gale's light when he went on deck. It being his watch below at the time, he did not go on deck till the collision occurred. Hitchcock, also a seaman of the brig, who was at the helm, says that at the time the Miranda's light was first discovered, and for more than an hour previous, and up to the time of the collision, the brig showed a red light suspended from the pall post. This is the whole testimony on the part of the libellant. The witnesses simply declare the fact to be so, without adverting to any circumstances which show that their attention was particularly called to it, or that they had any special reasons for recollecting it.

On the other hand Durand, the captain of the Miranda, says that he saw the light of the Gale about fifteen minutes before the collision, a mile or more distant: that it was a white light. He is positive it was a white light, because the second mate and himself had previously talked of it, and there was no other light in sight except that of the light-ship, and he is certain also, because the Gale carried the same light (white) when she shot across the bows of the schooner. Wilgus, the first mate of the Miranda, declares he noticed the signal light of the Gale. It was a white light, but burned low, giving a dull light. He still saw the same light hanging after the two vessels parted. Isaac Brown, the second mate, was one of the watch on deck at the time. He and the captain spoke together of the white light carried by a vessel then ahead of them as they supposed. They stood some time on the forecastle deck and saw a white light and that only. If the Gale had carried a red light, he says, they would not have gone aft to lower the peak of the mainsail, Joseph Brown, a seaman of the Miranda, states the brig had a white light, which burnt dim at the time. The light was so near he could not but observe it; and he says it was remarked by others at the time that the Gale carried a white light. Turner, also a seaman of the Miranda, says that the Gale carried a dim, white light; and is positive it was a white light, because he had heard the captain and second mate previously talking of the light in sight as a white light, and because, when he found the brig was close hauled on the wind, with her starboard tacks aboard, he noticed that she showed the wrong light.

It is apparent from the foregoing statement of the evidence upon this point, it predominates strongly in favor of the conclusion that the S. F. Gale showed a white light. The witnesses who testify on that side, had their attention particularly drawn to the fact: it was the subject of remark at the time. They saw the light before the collision, and after; their opportunity for observation was favorable, and it seems clear that those on board of the brig who speak to this point were mistaken; or, at all events, the S. F. Gale did not show that kind of light which the law required. There can be no doubt the act demands the exhibition of such a red light (when the vessel during the night is on the starboard tack), as under ordinary circumstances, and more especially in so clear a night as that when this collision occurred, can be distinguished from a green or white light. It is possible the explanation may be found, as has been suggested, in the fact that the S. F. Gale, just before the light-ship was passed, had been sailing with the wind free, and her officers had neglected to change their white light when they changed their course. However this may be, I am forced to the conclusion that the brig was not at the time showing the proper light, consequently those who had charge of her were themselves in fault in that respect. There is some doubt, also, whether there was a good look-out kept on board of the brig. The captain of the Miranda says, if a good look-out had been kept on the brig, the collision might have easily been avoided. This might have been so, but those on board of the S. F. Gale had a right to suppose, as they were close on the wind, the usual rule would be observed by the Miranda—to keep away; whereas, as we shall presently see, the course of the schooner was unchanged until the collision was unavoidable. The S. F. Gale not being free from blame, it follows the owner cannot, under the maritime law, sustain a claim for full indemnity for the damage done.

The next question is, whether within the meaning of the act of congress the loss or damage resulted from the neglect of the brig to comply with the requirement of the law, because if that is the case, so far from the Miranda being liable to the S. F. Gale, the latter would be liable to the owner of the schooner for the injury done to the Miranda. And perhaps we cannot better illustrate the principle than by supposing this were a libel filed by the owner of the Miranda against a brig for injury done to the former. Could it be sustained under the circumstances of this case? Conk. Adm. 302. We have to set out with the admitted fact, that

the S. F. Gale violated an express law of congress. In the case of the collision of the De Soto and Luda (Waring v. Clark, 5 How. [46 U. S.] 441), the supreme court went out of its way to decide, that if a collision occurs between steamers at night, and one of them has not signal lights, it will be held responsible for all losses until it is proved that the collision was not the consequence of the absence of signal lights. The court say they do not put the decision of the case on that ground, and they do not determine whether there was an absence of signal lights or not. The real ground of the decision on the merits was, that the Luda was run down whilst in the accustomed channel of upward navigation, by the De Soto, which was out of that for which it should have been steered to make the port to which it was bound. The opinion of the court in Waring v. Clark [supra] was given under the act of 7th July, 1838, which made it the duty of the master and owner of every steamboat running between sunset and sunrise, to carry one or more signal lights. It is said this principle applies also to the act of 1849 which we are now considering, and that the Miranda cannot be accountable for any loss to the S. F. Gale, until it is shown it was not occasioned by the brig carrying a white light.

Did the collision happen in consequence of the neglect of those who had charge of the brig? It may be admitted that the fact of the brig not having the proper light throws upon the libellants the onus of proving the damage was the result of some fault on the part of the Miranda. I have come to the conclusion, after an attentive examination of the evidence, that while it may be said the collision might not have happened if the brig had shown the right light, it may also be said it would not have occurred if there had not been fault on the part of the Miranda. It is insisted, if it be proved that the brig violated the law, it follows as a necessary consequence that the Miranda must stand excused. I do not so understand the law. There are certain rules which are settled in the maritime law, respecting the conduct of vessels at sea, but the neglect of these by one party will not excuse the other for the want of ordinary care and diligence. In a recent case, it seems to be implied that every proper precautionary measure must be taken on the part of the collided vessel to pass the other in safety; and then if a loss happen in consequence of the fault of the other, the damage is attributable to the neglect of this last. Newton v. Stebbins, 10 How. [51 U. S.] 605. And see St. John v. Paine, 10 How. [51 U. S.] 55, and The Cynosure [Case No. 3,528].

If the S. F. Gale showed the wrong light, it was not the less the duty of those on the Miranda to observe the usual nautical rules in the management of their schooner. It was not the intention of the act of congress to abrogate those regulations which have always been observed in the management of vessels. Notwithstanding the brig carried a white light, it was the duty of the Miranda, having the wind free, to keep away, and not to hold on her course. It was a clear starlight night, those on the Miranda had a right at first to presume that the brig was on the same course with themselves. But if it be true as stated, that the captain and mate of the Miranda looked at the light of the S. F. Gale for some time, they must have seen that they were overhauling the vessel ahead at a very rapid rate. It is to be borne in mind that the evidence shows the two vessels were approaching each other at the combined speed of from eight to ten miles an hour. It should have been enough to have excited to watchfulness. The law of congress is obligatory, but so are all the laws of the sea. There have been many rules and regulations established by the wisdom and experience of nautical men and sanctioned by the courts, for the conduct of vessels, but there is none of more imperative obligation, than the one which declares that when a vessel is approaching another in the night a competent and vigilant look-out should be kept on board of each. It is a rule prescribed alike by the law, and by common sense and common prudence. Did the Miranda keep such a look-out? It seems to me not. According to the evidence the officers knew they were approaching a vessel. What if it was a vessel on the same course with themselves? They were not the less bound to be vigilant in looking out for her and watching her movements. I concur entirely in the opinion of one of the nautical witnesses examined in court, Capt. Napier, that even if they had supposed the vessel ahead was on the same course with themselves, still it was their duty to keep a good look-out, and to call all the watch on deck to lower the peak, at a time when they were so near another vessel. It is impossible to escape the conclusion that if this had been done, in so clear a night as that was, it would soon have appeared that the brig ahead was in fact approaching them from an opposite course close hauled on the wind, notwithstanding the white light, and thus the collision might have been avoided. It was also the duty of the schooner, having the wind abaft the beam, to keep away. It seems clear that if the Miranda had had a competent watch at the time, and kept away as she ought to have done, no collision would have taken place. The loss that was sustained was not the result altogether of the neglect of the brig to show the right light, and was not the consequence alone of that neglect, but to say the least it was occasioned in a measure by the neglect of those in the Miranda. I find, therefore, that the two vessels were each in fault.

But it is urged, conceding there was a fault on the part of the Miranda, yet it was not such an omission as that of the brig.

The latter had violated an express law, by neglecting to do that the omission of which no circumstances could excuse, and it is not like other rules, which vary according to contingencies. I cannot yield my assent to this doctrine. The law of congress under particular circumstances requires a particular light. The maritime law requires a vessel under certain circumstances, to be managed in a certain way. Both are equally binding upon those who have the charge of vessels. And I think that is a sound rule, which, if sustained and enforced by the courts, conduces, to the greatest extent, to unremitting vigilance on the part of seamen. The doctrine laid down by Dr. Lushington in the case of The Hope, 1 W. Rob. Adm. 154, seems to be founded in good sense, and may be applied to this case: that if the brig carried the wrong light, and the master of the Miranda should say, "we will keep our course nevertheless," he would be to blame. It would be a dangerous doctrine, to authorize the master of the Miranda to say under the circumstances of this case: "That vessel has the wrong light; I will not trouble myself to avoid her: the consequences be upon herself."

Both vessels then being in fault, the next inquiry is how is the loss to be apportioned? The rule laid down by Lord Stowell in the case of The Woodrop Sims, under his second possibility by which a collision may occur, when both parties were to blame, or where there is a want of due diligence on both sides, is, that the loss must be apportioned equally between them as being occasioned by the fault of both. This seems to be the well settled doctrine in the English admiralty, and is the general rule of the maritime law. Story, Bailm. § 608; Abb. Shipp. (Shee's Ed.) 230–233, pt. 3, c. 1; Conk. Adm. 300. It has, however, been said in the argument, that the rule has never been adopted in this country. No case was cited in which the doctrine has been applied by a court of admiralty in this country, and it is certainly singular, in the many cases which have arisen, there are so few in which the fault has been found to be common to both parties, so as to determine what the rule is in such cases. But the doctrine to divide the loss appears to have been approved, and whenever it is referred to, it seems to be considered as a part of the maritime law to be administered by our admiralty courts. Story, Bailm. ubi supra; 3 Kent, Comm. 231, 232. It is treated as settled law by Judge Hopkinson in Reeves v. The Constitution [Case No. 11,659]; by Judge McKinley in Strout v. Foster, 1 How. [42 U. S.] 92; and by Judge Woodbury in his separate opinion in Clark v. Waring, 5 How. [46 U. S.] 503. And it was expressly decided and applied by the district court of Massachusetts in 1846, and treated as the settled doctrine in admiralty. Rogers v. The Rival [Case No. 11,867], and authorities there cited. And see the case of The De Cock [5 Mon. Law Mag. (Notes of Cas.) 303].

It is admitted that the rule in the common law courts is different, but all the text writers and judges who have mentioned the subject, seem to regard it as a fixed rule in admiralty. And on the whole, though it has sometimes been considered objectionable by able judges and writers, yet after some reflection I am satisfied the strength of the argument, reasoning upon general principles, is in favor of the rule, and sustains the authorities, in spite of a sneer that has occasionally been thrown out of its being rusticum judicium. It is safer to adopt this rule in cases of collision, than it is to measure out to each party in a particular case, the precise quantum of damage that he may have sustained.[2]

As the parties wish me to decide the question of damages on the proof now in, without referring it to a commissioner, I will state my views on the subject. The evidence is that the S. F. Gale was injured to the amount of $336, for which repairs were actually made and about that amount paid The other damage is stated by the captain at $300. One of the witnesses puts it from $300 to $500. They do not give all the particulars of the injury, from which the court might ascertain with accuracy the amount. It is stated that the new fore-sail was worth $40 more than the old. On the whole I have thought that $600 would, under the proof, be a fair amount to fix upon as the damage sustained by the S. F. Gale. The witnesses say that the damage done to the Miranda was $300. The whole damage done by the collision was then $900, one half of which would be $450. The S. F. Gale being injured $300 more than the Miranda, I shall order a decree to be entered against the claimant and his sureties for $150, and that divides the loss equally between the parties. I shall allow costs to neither party; each one must therefore pay his own.

Case No. 4,978.

FOSTER v. MOORE.

[1 Curt. 279.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1852.

PATENTS—EVIDENCE ENTITLING PATENTEE TO INJUNCTION—INFRINGEMENT—SUBSTITUTION—COMBINATION.

1. An exclusive possession of about eight years, under a patent for a useful machine, affecting the business of a large class of persons, is sufficient prima facie evidence to entitle the patentee to an injunction previous to a trial at law.

[Cited in Sargent v. Seagrave, Case No. 12,365; Earth-Closet Co. v. Fenner, Id. 4,-

[2] The rule has since been sanctioned by the supreme court. The Catharine v. Dickinson, 17 How. [58 U. S.] 170.

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

249; Corbin Cabinet Lock Co. v. Yale & Towne Manuf'g Co., 58 Fed. 565.]

2. The mere substitution of one known device, for another, though complex, is an infringement.

[Cited in Holly v. Vergennes Mach. Co., 4 Fed. 80; Wilt v. Grier, 5 Fed. 453; Yale Lock Manuf'g Co. v. Norwich Nat. Bank, 6 Fed. 389.]

[Cited in Jackson v. Allen, 120 Mass. 75.]

3. What is technically a combination, and how it may be infringed, though improved.

[Cited in Wallace v. Holmes, Case No. 17,100; Waterbury Brass Co. v. Miller, Id. 17,254; Saxe v. Hammond, Id. 12,411; Cochrane v. Deener, 94 U. S. 788; Milner v. Schofield, Case No. 9,609a.]

This was a suit in equity [by George Foster against Abner S. Moore] founded on letters-patent [No. 3,857] granted to Richard Richards, on the 16th day of December, 1844, for "improvements in machinery for cutting leather into soles." The letters-patent had been assigned to the complainant. The specification was in the following words: "To all Persons to Whom These Presents shall Come: Be it known that I, Richard Richards, of Lynn, in the county of Essex, and state of Massachusetts, have invented certain improvements in machinery for cutting leather into soles, and that the following description and accompanying drawings, taken in connection, constitute a full and exact specification of the construction and operation of my said invention: Figure 1, of the drawings above mentioned, represents a top view of my machine. Figure 2, is a side elevation. Figure 3, is a longitudinal vertical and central section. Figure 4, is an elevation of the end nearest to the cutting knives. Such other drawings as may be necessary to the following description will be referred to and described therein. So far as my machine consists of one or more cutters, suitably arranged in frame-work, and capable of being raised from, and depressed upon a platform beneath them, for the purpose of supporting the leather during the operation of cutting, it does not differ from many other machines in common use. A, Figures 1, 2, 3, is the frame work or table, which sustains the operative parts, and within which a frame B, is arranged in the position as seen in the drawings, and sustained in suitable bearings, in which it may be freely moved up and down in a vertical direction,—the object of the frame being to carry and elevate and depress the cutters. The frame B, is operated by the foot of the attendant, applied upon a treadle C; the said treadle being connected to the frame B, by a suitable roll D, jointed at its lower extremity to the treadle, and at its upper to the frame—the same being seen in Figure 3. A curved arm E, projects upwards from the treadle, and has at its upper end a projection a, to which one end of a strap b, is attached; the said strap being wound around and attached at its other end to a pulley or drum c, fixed upon a main transverse shaft d, upon which is a fly-wheel e. Another strap f, is attached at one end to, and wound around the drum c, in a reverse direction to that of the strap b, and extends downwards, and is secured at its other end to the treadle, so that the movement of the treadle by the foot causes a motion, first in one direction, and next in the opposite, of the balance or fly-wheel e. A small pulley g, is fixed upon one end of the shaft d; a strap or band h, being attached to the periphery of the pulley, and passing partly around it, thence upwards, in contact with a guide pulley i, thence over a pulley k, and thence downwards, and having a weight l, appended to it, as seen in the side elevation. The pulley k, runs loose upon the end of the knife or cutter shaft m, and has a small dog or pawl n, jointed to its side, and pressed against the toothed circumference of a ratchet wheel o, by a spring p,—the ratchet wheel being fixed upon the end of the cutter shaft. The cutter shaft m, turns or revolves in suitable bearings, in the frame B. It has the holders or plates qq, of the two cutters or bent knives r, s, confined upon it between its bearings, as seen in the drawings. Each of said holders is formed rectangular in its cross section, and rests upon the shaft, which is formed to receive it; the one holder with its knife being directly over the other, and its knife,—that is to say, the holders being on opposite sides of the shaft, and so arranged that the two knives, which are to be curved alike, shall be brought into line transversely with each other, throughout the curves of both. The two holders of the knives turn midway between their ends upon a pin t, which extends through, and is fixed in the cutter shaft, and projects from the same into each holder, so that when the end of one, or adjacent ends of both of the holders, is moved transversely in one direction, the other end of the same, or other adjacent ends of both, will be equally moved in an opposite direction, thus enabling us at any time to narrow or widen the toe or heel of the sole as occasion may require. The adjacent ends of the cutter holders are confined down upon the shaft by a screw u or v, which passes through one of the holders and the shaft, and is screwed into the other holder,—there being an elongated slot or opening formed transversely through the shaft for each screw to pass and move through, when the adjacent ends of the cutter holders are moved to the right or left transversely. Figure 5 denotes a vertical cross section of the cutter shaft and cutter holders taken through one of the confining screws, and its slot, u, being the screw, and w the slot. On the end of the cutter shaft, opposite to that on which the loose pulley is placed, a circular plate x is fixed,—the said plate having two notches formed in its circumference on opposite sides of its centre, and at one hundred and eighty degrees distant from the centre of one to that of the other; the said notches being arranged in a vertical line with each other. An end view of this plate is given in Figure

G, in which one of the notches is seen at y, the other being covered by the lower end of a slide z, which is adapted to the surface of the plate so as to play up and down vertically,—the length of the said slide being equal to the diameter of the plate, diminished by the depth of one of the notches. A latch a^1 is arranged horizontally over the cutters and turns on a fulcrum or joint at b^1, in such manner as to allow its end over and which is in contact with the circular plate x, to play up and down vertically. A stud, or other analogous contrivance, c^1, projects vertically from the frame A, directly underneath the slide Z, and has its top graduated or situated at such a distance from the lower end of the slide, that when the frame B descends, so as to carry either one of the cutters through the leather to be cut, the said stud will come into contact with the slide, and elevate the same to such extent as to throw the latch a^1 out of the notch, and thereby permit the cutter shaft to be partially revolved so as to bring the knife which was previously upwards into the position of the one which last performed its cutting operation, and thereby turn the circular plate so as to cause the latch to fall into the other notch. The partial revolution of the cutter shaft is effected by the treadle when it rises, acting through the arm E, and the mechanism directly intervening between it and the cutter shaft. When the treadle is depressed, the loose pulley upon the cutter shaft carries the dog or pawl over the teeth of the ratchet wheel O; that is to say, causes it to slip or slide over the same, but the instant the direction of the pulley is reversed by the band h, which is wound upon the pulley g, the dog acts in the teeth of the ratchet wheel and turns the cutter shaft. The leather to be cut into soles being previously reduced to a proper width, is placed upon the table or platform G, and between parallel guides H H. It is pressed forward beneath the cutting knife until it comes into contact with a vertical gauge plate K, which extends downwards from a horizontal shaft L, supported and moving in bearings M M, in a frame N, which is capable of being moved towards or from the cutter by a screw O, or any other suitable contrivance. The shaft L, has a bent lever P, fixed upon one end, as seen in Figures 1, 2, the said lever extending in one direction towards and underneath the cutter shaft, and being borne up against the said shaft by a weight Q, applied upon its opposite end. From the above it will be seen that the depression of the frame B, will cause the end of the lever P, first mentioned, to descend, and thereby turn the shaft L, a little in its bearings, in such manner as to cause the lower end of the gauge plate to move in a direction away from the cutter, and allow the piece of leather separated from the sheet thereof to fall freely away from the same and drop upon an inclined plane R, over which it slides out of the machine. Having thus described my machinery, that which I claim is as follows, namely: I claim the above specified manner of operating the cutting knives r, s, applied upon the revolving shaft m, namely: the arranging said knives as described upon a revolving shaft and causing them and the shaft to be partially revolved at suitable periods of time in the manner as set forth, so as alternately to bring each cutting knife in succession into the required position for it to cut through the leather when depressed by the frame or mechanism by which it is made to act upon the same. I also claim, in combination with the above, giving to the gauge plate (K) at the time of, or soon after the depression of either knife into the leather, a motion in a direction away from the cutting knives in order to permit the piece of leather separated from the sheet thereof to fall freely away from the same, as described. I also claim the combination of mechanical parts by which the requisite degrees of rotary motion of the shaft which carries the cutting knives, are determined in the manner hereinbefore described, the said parts being the notched circular plate x, applied upon the rotary cutter shaft, the catch or latch a^1, the slide Z upon the circular plate, and the fixed stud, or other analogous contrivance, by which the slide is moved when the knife frame is depressed; the whole being applied and operating substantially as described. I also claim, attaching the knife holders to the revolving shaft m, in such manner as to admit of a corresponding movement of their adjacent ends, in transverse direction, at one and the same time, and the fixing the said ends afterwards to the shaft, the same being for the purpose of narrowing or widening the toe or heel of the sole as set forth. In testimony that the above is a correct specification, I have hereto set my signature this twenty-first day of September, A. D. 1844. Richard Richards. Witnesses, R. H. Eddy. John Noble."

The complainant alleged that each of the things specifically claimed were used by the defendant. A machine constructed according to the specification, and also the machine complained of, were produced, and affidavits of experts were made by each party. The motion was for a preliminary injunction, founded on long possession under the patent, and an allegation that the defendant's machine was an infringement.

G. T. Curtis, for the motion.
R. Choate, contra.

CURTIS, Circuit Justice. The first question is, whether the complainant has shown such a prima facie title to the things patented, as will enable him to call on the court to protect his right until it can be tried. The affidavit of Pillsbury states that the patentee, and those claiming under him, have been engaged in building these machines since the letters-patent were granted, a period of about eight years. That, during this

time, they have made and sold upwards of one hundred and fifty of these machines, and they have been put in use in Massachusetts, Maine, Ohio, Pensylvania, and other parts of the country. That about fifty of these machines are now in daily use at Lynn, in Massachusetts, the place where they were originally introduced. And that, except in this case, the witness has not known the novelty, or validity of Richards's patent disputed; nor has he known any attempt made to infringe it. No conflicting evidence has been introduced by the defendant, tending to show that the possession of the patentee has been questioned, or interrupted, or that it has not been as extensively enjoyed as this witness declares; nor is the validity of the patent denied by any affidavit of the defendant.

This is such a primâ facie title as a court of equity is bound to protect. The familiar rule stated by Lord Eldon, in Hill v. Thompson, 3 Mer. 622, is, that when a patent has been granted, and there has been an exclusive possession of some duration under it, the court will enjoin, without putting the party previously to establish his right at law. And this rule has been followed in this and other circuits, and is well established in England. Isaacs v. Cooper [Case No. 7,096]; Washburn v. Gould [Id. 17,214]; Orr v. Littlefield [Id. 10,590]; Bickford v. Skewes, Webst. Pat. Cas. 211; Neilson v. Thompson, Id. 277. It is not possible to fix any precise term of years during which the exclusive possession must have continued. The reason for the presumption in favor of the validity of the grant is, the acquiescence of the public in the exclusive right of the patentee, which, it may reasonably be assumed, would not exist unless the right was well founded. And it is obvious, that this public acquiescence is entitled to more or less weight, according to the degree of utility of the machine, and the number of persons whose trade, or business are affected by it. I am satisfied that this is a useful machine, not only because it is so stated by Pillsbury, but from the number which are now in use; and there can be no doubt that it affects the trade and business of a numerous and intelligent body of persons in this and other states. In a case where, though the validity of the patent has been questioned, no specific and satisfactory ground of doubt has been laid by the defendant, this acquiescence, for a period of about eight years, dispenses with the necessity of bringing an action, at law, before moving for a preliminary injunction. But the complainant must show an infringement by the defendant; and the next question is, if he has done so.

In this, as in other patent cases, this is a complex question, partly of law and partly of fact; and in this, as in most patent cases, when the law has been determined and applied, the facts do not present great difficulties. The first inquiry is, what is claimed? and the second, has the defendant used what is claimed? The construction of the claim is matter of law. It has been argued that the first claim is for an abstraction. I do not so consider it. The claim is, of the described means of arranging the knives on a shaft, and causing them to revolve and be depressed, so as to produce certain effects; and this is, in substance, a claim of certain mechanism, described in the specification, so combined and arranged, as is therein shown, and adapted to produce specific effects. In point of form, I see no sound objection to the claim. Laying aside, for the present, the last claim, which is for the attachments of the knives, I find the mechanism claimed, consists in a revolving shaft having two knives placed upon it in a particular manner, and in the means of working this shaft, and, in combination with these, the means of giving to the gauge plate certain movements. It has not been denied, that the gauge plate itself, in the defendant's machine, and the means of moving it, so as to allow the soles, when cut, to fall out of the machine, are substantially the same as in the plaintiff's; and, indeed, an inspection of the two machines can leave no reasonable doubt on this point. It is true, the defendant's has a screw, by means of which the gauge plate may be moved, so as to adapt it to different sizes of soles; but this is plainly an addition to, and not an alteration of, this part of the thing patented, which does not consist in the gauge plate itself, or the means of graduating it, but solely in the means of communicating to it the rocking motion which allows the escape of a sole when cut, and then brings the plate into position to act as a gauge.

But it is correctly argued that even if the patentee was the original inventor of this means of giving this motion to the plate, and the defendant has used it, still, as it is claimed only in combination with the shaft and knives, and mechanism to move them, unless the defendant uses these also, he does not infringe; because these are, undoubtedly, an essential part of the combination, and if the whole, in substance, is not used, there is no infringement. And, therefore, it is necessary to see whether the defendant has infringed upon what is first claimed. That he uses a shaft, with knives attached to it in the same manner as is described in the plaintiff's specification, is clear. Here, also, he has added a screw, by means of which the knives may be moved, when the screws which attach the knives to the shaft, by compressing the knife-holders, are loosened. But this does not affect the arrangement of the knives on the shaft. It is an addition to, and not an alteration of, the thing patented. But the real question is whether the defendant's means of working the shaft are, within the patent law, substantially the same as the plaintiff's. These means may be considered under two

heads: namely, the mechanism by which the shaft is rotated and depressed, and that by which the degrees of rotary motion, requisite to bring the knives into the position to cut, are determined, and the revolution arrested and the shaft held while the cut is made, and then released. As to the first, Mr. Robert H. Eddy, whose affidavit is adopted by Mr. Thomas Blanchard, as correctly expressing his views, says: "I do not perceive any thing essentially new, or not well and long known to mechanicians, in the machinery used to rotate the shaft in the defendant's machine; nor does it seem to me to be so practically useful as that used by Richards for such purpose. The invention of Richards, namely, the arranging the knives upon a revolving shaft, and causing them and the shaft to be partially revolved, at suitable periods of time, in the manner as set forth in Richards's specification, namely, on its axis, so as to bring the knife, which was previously upwards, into the position of the one which last performed its cutting operation, is, in my judgment, identical with that adopted in the machine seen at the shop of said Moore," (that is, the defendant's machine.) "The vertical and intermittent movements of the knife-shaft are produced by machinery, which may be considered as common and well-known mechanical equivalents for those described in the said specification of the said Richards." No affidavit made by the defendant contradicts this; for though, as will presently be noticed, his experts declare that the two machines, in their opinion, are not substantially the same; they do not say that the defendant's devices are not well-known means of accomplishing the same ends effected by Richards. Indeed, in the written argument for the defendant, it is not insisted, that there is a substantial difference between the machines in this particular. The position there taken is, "that the combination of mechanical parts, whereby the degree of rotary motion is determined in the defendant's, is not shown to be substantially the same as in the plaintiff's."

It appears, by an inspection and comparison of the two machines, that in both, the degree of rotary motion is determined by a notched plate, fixed to the end of the knife-shaft, with which a catch engages when the notches are brought opposite to the catch in their revolution. The knife-shaft is thus arrested and fixed while it descends, and the knife cuts. The catch is disengaged, when this operation is completed, and the knife-shaft is left free to revolve, so far as to bring the other notch opposite to the catch, which engages with it, and the same operation is repeated. In the plaintiff's machine, the catch is placed above the plate, and at a right angle with it, and engages the notch, partly by its own weight, but assisted by a spring. In the defendant's, the catch is placed opposite the face of the plate, which has a flange upon it, in which are the notches; and the catch is a spring-catch, of well-known construction. In the plaintiff's machine the catch is disengaged from the notch by a slide, working on the face of the plate, put in motion upwards against the catch by descending with the knife-shaft, and striking a stud fixed to the frame of the machine.

In the defendant's, the catch is disengaged by impinging on an inclined plane, or wedge, against which it is moved by descending with the knife-shaft. In other words, the diversities are, that the defendant uses a spring-catch, the plaintiff a catch and spring; the defendant disengages by working against a wedge, the plaintiff by working through a slide against a stud. Of these diversities, Mr. Eddy, supported by Mr. Blanchard, says: "These are not, strictly, a combination, like that described in the patent of the said Richards; but they are a common and well-known combination for the purpose, and are mere substitutions for such mechanism as is described by the said Richards." Six experts, including Mr. Thompson, who built the defendant's machine, testify that, in their opinion, the two machines are not the same in principle and mode of operation. But no witness says that the use of a spring-catch, in place of a catch and spring, or the use of a wedge, or inclined plane, to disengage a catch, in place of a slide and stud, were not, what Mr. Eddy and Mr. Blanchard pronounced them to be, well-known combinations for those purposes. In my judgment, this is decisive. I do not think the doctrine respecting the use of mechanical equivalents, is confined by the patent law to those elements which are strictly known as such in the science of mechanics. In the present advanced state of that science, there are different well-known devices, any one of which may be adopted to effect a given result, according to the judgment of the constructor. And the mere substitution of one of these for another, cannot be treated as an invention. It does not belong to the subject of invention, but of construction. One constructor may adopt a spring-catch, another a catch and spring; but whether he takes one or the other, is matter of judgment in construction, as long as both are designed to accomplish the same end, and both are in common use to accomplish it.

The substance of this invention does not consist in the identical devices used, but in a practicable and described mode of effecting certain operations; and when the patentee has described what those operations are, and one practicable mode of effecting them, he has enabled constructors to effect these operations, not only by the identical devices he employed, but by all other known substitutes. If this were not so, no patent for machinery, of the least complication, would be of any value. Now, the difficulty which attends the affidavits, on the part of the defendant, is, that the opinions given by them are not accompanied by any explanation of

what the witnesses mean by principle, or mode of operation, or by any statement of what, in point of fact, they consider are the diversities between the two machines; or whether those consist in the substitution of one well-known mode of effecting a given movement, in place of another. And this is equally applicable to what they say respecting the means of revolving the shaft. They express an opinion that the means are different, and the practical result better. Mr. Eddy and Mr. Blanchard think the practical result not so good; and though they do not say the means are the same, they do say they are long and well-known means of revolving the shaft.

If I were to come to the conclusion that the defendant's mode of revolving the shaft was a real practical improvement, it would by no means follow that it would not be an infringement of the patent. Looking at the whole structure devised by the patentee, and covered by the first claim, the question would then be, if its substance was not used by the defendant, though he had improved it, by adopting a continuous, in place of an intermittent, motion. Very nice and difficult questions have been made concerning what are often called combinations, but the elements of which are not capable of being distinctly defined and separated. If a combination, properly so called, consist of two or more distinct things, and the patent is for combining them into one whole, it is familiar law, that if all are not used, the patent is not infringed. But the first claim in this patent is not for such a combination. It is for an operative part of a machine, and in substance covers that operative part; just as a patent for an entire machine covers the whole machine. In some sense, it may be called a combination, for it consists of different parts united together, as an entire machine does. But it is not strictly and technically a combination, any more than an entire machine is. And it may be improved, and a patent taken for that improvement; and at the same time, the improvement cannot be used without the consent of the original patentee. And even where a strict combination is claimed, if one of the elements of that combination is complex enough to admit of an improvement, without destroying its identity, such improved combination would still be an infringement. This case presents an illustration. The patentee claims the means of moving the gauge plate, in combination with the knife-shaft, and the means of revolving, fixing, and depressing it. This is technically a claim for a combination, and would not be infringed by a machine which should omit the motion of the gauge plate. But if that is used, the other element of the combination may be capable of being improved, without destroying its identity; and if thus improved, the whole combination, in the sense of the patent law, would be used.

Whether the change made by the defendant, in this case, goes beyond the mere substitution of one known device for another, so as to amount to a patentable improvement, or whether, if it does, it is still only an improvement of the thing patented, and so an infringement, are questions which it may be proper to raise hereafter, in the progress of the cause; but in the present state of the evidence, I do not see such grounds of doubt upon these points as ought to prevent the court from protecting the right of the plaintiff, by requiring the defendant to keep an account and file a bond, with sufficient sureties, to pay such sums as may be finally decreed against him; and in default thereof, an injunction must issue. I make the order for an injunction conditional, because it is not suggested that the defendant has constructed, or is about to construct, any other machine than the one complained of; and if the plaintiff is made secure of receiving all the profits which may arise from the use of the machine until a final decree, he will be sufficiently protected in case it is decided that the defendant infringes on a right belonging exclusively to him. I have not thought it necessary particularly to examine the other claim in the specification.

FOSTER (MOORE v.). See Case No. 9,760.

FOSTER (MORA v.). See Case No. 9,784.

FOSTER (NELSON v.). See Case No. 10,105.

Case No. 4,979.

FOSTER v. PEASLEE.

[21 Law Rep. 341; 36 Hunt. Mer. Mag. 454.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1856.

POWERS OF THE SECRETARY OF THE TREASURY TO SUSPEND THE ISSUE OF CERTIFICATES TO IMPORTERS OF DISTILLED SPIRITS—ACT OF MARCH 2, 1799.

1. The collection act of 1799, § 41 [1 Stat. 659], requires the delivery to the importer of distilled spirits, of a certain certificate to accompany each cask, as evidence that the same has been lawfully imported; and section 43 provides that the finding of such cask, without such certificate, shall be presumptive evidence of its being liable to forfeiture. In 1850 the secretary of the treasury directed the collectors to discontinue the delivery of said certificates, except on payment of fees therefor, on the ground that, the object of said provisions being the prevention of fraudulent claims for drawbacks, subsequent legislation had rendered them unnecessary. *Held*, that their object was also to prevent illegal importation, and that the secretary, having no power to repeal the rule of evidence established by section 43, had no right to withhold the certificate on which the burthen of proof depends.

[Cited in Clark v. Peaslee, Case No. 2,831; Crookes v. Maxwell, Id. 3,415.]

2. Whether the secretary would have power, in any case, to order the collectors to disobey

[1] [36 Hunt, Mer. Mag. 454. contains only a partial report.]

the positive requirement of an unrepealed act of congress, because later legislation, in his opinion, rendered the same unnecessary, quaere.

This action was assumpsit for money had and received, and was submitted upon the following statement of facts, viz: On the 26th day of December, 1854, the plaintiff imported into the port of Boston, from Rochelle, ninety-seven packages of brandy, of which due entry was made, in bond, at the custom house, at said port of Boston; and the plaintiff applied to the defendant, who was the collector of customs at said port, for the certificates to accompany each cask or package of said brandy upon the sale thereof. But the said defendant refused to grant said certificates, unless the said plaintiff would pay therefor the sum of four cents for each and every of said certificates, which the said plaintiff paid, but under the following protest in writing, then and there filed with said defendant: "We protest against the payment of fees for particular certificates, which we are entitled to without charge under section 41 of the act of 1799, and for marking and gauging under said act, believing that such charges or fees are unauthorized by any law of congress, and that they are illegal and unjust."

Milton Andros, for plaintiff.
B. F. Hallett, for defendant.

CURTIS, Circuit Justice. The collection act of March 2, 1799, by its 41st section, requires the delivery to the importer of distilled spirits, of a particular certificate, in the form prescribed, to accompany each cask, wherever the same may be sent within the limits of the United States, as evidence that the same have been lawfully imported. The 43d section enacts that the importer shall deliver to the purchaser of each cask the certificate belonging thereto, on pain of forfeiting fifty dollars for neglecting so to do; and if any such cask of distilled spirits be found in the possession of any person unaccompanied by its certificate, it shall be presumptive evidence of its being liable to forfeiture, and shall be seized and a forfeiture inflicted, if the claimant shall fail to prove on the trial that it was legally imported, and the duties paid thereon. It is stated at the bar that these certificates continued to be given, pursuant to the above directions of the collection act, until the year 1850, when, by a circular of the 28th of March of that year, the then secretary of the treasury directed the collectors of the customs to discontinue their delivery, unless the importer should request it and pay fees to the officer for making the same.

The grounds upon which the defendant's counsel has rested the justification of this change of practice are, that the main purpose of these provisions of the collection act of 1799 was to guard against fraudulent claims for drawbacks on the exportation of spirits, wines, and teas, for which opportunity was given by other provisions of law, which allowed those articles to go into the possession of the importer; and that, as by force of the acts of April 20, 1818 (3 Stat. 469), and March 3, 1849, § 5 (9 Stat. 399), drawbacks cannot be claimed on the export of any articles, save those which have remained in the public stores, the opportunity for frauds and the necessity of the certificates, marks, &c., to guard against them no longer exist, and the secretary of the treasury had power to dispense with them.

Without stopping to inquire whether the secretary of the treasury has power, in any case, to order the collectors of customs to disobey the positive requirement of an unrepealed act of congress, because later legislation has rendered that requirement, in his opinion, unnecessary, I think it clear that, in this case, he had not power to order these certificates to be discontinued. The purpose of these provisions of the act of 1799 was not limited to the prevention of fraudulent claims for drawbacks. The object was to afford security against illegal importations. This appears from the provisions requiring the certificate to accompany each cask when sold, though the time limited for exportation may have expired; and also from the change of the burthen of proof respecting the legality of the importation, if such a cask be found in the possession of any person unaccompanied by the appropriate certificate. This rule of evidence the secretary of the treasury has no power to repeal, and it is the law of the land now; and if so, it cannot be maintained that the secretary has power to direct his subordinates to withhold these necessary documents altogether, and thus subject the importer to the penalty which is inflicted for selling without a certificate, or the purchaser to the risk of seizure and condemnation; or to withhold them unless the importer will pay fees for them, thus exacting from the importer a tax not imposed by law. My opinion is that upon the facts agreed the plaintiff is entitled to a judgment.

Case No. 4,980.

FOSTER et al. v. The PILOT NO. 2.

[1 Newb. 215;[1] 1 Am. Law Reg. 403; 5 Pa. Law J. Rep. 231.]

District Court, W. D. Pennsylvania. Jan., 1853.[2]

SEAMEN'S WAGES—LIBELANT AS PART OWNER OF THE VESSEL.

1. A seaman who is at the same time a part owner of the vessel in which he serves, is not thereby precluded from libeling in admiralty for wages.

[Disapproved in The Benton, Case No. 1,334. Cited in Pettit v. The Charles Hemje, Id. 11,047a.]

[1] [Reported by John S. Newberry, Esq.]

[2] [Reversed in Case No. 5,199.]

2. A. & B. were, with others, part owners of a vessel, and also served on board her as mariners. The vessel was sold on execution out of a state court, on a judgment against all the owners. *Held*, that the sale not affecting the liens of seamen, A. and B. might libel the vessel in the hands of the purchaser at sheriff's sale, for wages due prior thereto, notwithstanding the former part ownership.

3. The seamen's lien for wages is not discharged by a sale on execution against the owners of a vessel.

[Cited in The Skylark, Case No. 12,928.]

In admiralty. Libel for wages.

Mr. Pinney, for libelant.

Mr. Stanton, for respondent.

IRWIN, District Judge. On the 7th day of December last, several bills were filed by James Foster and others, for wages alleged to be due them as mariners of the steamboat Pilot No. 2, belonging to the port of Pittsburg. On the same day, the marshal seized the vessel by process in favor of said libelants, and has since held it in custody to answer their claims, and to await the adjudication of this court. Prior to the time when the said libels were filed and the attachments served, the said steamboat was taken in execution by the sheriff of Alleghany county, upon judgments obtained in the district court of said county, against the owners, and after due notice, it was on the 18th day of December, publicly sold by the said sheriff to B. McBride, for the sum of seven hundred and sixty dollars. On the 21st of December, the said McBride, as intervener, answered the several libels, from which it appears that as purchaser at sheriff's sale, he claims to hold the said steam vessel discharged from any lien which may have existed prior to the sale, and from the claims of the libelants, who are denied to have been mariners in said vessel as is asserted in the said libels, which, therefore, he prays may be dismissed, and the libelants condemned in costs, &c. At the hearing no proof was offered in support of the latter allegation, but it was contended that two of the libelants named, Alexander Woods and Jacob Gallatin, whose claims for wages amounted to the sum of five hundred and eighteen dollars and sixty-three cents, were before and after the voyage last made by the steamboat, and at the time of filing their several libels, its part owners, and that the judgment and execution upon which it was sold, were against the said Woods and Gallatin, as well as against the other part owners, and that, therefore, they have no lien thereon for wages or otherwise. So much of the answer as alleges the part ownership of the vessel by Woods and Gallatin at the time mentioned, is admitted to be true, but it is denied that their claim as mariners of the said vessel for wages due and their lien as such mariners can in any manner be affected by such part ownership. This is the only question for consideration.

There are principles of law governing mercantile partnerships which in argument are supposed to involve and settle the points raised by the answer adversely to the claim of the libelants. But it is unnecessary to inquire what would have been the legal effect of the disputed claims if creditors of the partners of the steam vessel claiming by liens inferior to that of wages or claiming in personam had intervened to contest the claims for wages or to inquire whether part owners not parties to the libel, could successfully intervene to resist the claims for wages of their copartners, on the ground that such claims, like all other claims between partners in relation to services to the partnership, or connected with the partnership property, can only legally be adjusted and determined according to the law of partnership. Neither creditors nor part owners have intervened; but had either or both events occurred, it must not be inferred that such intervention, under the circumstances supposed, would be regarded as a legal obstacle to the mariner's claims for wages. It is not meant, however, to say more than what properly belongs to the case under consideration, as it may be affected by the proofs exhibited, the principles of maritime law, and as in principle it is distinguished from that assumed in argument. The respondent is a purchaser of the steam vessel subject to liens for mariner's wages, and as no one else intervened to contest those liens, the inquiry will be confined to what he has set forth in his answer as above noticed, and the proofs and the law which sustain the claims of the libelants.

The claim of mariner's wages has a priority above all other claims against the vessel, the freight, and the proceeds of both, into whosesoever hands they may come. It is a permanent lien, and secures to the mariner for his wages, a preference above all other persons, and may be enforced in admiralty against a bona fide purchaser, without regard to the title through which the purchaser claims. The respondent purchased the steam vessel at sheriff's sale, eleven days after it had been libeled, and was in custody of the marshal, and while the libelants were proceeding in this court to enforce their liens. He cannot, therefore, allege with truth, that when he purchased her he had no legal notice of these claims. But with or without notice. if all the libelants were mariners, and were all entitled to wages, their lien against the vessel, after as well as before sale, is unquestionable. But whilst this is not denied as a general principle, it is contended that two of the libelants, though they might have been as alleged, employed as mariners in the vessel, yet as part owners of it, they could not by any known principles of law, proceed by libel in admiralty for the recovery of wages: that all the owners of the vessel were debtors for wages, and all equally liable: that the

libelants could not separate themselves from other part owners, and assert a separate claim against the partnership property, which, in effect, would be to claim against themselves as well as against their copartners, nor could they claim against a bona fide purchaser of the partnership property under a judicial sale: that such claims for services to the partnership in a steam vessel or otherwise, might be met with similar or equally good claims by other part owners, and that their separate or mutual charges and accounts can only be legally settled by the law of partnership. It was further urged that, if part owners of a vessel had in admiralty a lien for wages as mariners, the right would extend to all other admiralty liens to the exclusion of creditors, and thus open a door to fraudulent claims, which, in most instances, it would be impossible to expose, or successfully resist. The argument in this case is specious, but unsound. The owners of a steam vessel must, from necessity, in a voyage of that vessel, be subject to mariner's wages; and, if it should happen that one of their number should be employed as a mariner, such employment would be in a capacity distinct from, and unconnected with the appropriate business of a partnership of that nature, the object of which is either to let the vessel out to freight, or for mutual adventure in vessel and cargo. As one of the crew, his name would regularly be included in the shipping articles for the voyage; and either by them or other contracts, his station and rate of wages would be determined; and while subject to all the penalties and forfeitures, prescribed by the act of congress for a failure to perform his duties as a mariner, he would, as such, be entitled to the stipulated wages, and the triple remedy which the law provides for enforcing its payment: a lien upon the vessel, the freight and the proceeds of both, regardless of partnership relations and liabilities, unless by express contract another way of securing his wages had been provided. Without such an agreement, it would be fair to infer that his copartners in a vessel regarded his right to wages as unconnected with, and beyond the control of the partnership. In pursuing the remedy by libel, it would, therefore, be enough for the libelant to show, by the shipping articles or otherwise, that he shipped as a mariner, and, as such, was entitled to wages, and that his wages were due and unpaid. The act of congress, which secures this right, is in accordance with the policy and usages of maritime law, which regards, with peculiar favor and tenderness, the situation of seamen, by giving them a lien for wages paramount to all other claims, and a summary remedy for enforcing the right, unaffected by collateral matters, or common law pleadings. But whatever doubt there may be as to the remedy, when a vessel is owned by several in strict partnership, there can be none in a case where they they are merely part owners, as the respondents are alleged to be in the answer, and as they must be taken to be in the absence of all controlling circumstances. The general relation of part owners of a vessel, is that of tenants in common and not as copartners; they are, therefore, not liable in solido, nor entitled, in the settlement of their accounts, to be governed by the principles of partnership. Nicholl v. Mumford, 4 Johns. Ch. 522; 2 Johns. 611. There are exceptions, but this case is not one of them; and as liens may arise either from express or implied assignments, it is but a reasonable presumption, when not opposed by special or express contract, that part owners do not intend to rely solely upon the personal responsibility of each other, to reimburse themselves for expenses and charges incurred upon the common property for the common benefit, but that there is a mutual understanding that they shall possess a lien in rem. Story's Partn. 444.

The navigation of the western waters by steamboats is often attended with more than ordinary risk and loss; to lessen such risk, it is not unusual for those about to engage in such business to unite in partnership with one or more persons, known to be skillful and trustworthy mariners, whose interest in the vessel, though generally small, is always sufficient to call into action the greatest amount of vigilance, ability and care of which they are capable, an advantage which it would be vain to expect from mariners bound to their duty only by the prospect of ordinary wages. The law, as explained, harmonizes with this policy, by giving to a mariner, though a part owner of a vessel, a maritime lien for his stipulated wages, while it does no injustice to another part owner, or to their creditors, since it adds nothing to the wages which must necessarily be incurred in a voyage. The creditors are generally such as have claims for repairs to a vessel, or for materials furnished, and have often no other security for payment than the lien which the law gives them upon the vessel. Both part owners and creditors have a deep interest in its safe return; and when, to the usual means of promoting that object, is superadded the connection of mariner and part owner, it may be safely assumed, that it would be impolitic, unjust, and contrary to the principles of maritime law, to deny to the mariner his claim for wages. Upon full consideration, made the more necessary from the absence of a reported case of a similar nature, I feel satisfied that the claims of the libelants are fully sustained by the proofs and the law. Decree accordingly.

[NOTE. This decree was reversed by the circuit court on appeal. Case No. 5,199.]

FOSTER v. REMICK. See Case No. 4,959.

Case No. 4,981.

FOSTER v. RHODES.

[10 N. B. R. (1874) 523.] [1]

Circuit Court, E. D. New York.[2]

BANKRUPTCY — RECEIPT OF RENTS OF MORTGAGED PROPERTY BY ASSIGNEE—FORECLOSURE—RIGHTS OF MORTGAGEE.

1. Where an assignee in bankruptcy receives the rents of mortgaged property, it must be distributed among the general creditors of the bankrupt. If the mortgagee desires it to be applied specifically to his lien, he must not only show the insufficiency of his security without the pernancy of the rents and profits, but he must also intercept the rent before it can reach the assignee.

2. Where a mortgagee completes his foreclosure without intercepting the rents, he cannot afterwards, on finding the property insufficient, have the rents applied; whatever rights to intercept the rents he may have had ceased with the completion of the foreclosure.

[Cited in Teal v. Walker, 111 U. S. 251, 4 Sup. Ct. 425.]

The plaintiff [William Foster] claimed a lien on certain assets of the bankrupt [James F. Rhodes] in the hands of the assignee; consisting of rents derived from two houses owned by Rhodes prior to his bankruptcy, under leases made as early as May 1, 1871. The plaintiff claims his lien or priority in these rents, by virtue of two mortgages on these two houses, which were made by the bankrupt twenty days later than the leases. Each mortgage was made to secure the sum of two thousand five hundred dollars and interest. Under a thirty days' interest clause, both became due at the option of the petitioner, on the 26th of December, 1871. Rhodes' bankruptcy dates from the 11th day of November, 1871. About January 1, 1872, the plaintiff took measures to foreclose his two mortgages. On the 30th day of March, 1872, the usual decrees of foreclosure were made therein, and the property subsequently sold. The rents, amounting to one thousand dollars, became due after Rhodes became a bankrupt, and before sale of the premises. Under the above facts, the plaintiff, after sale, finding the proceeds of the mortgaged premises greatly insufficient to pay his debt, applied to have the rents received by the assignee paid to him, claiming a specific lien by virtue of a clause in the mortgage, after the granting part, in these words: "Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging. and the reversions, remainders, rents, issues, and profits thereof."

Mr. Johnson, for plaintiff, made the following points:

First. A mortgage operates as an assignment of the rent due under a lease made prior to the mortgage. 1 Washb. Real Prop. p. 570; McKircher v. Hawley, 16 Johns. 289; Demarest v. Willard, 8 Cow. 206; 1 Doug. 279.

Second. The mortgage conveys the rents, issues, and profits of the premises.

Third. There are no cases that hold that the mortgagee has not a lien on rents accruing after default made.

Fourth. But for the bankruptcy proceeding we had a right to acquire a lien; this was a part of our security, and entitles us to the relief prayed. In re Dey [Case No. 3,870].

W. W. Bliss, for assignee.

HUNT, Circuit Justice. The petitioner insists that by virtue of his mortgage, he became assignee of the rents under a lease made prior to the mortgage. I think the creditor can no more ask for an incident under this mortgage, such as the rents, than he can ask for the principal, that is, the land. His mortgage and all rights and claims incidental and collateral as well as direct and immediate, are at an end. By the foreclosure, every right or claim, in whatever form it existed, is terminated. If he ever had a claim to the rents, it was ended when the foreclosure was complete. Judge BENEDICT'S opinion is satisfactory to me. The order should be affirmed.

[NOTE. Judge Benedict's opinion in the district court is here published as Case No. 4,963.]

Case No. 4,982.

FOSTER et al. v. SAMPSON.

[1 Spr. 182.] [1]

District Court, D. Massachusetts. April, 1849.

SEAMEN—SHORT ALLOWANCE — DOUBLE WAGES—DAMAGES.

1. Where a vessel sails, without the statute quantity of bread, and the crew are put upon a short allowance of bread, it is no defence to their claim for double wages that flour was furnished as a substitute.

[Distinguished in The Hermon, Case No. 6,411.]

2. Where double wages are allowed, under the statute, for such short allowance, damages may also be given for a deficiency of other food.

3. The owner is bound by his contract to furnish the seamen suitable subsistence. What is suitable, depends upon what is usual, in similar voyages.

This was a libel, promoted by three of the crew, against the master of the bark Fanny, claiming compensation for short allowance of provisions, on a voyage from St. Ubes to Boston.

R. H. Dana, Jr., for libellants.

Edward Dexter, for respondent.

SPRAGUE, District Judge. It is admitted that this vessel, when she left St. Ubes, had not on board more than one-half the quantity of ship-bread required by Act 1790, c. 29, § 9 (1 Stat. 135), and that, in consequence thereof, the crew were put on an al-

[1] [Reprinted by permission.]

[2] [Affirming Case No. 4,963.]

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

lowance, one week, of three and a half pounds, and another week, of three pounds of bread, for each man. It is not denied, that this is a short allowance of bread; but the defence is rested on the fact, that flour was given to the crew, which could be baked into bread, in quantities sufficient to make up the deficiency. The statute requires that there shall be a certain quantity of ship-bread on board, at the commencement of the voyage, beside any other provisions. It is clear, that this requirement can be satisfied by nothing but ship-bread. The statute subsequently says, that if the crew shall be put upon a short allowance of bread, extra wages shall be recoverable. It is not necessary to decide whether this, having reference to what precedes, means ship-bread only, or all kinds of bread, because flour is not bread. It may, with other ingredients, be converted into bread; but even this is not practicable, under all circumstances. There is good reason for requiring a strict compliance with the statute; for it is important to have food that does not require cooking, especially in case of wreck, or bad weather.

It is further contended, that the master made efforts to procure bread at St. Ubes, but that it was impracticable. It is not necessary to decide whether this would be a defence, under the statute, as it is not made out by the evidence. I would remark, however, that the point has never been decided by the supreme court, or by any circuit court; and the only case in which the defence was sustained in the district courts, is that in The Washington [Case No. 9,086], while in The Harriet [Id. 2,982] the defence was not sustained. In The Mary [Id. 9,191], on the other hand, the reasoning of the court sustains the decision in The Washington. I am of opinion that the libellants are entitled to double wages, for two weeks, under the statute.

The libel also claims compensation for short provisions, in other respects, beside the bread, on the general principles of the maritime law. Proper subsistence is a part of the contract between the owners and seamen. Dixon v. The Cyrus [Case No. 3,930]; The Castilia, 1 Hagg. Adm. 59. What is proper subsistence, depends upon what is usual, in similar voyages, in vessels of this description. We have had the evidence of shipmasters and merchants, acquainted with the subject, who agree that the practice is so uniform, to give tea, or coffee, night and morning, and flour, rice, or beans at dinner, in addition to meat, that every seaman has a right to expect substantially that kind of fare. In this vessel, there were ten days when the crew had nothing but meat, of which there was an abundance, and a short allowance of bread. For thirty-five days they had no tea, and for nineteen days only bean coffee in the morning. The weather was unusually severe, and the crew were subjected to more than usual exposure.

I shall allow them $20 each, in addition to the two weeks double wages, with costs. Decree accordingly.

See The Mary Paulina [Case No. 9,224]; Collins v. Wheeler [Id. 3,018].

Case No. 4,982a.

FOSTER et al. v. SIMMONS.[1]

Circuit Court, D. Massachusetts. Oct. 7, 1878.

CUSTOMS DUTIES—WASHED AND UNWASHED WOOL—COMPUTATION OF DUTIES—TIME FOR PROTEST.

[1. The provision of Rev. St. § 2504, Schedule L, that the duty on wool of the first class, imported washed, shall be "twice the amount of the duty" to which it would be subjected if unwashed, must, in view of the necessities of its practical application, be construed to require a doubling of the specific and ad valorem rates, and not a computation of the amount of duties which the law would impose on the number of pounds of unwashed wool, and then a doubling of this amount.]

[2. There is no new liquidation of duties when goods imported for warehousing are withdrawn from bond, and consequently the 10 days allowed for filing a protest (Rev. St. § 293) must be computed from the date of the original liquidation, which is made at the same time and the same manner as when the entry is for immediate consumption.]

Statement of Agreed Facts.

This is an action of money had and received, to recover $342.46 in gold coin, and interest thereon, the same being the amount of customs duties exacted by the defendant [William A. Simmons], then collector of customs for the port of Boston, and paid by the plaintiffs [Charles O. Foster and others] to him under protest, upon certain importations of washed wool of the first class, imported by the plaintiffs from Liverpool, England, in the steamers "Minnesota" and "Illyrian," as hereinafter set forth. The writ is dated August 10, 1877, and, with the declaration and answer, may be referred to as part of these agreed facts.

The first importation of the plaintiffs was by the "Minnesota," of "70 bags River Plate skin wool," containing 11,678 pounds, at the entered value of $4,963, and was so invoiced and entered for warehousing. The invoice was dated Liverpool, March 17, 1877, and the entry for warehousing was duly made here April 2, 1877, when an estimate of duties was made, a bond given, and the goods sent to the warehouse. At the time of the entry the collector designated upon the invoice one bag of the wool in every ten to be opened, examined and appraised, and ordered these designated packages to be sent to the public stores for that purpose; and the packages so designated were sent to the public stores, where they were duly opened and examined by the appraiser, who, on the 3d of April, 1877, made the following report on the invoice:—"Washed River Plate Wool. Class I. Value over 32 cents per lb. Duty 20 cents and 22 per cent. Correct." On the 20th of

[1] [Not previously reported.]

April, 1877, the duties were ascertained, liquidated and assessed upon the merchandise so entered in accordance with that report; that is to say, at 20 cents on the pound, and 22 per cent. ad valorem. On the 13th of April, 1877, the plaintiffs withdrew from the warehouse three bags of the above wool, amounting to 487 pounds, and of the value of $207, upon which the defendant, as collector of customs, exacted the customs duty according to the foregoing ascertainment and liquidation of 20 cents a pound, and 22 per cent. ad valorem, amounting to $142.94, which amount the plaintiffs paid on the same day. On the 27th of the same April, the plaintiffs delivered to the defendant the following protest:—"Charles O. Foster & Co., 22 Broad Street. Boston, 19 April, 1877. To the Honorable the Collector of Customs, Boston: Dear Sir:—On the 2d day of April, 1877, we imported per steamer 'Minnesota' from Liverpool, 70 bags River Plate skin wool, as per invoice dated 16 March, 1877. Upon this importation duty has been assessed at 20 cents per pound, and 22 per cent. ad valorem—the wool in question being rightly classed as 'washed wool of the first class.' By the act of congress, passed 2d March, 1867, it is provided (section 1) 'that the duty upon wool of the first-class which shall be imported washed, shall be twice the amount of duty to which it would be subjected if imported unwashed.' In the present case we are charged upon washed wool double the rates of duty levied upon unwashed wool, instead of twice the amount of such duty, as the act provides. We therefore hereby respectfully protest against the assessment of duty made upon the present importation. We remain, dear sir, Your obedient servants, Charles O. Foster & Co." The collector not changing the assessment and liquidation of the duty, the plaintiffs thereafter, and within thirty days, duly appealed to the secretary of the treasury, who, on the 16th of May, 1877, affirmed the decision of the collector. The plaintiffs claim that this sum of $142.94 was $28 in excess of the true amount of duty due upon that withdrawal.

The second importation of the plaintiffs was by the steamer "Illyrian" from Liverpool, of 219 bags, containing 38,455 pounds of River Plate skin wool, of the entered value of $16,321; and was so invoiced and entered for warehousing. The invoice was dated Liverpool, March 24, 1877, and the entry for warehousing was duly made here April 9, 1877, when an estimate of duties was made, a bond given, and the goods sent to the warehouse. At the time of the entry the collector designated upon the invoice one bag of the wool in every ten to be opened, examined and appraised, and ordered the designated packages to be sent to the public stores for that purpose; and the packages so designated were sent to the public stores, where they were duly opened and examined by the appraiser, who on the 10th April, 1877, made the following report upon the invoice:—"Washed Wool. Class I. Value over 32 cents per lb. Duty 20 cents and 22 per cent. Correct." On the 27th April, 1877, the duties were ascertained, liquidated and assessed upon the merchandise so entered, in accordance with that report; that is to say, at 20 cents on the pound and 22 per cent. ad valorem. Afterwards the plaintiffs from time to time, as below stated, made withdrawals of said wool, upon which the defendant, as collector, exacted, at the time of the withdrawals, from the plaintiffs, customs duties according to the said ascertainment and liquidation, of 20 cents a pound and 22 per cent. ad valorem, which several sums the plaintiffs paid at the time of the withdrawals, and within ten days after said several payments made and delivered to the collector protests against such payments, and the collector, not changing his exactions of duties, the plaintiffs within thirty days respectively, from the date of the several protests, appealed to the secretary of the treasury, who affirmed the decisions of the collector, and the writ was brought within ninety days thereafter.

The dates and the amounts and values of the withdrawals, the amounts of duties exacted and paid, the dates of protest, and the amounts claimed to have been paid in excess, are given in the following schedule:—

Dates of Withdrawals and of the Payment of Duty Thereon.	Number of Bags Withdrawn.	Amounts Withdrawn in Pounds.	Values, $	Amounts of Duty Paid, $ cts.	Amounts Claimed to have been Paid in Excess.	Dates of Protest.
May 16, 1877.	6	1,054	447	309.14	60.61	May 23, 1877.
May 18, 1877.	5	883	375	259.10	50.77	May 24, 1877.
July 2, 1877.	5	883	375	259.10	50.77	July 6, 1877.
July 6, 1877.	5	883	375	249.10	50.77	July 7, 1877.
July 9, 1877.	10	1,766	750	518.20	101.54	July 10, 1877.

One of the protests last named, which may stand for all, was as follows:—"Charles O. Foster & Co., 22 Broad Street. Boston, May 23, 1877. W. A. Simmons, Esq., Collector of Customs, Boston. Sir:—We hereby protest against charge of duty of 20 cents per pound, and 22 per cent. ad valorem on six bales washed wool, part of goods entered by us on the 9th of April, 1877, per S. S. 'Illyrian' from Liverpool (bond No. 584), and withdrawn for consumption on the 16th of May, 1877. We claim that, for the purpose of assessing duty, the washed wool should be treated as unwashed, the duty charged at ten cents per pound on the number of pounds withdrawn, and eleven per cent. ad valorem upon the same number of pounds of the wool if unwashed, and that double the aggregate is the correct amount of duty; we therefore further claim that, under the existing laws, the duty as exacted by you on the said six bales wool should be reduced, so that the same should merely equal two times the amount of duty on the same number of pounds of the same wool in the grease or unwashed. Yours, very respectfully, Charles O. Foster & Co." The value of the wool of both these importations, in its unwashed condition, at Liverpool, the last port whence exported to the United States, excluding charges in such port, was, at the time of exportation, less than 32 cents a pound, and its value in a washed condition at the same time and place, was somewhat more than twice the same per pound. Wools of this class, by being washed, shrink from 50 to 65 per cent. in weight, the dirt and grease being removed by the washing, and the wool remaining; and the value of the pound of washed wool of this class is somewhat more than double the value of the pound of unwashed wool of the same class.

The law imposing duty upon wools of this class is as follows (Rev. St. U. S. p. 474): "Wools of the first-class the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall be thirty-two cents or less per pound, ten cents per pound, and in addition thereto, eleven per cent. ad valorem. Wools of the same class the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed thirty-two cents per pound, twelve cents per pound, and in addition thereto ten per cent. ad valorem." "The duty upon wool of the first class which shall be imported washed, shall be twice the amount of the duty to which it would be subjected if imported unwashed."

If the protests of the plaintiffs, or any of them, shall be held to be sufficient and made in season, and if the mode of assessing the duty upon the merchandise in question, claimed by the plaintiffs in their protests severally, is the correct mode, it is agreed that the several sums hereinbefore stated to be claimed by the plaintiffs as exacted in excess are correct amounts, and that judgment may be rendered in gold in favor of the plaintiffs, for such of these amounts as the court shall decide the plaintiffs to be entitled to, with interest thereon from the date of payment, with costs, otherwise judgment shall be rendered for the defendant with costs.

A. D. Chandler, for plaintiffs.

The government in assessing the duty on these wools, doubled the rates. The correct method, under the statute, is to double the amount. There is a marked difference between the two methods, thus:—

Government Method.

1,000 lbs. Washed Wool of the First Class.	
1,000 lbs. washed wool at 20 cents per pound.....	$200 00
1,000 lbs. washed wool are worth $280.00 (at 28 cents per lb.), 22 per cent of which is.....	61 60
Duty by government method.....	$261 60

Correct Method.

1,000 lbs. Washed Wool of the First Class.	
1,000 lbs unwashed wool at 10 cents per lb.....	$100 00
1,000 lbs unwashed wool are worth $140.00 (at 14 cents per lb.), 11 per cent of which is.....	15 40
Duty on 1,000 pounds unwashed wool	$115 40
"Twice the amount" of this duty gives the correct duty on 1,000 lbs of washed wool, as.....	2
	$230 80

Difference Between the Two Methods.

Government method	$261	60
Correct method....	230	80
Difference	$ 30	80 on every 1,000 lbs.

It is not to be forgotten, in these calculations, that washed wool is worth at least twice as much as unwashed wool, at the last port of export. Washed wool is, in fact, worth more than twice as much as unwashed wool. Hence the difference against the importer is really greater than that shown by the above examples.

This difference in the value of the wools expressly appears in the agreed facts, as follows: "The value of the pound of washed wool of this class (washed) is somewhat more than double the value of the pound of unwashed wool of the same class." As the Revised Statutes require the duty on washed wools to be assessed at "twice the amount" of duty to which it would be subjected if unwashed, and not double the rates, the correct method is demonstrable as above shown.

George P. Sanger, U. S. Atty.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Masters of ships laden with goods for importation, on their arrival within four leagues of our coast, or within any of the bays, harbors, ports,

or inlets thereof, are required, upon demand, to produce the ship's manifest of such goods to such officer of the customs as shall come on board the ship for his inspection, and it is made the duty of such officer to certify the fact of compliance with that requirement, and the day the manifest was so produced. Imported goods may be entered for consumption or for warehousing, at the option of the importer or consignee, and the proceedings in the two cases, so far as respects the entry, are in all particulars the same. Such an entry must be in writing, and must be made to the collector of the district within fifteen days after the required report is filed by the master. Appropriate forms for that purpose are prescribed by law and the regulations of the treasury department, and the provision is that the owner or consignee making the entry shall also produce to the collector and naval officer, if any, the original invoice or invoices of the goods or other documents received in lieu thereof, or concerning the same, in the same state in which they were obtained, with the bills of lading for the importation. Waring v. Mayor, etc., 8 Wall. [75 U. S.] 117. Two importations from Liverpool were made by the plaintiffs, of River Plate skin wool, one by the Minnesota and the other by the Illyrian. Entry for warehousing was duly made in the former case, April 2, 1877, and the latter, April 9, in the same year. In the first importation there were 70 bags, containing 11,678 pounds of wool, invoiced and entered as of the value of $4,963; and in the second importation there were 219 bags, containing 38,455 pounds of wool, invoiced and entered as of the value of $16,321. Beyond question these proceedings were regular, and the agreed statement shows that the duties were estimated in each case at the time of the entry, that the required bond for the same was also given in each case, and that the collector designated on the invoice one in ten of the packages to be examined and appraised, and ordered the same to be sent to the public store for that purpose. Due report was by the appraiser made in the first case, April 3, 1877, as follows: "Washed River Plate Wool. Class 1. Value, over 32 cents per lb. Duty 20 cents and 22 per cent. Correct." In the second case the report bears date April 10, in the same year, and is in the words following: "Washed Wool. Class 1. Value over 32 cents per lb. Duty 20 cents and 22 per cent. Correct."

All these facts are agreed to, and it is also agreed that the duties in the first case were on the 20th of April, in the same year, ascertained, liquidated and assessed in accordance with the report of the appraiser, and that the duties in the second case were ascertained, liquidated and assessed by the appraiser, April 27th, of that year, in accordance with the report of the appraiser in that case. Protests were subsequently filed by the plaintiffs in each of the cases. In the first case, the protest though bearing date April 19th, 1877, was not delivered until the 27th of the same month. They, the importers, object to the liquidation of the duties in that case because the goods are charged with double the rates of duty upon unwashed wool instead of twice the amount of such duty as the act of congress provides. Formal protest was also filed in the second case, dated May 23, 1877, in which the plaintiffs object to the liquidation of the duties in that case, because, as they, in effect, insist, the washed wool should be treated as unwashed wool, and double the aggregate duty imposed upon the unwashed wool is the correct amount of duty to which the washed wool is properly subject, under the existing act of congress. Provision is made that the decision of the collector as to the rate and amount of duties shall be final and conclusive unless the owner or importer, consignee or agent shall, within ten days after the ascertainment and liquidation of the duties, as well in cases entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the secretary of the treasury, whose decision on such appeal shall be final and conclusive. 13 Stat. 215; Rev. St. § 2931; 19 Stat. 247.

Ten days from the date of the ascertainment and liquidation of the duties are allowed for the filing of the protest, or the giving notice in writing to the collector by the importer, consignee or agent, of his dissatisfaction with the collector's decision, setting forth therein distinctly and specifically, the grounds of such objection; and the agreed statement shows that the protest in the first case was seasonably filed, and in the judgment of the court it is sufficiently distinct and specific to constitute a compliance with that requirement in the act of congress. Davies v. Arthur, 96 U. S. 758.

Certain descriptions of importations were, under the act of the 2d of March, 1867 [14 Stat. 559], divided into classes, to facilitate the ascertainment of the duty, or rate of duty, to which the articles were subjected by the provisions of that act, which classification was, to a large extent, preserved in the Revised Statutes. Wool of the first class, the value whereof, excluding certain charges, shall be thirty-two cents or less per pound at the port whence exported, is subject to a duty of ten per cent. per pound, and in addition thereto, eleven per centum ad valorem; and wool of the same class, whose value, excluding charges, exceeds thirty-two cents per pound, is subject to a duty of twelve cents per pound, and in addition thereto, ten per cent. ad valorem, the antecedent provision being that the duty upon wool of the first class, which shall be import-

ed washed, shall be twice the amount to which it would be subjected if imported unwashed. Washed wool was imported in both of these cases, and the contest upon the merits is, whether the duties imposed by the collector were or were not correct. Both of these importations, if unwashed, were, at the time of their importation, excluding charges at Liverpool, valued at less than thirty-two cents per pound, and their value in a washed condition was somewhat more than twice the value per pound of the unwashed wool. Wools of the class mentioned, by being washed, shrink from fifty to sixty-five per cent. in weight, the dirt and grease being removed by the washing, which greatly diminishes the weight of the article, consequently the value of the pound of washed wool is somewhat more than double the value of the pound of unwashed wool of the same class. First class wool, if imported washed "shall be twice the amount of the duty to which it would be subjected if imported unwashed." Although the appraiser found that the value of the wools in these cases was over thirty-two cents per pound, yet it is plain that he committed an error in that regard, as the duty which he recommended in each case was twenty cents specific and twenty-two per cent. ad valorem, which is the duty imposed upon washed wool of the value of thirty-two cents per pound and less, as will be seen by doubling the rates charged upon unwashed wool of that valuation. Twenty cents specific duty and twenty-two per cent. ad valorem is just double the duty imposed on unwashed wool of the first class, when of the value of thirty-two cents and less, excluding charges at the last port or place whence exported. Grant the value of the wool imported was thirty-two cents or less, then it is clear that the collector in ascertaining and liquidating the amount, doubled the rates imposed by law upon unwashed wool of the same class, which is the theory assumed by both parties in this controversy. Viewed in that light the United States contend that the ascertainment and liquidation of the duties were correct and that the plaintiffs are not entitled to recover any thing, because they fail to show that they paid to the collector any excess beyond what the law imposed. On the other hand the plaintiffs contend that the ascertainment and liquidation of the duties were erroneous; that the collector should first have computed the amount of the duties which the law would impose on the number of pounds of unwashed wool and then have doubled that amount. Opposed to that it is contended by the United States that double the rates of duty in such a case, and twice the amount of the duty, are the same thing, which cannot be sustained, if it be meant by the proposition that the two methods of computation will produce the same aggregate result. Nor can the theory of the plaintiffs be sustained, as the agreed facts show that the unwashed wool, by being washed, shrinks from fifty to sixty-five per cent., which is sufficient to show that the construction of the provision assumed by the plaintiff cannot be correct. Instead of that, the exact, literal meaning of the phrase would be approached much more nearly by adding the amount of the shrinkage of unwashed wool to the number of pounds of washed wool imported, and computing the duty at twice the amount of the duty to which it would be subjected if imported unwashed. If the amount of the shrinkage could be ascertained in every case, the theory suggested would work out the correct result; but it cannot be admitted that congress intended that it should be the duty of the collector in every case to ascertain how much the shrinkage of the unwashed wool was when it was converted into washed wool, before he could estimate and liquidate the duties upon the goods imported as washed wool. Congress never intended that such a construction should be adopted, as it would impose upon the collector the duty of making an inquiry which he could rarely, if ever, answer; and it is equally clear that congress never intended to adopt the theory of the plaintiffs, as that would leave fifty per cent. or more of the goods imported, duty free or without any customs taxation whatever. "Twice the amount of the duty to which it would be subjected, if imported unwashed," are the words of the act, and in the judgment of the court the rule of computation adopted by the collector is the only one of a practicable character which can be adopted consistent with the language of the provision. Customs taxation is usually by rates of duty specific or ad valorem, or by both, as in this case; and if the language had been twice the aggregate sum imposed upon a like amount of goods the case would have been clear, but the language is "twice the amount of the duty," which may well be construed to mean twice the duty upon the pound of washed wool to which the importation would be subjected if imported unwashed. Judgment must therefore be for the defendant in the first case.

Enough appears in the statement of the case to show that the protest in the second case was not filed in season to constitute a compliance with the act of congress, to which reference has already been made. 13 Stat. 215; Rev. St. § 293. Neither party controverts that proposition, if the ten days be computed from the original ascertainment and liquidation of the duties, but the plaintiffs insist there may be and is a subsequent ascertainment and liquidation of duties where the entry is for warehousing, and that if any subsequent protest is filed within ten days from such subsequent ascertainment and liquidation of the duties, the protest is seasonable. Nothing of the kind is provided for in the acts of congress. Nor can any such inference be drawn from the provision, which

is that the decision of the collector as to the rate and amount of duties, and the dutiable costs and charges thereon, shall be final and conclusive, unless the owner, importer, consignee or agent shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs give notice in writing to the collector, on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto. Appeal, if any, must be taken within thirty days from that ascertainment and liquidation of the duties, and the same proceedings take place in respect to the entry and the ascertainment and liquidation of the duties, whether the entry is for warehousing or for consumption.

Usually the boarding officer, as before remarked, boards the vessel on her arrival, and obtains the manifest and delivers it to the collector; but if the boarding officer does not perform that duty, then the act of congress makes it the duty of the master to deliver the manifest to the collector within twenty-four hours after the arrival of the vessel, and to make formal entry of the vessel within forty-eight hours after the vessel arrives in port. On the arrival of the vessel the consignee, owner or agent is required to make an entry of the cargo, either for consumption or for warehousing, and to produce the bill or bills of lading, together with the invoice duly certified, setting forth the quantity, quality and general description of the merchandise. Where the entry is for consumption, an estimate of the amount of the duties appearing to be due, is made from the quantity and description given in the invoice; and, if the person making the entry deposits the estimated amount of the duties so appearing to be due, a permit is then issued to deliver the cargo after the quantities are ascertained, the invoice being at the same time sent to the appraiser with the request endorsed on its face to "examine and classify the merchandise, and to report thereon;" and at the same time the surveyor is requested to ascertain and report quantities. Step by step the same proceedings are had in the case of merchandise entered for warehousing, except that in lieu of a deposit covering the estimated amount of the duties, a bond is taken in the penal sum of double the amount of the duties appearing to be due by the invoice. Formal entry is required in both cases, and in both cases the duties are ascertained and liquidated on the receipt by the collector, of the appraiser's report in relation to classification and rate, and the surveyor's report in relation to quantity. No other appraisement takes place unless the party making the entry, or the collector, is dissatisfied with the appraisement, in which event the collector may order another appraisement by the local appraisers, or by the principal appraiser, or by three merchants. Alterations are sometimes made by the second appraisers, but when the duties are ascertained and liquidated, the importer, if dissatisfied with the decision of the collector, has ten days from the date of such ascertainment and liquidation in which to enter his protest, and may appeal to the secretary of the treasury within thirty days from the same date. Withdrawals of parcels of merchandise where the entry is for warehousing, may be made at any time pursuant to the treasury regulations, but there is no act of congress providing for any other ascertainment and liquidation of the duties, nor for any other protest or appeal. When the entry is made the duties are estimated by the collector for the purpose of fixing the amount of the required deposit or bond, but the ascertainment and liquidation of the duties follows the action of the appraiser and that of the surveyor, unless the importer augments the value or quantity, or both, in the entry. The estimation of duties for the purpose of fixing the amount of the deposit in case the entry is for consumption, or of the bond in case the entry is for warehousing, is always made from the value and quantities specified in the invoice, but it is a mere estimate, and should never be confounded with the subsequent ascertainment and liquidation of the duties. Attempt is made in argument to support the opposite theory from Mr. Justice Strong, in an opinion given by him in the supreme court. Westray v. U. S., 18 Wall. [85 U. S.] 322.

Four points were decided in that case: 1. That the collector is under no obligation to give notice to the importer of the liquidation of duties on imported merchandise. 2. That the right of the importer to complain or appeal begins with the date of the liquidation, whenever that is made. 3. That the warehouse bond is a bond given to secure the payment of whatever duties may be by law chargeable upon the merchandise to which it refers. 4. That the obligor can only be relieved from the penalty by the payment of all the duties, to secure which he gave the bond.

Beyond that there is nothing in the opinion which controls the present case. In the course of the opinion the judge points out very clearly the difference between the estimate of duties made to fix the amount of the deposit or the amount of the bond, and the subsequent ascertainment and liquidation of the duties which mark the date from which the ten days allowed for protest begin to run. It is clear from that opinion that the limitation of the right to complain or appeal, commences with the date of the liquidation, and that the collector is not required to give notice when the liquidation takes place. Nor is there any thing in that opinion in the judgment of the court here which gives any sanction to the theory that the collector must make a new liquidation of duties every time the importer withdraws from the warehouse any portion

of the imported goods. Such a theory, if accepted, would prove to be very inconvenient, and would increase the duties of the collector's office beyond what the present force in those offices could perform, but the better answer to the proposition is that there is no act of congress which authorizes any such proceeding. Apply the rules here suggested and it is clear that the defendant is also entitled to judgment in the second case.

Judgment for the defendant.

Case No. 4,983.

FOSTER v. SIMMONS.

[1 Cranch, C. C. 316.] [1]

Circuit Court, District of Columbia. June Term, 1806.

SLAVERY—IMPORTATION INTO WASHINGTON.

An importation of a slave from the county of Alexandria, into the county of Washington, is an importation into the state of Maryland, within the meaning of the act of 1796, c. 67, as adopted by congress on the twenty-seventh of February, 1801.

Petition for freedom on the ground that the petitioner [William Foster, a negro] was born and on 27th of February, 1801, resided in that part of the District of Columbia which was ceded by Virginia to the United States, with Mr. Chapman, his owner, who sold him to Mr. Payne, who sold him to the defendant [William Simmons] in Washington county, in this District, and sent him to the defendant, from the county of Alexandria, into this county. By the act of congress of the 27th of February, 1801 (2 Stat. 103), it is enacted that the laws of Maryland, as they then existed, should continue in force in that part of the District which was ceded by that state. And the act of Maryland, 1796, c. 67, was then in force, by which it is enacted "that it shall not be lawful to import or bring into this state, by land or water any negro, mulatto, or other slave for sale or to reside in this state; and any person brought into this state as a slave contrary to this act, if a slave before, shall thereupon cease to be the property of the person so importing, &c., and shall be free."

Mr. Caldwell, for defendant, moved the court to instruct the jury, that if they should find that on the twenty-seventh of February, eighteen hundred and one, the petitioner resided with, or under the authority of his master in Alexandria, his master had a right to send him into the county of Washington, and the petitioner did not thereby gain his freedom.

Mr. Mason, on the same side, contended that all locality as states ceased as to the two parts of the District at the time of the transfer of jurisdiction by the two states to the United States. That a law for the forfeiture of property ought to be construed strictly in favor of the property in the master. That neither the letter nor spirit of the act of Maryland has been violated. That the defendant has not brought a slave into the state of Maryland.

Mr. Jones and Mr. Hiort, for petitioner, contended, that as the law in Washington county was to continue as it was before the twenty-seventh of February, eighteen hundred and one, and as the law before that day, in the county of Washington, was, that no slave could be lawfully imported into that county, the law is the same yet, and that a bringing from Alexandria county to Washington is the same as from Virginia to Maryland. If this adopted law is to be construed so strictly, there is no limitation to importation of slaves, even directly from Africa. The act of congress of the third of May, 1802, c. 52, § 7 (2 Stat. 193), only authorizes slaves to be brought from Virginia and Maryland into the District as they might before the twenty-seventh of February, 1801. That is, Virginia slaves may be brought into Alexandria county, and Maryland slaves into Washington county, but it does not authorize the bringing of slaves from Virginia into Maryland, nor from Maryland into Virginia. Lacy carried Lee's slaves from Alexandria to Georgetown, and the court decided it was a carrying out of the state of Virginia, within the meaning of the act of assembly of Virginia of the 25th of January, 1798, p. 374, §§ 6, 7.

THE COURT (nem. con.) refused the instruction, saying that they must take the whole act, or no part of it. If this construction be not given to the statute, there is no law to prevent the importation of slaves into the District of Columbia. It was the intention of congress to continue in force in this part of the District all the laws as they then existed.

FOSTER (SPRINGER v.). See Cases Nos. 13,265 and 13,266.

Case No. 4,984.

FOSTER et al. v. SWASEY.

[2 Woodb. & M. 217; 10 Law Rep. 32; 16 Hunt, Mer. Mag. 602.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

EQUITY JURISDICTION—REMEDY AT LAW — FRAUD IN SALE OF PROMISSORY NOTE—AUTHORITY OF SPECIAL AGENT TO BIND PRINCIPAL.

1. A complainant in chancery, residing in another state, but in the same circuit, cannot be required to furnish security for costs, except at the first term.

2. When redress is sought in chancery, it cannot be granted in the courts of the United States, however it may be in England, or in the states, if the redress is in every way as full and appropriate at law. This objection

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq. 10 Law Rep. 32, contains only a partial report.]

may be taken on demurrer, when it appears on the face of the bill, but is not too late at the hearing, if after an answer no disclosure is obtained.

[Cited in Hathaway v. Roach, Case No. 6,213; Almy v. Wilbur, Id. 256.]

3. An averment of fraud in the sale of a promissory note, and a request for a discovery of facts accompanying the sale, furnish sufficient ground for jurisdiction in chancery, and the proceedings once properly begun there, will be continued, when important facts are thus disclosed, and the subject in controversy is one proper for chancery, as well as a court of law.

4. An expression of belief, by the vendor of a note, that the maker is responsible, is equivalent to an assertion that he is so, if meant to be so understood, and if made with knowledge that he was not responsible.

5. Where the vendor receives valuable property for such note, and no payment is made for part of the price except in the note, the owner of the property is entitled to recover that part, or damages equal to it, if the signer of the note was worthless, and so known to be by the vendor of the note.

6. A special agent has no power to go beyond what is confided to him, in making a trade, so as to bind his principal by any contract he thus makes, but is liable for himself. Yet a contract made by such an agent, by means of false and fraudulent assertions, is void, and may be rescinded or damages given in a suit against the principal, if the latter received the benefits and proceeds of it.

7. Quaere. If notes are sold, which are worthless, and the purchaser does not specially agree to take the risk, whether he may not recover the consideration paid for them.

This was a bill in equity, alleging that the plaintiffs [Samuel J. Foster and others] about the 5th of August, 1842, sold to the defendant [John H. Swasey] through his agent, T. George, a certain quantity of lumber, and received in part payment thereof, a draft on the defendant, and, for the residue, a note, dated July 23, 1842, for $910, made by M. M. Rice, of Brighton, to E. Rice, and by him indorsed, payable in four months at the Suffolk Bank. It further averred, that the note has never been paid; that the drawer and indorser were insolvent, and, when sending the note to his agent, the defendant knew the same to be worthless, and that he obtained it without consideration. That the note was represented by the agent to them to be good, and thus the defendant "committed a gross fraud on them, and he ought in equity to pay to your orators the whole amount of the said note, with interest and damages therefor." A disclosure was also asked as to certain facts material in the case, and, after being made, a decree was requested for such other relief as the case and equity may require. The answer denies, that the defendant became possessed of the note, except for a valuable consideration. It admits the sending of it to George, as his agent, to sell for lumber, and that it was sold to the plaintiffs, and the balance for the lumber paid in a draft on him and Boynton, a partner, but denies that he authorized George to state the note was good, or that he did so state, but merely referred the plaintiffs to others for their responsibility, and avers that the plaintiffs made inquiry as to it, and relied on their own information so obtained. It alleges further, that his letter to George concerning the sale of the note, was not shown to the plaintiffs before the sale, or in any way used at the sale; nor was he known to the plaintiffs as the owner, except by inference from the draft for the balance being made on himself and partner. That the maker and indorser were not then insolvent; that he believes there was a valuable consideration for the note between them; that in September, 1842, E. Rice conveyed his farm to E. Rice, Jr., but still resides on it, and the sale was not bona fide; that neither he nor his agent intended any fraud in the sale of the note; that he wrote a letter to the latter inclosing it, similar to the one set forth in the bill, about August 5, 1842; that one George Miller brought this note to him July 26, 1842, and he advanced $200 on that and two notes of G. Winthrop, for $267.46 each, to be repaid in ten days, or said notes kept and their proceeds applied to a debt of almost $3,000 then due from Miller to them; that M. M. Rice was a frequent borrower of money; that another note of his was pledged to him about the same time in a like manner, payable at a future day, and that he made frequent loans to him before the date of this transaction, but none since. There was much contradictory evidence in the case as to the reputed solvency of the indorser and maker when the note was sold, though they themselves both swore to their want of ability then to pay, and to their failure in business before the note became due. The letter of the defendant, inclosing the note to George to be sold, promised five per cent. commission, if selling it for lumber, and offered to put a few hundred dollars with it to get rid of it, and said others had stated the Rices were good, and some at Bangor knew them, and added, "I think the note good." It desired secrecy as to himself. Some of the rest of the testimony is referred to in the opinion, when found to be important. In this case, before the argument on the merits, but after the close of the pleadings and publication of the evidence, the defendant moved that the plaintiff, being resident abroad, should furnish security for cost.

T. P. Chandler, for plaintiff.
Allwyn & Paine, for defendant.

WOODBURY, Circuit Justice. The motion is refused, because it is so late. The place of the plaintiff's residence appears in the bill, and was known several terms ago. 1 Daniels, Eq. Prac. 56, 41; 3 Johns. Ch. 520. The motion, therefore, should have been made before so much cost was incurred, and the case ready for a hearing. A motion of this kind, too, is granted only when the party is a resident abroad. Newl. Ch. Pr. 410. Cases exist where being resident in Ireland or Scot-

land has been regarded as abroad for this purpose. But those countries are under distinct judicial tribunals, and in some respects under different laws; while in this case the plaintiff resides, not out of the United States, nor even out of this circuit, but in the state of Maine. I think it would, at this late day in the case, and under the circumstances of his living within this circuit, be unjustifiable to require him to furnish security as coming either within our practice or that of England. The 44th rule provides, if the plaintiff lives without the state, the defendant may require security for cost, if moving it at the first term. But the motion is not made in season to come within this rule, and being founded only on the general practice in chancery, must by that be refused.

At a subsequent day in the term, after the argument in chief on the case, the following opinion on the merits was delivered by—

WOODBURY, Circuit Justice. This case is one of some difficulty as to entertaining jurisdiction over it in equity, and as to the real merits between the parties. There is enough alleged to give jurisdiction prima facie, by averring fraud on the part of the defendant, in selling or delivering the note in part payment to the plaintiffs for this lumber, and asking for a discovery of certain material facts under oath, in order to support the charge. 1 Story, Eq. Jur. c. 6; 6 Ves. 182; 7 Johns. Ch. 201. But after having obtained all the plaintiffs could by way of discovery, it is difficult to see much in the relief requested from the supposed fraud, that could not be given at law. See cases in Pierpont v. Fowle [Case No. 11,152]. In such cases in England, a court of equity will proceed further, and complete the inquiries, or will send the parties to law, when the jurisdiction is there concurrent and the remedy ample, according as to its discretion may seem proper. See cases in Pierpont v. Fowle [supra]. Here, under the 16th section of the judiciary act [1 Stat. 82], it has sometimes been held, that a like course will be pursued. Bean v. Smith [Case No. 1,174]; [Boyce v. Grundy] 3 Pet. [28 U. S.] 215; [Herbert v. Wren] 7 Cranch [11 U. S.] 370. While at other times it has been held, that the case cannot proceed in equity at all, if the power is concurrent in the whole matter at law, and the relief is as full and as good in all respects. Russell v. Clark, 7 Cranch [11 U. S.] 89; Baker v. Biddle [Case No. 764]; 1 Story, Eq. Jur. §§ 91, 194. I have been inclined to the latter opinion; and hence would not proceed to sustain jurisdiction longer in equity than to obtain the disclosure, as has been done here already, if it was not as well settled in my judgment, that having once obtained jurisdiction of a case, in equity on proper grounds, and what remains to be done being still a proper subject for equity, it is taken out of the operation of the 16th section of the judiciary act.

The court in equity may, in such a case, proceed to finish it, if deemed expedient, and if a good ground in equity is set out, rather than send the parties to new actions and longer delays in the courts of law. Warner v. Daniels [Case No. 17,181], and cases there cited; [Hepburn v. Dunlop] 1 Wheat. [14 U. S.] 197; Gaines v. Chew, 2 How. [43 U. S.] 619; [Pratt v. Law] 9 Cranch [13 U. S.] 493. An additional reason for continuing to act in equity here is, that some of the material facts have been obtained by the disclosure, and in rescinding the contract for fraud, if void, some conditions may be imposed as to the return of the note, which could not be at law. The time of taking this objection is also excepted to; but, as remarked in the case just cited, of Pierpont v. Fowle, it need not be by demurrer, unless appearing on the face of the bill; and where a disclosure is asked as here, the court should in no case send it to law till after the answer and disclosure are completed in equity. Continuing, then, to sustain jurisdiction over this case, it once having been proper for a discovery, and still being a matter of fraud to be decided, over which the general jurisdiction of a court of equity is clear, the next inquiry is, whether the facts disclosed in connection with the other proof, show the defendant to have been guilty of fraud in disposing of this note.

What was said and done at the time of the sale is the first test. The defendant was not then present, but did the business by an agent. What that agent said and did, will not bind him, it is argued, as he was a special agent for this business alone, and acting under a written authority, which gave him no direction to make false representations, or to bind his employer by any warranties or affirmations. It is true, that such is the general rule in cases of that character. 5 Johns. Ch. 247; Raymond v. Crown & E. Mills, 2 Metc. [Mass.] 324. It is, therefore, that such an agent is himself liable to a suit in that case. Pasley v. Freeman, 3 Durn. & E. [3 Term R.] 51. But this principle relates to the power of such an agent to enter into a contract for his principal, and to bind him by express stipulation. For, at the same time that this principle thus applies, it is well settled, that if an agent, in making a sale of an article, commits a fraud or states falsehoods as to material facts, which are relied on, it exposes the sale to be avoided. The theory is not, in such case, that he binds his employer by any engagement which he is not empowered to make, but that his employer cannot take the benefit of his sales without taking the burthen of them, and that he must repudiate the whole, and not merely a part, where all was dependent and united. That if he does not choose to ratify the whole, he must ratify nothing connected and interwoven; and that the fraud or falsehood, if bad at all, is bad for the whole, and restores the parties to the condition in which they stood before it happened. Doggett v. Emerson

[Case No. 3,960]; Mason v. Crosby [Id. 9,234]. The employer of an unfaithful agent is to suffer by his misconduct generally, rather than his victim. Hence, in this case, if the agent did at the sale what he was not authorized to do, and it amounts to a falsehood or fraud, and the defendant repudiates it, he must repudiate the matter or engagement to which it related, and restore things to the position in which they would otherwise have stood. What did the agent here do? He either bought the lumber for the note and draft, or bought the lumber and agreed to pay for it in the note and draft. In either event, if the statements as to the note were deceptive, so as to avoid the sale or the payment, the amount to be refunded would be the same. It would not be the course here, if the sale was void, to rescind the sale, and restore the lumber on the one hand and the note and draft on the other. Because the lumber has, doubtless, been sold and worked up, and the draft converted into money, and the relief would rather be to give damages to the amount for which the note was received, and order the latter to be returned. So if the sale of the lumber was good, but the payment, so far as regards the draft, void, because accompanied by deception, then the relief would be, the further payment of a sum equal in amount to the note.

It is of no consequence, therefore, under which aspect it is regarded. But the difficult and doubtful question is, whether the agent was in fact guilty of deception. He denies any. The answer, also, from the information and belief of the defendant, denies any under oath. And the letter sent with the note does not expressly direct any misrepresentation to be made, and the agent swears that none was made; but that the plaintiffs were merely referred to others for information. On the other hand, the force of these matters is some weakened by the circumstance, that the respondent was not present, and hence could not know personally what took place, and that the agent is in a position impairing his credibility. Story, Ag. § 131; 1 Metc. [Mass.] 201. Beside this, there is the positive testimony of the clerk, that the agent represented the maker and indorser to be good. There is the admission of George, the agent, also, that he showed the defendant's letter to the plaintiffs at the sale, in which he states, "I think the note is good." Fraud may consist in asserting a belief as well as asserting a fact. Indeed, asserting a belief is asserting the fact of belief, and if it is done with a design to mislead, it is fraudulent. Stebbins v. Eddy [Case No. 13,342].

There are numerous circumstances, also, soon to be particularized, showing the defendant to have placed little confidence in the goodness of the note; and the distance to which it was sent for sale, and the secrecy as to the name of the owner, and the length of time the note run, with an intermediate failure of the parties to it, and the number of other like notes in the market, known to the defendant, and much discredited; lead the mind strongly to a conviction, that the defendant did not then believe the note to be good, or that it would be ever paid; and that the agent understood from the letter of the defendant that the note was to be got rid of, even at the hazard of paying more money with it; and of stating the opinion of others as of the defendant to be, that "the note was good." Allow me to repeat, as the contrary view seems to have been much relied on, that it was of no consequence whether this was flung into the form of an opinion, or assertion by Swasey or George, if it was meant to impress and did impress on the minds of the plaintiffs, convictions that the note was good, when in truth, they had sufficient reason to believe it never would be paid. [Smith v. Richards] 13 Pet. [38 U. S.] 36. Indeed, the letter of the defendant being shown to the plaintiffs by the agent, contains enough from the defendant himself to deceive and mislead, as to the goodness of the note, beside the oath of the clerk to the assertion of the agent, also, that it was good. The whole letter is tantamount to an assertion by the defendant himself, that the note was good; and all this was done when the current of circumstances is strong, that he knew and felt convinced to the contrary. Because: Firstly. Why should the defendant want to sell it for boards, if it was good? He was a grocer and a man of substance, and could well wait till it became due, rather than take lumber. Secondly. Why should he pretend in the letter, that he wished to realize the money on it earlier than the day, as a reason for selling, when he paid out on the draft $908 in money, in order to realize only $910 on the note? The gain in money to use was $2 only, till the lumber was converted into money, and out of that and other funds was to be paid freight of the lumber also from Bangor to Boston. Thirdly. How could he expect to sell for $910 what he advanced only $200 on, aided by other notes of more than $500 in amount, provided the purchasers were not in some way misled? How could he, if they were dealt fairly by, and knew as much as he did of the Rices and their condition—he who told some witnesses before in August, the note was worthless, not worth the paper it was written on? Fourthly. Why did he write, but for this wish, to be concealed in the business, when done at such a distance from his partner? and why did he not indorse the note, if he did not desire to get it off without giving his responsibility? and why not give his responsibility if the note was really believed to be good? or why did not his agent do it when asked? and why after all this, did he say, "I think the note good," if he did not mean to have it reported as the opinion of one like himself, having the best means of judgment? and why give so large commis-

sions for selling it, if not wishing to get rid of a bad note? Fifthly. How could he say likewise, that he thought the note good, when nobody at Boston would advance over $200 on it, and other notes united? when he knew several other notes of like tenor of the same parties to be in the market at a low credit, apparently "made to sell," when the same parties were otherwise indebted much to him? when they were in broker's hands? when one of them had then failed? when the other had made a conveyance of his property as early as June, 1842? and, though not known to all then, a person so much connected with them as the defendant, probably knew the fact before or as early as the sale of this note, August 5, 1842? The elder Rice testifies the business of the conveyance was done openly, and the son took possession of part of the property in June, 1842; and Swasey told Veazy he knew it in July, and Goding swears he knew it within three weeks of its taking place.

To doubt, after all this, that the Rices were both then insolvent, as they both swear, and were likely to be, when the note fell due, as both went into bankruptcy before, and their notes were pledged as early as the date of this for less than one fourth their face; and to doubt that this was the impression among money dealers like the defendant, as he knew no more than one fourth could then be raised on them, is not reasonable. There may be purchases or sales of notes without recourse, and this without fraud; and then the rule applies, caveat emptor. 1 Story, Eq. Jur. §§ 147–149, 204–212; 2 Kent, Comm. 482, 491; Salem India Rubber Co. v. Adams, 23 Pick. 256. The defendant's not having indorsed this note, is some evidence of such a sale here, and exonerates him from liability on the note himself as a party to it. Chit. Bills, 244; 6 Barn. & C. 373; 9 Dowl. & R. 391; 3 Durn. & E. [3 Term R.] 759. But it still leaves him responsible for the property or money given for the note in either of three events. One is, if the notes paid over or sold were bank notes or bankers' drafts, which pass as money, and were then worthless, the promissors having previously failed. 2 Hill, 509; Chit. Bills, 244–246; 7 Durn. & E. [7 Term R.] 65; 8 Yerg. 175; 10 Ves. 204; 8 Durn. & E. [8 Term R.] 40; 11 Wend. 9. Though once the rule was different, if they were paid over when the debt was incurred. Id.; 12 Mod. 203; 6 Barn. & C. 373. Another is, if they were promissory notes, which the seller knew to be worthless. Fenn v. Harrison, 3 Durn. & E. [3 Term R.] 759. Lord Kenyon said it was like sending out a counter, instead of current coin. Another, though more doubtful, is, that if without such knowledge, notes or drafts on individuals are not specially agreed to be taken at the risk of the purchaser, the loss will not fall on him. Ex parte Blackburne, 10 Ves. 204; Jones v. Ryde, 1 Marsh. 157–159. But if he agrees to take the risk, he must, if nothing indicates fraud or knowledge, and it is an honest exchange. Chit. Bills, 246, and cases. When it is questionable what the agreement or knowledge was, it seems more just to require a good payment for a good consideration. There are, then, several equitable grounds made out in this case for a recovery, with considerable strength of evidence, but some of them more satisfactorily than others. One is, that the defendant has received valuable property of the plaintiff, for which he has not paid in full, except by a worthless note, which it is doubtful whether the plaintiff agreed to take at his own risk. Another is, that it was passed to the plaintiff by the defendant's agent, under circumstances rendering it probable that the defendant knew and believed the note to be worthless. And finally, the evidence is quite strong, that false representations were made by the defendant as to the note being good, which were communicated to the plaintiff by his agent, and which led to the purchase.

It is satisfactory to reflect, also, in support of the equity of this conclusion, that the defendant will lose nothing by it, as he will have the benefit of his note against the Rices if they be good, since it must be restored to him; and will be obliged merely to pay, for aught which appears, a fair market price for the lumber he got, merely making up now the part which was paid in worthless paper, like that which is counterfeit, or on a broken bank. The man who circulates such a discredited note as this, should suffer by it, rather than a credulous and innocent receiver. I have not gone into the question, as to this note being an accommodation one, and without consideration (4 Johns. Ch. 128; 7 Wend. 5677), because, in the hands of third persons without notice, like the plaintiffs, and before due, that circumstance would be no defence. Let the decree be entered, that there was fraud as to the note in controversy, when sold in part payment for the lumber, and that it be restored to the defendant on his paying the amount for which it was taken by the plaintiff with interest since, and which amount and interest he is decreed to pay.

A question as to costs was afterwards made, which is not deemed of sufficient importance to be reported.

Case No. 4,985.

FOSTER et al. v. SWASEY et al.

[3 Woodb. & M. 364.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

BANKS AND BANKING—SERVICE OF TRUSTEE PROCESS—PAYMENT TO DEPOSITOR—ENTRY OF BANK'S BOOKS.

A bank, the teller of which, on the day of, but before, the service on it of a trustee pro-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

cess against a depositor, had paid the depositor's check to a larger amount than his deposit, was held not to be chargeable as trustee, though the payment was not entered on its books till some days subsequent.

This was an action of debt on a judgment [by Samuel J. Foster and others against John H. Swasey and the Atlantic Bank, as trustee]. The writ was sued out on the 4th day of August, 1847, and served the same day on the trustees. The latter disclosed that, previous to the 4th of August the defendant Swasey had in deposit in their bank a balance of about $1,500. That he then drew a check for about $2,500, in favor of a third person, on the bank, which was presented and paid before the 4th of August by the teller, but not entered on the books till the 7th of August, when the excess of the check was paid to the teller by Swasey. The bank further stated, by their cashier, in answer to interrogations by the plaintiffs, that the teller had no authority to pay from the funds of the bank more than the drawer of a check has on deposit, and if he does it by accident or knowingly, and it is repaid in a few days, the entry is not usually made on the books till then. If the drawer does not soon repay it, the bank has the right to charge the excess or difference to the teller. The question whether the bank could be considered chargeable as trustee of Swasey or not, was argued by

Mr. Andrew and T. P. Chandler, for plaintiffs.

Clark & Bigelow, for the bank.

WOODBURY, Circuit Justice. There are two grounds on which the bank is entitled to a discharge in this case. 1st. The draft on them by Swasey for the amount on hand, and even more, may properly be considered as an assignment of that balance to the drawee. It is a direction to pay it to him, probably being a third person, and is, therefore, good for the amount, though asking a still larger sum to be paid to him. The excess does not vitiate it for what is good. It is a valid transfer of all he has a right to. Notice of it was given to the bank before the service of the trustee action, and the money was actually paid over in conformity to the order or assignment. Because the teller chooses to pay over a still greater sum does not affect the rightful payment of the amount due, looking to the transaction as an assignment and a payment under it. 2dly. If the holder of the check is regarded as an agent or representative of Swasey, then it would seem that a payment had been actually made to him of all the balance held by the bank before the institution of this suit. In this view, whether the draft was nominally in favor of Swasey himself or not, would be immaterial. A depositor has the right to withdraw the balance of his deposits in favor of himself whenever he pleases. And if doing it before this suit, then Swasey had no money or effects in the hands of the bank when the writ was served. If there was any collusion or fraud or conditions attached to the draft or the payment, to the extent of the true balance, it should be made to appear in the answers; and interrogatories to draw out that fact should have been put, and probably would have been, if any foundation was supposed really to exist in favor of such a hypothesis.

Something has been said in the argument as to the want of legal power in the teller to pay over the amount of the whole draft. But however that may have been, he and the bank were both bound to pay on it the balance due; and his payment to this extent was legal and authorized. This settles the question as to that, and it is only that which is sought to be reached by this action. Indeed, if it was necessary to pass on the validity of the payment of the whole as regards the bank, I have little doubt it was a valid payment, both as regards the bank and the holder of the draft. Being done by the agent of the bank and from the funds of the bank, without notice shown of any objection made to the holder of the draft, it is an admission by the bank and the teller, its agent for this purpose, that Swasey, the drawer, had funds there to that amount, or at least funds and credit, which induced them to honor the whole draft. The payment, therefore, as between the bank and the holder, was valid for the whole, and could not be ripped up. The remedy by the bank for the excess was good against both the teller and Swasey; against the former on his violated bond, and against the latter for money paid for him to the extent of the excess. 1 Hall, 78. In the case of Menard v. Cox, 7 La. 167, the teller informed the holder that the drawer had not funds, and hence the money was paid by the teller, rather than the bank; and he, and not the bank, could sue the drawer for the amount, it being advanced by the teller, rather than the bank, for the amount and the benefit of the drawer. 7 Har. & J. 381; 1 Hall, 78.

There is no ground on which the creditors of Swasey could rightfully complain of what was done in this case by the bank or the teller, unless they were actually misled by the transaction not being entered on the books till the 7th of August. If between the payment to the holder and the entry of it on the books, the plaintiff, as a creditor of Swasey, had inquired at the bank, and not been told of the payment, and had seen or been informed of the balance standing to Swasey's credit, then some ground would have existed to say they had been injured or misled by the transaction, though then it is doubtful whether, in law, the payment would not be a good one, if made, in point of fact, before the service, and done bona fide. But the bank would, in that event, be entitled to no cost on account of the suit, caused by their neglect to disclose

all the facts to the plaintiffs. Nothing of this kind, however, is shown to have happened here; no such inquiries and no such neglect to give full information. When the truth of the money having been actually paid over, and not of its being entered on the books the same hour, day or week is the test of the bank having or not having money on hand after the payment, it seems of little importance when the entry is made on the books, if nobody is misled by the delay to do it. Judgment for the trustee.

FOSTER (UNITED STATES v.). See Cases Nos. 15,141 and 15,142.

FOSTER (WESTON v.). See Case No. 17,452.

FOSTER, The H. B. See Cases Nos. 6,290 and 6,291.

FOULKE (UNITED STATES v.). See Case No. 15,143.

FOULKROD (MAYER v.). See Cases Nos. 9,341 and 9,342.

FOUR CASES CUTLERY (UNITED STATES v.). See Case No. 15,144.

FOUR CASES OF LASTINGS (UNITED STATES v.). See Case No. 15,145.

FOUR CASES PRINTED MERINOES (UNITED STATES v.). See Case No. 15,146.

Case No. 4,986.

FOUR CASES SILK RIBBONS.

[1 Ben. 214;[1] 5 Int. Rev. Rec. 181.]

District Court, S. D. New York. June, 1867.

PRACTICE—BONDING GOODS SEIZED IN WAREHOUSE—VALUATION—DUTIES.

Where goods which had been entered for warehouse were libelled by the United States as forfeited, and were attached by the marshal under the process while still in warehouse, and the owners filed a claim to them, and presented a petition to the court praying that the goods be appraised at their cash value, less the duties, that they might be bonded in accordance with the eighty-ninth section of the act of March 2, 1799 (1 Stat. 696): *Held*, that the practice of giving the bond in such cases, in the amount of the value of the property, less the duties, is correct, and will continue to be the practice of this court till overruled by superior authority. The case of U. S. v. Segars [Case No. 16,249] commented on.

[Disapproved in U. S. v. 12,347 Bags of Sugar, Case No. 16,555. Approved in U. S. v. Three Horses, Id. 16,500. Cited in U. S. v. 1,291 Bales of Tobacco, Id. 15,965.]

This was a petition by Sarasin & Co., of Basle, Switzerland, the owners and claimants of the goods proceeded against in this suit [viz. four cases of silk ribbons, marked S. & C. 1208, 1210, 1211, 1213], praying for an order that the goods be appraised at their cash value in the city of New York, less the duties legally chargeable thereon; and that, upon filing such appraisement and a certificate from the collector and naval officer of the port of New York, that the duties on the goods have been paid, or secured to be paid, the goods be delivered to the claimants, on their executing to the United States a bond, with sureties, according to the statute in such case made and provided.

The goods were imported in August, 1866, and entered for warehouse under the acts of August 6, 1846 (9 Stat. 53), March 28, 1854 (10 Stat. 270), and March 14, 1866 (14 Stat. 8). The general provisions of those acts are, that goods entered for warehouse may remain in warehouse, under bond, for a limited time, without the payment of duties, subject to withdrawal for consumption on payment of duties, and to withdrawal for reexportation without payment of duties. The bond under which the goods are warehoused, is a bond to secure the proper duties and expenses, to be ascertained on the entry for warehousing. Act Aug. 30, 1842, § 12, as amended by Act Aug. 6, 1846, § 1 (9 Stat. 53). In the present case, such bond was given. Afterward, and in October, 1866, the goods, while still in warehouse, were seized by the collector as forfeited, under the provisions of the fourth section of the act of May 28, 1830 (4 Stat. 410), and the first section of the act of March 3, 1863 (12 Stat. 737). A libel of information was filed by the United States, and the goods were attached by the marshal, and were in his custody. A claim to the goods had been filed by the petitioners.

This application was founded on the eighty-ninth section of the act of March 2, 1799 (1 Stat. 696), which provides that, on the prayer of any claimant of goods so seized and prosecuted, for their delivery to him, the goods shall be appraised; and if, on the return of the appraisement, "the claimant shall, with one or more sureties, to be approved of by the court, execute a bond in the usual form to the United States, for the payment of a sum equal to the sum at which the * * * goods * * * so prayed to be delivered are appraised, and moreover, produce a certificate from the collector of the district * * * and of the naval officer thereof, if any there be, that the duties on the goods * * * so claimed have been paid or secured in like manner as if the goods * * * had been legally entered, the court shall by rule order such * * * goods * * * to be delivered to the said claimant." The statute merely provides that the goods shall be appraised, and that the bond shall provide for the payment of a sum equal to the sum at which the goods are appraised. The claimants insisted that the court should order the goods to be appraised at their cash value in the city of New York, less the duties legally chargeable thereon; and that the bond should be a bond for the payment only of such cash value, less such duties. The district attorney, representing the government, insisted that the goods

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

should be appraised at their cash value in New York, without any deduction of such duties, and that the bond should be given accordingly. The question to be determined by the court was, which was the proper course of procedure.

It was made known to the court, that under instructions from the treasury department, the officers of the customs had been, for about six months previous, requiring appraisements and bonds, in cases like the present one, for the value of the goods, without any deduction of the duties. Such procedure was said to be generally acquiesced in by the claimants of property seized, but the present application was brought before the court for the purpose of obtaining an adjudication as to the correct practice.

S. G. Courtney, Dist. Atty., and Thomas Simons, for the United States.

Sidney Webster, for claimants.

BLATCHFORD, District Judge. This question has heretofore been presented to this court in at least two cases, in which orders for bonding were made in accordance with the views urged by the claimants. One of the cases was that of U. S. v. 1,406 Boxes of Sugar [Case No. 15,959], marked "L. V. H. & Co.," in which, February 25th, 1862, an order was made by this court (Judge Betts), that the property be bonded at its market value, less the duties. But no minutes of any argument of the question before the court and no written opinion are found. The second case referred to was that of U. S. v. 1,382 Hogsheads of Sugar [Id. 15,962], in which, March 22d, 1862, an order was made by Judge Betts, that the goods seized be bonded by the claimant at their appraised value in this market, exclusive of the duties. In an opinion delivered in this court, by Judge Smalley, in that case, in June, 1862, on a motion made by the United States to set aside an order releasing the goods from custody, it is stated that the question decided by Judge Betts, by the order of March 22d, 1862, was argued before him, and that, after full consideration, he held that the bond should be for the value, less the duties. But in that case, as in the other, no minutes of the argument of the question before Judge Betts are found, nor does the subject appear to have been disposed of by him in a written opinion. The motion before Judge Smalley in the case, turned upon other points than the one now presented for consideration. This court is, therefore, now asked to review the subject, and settle the course of practice for this district.

Under the acts on which the libel in this case is founded, the penalty imposed is the forfeiture of the goods. If the goods are not warehoused, but are entered for consumption and the duties on them are paid, and they are, when seized, in the hands of the importer, he loses, if the goods are forfeited, the duties which he has paid, and the goods also. As the duties on the goods have been paid, those duties enter as an element into the value of the goods at the time of their seizure; and the government, in availing itself of the provisions of the ninetieth section of the act of March 2, 1799, in case the goods are condemned and not delivered on bond to a claimant, and selling the goods at auction to the highest bidder, receives the market value of the goods, of which value the duties form a part. The government receives just what the importer loses. If, after the government, under such circumstances, seizes the goods for forfeiture, they are bonded at their market value, then, in case they are condemned, the government receives and the importer loses the same amount as if they were not bonded, that is, the duties which have been paid, and the value of the goods in market, into which value the duties enter as a constituent part.

If the duties on the goods have not been paid, and the goods are, when seized, in warehouse under the warehousing acts, with a bond to secure the duties, the property is in a very different situation from that which it is in when it is not warehoused, but is seized in the hands of the importer, after a consumption entry and after the payment of duties. The interpretation uniformly given to the eighty-ninth section of the act of March 2, 1799, is that the sum at which the property seized is to be appraised is its value as of the time and place of seizure. The theory is, that the government is entitled, on a forfeiture and condemnation, to the value of the property as it stood at the time of the seizure—at the time it thus came into the hands of the government. When the property is not warehoused, but is seized after a consumption entry, and after the duties on it have been paid, and is then condemned, this theory is carried out by causing the importer to lose and the government to receive, either by sale of the property, or by a suit on the bond given to procure its release after arrest, what was its value as it came into the possession of the government at the time of its seizure. It is true that, under such circumstances, the government receives, on the consumption entry, the duties on the property, and that afterward those duties enter into the price or value which the government receives for the property, after it is condemned; and thus, according to a form of speech, the government may be said to receive, and the importer to pay, the amount of the duties twice. But this is a fallacy. The duties are first paid as duties on the consumption entry, and then the property becomes part of the common stock of the country, and enters into its markets, and has a merchantable value, composed of all the elements which go to make up such value, such as cost of manufacture, freight, commissions, duties, mercantile profit, and other items. That value it is, which, when

the property is seized under such a state of facts, passes from the importer to the government; and the importer necessarily loses the duties he has paid, and the money value of the property, which otherwise would have gone into his own pocket—no more and no less. But when the property is in warehouse, under a bond to secure the duties, it is there subject to withdrawal for consumption on payment of duties, or to withdrawal for re-exportation without payment of duties. If seized while so in warehouse, it has, at the time of seizure, a value composed of very different elements, so far as the question now under consideration is concerned, from those which compose its value when it is not in warehouse, but is seized in the hands of its importer, after a consumption entry and after the payment of duties. If sold by the importer while so in warehouse under bond, the duties do not form an element of its price or value. The purchaser pays to the importer the value of the property, not including any duties, and afterward pays the duties on withdrawing the property for consumption, or re-exports it without paying duties. The property cannot, while in warehouse under bond for the duties, be put into market for consumption, so as to have the duties enter as an element into its value; and if it is withdrawn for re-exportation, the duties can never enter into its value in any market in this country under its existing importation. These views show, that when property in warehouse under bond for duties is seized, the duties form no part of its value at the time it is seized. Now, applying the remedies which the law gives to the government to this state of facts, these consequences follow. If the government enforces the forfeiture, and the property is not released on bond, but is sold, the government receives for it, by putting it into market, a price into which the duties enter as a component part (the property, when sold, being put into competition with other property of the same kind which has paid duties), and thus the government receives not only what was the value of the property to the importer at the time of the seizure, but also an additional value representing the amount of duties. Thus, the government virtually receives the duties on the property, and also its value at the time of seizure. It receives what the importer ought to lose, namely, the value of the property to the importer at the time of its seizure; and it also practically receives the duties, by receiving the same price for the property which it would bring if it had paid duties. It also claims the right to enforce against the importer the bond for duties given on the entry for warehouse. If it should be allowed to enforce that bond, then, in such case, as in the case where the property was condemned and sold on being seized while not in warehouse, but while in the hands of the importer, after a consumption entry and after the payment of duties, it would seem to receive the amount of the duties twice. But this again is specious. The bond for duties given by the importer, if enforceable, would be enforced by reason of the voluntary act of the importer in giving it. The transaction of giving such bond, and any rights of the government under it, are separate and distinct from the rights acquired by the government by virtue of any fraud which justifies the seizure of the property. As to what the government receives as representing duties when it sells the property in market, it receives that as an incident of sovereignty. The property has virtually been imported by the government itself, and it has the right to put it into the market, and all it receives for it, as representing duties on like property, is clear gain. But such gain arises from the principle that the government pays no duties on articles imported by itself. If the government imports property which is afterward sold by it, it receives on the sale a price into which the amount of duties on like property, when imported by an individual, enters as a constituent part, and the gain thereby accruing to the government is an inherent incident of its sovereign right. But, although the course of proceeding in the case of a sale on forfeiture where the goods are in warehouse under bond, may bear the semblance of giving to the government the amount of the duties on the property twice, in addition to the value of the property to the importer at the time of its seizure, yet the importer loses nothing but what was the value to him of the property at that time; and, if the bond given by him for the duties is enforced, he loses those also.

At this stage comes up the question now presented for decision. If the property proceeded against in this suit is released on a bond such as the government insists on—namely, a bond for the value of the property when seized, including the duties—and the property is condemned in the suit, the government will receive, under such bond, not only the value of the property to the importer at the time of seizure, but also an additional value, representing the amount of the duties; and, besides that, it will receive the duties imposed by the collector, in case the goods are withdrawn for consumption. It will thus receive, in all, just what it would receive in case the property were condemned and sold, on its seizure while not in warehouse, but while in the hands of the importer, after a consumption entry, and after the payment of duties. And it will not receive that full amount, if a bond for the value less the duties, is given. But it has been already shown that the warehousing system introduces a change, to the full benefits of which the importer is entitled. Where the property is not warehoused, the government receives the duties; and if it afterwards seizes and condemns the property, it receives its full market value. If the property is

warehoused, and then seized, condemned, and sold, without being delivered to the claimant on bond, the government acquires the title to the property, and sells it in like manner as if it had itself imported it. But in case such a bond as the government claims to receive in the present case is given, the importer will, as we have seen, lose, if the property is condemned in the suit, not only what was the value to him of the property, in warehouse, at the time of its seizure, but, in addition, a sum equal to the amount of the duties legally chargeable thereon; and if, after thus bonding the property, he withdraws it for consumption, he must pay the duties on it in cash to the collector, notwithstanding the amount of them has been included in such delivery bond. He will thus, in case of a condemnation, lose more than he would if the property were not delivered to him on bond, but were to remain in the hands of the government, and be sold by it. In each case, the same offence is charged and has been committed, for which the property is forfeited. In each case the property is in warehouse, under bond for the duties. The merchandise is equally guilty in each case; but, if the claimant seeks to avail himself of the privilege of bonding his property when it is seized while in warehouse, he cannot do so, according to the views urged by the government, without imposing upon himself a liability, in case the property is condemned, which he will not incur if he leaves the property in the hands of the government. Such a result is opposed to the spirit and intent of the eighty-ninth section of the act of March 2, 1799. One of the principal points involved in the case before referred to, decided by Judge Smalley, was, whether the bonding system, provided for cases of seizure by the eighty-ninth section of that act, applied to property seized while in warehouse. He decided that it did so apply, and that it was the intention of congress that the merchant should have the full benefits and advantages of the warehousing system. To require from him such a bond as the government claims, would be to deprive him practically of the benefit of bonding warehoused property seized and prosecuted while in warehouse. But if the property is delivered to the claimant on a bond for its value when seized, not including the duties, then, if the property is condemned in the suit, the importer will lose the same amount as if he had not bonded the property, and no more; and will thus have the full benefit of the privileges of the warehouse system, and the full benefit of the system of bonding provided by the eighty-ninth section of the act of 1799.

It is claimed by the government that this view is contrary to the decision of Judge Cadwalader, in the district court of Philadelphia, in the case of U. S. v. Segars [Case No. 16,249]. It does not appear, in the report of that case, that the property seized was in warehouse. The question before the court for decision, as stated in the opinion, was whether the amount of regular duties payable on the property, if legally entered, was to be deducted by the appraisers in ascertaining the value for which the delivery bond should be given; or, in other words, whether, in case of condemnation, the claimant should lose the amount of those duties, as well as the value of the property forfeited. The court does not, in its opinion, allude to the warehousing acts, or discuss the question in reference to property seized while in warehouse. It lays down the principle, that if the property is to be delivered to the claimant, on substituting for it a bond, under the eighty-ninth section of the act of 1799, that bond should be a substitute for the full value of the property. Such full value the court, in that case, held to be the market value, without a deduction of the amount of the duties. Where property is seized in the hands of the importer, after a consumption entry, and after the duties are paid, the full value of the property to the importer, at the time of the seizure, necessarily includes the duties, as we have seen. But where property in warehouse under bond for duties is seized, the full value of the property to the importer at the time of seizure does not include the duties. The delivery bond is intended to be a substitute for the full value of the property to the importer at the time of seizure, and for nothing more.

Uniformity of principle and equal justice to the importer in all cases of seizure can be carried out only by varying the basis of appraisement in the manner indicated, in cases of delivery bonds on seizures of property in warehouse. It is said by Judge Cadwalader, in his opinion, that the circumstance that the duties have not been paid when the proceeding to forfeit the property is instituted, is, in reason, attended with no difference in favor of the importer. That is very true. But it is equally true that the circumstance that he has availed himself of the provisions of the warehousing acts, and given a bond for the duties, instead of paying them, ought not to work a difference against him. Such a difference is manifestly worked if he is compelled, as a condition of obtaining a release of his property from seizure, to give such a bond as the government claims in this case.

While I regret to seem to differ from so experienced and able a jurist as Judge Cadwalader, I am satisfied, after thorough reflection, that the principle laid down by Judge Betts, and always adhered to by him, in regard to the amount of the bond to be required in cases of seizures and prosecutions for forfeiture of property in warehouse under bond for duties, was correct. Such will continue to be the ruling of this court in like cases, until varied by superior authority.

The prayer of the petition is granted.

FOUR CRIBS OF LUMBER (TOME v.). See Case No. 14,083.

Case No. 4,987.

FOUR CUTTING MACHINES.

[3 Ben. 220;[1] 9 Int. Rev. Rec. 145.]

District Court, S. D. New York. April 27, 1869.

INFORMER—INTERNAL REVENUE ACTS—GOVERNMENT OFFICER.

Where an inspector of internal revenue at Philadelphia, appointed under the fifth section of the act of June 30, 1864 [13 Stat. 224], made researches there as to sales of tobacco made by merchants at New York to customers in Philadelphia, which researches were embraced within his duties as such inspector, and were discharged in co-operation with, and under the direction of, officers of the internal revenue at New York: *Held*, that information so obtained by him never became, as against the United States, his private property, so as to allow him any discretion as to withholding it from his superior officers, and that he was not entitled to share as informer in forfeitures resulting from violations of the internal revenue law which he thus discovered, and of which he gave information.

[Cited in U. S. v. Chassell, Case No. 14,789; U. S. v. Two Hundred and Seventy-Eight Barrels of Distilled Spirits, Id. 16,581; U. S. v. Simons, 7 Fed. 714.]

A. J. Vanderpoel, for Payne.

B. K. Phelps, for Michener.

BLATCHFORD, District Judge. In this case, an order of reference was made to a commissioner, in August, 1868, to ascertain and report who is the informer in this case, entitled to share, as such, in the sum of $21,558.44, now in the registry of this court for distribution. The contest has proceeded before the commissioner between one Michener and one Payne, and a large mass of testimony has been taken before him on the part of those parties respectively, each of them claiming, as against the other, that he is entitled as informer. The United States do not seem, by the minutes of testimony taken by the commissioner, to have been represented before him on the reference, and the witnesses produced by each claimant were cross-examined only on the part of the other claimant, and not on the part of the United States. It was, therefore, very naturally and properly assumed by the commissioner, that the United States regarded the one or the other of the claimants, at all events, as entitled to share, as informer, in the funds, and that his duty was limited to the inquiry, as matter of fact, into the question as to who, within the language of the 179th section of the act of June 30, 1864 (13 Stat. 305), as amended by the 9th section of the act of July 13, 1866 (14 Stat. 145), first informed of the cause, matter or thing whereby the forfeiture in this case was incurred. That forfeiture is one incurred under the internal revenue acts of the United States. The commissioner has reported that Michener was the sole informer in this case. Payne has filed five exceptions to this report: (1) Because Michener is found to be the sole informer; (2) because Michener is found to be an informer; (3) because Payne is not found to be the informer; (4) because Payne is not found to be the sole informer; (5) because certain testimony offered by Payne before the commissioner was excluded by him. The questions arising on these exceptions have been argued before the court by the counsel for Michener and Payne respectively, the United States not being represented. The counsel for Payne, however, in fact argued on the part of the United States, by contending, that, independently of the question of Payne's rights as informer, Michener could not, in any event, share as informer, even though he should be found to be, as matter of fact, the person who, within the 179th section of the act of 1864, first informed of the cause, matter or thing whereby the forfeiture was incurred.

I have examined the evidence in this case with care, and am of opinion that Payne was not the person who, within the 179th section, first informed of the cause, matter or thing whereby the forfeiture in this case was incurred; and that Michener was the person, and the only person, who, as against Payne and all other persons, except the United States, first informed of such cause, matter or thing. I also think that the commissioner properly excluded the evidence named in the fifth exception. As respects Payne, therefore, and the exceptions taken by him, all of them are disallowed. But I think that Michener, although in fact the first informer, as against Payne and all other persons, is not entitled, as informer, to any share in the moneys to be distributed in this case. If I were inclined to a different opinion, I should, under the circumstances of this case, give an opportunity to the United States to be heard on the question, through their attorney, but that now becomes unnecessary.

It appears, that, during the whole period covered by the acts of Michener, on which he relies as constituting him informer, he was a revenue inspector at Philadelphia, appointed by the secretary of the treasury under the authority of the 5th section of the act of June 30, 1864; and that it was a part of his official duty to make the investigations and do the acts on which he relies. The property seized was forfeited and condemned for violations of the internal revenue laws, committed in New York by the firm of Alexander Ross & Co., in the manufacture and sale of tobacco. The researches and investigations made by Michener at Philadelphia, which place was his post of duty, were in reference to sales of articles made of tobacco by Ross & Co to customers of theirs at Philadelphia. Such duties were

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

discharged by Michener in co-operation with, and under the direction of, officers of the internal revenue at New York. The duties of an inspector, as defined by the 5th section of the act of June 30, 1864, are, the "proper enforcement of the internal revenue laws" and the "detection of frauds." The duties performed by Michener in this case were strictly duties of that character. The same section confers on an inspector the power of examining persons, books and premises, as may be necessary in the discharge of the duties of his office. In the present case, he examined and investigated in Philadelphia, to detect frauds committed by tobacco manufacturers in New York. But that was as much a part of his official duty as if the manufacturers had carried on their manufactory and committed the frauds in Philadelphia, and in the assessment district in and for which Michener was appointed. In discharging duties of this character, the whole time and services of Michener belonged to the United States, for the per diem compensation fixed by the said 5th section. All information acquired by Michener in the discharge of those duties, became, ipso facto, the property of the United States. Such information never became, as against the United States, the private property of Michener, so as to allow to him any discretion as to communicating it to or withholding it from his superior officers. That is the test. Information possessed by a private individual, holding no official relation to the United States, and bound by no official duty to disclose such information to his superiors, may be withheld or disclosed by him, as he elects. If he is the first to disclose it, he may become an informer under the law. But a person whose duty it is to disclose information, and who violates such duty if he does not disclose it, cannot be an informer. The information is, in judgment of law, disclosed to the United States, by being possessed by him as an officer of the United States charged with the duty of procuring the information, the moment he obtains the information. Undoubtedly, congress may, if they choose, award to an officer, under such circumstances, a share, as informer, in the proceeds of forfeitures; and if the language of the 179th section of the act of 1864 were such as to require or admit, in its proper construction, the including of Michener in its description of informers, I should so hold. But the language of that section is, that the informer's share is to be to the use of the person who shall first inform of the cause, matter or thing whereby the fine, penalty or forfeiture has been incurred. Who is to be first informed? The statute is silent. But it must necessarily mean, that the person to be first informed is a person whose duty it is, on behalf of the United States, to receive the information and impart it to his superior officers. That was, in this case, the duty of Michener. But it was equally his duty to procure and impart the information; and he cannot be treated as an informer, for having ascertained the facts in question and imparted them to himself. Nor can he be treated as an informer because he imparted them to another or a superior officer; because, if, in this case, any other person besides Michener himself be regarded as the proper person to be first informed, so as to give to the communicator of the information the position of informer under the statute, we cannot stop short of the highest officer, the secretary of the treasury or the president, as the only proper recipient of the information, and the person who first informed such highest officer would be entitled as informer. Under the 91st section of the act of March 2, 1799 (1 Stat. 697), the informer is required to be a person who gives to a collector information in pursuance of which a fine, penalty or forfeiture is recovered, and may be any person other than the naval officer or surveyor of the district. Under that section, it was very properly held, by Judge Ware, in the district court for Maine, —Hooper v. Fifty-one Casks of Brandy [Case No. 6,674],—that an inspector of the customs could be an informer. But, under that act, the information was required to be given to the collector. If that language had not been used in that act, it would have been difficult for the court to say, as it did, that congress had offered to the inspectors an additional compensation beyond their regular stipend, and that they came within the words of the act. Under the 179th section of the act of 1864, the words "first inform," in order to warrant the treating of Michener as an informer, in this case, must be read as if they were written "first learn," or "first ascertain." But that is not the language. The import of the words "first inform" is, that the information is to be imparted by one person to another and a different person; that the latter person is to be one whose official duty it is to act on such information by imparting it to his superior officers, or otherwise; that he cannot obtain such information in the course of the discharge of his official duty, and impart it to himself, so as to make himself an informer under the law; and that the person who is to impart the information, so as to be informer, must be a person who has imposed upon him no official duty to impart the information. There is no principle which would put Michener in the position of informer, in this case, for what he did, which would not also require the court to regard Mr. Harvey, the inspector in New York, who received the information from Michener, as an informer in the case, because he was the first to inform Collector Bailey, who seized the property; and it would be difficult to say that Mr. Harvey and Michener would not, each of them, be entitled to the

same share as the other. These views are substantially those held by Judge Lowell, in the district court for Massachusetts, in the case of U. S. v. One Hundred Barrels Distilled Spirits [Case No. 15,946].

There must, therefore, be a distribution of the money in court in this case, without any reference to the claims of either Payne or Michener, as informer.

Case No. 4,988.

FOUR HUNDRED AND SIX HOGSHEADS OF MOLASSES.

[4 Blatchf. 319.] [1]

Circuit Court, S. D. New York. May 17, 1859.

CHARTER PARTY—CONSTRUCTION OF BILL OF LADING GIVEN BY MASTER FOR GOODS PURCHASED BY CHARTERER—SPECIFIED FREIGHT.

Where a vessel was chartered to G. by a charter party, for a specified sum, for a voyage to Cuba and return, and G., at Cuba, loaded the vessel with molasses which he bought there from P., but the purchase was not absolute, the transfer of title to the molasses depending on the payment of drafts drawn by P. on G., and the molasses was shipped in the name of P., and a bill of lading was signed therefor by the master, which stated that the cargo was to be delivered to the order of P., at a specified rate of freight, to be paid by him or his assigns, but contained at its foot the words, "without prejudice to charter party," and afterwards R. advanced, on the security of the bill of lading, the money to take up the drafts, and took an assignment of the bill of lading: *Held*, on a libel filed by the owner of the vessel against the molasses, for the charter money, that the molasses was liable only for the freight specified in the bill of lading.

[Cited in The Peer of the Realm, 19 Fed. 217.]

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, to recover freight under a charter party, entered into between one Townsend, agent and part owner of the vessel, and the firm of T. R. Gordon & Co., for a voyage from Savannah, Georgia, to Matanzas, Cuba, and back to the port of New York. The charterers were to load the ship with a cargo of yellow pine timber at Savannah, and with such return cargo as they might think fit, and were to pay for the vessel, for the voyage, $3,400. The cargo of yellow pine was taken on board, and delivered at Matanzas to the firm of C. E. Poujaud & Co., of that place, agents of the charterers. A return cargo of molasses was taken on board, T. R. Gordon, one of the charterers, being present, and, on the arrival of the vessel at New York, she was reported by the master to Gordon. A bill of lading was signed by the master at Matanzas, from which it appeared that the molasses was shipped by C. E. Poujaud & Co., to be delivered at New York to their own order, they or their assigns paying freight at the rate of $2.50 for every 110 gallons. At the bottom of the bill of lading were the words, "without prejudice to charter party." The house of D. Curtis & Co., correspondents of C. E. Poujaud & Co., received, early in May, 1857, advices from the latter concerning the cargo, together with a copy of the bill of lading, which was dated the 25th of April previous. With the bill of lading they received drafts of C. E. Poujaud & Co. on T. R. Gordon & Co., the charterers, for the price of the molasses, payable at 60 days' sight. D. Curtis & Co. received the amount of the drafts, deducting the discount for the time they had to run, from T. R. Gordon & Co., and endorsed the bill of lading, and delivered it to that house. It appeared, from the proofs in the case, that T. R. Gordon & Co. were unable to raise the money for the price of the molasses, and that they applied to the claimants, Reid & Nash, who advanced the money, and took an assignment of the bill of lading as their security. They claimed to have the goods delivered to them, on payment of the stipulated freight in the bill of lading, and that they were not bound to pay the amount due on the charter party. The district court decreed for the libellants, for the full amount of the charter money [case unreported], and the claimants appealed to this court.

Welcome R. Beebe, for libellants.
James N. Platt, for claimants.

NELSON, Circuit Justice. It is quite clear that the purchase of the molasses by the firm of T. R. Gordon & Co., at Matanzas, was not absolute, so as to vest the title, legal or beneficial, in it; and that the transfer of title depended upon the payment of the drafts at New York. The molasses was shipped in the name of the vendors, and bills of lading were taken in the usual way, and the bills of lading, drafts, &c., were forwarded to their correspondents, to close the transaction. Reid & Nash advanced the purchase money, on the security of the bills of lading, and the cargo of molasses became subject to this advance. There can be no claim, therefore, upon the cargo, for the payment of the charter money, founded upon the idea that the molasses belonged to the charterers. This brings the case down to the question as to the effect to be given to the words at the foot of the bill of lading, "without prejudice to charter party." On the part of the libellants it is insisted, that these words should be construed as qualifying the price of the freight stipulated in the bill of lading, and as subjecting the shipper to the payment of the charter money, though that should exceed the specified freight. On the part of the claimants it is insisted, that these words were intended only to guard against any waiver of the charter money, as between the charterers and the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

owner. I am inclined to adopt the latter view.

The bill of lading contains the contract between the shipper and the master, and in it the latter stipulates to carry the cargo at a fixed rate; and it appears to me, that if he intended to qualify the contract in respect to the rate of the freight, he should have used more specific terms than those relied on. The shipper was specially interested in the matter of freight, as it was to be paid by him or his agent on the arrival of the cargo; and it is quite clear that he had a right to enter into this particular contract for the freight, without regard to the charter party. In the case of Heckscher v. McCrea, 24 Wend. 304, it was held, that if the charterer had no cargo at the place stipulated in the charter party, the master was bound to take cargo offered by others, sign bills of lading therefor, and credit the proceeds of the freight to the charterer, and look to the charter party for any balance. The master may have had this rule of law in view when he consented to enter into the special contract of affreightment irrespective of the terms in the charter. Even if the charter party contained a clause hypothecating the cargo for the freight (which it does not), it would be difficult to maintain the position that the consent by the master to ship the goods of a third party for a specific freight, differing from that in the charter party, should not be binding between the parties.

It was insisted, on the argument, that there was some collusion between Reid & Nash and T. R. Gordon, with a view to evade the lien or liability of the cargo for the charter money. I am not satisfied that the evidence in the case supports any such conclusion; but, if it did, the question here is solely between the shippers (C. E. Poujaud & Co.) and the owner, as the former were bound to pay the freight; and, if the cargo is liable for the balance of the charter money, instead of the price specified in the bill of lading, the loss would fall on them. At least, this is the necessary conclusion from the terms of the bill of lading, and there is nothing in the proofs tending to contradict it.

Upon the whole, after the best consideration I have been able to give to the case, I think that the decree below should be reversed, with costs, and a decree be entered charging only the freight specified in the bill of lading; and, as this was tendered, this decree must be entered without costs.

FOUR HUNDRED AND SIXTY BARRELS OF FERMENTED LIQUORS (UNITED STATES v.). See Case No. 15,147.

FOUR HUNDRED AND SIXTY-NINE BARRELS OF SPIRITS (UNITED STATES v.). See Case No. 15,148.

FOUR HUNDRED AND SIXTY-SEVEN BARS OF RAILROAD IRON (HARLEY v.). See Case No. 6,068.

FOUR HUNDRED AND THIRTY-EIGHT BALES OF COTTON (SARATOGA, The, v.). See Case No. 12,356.

Case No. 4,989.

FOUR HUNDRED AND TWENTY MIN. CO. v. BULLION MIN. CO.

[3 Sawy. 634;[1] 11 Morr. Min. Rep. 608.]

Circuit Court, D. Nevada. Nov. 8, 1876.

PATENT TO MINING CLAIM — WHO ENTITLED TO — PRE-EMPTION — DEFENSES IN ABATEMENT AND ON MERITS — SEVERAL DEFENSES IN SAME ANSWER—ESTOPPELS MUTUAL—JUDGMENT TECHNICALLY CORRECT REVERSED—PARTIAL NEW TRIAL —STATUTES OF LIMITATIONS AND MINING CLAIMS — PAROL PARTITION — TENANTS IN COMMON — OUSTER—TITLE UNDER STATUTES OF LIMITATIONS —TITLE QUIETED.

1. Under the act of congress of 1866 (14 Stat. 251), the right to purchase a mining claim to a gold or silver-bearing lode, and to receive a patent therefor from the United States, was granted to the person, or association of persons, who, in pursuance of the laws of the state or territory, and the mining customs, rules and regulations of the place embracing the location, recognized and enforced by the courts, is the owner, and entitled to the possession, as against everybody except the United States.

[Cited in Trafton v. Nougues, Case No. 14,134.]

2. The right given is simply a right of purchase, and is in the nature of a pre-emption right, founded upon like principles as the pre-emption laws; and not a right similar or analogous to that of a grantee under an inchoate or imperfect Mexican grant.

3. Under the statute of Nevada authorizing the defendant to set up in his answer as many defenses as he has, if an answer contains a defense which only goes to defeat the present action and other defenses on the merits, and the issues as to both are in fact found for defendant, but the judgment is apparently entered for defendant upon the finding upon the merits, the matter upon the merits will be res adjudicata, and the parties will be estopped from further litigating the merits, even though the issue upon the matter of abatement is also found in favor of defendant, and the judgment might have been rested on that issue.

4. In such case, where all the issues are in fact specially found in favor of the defendant, and judgment entered thereon generally, without any provision that it shall be without prejudice, or without any other limitation or restriction, the estoppel will extend to every matter of fact in issue, and in fact found by the court in favor of the defendant.

[Cited in Stubblefield v. Menzies, 11 Fed. 273.]

5. Where the statute authorizes the defendant to set up in the same answer as many defenses as he has, and several defenses are set up, it is competent for the court to determine them all, without reference to the character of the different defenses, and where all are in fact determined, the determination as to all will be conclusive between the parties.

6. When the findings and judgment in a given case are conclusive on both parties if conclusive on one, the estoppel is mutual within the meaning of the rule requiring estoppels to be mutual.

7. Where a judgment is broader in its scope, and more advantageous to a party than he is

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

entitled to have, it will be reversed or modified, although upon the record it appears to be technically correct.

8. A judgment which would operate as an estoppel upon points that manifestly ought not to be concluded, will be reversed, although there is no technical error shown by the record.

9. A new trial may be granted, under the practice in Nevada, upon some issues without disturbing the findings upon other issues, and in such cases the judgment would not necessarily be reversed if the remaining findings not vacated are sufficient to sustain the judgment. The judgment in such case may be reversed, modified or affirmed, as justice may require; but there would be no estoppel as to the matter embraced in the finding vacated.

10. The statute of limitations of Nevada relating to mining claims constitutes a part of the local laws by which the rights of parties are to be determined for the purpose of ascertaining who is entitled to purchase a part of a mineral lode under the act of July 26, 1866.

11. A parol partition executed by the parties taking actual exclusive possession of the portions respectively assigned to them in pursuance of the agreement to partition, which possession and partition are acquiesced in by the parties is valid; and upon such a partition the parties cease to be tenants in common.

[Cited in Kinney v. Consolidated Virginia Min. Co., Case No. 7,827.]

12. One tenant in common may oust his cotenant, and claim adversely, thereby setting the statute of limitations in motion, and from the time of such actual ouster and adverse possession, they deal at arms length, and there is no longer any relation of trust or confidence between them.

13. Adverse possession for the time limited by statutes of limitations not only bars the remedy, but extinguishes the right and vests a perfect title in the adverse holder.

14. A title acquired under a statute of limitations will be quieted in the adverse holder on a bill in equity filed for that purpose, even against the holder of the paper title barred.

The facts as alleged in the bill are as follows: On June 23, 1859, John Cosser and Walter Cosser, under the firm name of Cosser & Co., J. Morris, J. Durgan, Thomas Winters, V. A. Houseworth, C. True, J. Powell and A. Ricard located and appropriated, in the manner prescribed by the mining rules on the Comstock lode, a mining claim of 1,600 feet in length on the lode; took possession of the same, and thereby, as tenants in common, became the owners of said claim, as against all the world, except the United States. In July, 1859, the said parties, while still in possession, by a verbal agreement, to which all assented, agreed that said mining claim should be segregated into two parts, and that said Durgan, Morris, Powell, Ricard and True should thenceforth, as tenants in common own and possess exclusively the portion of said claim and lode extending from its northern boundary southerly a distance of 420 feet, and should release all their interest in the other portion of said claim and lode to said Winters, Crosser & Co. and Houseworth, who should own and possess, in the same manner, said southern portion of said claim and lode, and release to said first-named parties all their interest in said northern portion of 420 feet. In pursuance of said agreement a monument was placed to mark the division line and the parties took possession of their respective portions, Durgan and his associates taking possession of the northern part, and Winters and his associates of the southern part, and thenceforth each of said parties and their successors in interest exclusively held possession and improved the part so allotted to them, in accordance with the mining rules and regulations, and claimed no interest in the other portions of said claim or lode. No written conveyance was ever made in pursuance of said agreement, and no demand for one was ever made, except the demand for the purposes of this action. All the right, title and interest of said Durgan and his associates in said north 420 feet of said lode were subsequently, by sundry mesne conveyances, conveyed to the complainant, a corporation organized under the laws of Nevada. Between the segregation, as aforesaid, and January 1, 1864, said Durgan and associates had spent in prospecting and developing said mine not less than $30,000, and since the latter date the 420 Mining Company has for like purposes spent an additional sum of $30,000. The Bullion Mining Company, a corporation organized under the laws of California, has since acquired all the right, title and interest of said Winters and his associates in the southern portion of said lode, and has since held the same in accordance with the mining rules and regulations. On November 16, 1868, the Bullion Mining Company commenced an action in the proper court against the 420 Mining Company, to recover said northern 420 feet of said lode, alleging title in plaintiff, and wrongful possession and withholding by defendant. Defendant answered, admitting possession by defendant, but denying that the possession was wrongful. This action was voluntarily dismissed on plaintiff's motion without trial, on June 3, 1872, without notice to the defendant to the action. On November 6, 1868, while the 420 Mining Company is alleged to have been in possession of said northern 420 feet of said lode, the Bullion Mining Company applied at the proper land office for a patent, embracing the whole of said claim, both the southern part and said northern 420 feet conveyed to the 420 Mining Company, being the part now in controversy, under the act of congress entitled, "An act to grant the right of way to ditch and canal-owners and for other purposes," approved July 26, 1866, and in pursuance of such application a patent embracing the whole of said claim on the Comstock lode was issued in due form to said Bullion Mining Company on March 26, 1875. It is alleged in the bill that the said application for a patent was based solely on the said location, made June 23, 1859, and that the only pretense of title to said part in controversy is a conveyance to the Bullion Mining Company of their interest therein by said Durgan and his associates,

made subsequently to the said conveyance by the same parties to the 420 Mining Company, with a knowledge at the time on the part of the Bullion Mining Company, of the prior conveyance to the 420 Mining Company. On November 30, 1872, the 420 Mining Company commenced an action in the proper court in the state of Nevada against the Bullion Mining Company, to determine the adverse right of the latter company to said 420 feet of said lode, which action was duly tried and a judgment therein duly entered, and a copy of the record in that suit is annexed to, and made a part of, the bill of complaint in the present action. It is further alleged that by reason of the issue of the patent, as aforesaid, the legal title to said northern 420 feet of said lode became wrongfully vested in the defendant; but, that by reason of the facts alleged, the complainant was really the owner of said 420 feet of mining ground, and entitled under said act of congress to the patent therefor. The bill thereupon prays that the complainant be decreed to be entitled to said mining ground; that the defendant holds the legal title in trust for complainant, and that it may be required to convey said 420 feet of said lode to complainant.

The complaint in the record of the said action of the 420 Mining Company against the Bullion Mining Company commenced November 29, 1872, to determine the adverse claim of the latter, attached to and made a part of the bill, alleges that the 420 Mining Company, complainant therein, is "the owner of, in possession of, and entitled to the possession of," the said 420 feet of the Comstock lode now in controversy; that the Bullion Mining Company, defendant therein, "claims an estate or interest therein adverse to the plaintiff," and denies the validity of such adverse claim. It then sets out the commencement of the said former action by defendant against complainant to recover possession of said 420 feet; the answer of defendant denying the right; the application of defendant in this action for a patent; the filing of protest by complainant; the subsequent dismissal of the action to recover possession by complainant in that action (defendant in this) without notice to the defendant therein that the right has never been determined between the parties; and praying that the Bullion Mining Company, defendant, may be required to set forth its claim; that the rights of the parties be determined by the court, and that the defendant, the Bullion Mining Company, be adjudged not to have any estate or interest in said mining ground, etc. The answer to said complaint denies the ownership of the complainant, its right of possession and its actual possession of said 420 feet, or any part thereof, at the time of the commencement of the action. It denies that the defendant's claim is without right, and then affirmatively avers that "at the date of the commencement of this action, and for a long time prior thereto, it was and still is the owner of, and in possession of, and entitled to the possession of, said mining ground, ledge, or lode, and every part thereof." It then alleges affirmatively, in appropriate terms, an adverse possession in the defendant of the said 420 feet of the Comstock lode for a period exceeding the time required to give a title under the statute of limitations of Nevada in cases of mining claims; and that during all of said time the defendant had held and worked such claim in the manner required by the laws and customs in force in the district in respect to such claim; and then also avers affirmatively that neither the claimant nor any person under whom it holds had been seised or possessed of said 420 feet, or any part therein, within the period prescribed by the statute of limitations applicable to such cases; and further, that the alleged cause of action had not accrued within a period of four years. Upon the trial of the issues, the court found the facts to be as follows: "(1) That the plaintiff was incorporated in the state of California, on the twenty-third day of June, A. D. 1863. (2) That the trust deeds were executed to the 420 Mining Company, located in the Virginia mining district, county of Storey, territory of Nevada, the first bearing date September 30, 1863, and the second July 5, 1864, and each conveys all the right, title and interest of the parties therein named, as grantors of, in and to that certain mining ground known as the mining ground of the 420 Mining Company. No other description of the ground is given, and no title in either of the grantors to the mining ground in dispute in this action was shown. (3) That some time in the fall of 1859, a shaft was commenced on the northern end of the ground in dispute in this action, by some persons, claiming to represent a company called the 420 Company, and thereafter, down to the early part of the year 1863, work was done in three different shafts on the ground in dispute, by persons claiming to work for a company called the 420 Company. That no further work for any company of that name is shown to have done until some time in the year 1865, when some persons commenced work in a shaft on said ground, claiming to work for the 420 Company, and continued there for a short time, until ejected by the employés of the defendant, as hereafter stated. (4) That on the sixteenth day of November, 1865, the defendant in this action filed a complaint in this court against the plaintiff, alleging that it was the owner of the ground in dispute in this action, and that the defendant had entered upon and taken possession of and ousted the plaintiff from said mining ground now in dispute, and was still in possession thereof, holding adversely to the plaintiff, the Bullion Mining Company. Said complaint was sworn to by George W. Hopkins, secretary of said Bullion Mining Company.

To that complaint the defendant, the 420 Mining Company, this plaintiff, filed an answer denying specifically each allegation of the complaint, and the same was sworn to by C. J. Lansing, its attorney in the case. Said action was pending untried until the ——— day of - ——, 1872, when it was dismissed, on motion of the plaintiff therein. (5) There was no evidence showing that any location of the mining ground in dispute in this action had ever been made by the plaintiff, or any person or persons through whom it claims. (6) The defendant proved that it claimed under two locations of the ground and claim in dispute in this action. The two claims were united early in 1863, under the name of the Bullion Company, and on the eighteenth day of February, A. D. 1863, a trust deed, in which some of the original locators in each of said locations joined, was executed by various persons which conveyed, in terms, to this defendant, mining ground which embraces all the grounds in dispute in this action. (7) In August, 1860, persons commenced work on the mining ground described in finding six, under the locations therein mentioned, and continued work until the conveyance made to the defendant, as aforesaid, and defendant has continued to work thereon day and night, from that time to within a few months past, all the time claiming title to all of said mining grounds, including said ground in dispute. (8) On the seventh day of June, 1866, defendant received from one G. W. Birdsall, a deed of a mining claim, embracing the mining ground in dispute in this action. No title thereto was shown in said Birdsall, but defendant claimed title under that deed and the trust deed aforesaid. (9) That the agents of defendant, in the year 1865, forcibly ejected from the mining ground in dispute in this action the persons mentioned in finding three as working thereon for the 420 Company, and from that time until the commencement of this action, and until the trial, the defendant has been in the actual, exclusive, and uninterrupted occupation and possession of all the mining ground in dispute in the action aforesaid, claiming title thereto, and claiming the same adversely to plaintiff. As a conclusion of law, I find that the defendant is entitled to judgment as prayed in the answer, and order accordingly." Thereupon the following judgment or decree was entered: "This cause came on regularly for trial on the fifteenth day of August, A. D. 1873, and by oral consent, given in open court, a jury was waived, and the trial had by the court, and the court having heard the evidence, and the cause being subsequently submitted, the judge, this day filed his findings of fact herein in favor of the defendant. Thereupon it was ordered by the court that judgment be accordingly entered for the defendant. Wherefore, it is ordered and adjudged that the plaintiff is not entitled to any of the relief prayed for in its complaint, and that it take nothing by its action. It is further adjudged that the defendant have and recover of the plaintiff its costs of suit, taxed at $155.05. Judgment filed August 21, 1873."

The following are the provisions of the acts of congress construed by the court: Section 1 of the act of July 26, 1866 [supra], "granting the right of way to ditch and canal owners over the public lands, and for other purposes," declares "mineral lands on the public domain to be free and open to exploration and occupation by all citizens of the United States," * * * "subject to such regulation as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States." Section 2 provides that "whenever any person, or association of persons, claims a vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same are situated, and having expended in actual labor and improvements thereon an amount of not less than $1,000, and in regard to whose possession there is no controversy or opposing claim, it shall, and may be lawful for such claimant, or association of claim ants, to file in the local land office a diagram of the same so extended laterally or otherwise, as to conform to the local laws, customs and usages of miners, and to enter such tract, and receive a patent therefor granting such mine," etc. Section 3 provides "that upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of in tention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of such period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey and description, and a patent shall issue for the same therefor." Section 6 provides as follows: "That whenever any adverse claimant to any mine located and claimed as

aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases." Section 9 makes similar provision for confirming water rights under like circumstances; that is to say, "whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing and other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected therein." On July 9, 1870 [16 Stat. 217], six sections were added to the act and were thenceforth to form a part of it. Similar rights under section 12 (section 1 of the new act) were extended to the possessors of placer claims; and section 13 provided that "where said person or association, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim." In 1872 [17 Stat. 91] a new act was passed as a substitute for much of the former acts, making still more specific provisions as to the mode of proceedings, etc., but providing that the repeal of portions of former acts should not affect rights already vested thereunder, and that proceedings to perfect such vested rights might be had in pursuance of the provisions of the new act.

C. J. Hillyer, Delos Lake, and R. S. Mesick, for complainant.

M. N. Stone, John Garber, and R. H. Lloyd, for defendant.

SAWYER, Circuit Judge (after stating the facts). Upon the facts shown by the bill of complaint, the defendant insists that the right to the 420 feet of the Comstock lode in question, and, consequently, the right to the patent, appears in the bill to have been once directly put in issue, in an action between the same parties fully litigated and determined in favor of the defendant; and that the matter is res adjudicata, and a bar to further litigation. On this ground it is claimed that the bill shows no equity. After a careful consideration of the acts of congress set out in the statement of the case, it is clear to my mind, that it was the intention of congress to give the right of purchase of a mining claim, to a silver or gold bearing lode or vein, to the person or association of persons who, in pursuance of the laws of the state or territory and the local mining customs, rules and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner and entitled to the possession as against everybody except the government of the United States. It will be seen that the act expressly refers to, and recognizes, the laws of the state or territory, the local customs, rules and regulations not in conflict with the laws of the United States, the decisions of the courts, and even, in express terms, the states and territorial statutes of limitation applicable to the subject. The act requires the party seeking a patent to file a diagram of the claim, and post a copy in a conspicuous place on the claim, together with a notice of intention to apply for a patent, and requires the register of the land office, also, to publish a notice of the same in a newspaper published at the nearest place, for ninety days. It then authorizes the adverse claimant, before approval of the survey, to file a protest, upon which all proceedings are stayed "until final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases." That adjudication is to be had in the ordinary courts, and to be determined under the ordinary rules, regulations, customs, and laws of the locality. It seems impossible to come to any other conclusion, than that the party, who at the time can maintain his right to the claim in the courts of the country as against any person but the United States, under the local laws, customs, rules and regulations, is the party upon whom congress intended to confer the right to purchase, no matter how that right originated, if under such laws and customs and decisions of the courts he has the present right. And this is simply a right to purchase—a privilege given to the party, of which he may avail himself or not, exactly like a pre-emption law, and founded upon similar reasons and policy. And what this privilege is, is stated in the cases of Hutton v. Frisbie, 37 Cal. 479, and Frisby v. Whitney, 9 Wall. [76 U. S.] 191. The case is in no wise like the case of an inchoate, imperfect Spanish grant, but is in all respects like a case under the pre-emption laws. The object of a determination of the right by litigation where there is an adverse claim, is simply to ascertain the party who has the right to the claim under the laws of the state and local rules and customs; for that person, when found, is the party upon whom the law confers the privilege—the right to purchase. There is no bounty about it, for the party must pay for the land five dollars per acre and the cost of survey, which is more than double the price of ordinary public lands. Undoubtedly the price is often far less than the real value, and so it often is in ordinary pre-emption cases; but this fact in no way affects the principle upon which the law proceeds. Doubtless the object of conferring the privilege is to encourage explora-

tion of hidden mines, as the privilege in ordinary cases of pre-emption is to encourage settlement and cultivation of the public lands, for the purpose of developing the resources, and contributing to the general prosperity of the country.

If I am right in this view—and it really does not seem open to serious argument—then, in order to ascertain which party was entitled to a patent, it is only necessary to determine which party at the time of its issue was the rightful owner of the mining claim in question, as against everybody but the United States, under the laws, rules, customs and the decisions of the courts in force at the time in the locality embracing it without regard to the act of congress; for the act of congress remits the parties to these laws, rules and customs solely to determine their rights.

The next question is, whether it appears, upon the averments of the bill, that the title to the mining claim in dispute, under the local laws and customs upon which it depends, has been once directly put in issue between the parties, and tried and determined in such manner as to become res adjudicata. If so, it ends the case. If not, it will be necessary to consider the other questions raised by the demurrer. After a thorough consideration of the question, I am unable to resist the conclusion that the title has been so put in issue, tried and determined as to become res adjudicata, and a bar to further litigation. That it was put in issue, and the facts found, there can be no doubt; and I do not understand that this proposition is controverted. But it is insisted that there was another issue, also found for defendant, upon which the judgment might have been rested, and still be correct; and that there was no occasion to pass upon the title, and no authority in the court to pass upon it; or if there was authority so to do, that it does not appear affirmatively that the judgment went upon that ground, and consequently there is no estoppel. The statute of Nevada, at the time of the commencement of the action, the record of which is made part of the bill, authorized a party in possession of land or of a mining claim to bring an action against any adverse claimant to determine his adverse claim. As that is the most favorable view for complainant, I shall assume, what the defendant denies, that the action in question was brought under, and depended upon, that provision of the statute; and that in case of a failure to prove possession at the time of the commencement of the action, the suit would necessarily fail on that ground, if on no other. The want of possession is not, strictly speaking, jurisdictional, for the court has jurisdiction to consider and determine the subject-matter. It is a technical dilatory objection in the nature of matter in abatement. It simply defeats the present action, without regard to the merits. The party out of possession, upon this view, must first bring his action to get into possession; but this would not be a complete remedy against a party claiming title adversely. A recovery of possession might be had and the defendant still set up his claim, and make it necessary for the successful party to bring another suit to determine his adverse claim, and injoin his silence, even though the first judgment might be conclusive evidence of his right on the trial of the second action. Having recovered possession, he would then be in a position to maintain his further action to obtain a complete remedy. If he brings his action to determine an adverse claim while out of possession, the most that can be said is that his action is prematurely brought, and on this appearing it would be dismissed, as it would be one valid ground of defense to this particular action. The statute has since been amended, both in Nevada and California—and in Nevada the act passed pending this action—so that a party out of possession can now, at least, maintain the action. But conceding a want of possession at the commencement of the action to be one good defense, there may be several other good defenses, and section 1112 of the Compiled Laws of Nevada provides that "the defendant may set forth by his answer as many defenses and counterclaims as he has. They shall each be separately stated," etc. Thus all defenses, whether dilatory or to the merits, may be set up in the same answer and tried together. If it is admissible to set up several defenses in one answer, it must be competent for the court to try and determine them all. The law neither injoins nor permits a vain thing to be done. But it would be doing a vain thing to set up a defense which could not be tried when set up.

It may not be necessary to dispose of all the issues, and sometimes, doubtless, all are not determined; but it is certainly admissible to do so, and if properly tried and determined, I can see no good reason for not holding every issue so properly in fact tried and determined, to be finally and conclusively determined. Suppose the judge should be entirely satisfied that defendant's title is good, and so find distinctly, on that issue, without passing at all upon the issue as to whether defendant was in possession at the commencement of the action, either because the evidence on that point left it in doubt, or because, for any reason, he preferred to rest his judgment on the defendant's title—on the real merits of the case—can there be any doubt that the matter would be res adjudicata? If he is authorized to find the issue, without passing upon the other issue, and his determination would be res adjudicata, he is certainly authorized to pass upon it in connection with the other issue, and if so determined, it must have the same force as a determination in the other mode. The question must be: "Was the issue in fact determined?" In the case before tried, the

complaint of plaintiff alleged title in itself, possession at the commencement of the action, and an adverse claim on the part of the defendant, together with other matters. The defendant took issue directly on the allegation of title, and on the allegation of possession in plaintiff at the commencement of the action, but admitted making an adverse claim. Another answer, then, affirmatively alleged title in defendant itself, and as affirmative matter, also, directly alleged, in apt and proper form, an adverse possession during the period prescribed by the statute of limitations of Nevada, applicable to the subject. Thus the title of the plaintiff, his possession at the commencement of the suit, and the adverse possession of the defendant for the period prescribed by the statute of limitations to bar the action and vest the title in defendant, were each directly in issue, and each issue was in fact submitted by the parties and tried by the court without a jury. A special finding was filed, from which it appears exactly what was found, and, manifestly, all these three issues were found against the plaintiff. The court did not, in so many words, say in its finding that the plaintiff had no title, or, in so many words, that the plaintiff was not in possession at the time of the commencement of the action, but it found facts which necessarily showed that plaintiff had no title, and that defendant had title; and it found in express terms, in so many words: "That the agents of defendant, in the year 1865, forcibly ejected from the mining ground in dispute in this action, the persons mentioned in finding three, as working thereon for the 420 Company, and from that time until the commencement of this action, and until the trial, the defendant has been in the actual, exclusive and uninterrupted occupation and possession of all the mining ground in dispute in the action aforesaid, claiming title thereto, and claiming the same adversely to the plaintiff."

From the finding of the fact of adverse possession of defendant since 1865 it inferentially or argumentatively appears that the plaintiff could not have been in possession at the time of the commencement of the action. The court adds, as a conclusion of law, that the defendant is entitled to judgment, as prayed in the answer, and orders judgment accordingly. Upon these findings a judgment for the defendant, in the usual and proper form of a judgment on the merits, was entered, wherein, after reciting the filing by the judge of "his findings of the facts herein in favor of the defendant," "it is ordered and adjudged that the plaintiff is not entitled to any of the relief prayed for in the complaint, and that it take nothing by its action," and adjudged costs. This is certainly an appropriate judgment upon the finding on the issue as to adverse possession, and more appropriate to this issue than upon a finding merely against possession in the plaintiff at the time of the commencement of the action. It is not a judgment of nonsuit, or a judgment in form upon a plea in abatement, or a judgment in any manner without prejudice, but apparently and in form a judgment on the merits. As a matter of construction of the findings, and judgment, I also think it manifest that the judgment was intended by the judge to be based, and that it is based, upon the finding of adverse possession in the defendant for a period prescribed by the statute of limitations for barring the action and vesting title in the defendant, and on title in the defendant. The judge finds in express terms on that issue, and makes it the prominent finding in the case; while he does not find expressly on the issue as to the possession of plaintiff at the commencement of the suit, but omits to say anything about that distinct issue presented on the allegation of the complaint.

It is only inferentially and argumentatively that we ascertain the fact of want of possession of the plaintiff at the commencement of the suit, from the finding of adverse possession in the defendant for a period covering the date of the commencement of the suit, on the affirmative issue tendered by the defendant in setting up the statute of limitation. It is evident from this, and from the fact that the judgment is appropriate to the finding, that the judge proceeded especially upon this finding in adjudging the matter in controversy—that he intended to put his judgment upon the merits of the case and not upon the matter of abatement—or matter not touching the merits, which only defeated the present action. Suppose this ninth finding had been omitted, there would be no finding at all upon the issue as to whether the plaintiff was in possession at the commencement of the action. Or, suppose, on appeal from an order denying a motion for a new trial the supreme court had reversed the order as to the ninth issue only, finding adverse possession for the period specified, on the ground that it was not supported by the evidence, there would be no other finding showing that the plaintiff was not in possession at the time of the commencement of the action, upon which the judgment could be sustained. The supreme court of Nevada, under the practice that prevails in that state, only exercises appellate jurisdiction. It could not set aside a verdict on the issue as to adverse possession, and itself investigate the question anew, and make for itself another finding that plaintiff was not in possession at a particular date—the date of the commencement of the suit—and on its own finding sustain the judgment. Non constat, that the court below would find on the evidence that there was no possession at that date, if the evidence was insufficient to show an adverse possession for the whole period found. The supreme court would, upon vacating the ninth finding, necessarily remand the case for a new trial on these issues. Had there been a tenth finding, that the

plaintiff was not in possession at the time of the commencement of the action, the judgment might be sustained on that finding, upon the hypothesis I have assumed for the purpose of the argument, even upon a reversal of the ninth finding. Thus it appears that the judgment of the court must rest upon the ninth finding, which was evidently intended to be, and is, a finding on the issue of adverse possession, and only inferentially and argumentatively shows that it includes the time at which the suit commenced, but is not an express finding on that issue. The two issues are not the same, not identical, for one is broader and includes more than the other. The court found the larger issue, which, of course, includes the smaller, and the judgment is rested on the issue as found, and not upon issues not mentioned at all in the finding, and which are only worked out by inference. As a matter of construction, then, I hold that the record shows upon its face that the question of adverse possession, and, consequently, of title in the defendant, was put directly in issue, litigated and found for the defendant, and that the judgment entered is rested on that finding. But if there had been another distinct, express finding that the plaintiff was not in possession at the time of the commencement of the action, the other findings and the judgment being precisely as they now are, I still hold that the matter would be res adjudicata. As before stated, the statute of Nevada authorized the defendant to plead as many defenses as he had. He did plead several, each of which, if sustained, is good. All were tried and submitted, and the issues on the merits were expressly found in a special verdict showing that they were determined and the judgment is appropriate to the issues on the merits, and sanctions and concludes the findings which after judgment are no more open to question except on appeal. So are the authorities under the same system of practice as that which prevails in Nevada, and I have found none to the contrary. Sheldon v. Edwards, 35 N. Y. 286, is exactly in point on this proposition and on the last, but by no means so strong a case on the last proposition as is the case now under consideration. Clink v. Thurston, 47 Cal. 30, and Munson v. Munson, 30 Conn. 426, 433, 434, are also in point; although the latter is under a system of practice different from that which prevails in Nevada. See, also, on the more general question, Low v. Mussey, 41 Vt. 394; White v. Simonds, 33 Vt. 178; Farmers', etc., Bank v. Bronson, 14 Mich. 371; Bissell v. Kellogg, 60 Barb. 627; Amory v. Amory, 26 Wis. 152; Felter v. Mulliner, 2 Johns. 181; Rockwell v. Langley, 19 Pa. St. 502; Day v. Vallette, 25 Ind. 42.

But the law as stated in a recent decision of the supreme court of the United States is also in point, and if it be correct must be conclusive. In House v. Mullen, 22 Wall. [89 U. S.] 42, there was a demurrer to the bill on four distinct specified grounds, of which the first was misjoinder of the parties; and the fourth, that the claim is stale and barred by the statute of limitations, etc. The decree is, "that it is considered by the court that the said demurrer of the defendants be sustained. It is therefore adjudged and decreed that the said bill of complaint of Eliza House, Mary Hunter and Charles Hunter be, and the same is, hereby dismissed out of this court." On appeal, the supreme court hold that the second, third and fourth grounds of the demurrer are untenable, and in those particulars the bill is good; but that the bill is bad on the first ground for misjoinder of parties, and that the "demurrer therefore was properly sustained and the bill dismissed." Id. 46. But, says the court, the record does not show that the bill was dismissed for misjoinder of parties, and it is not dismissed "without prejudice." "There are grounds stated in the demurrer which would, if sustained, be a bar to any other suit, to wit: staleness of the claim, statute of limitations, and long acquiescence in the possession and claim of title by the defendants. It does not appear by the decree, or by the order sustaining the demurrer, on which of the grounds set out in the latter it was dismissed, or on what ground it was dismissed. As the record stands, this decree might be pleaded successfully as a bar to any other suit brought by Eliza House, or by Mary Hunter, her child, in assertion of her right to this lot, though we are of opinion that the only defect in the bill is that it shows no interest in Mary Hunter, while it does show a good cause for equitable relief on the part of Eliza House. If the decree had dismissed the bill without prejudice, or had stated as the ground of dismissal the misjoinder of the parties, or the want of interest in two of them, we would have affirmed it; but to prevent a great injustice we must reverse the present decree and remand the case," etc. Thus on the ground alone that the decree in the form rendered would be a bar to another action, on points that ought not to be concluded it was reversed, although there was no technical error. Upon the doctrine of that case there is no escaping the conclusion that the former judgment between the parties in this action is conclusive; for it is a much stronger case for the application of the doctrine than the one cited. In the former action between these parties, the issues were made, submitted, tried, and found by the judge in favor of the defendant in such manner as to show the exact issues found, and a judgment upon the findings entered, such as should be entered on the merits, a judgment in form upon the merits, and not in terms a mere "dismissal out of this court," as in the case of House v. Mullen [supra]. This, therefore, must be regarded as a judgment rendered on the merits. See, also, Durant v. Essex Co., 7 Wall. [74 U. S.] 109. There was, in fact, an appeal in the former action, and counsel

on both sides have referred to the opinion of the supreme court of Nevada on the appeal. 9 Nev. 248. It is manifest that the supreme court also regarded the judgment as having been rendered on the merits, and affirmed it on the ground that the action was barred by the statute of limitations. In the case of Aurora City v. West, 7 Wall. [74 U. S.] 103, the supreme court also says: "The better opinion is that the estoppel, when the judgment is on the merits, whether on demurrer, agreed statement or verdict, extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause and was determined in the course of the proceeding." And Mr. Justice Miller, who alone dissented, stated the rule to be that "when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided." Id. 106. The case under consideration is, in my judgment, clearly within the very restricted doctrine as stated by Mr. Justice Miller; for it appears by the record itself what issues were submitted, and what issues of fact were in fact found, at least, so far as the defense and title founded upon the statute of limitations are concerned.

The discussions in the courts have heretofore mostly arisen upon general verdicts where it could not be known from the verdict and pleadings upon what particular issues the jury passed. In such cases, some authorities hold that the party relying on the estoppel must show by extrinsic evidence what issues of fact were determined, and this is the view which Mr. Justice Miller seems to hold in the dissenting opinion cited. Other, and apparently a majority of, cases hold that a general verdict is itself prima facie evidence that all the issues of fact were determined, and that the party seeking to avoid the estoppel must show by extrinsic evidence what points in issue were not in fact determined by the jury; and the supreme court seems to go to this extent at least. But no such question can arise on special findings like those in this case where the record itself shows the exact issues found by the judge. The authorities cited by complainant's counsel relate to general verdicts, and are therefore inapplicable.

It is urged that upon the findings there is no estoppel, because the estoppel is not mutual, for the reason that, if certain findings had been the other way, it would not have been conclusive on both. It is not necessary to inquire what might have been the effect, had the findings and judgment been different. The question is, what is the effect upon both parties of the findings and judgment under consideration, not what the effect of some other findings and judgment might be. Are these findings and judgment conclusive on both parties, if conclusive on one? If so, the estoppel is mutual within the meaning of the rule. This point is also judicially determined in Sheldon v. Edwards, 35 N. Y. 288, before cited. There can be no doubt, I think, that in this case both parties are concluded if either is, and the estoppel is therefore mutual within the rule.

It is further argued, that if this adjudication is conclusive it might result in injustice to the complainant; for, if on appeal, the supreme court should come to the conclusion that the finding upon the issue of the statute of limitation was not supported by the evidence, the judgment could not be reversed, because it is still right on the issue that the plaintiff was not in possession, and the court could not disturb a judgment which is not erroneous. We have already seen that the supreme court of the United States, in House v. Mullen [supra], did reverse the judgment where there was no technical error—where the judgment was not erroneous in the sense in which counsel use the term for the purposes of this argument—and on the sole ground that all the points covered by it would be res adjudicata and operate as an estoppel, whereas it appeared to the court that some of the points ought not to be considered as finally determined, which upon the record as presented would be concluded. This reversal, doubtless, proceeded upon the idea that the judgment was broader in its scope and more advantageous to the plaintiff than he was entitled upon the record to have it. So in this case, if the defendant in the former action obtained a judgment covering the entire merits when, in fact, either upon the issues found or upon the issues correctly found, after determination of the appellate court, that other issues were improperly found, he ought only to have had judgment of nonsuit or dismissal without prejudice, the appellate court would undoubtedly have reversed or modified the judgment, and the latter might be done under the practice in Nevada. This would certainly be doing no vain thing, as insisted by counsel, but doing what a party would be legally entitled to claim at the hands of the court. The court would have no discretion to allow a judgment to stand which would conclude a further litigation of issues, that they were satisfied from the record ought not to be concluded, simply because the judgment in its present form might, also, give proper effect to the determination of other issues properly determined.

Under the system of practice in Nevada at the time, there were two appeals allowed, one from the judgment and one from an order granting or denying a motion for new trial, wholly independent of each other, and which might be taken separately or together, and upon either of which the judgment in a proper case might be modified or reversed. Upon an appeal from a judgment, only questions of law affecting the validity of the judgment could be considered. The facts

could not be reviewed. If a party desired to have the facts reviewed, it was necessary to move for a new trial, and to prepare a statement as the basis of the motion, specifying the precise issues, or points upon which the evidence was insufficient to sustain the verdict or finding, and to insert all the evidence bearing upon that precise point, and no more. Upon a denial of the motion for new trial, the party had his appeal; and the statement for new trial constituted the record upon which the appeal on the points specified was heard. Should the verdict or findings be found to be unsupported by the evidence wholly, or in part, it might wholly, or to the extent found erroneous, be set aside. If the finding set aside is material to support the judgment, the judgment would necessarily be reversed. But if the other findings, not disturbed, are still sufficient to sustain the judgment, the judgment would not, necessarily, be reversed, but it, doubtless, might be. If not reversed, the vacating of the findings on some of the issues not necessary to sustain it, would take those issues out of the operation of the rule relating to res adjudicata, because they would appear not to have been determined. Thus, in the case in hand, suppose there had been another express finding, that the plaintiff in the former action was not in possession at the commencement of the action, and on motion for new trial, or on appeal from the order denying a new trial, the court should be satisfied that the finding as to the adverse possession was not supported by the evidence, but that the finding of want of possession at the commencement of the action was correct, the finding on the issue as to adverse possession could be set aside without disturbing the other findings. But the judgment, if correct, on the remaining issues need not be disturbed, or, if too broad in its scope, it could be modified and properly limited. Thus the rights of the parties could and would be protected. New trials as to some particular issues were often granted, even under the old system of practice, without disturbing the verdict or findings on other issues. Wiggin v. Smith, 54 N. H. 213, 223, 224; Robbins v. Inhabitants of Townsend, 20 Pick. 351; Winn v. Columbian Insurance Co., 12 Pick. 288; Hutchinson v. Piper, 4 Taunt. 555. The practice in California and Nevada affords still greater facilities for pursuing this course, as is sometimes done. Argenti v. City of San Francisco, 30 Cal. 463. Doubtless, if it was more frequently done, it would greatly redound to the advantage of the parties, and conduce to the administration of justice.

But in this case, if the finding upon adverse possession should be set aside, as we have seen, there would be no finding at all on the issue as to plaintiff's possession at the commencement of the action, as that fact is only inferred from the finding on the larger issue of adverse possession for a period of time covering the commencement of the suit, and the judgment would necessarily fall on the vacation of this finding, unless the other facts found also show the better right to be in defendant. The difficulty suggested, therefore, if any there be, could not apply to this case, and the argument is without force here, whatever might be said had there been an express finding on the other issue. In this case, as we have seen, there was an appeal from the order denying a new trial upon the issue as to the adverse possession, and the supreme court held the finding to be amply supported by the evidence. Thus, it is manifest that the power of the courts is ample by vacating one or more of the findings, and by reversing or modifying judgments on appeal so as to restrict their operation, to fully guard and preserve all the rights of litigants without encroaching upon the application of the wholesome doctrine of res adjudicata. Speyer v. Ihmels, 21 Cal. 280, 288, 289, is another example of the reversal of a judgment technically correct on the record for the protection of the rights of the parties. Upon my view therefore there is nothing either upon authority or upon principle to take the case out of the rule of estoppel invoked by defendant. If I am right thus far, then it was finally and conclusively determined in the former action between the same parties that the defendant had the title as against the complainant; for the adverse possession for the time prescribed, not only barred the action to recover the possession, but vested the title as against complainant in the adverse possessor—the defendant. See Arrington v. Liscom, 34 Cal. 380-385, and the numerous cases there cited; Cannon v. Stockmon, 36 Cal. 540; and Leffingwell v. Warren, 2 Black [67 U. S.] 605, where it is said by the supreme court of the United States that "the lapse of time limited by such statutes not only bars the remedy, but extinguishes the right and vests a perfect title in the adverse holder." A title so acquired will be quieted in the adverse holder on a bill in equity for that purpose, even against the holder of the paper title barred. Arrington v. Liscom, 34 Cal. 386; Pendleton v. Alexander, 8 Cranch. [12 U. S.] 462. The latter case, and the statutes under which it arose, were fully examined in Arrington v. Liscom [supra]. The other findings, also, seem to show title in the defendant.

It is further argued, on the part of the complainant, that the statute of limitations does not apply, because the title is in the United States, and such statutes do not run against the government; and Gibson v. Choteau, 13 Wall. [80 U. S.] 92, is cited to sustain the position. But this case can have no application, for, as we have seen, the party who is the owner of the mining claim as against everybody but the United States, under the laws of the state or territory, and the rules and regulations of the locality em-

bracing the mine irrespective of the act of congress, is the party entitled to a patent; and the statutes of limitations of the state or territory applicable to the subject themselves constitute a part of the laws by which the right to a mining claim is to be determined, for the purpose of ascertaining who is the party upon whom the right to purchase is conferred by the act of congress. Such statutes, as we have seen, are expressly recognized by section 13 of the act of congress as a part of the laws by which the right to a patent is to be determined.

So, again, it is urged that there was a trust, or confidence, reposed in the defendant and its grantors by complainant and its grantors, as tenants in common, which precluded the defendant from acquiring the title except for the benefit of all. This proposition is also untenable. According to the allegations of the bill there was a valid parol partition and segregation of the interests of the parties executed and followed by exclusive possession in pursuance of such partition. Such partitions are, doubtless, valid. Long v. Dollarhide, 24 Cal. 218. Thus the parties by this partition ceased to be tenants in common, and forever after dealt at arm's length. Besides, the taking possession of the whole under conveyance from the former locators, claiming to own the whole, and excluding the complainant and its grantors, was a hostile act, which constituted an ouster, and set the statute of limitations in motion. It certainly will not be claimed that one tenant in common cannot oust his co-tenant and by long-continued adverse possession bar his right. But, as we have seen, the parties had ceased to be tenants in common.

After a careful consideration of the case, I am satisfied that the right of the defendant as against the complainant was conclusively adjudicated in the former action, and that the patent properly and rightfully issued to the defendant in its own right. It is, therefore, unnecessary to consider the question as to the conclusiveness of the patent upon the other grounds argued. If, however, the procuring of a patent in a proceeding in all respects regular in its forms in the mode pointed out by this statute, where no fraud has intervened in the course of the proceedings, cannot be regarded as a proceeding in rem, or in the nature of a proceeding in rem, and be conclusive upon all the world, then, in my judgment, the statute ought to be speedily so amended as to make it such a proceeding and conclusive. So, also, if there is any case wherein the doctrine of res adjudicata should be carried to its utmost limit, or where the statute of limitations should be rigorously applied, it is this class of cases. There certainly can be no class of cases wherein it is more to the interest of the public that there be an end of litigation. Happily, in this case, as I view it, the question of title appears to have been adjudicated within the most limited scope of the rule of law invoked. I cannot close this opinion without expressing my obligations to the counsel on both sides for the very able, thorough and exhaustive printed arguments furnished—arguments every way worthy the inportance of the questions involved and the very large pecuniary interests at stake. Let the demurrer be sustained and the bill dismissed.

FOUR HUNDRED BARRELS OF SALT (WINSLOW v.). See Case No. 17,881.

FOUR HUNDRED BASKETS OF CHAMPAGNE (UNITED STATES v.). See Case No. 15,149.

FOUR PART PIECES OF WOOLEN CLOTH (UNITED STATES v.). See Case No. 15,150.

Case No. 4,990.

FOURTEEN HORSES, ETC.

[10 Ben. 358.] [1]

District Court, S. D. New York. March, 1879.

FREIGHT—LIEN—CHARTER—CARGO—PRACTICE.

1. A vessel was chartered to go from New York to ports in the West Indies and back to New York. The charter was expressed to be for the purpose of carrying a circus company and their necessary tents, clothing, horses, etc. It provided for the payment of charter money at the end of each month and it bound the vessel "and the merchandise laden on board" to the performance of the charter. On the return of the vessel, while she was at Flushing, L. I., and before she was towed to her pier in New York, and before any of her cargo was discharged, the owner of the vessel filed a libel to recover a balance of charter money due and attached the horses and paraphernalia of the circus company on board. The charterer excepted to the libel: *Held*, that the property attached was cargo, on which the lien for charter money was given by the charter.

2. The clause in the charter making the charter money payable by instalments, at a place where the vessel would not probably be when the time of payment arrived, did not destroy the lien on cargo given by the charter.

3. The failure to pay the monthly instalments due before the filing of the libel was a breach of the charter, and the owner of the vessel had a lien on the cargo for his security.

4. The libel was not prematurely filed, and the libellant was entitled to recover.

In admiralty.

Edward L. Owen, for libellant.

Edward D. McCarthy, for claimant.

CHOATE, District Judge. This is a libel against the cargo of the schooner John N. Colby for freight, etc., alleged to be due under a charter party. The charter party was made in New York, on the 27th of October, 1876, between the libellant as master and

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

agent of the owners and one Murray. By its terms the libellant agreed on the freighting and chartering of the vessel to Murray, for a voyage from New York to such safe ports and places as charterer may direct, including the West Indies and South America and back to New York, for a term of at least three months, with privilege to keep the vessel three months longer, the owner to furnish crew and provisions, the whole of the vessel, except the captain's and mates' room and necessary accommodations for the crew and for the tackles, sails and provisions of the vessel to be at the sole use of the charterer, the owner to take on board during the voyage "all such lawful goods and merchandise as the charterer or his agent may think proper to ship," the charterer to pay to the owner or his agent "freight at the rate of $690 per month and pro rata for parts of a month earned and due at the termination of each month, payable $500 to Evans, Ball & Co. upon the presentation of order of charterer, and $190 to the captain," "the charterer to pay all port charges, both foreign and domestic, including loading, discharging, consul fees, etc." The charter contained the following clauses: "It is understood that the vessel is chartered for the purpose of transporting a circus company and their necessary tents, clothing, horses, etc." "It is hereby understood that the monthly payments under this charter are to commence November 6th, 1876." "To the true performance of the foregoing agreements the said parties do hereby bind themselves, their heirs, executors, administrators and assigns, and also the said vessel, her freight and appurtenances and the merchandise laden on board, each to the other in the penal sum of the estimated amount of charter."

Under this charter, the vessel took on board at New York, on the 6th of November, the circus company, its horses, tents, and other equipments, and proceeded under the direction of the charterer to various ports in the West Indies, and arrived at New York on her return on the 3d of April, 1877. During this time the vessel was at sea, going from port to port, seventy days; the rest of the time was spent in various ports where the circus was landed and gave public performances.

This libel is brought by the owner of the vessel, claiming a balance of freight money and port charges paid. The libel was filed April 3d, 1877, while the vessel was lying at Flushing, L. I., and before she was towed to her pier in New York, and before any of the cargo was discharged. The property seized by the marshal was also seized on board the vessel and before it was discharged. The libel avers that the libellant has always, since the making of said charter party, well and truly performed all the covenants and undertakings thereof on his part, but that the charterer has not kept his covenants and undertakings; that the vessel was employed under the charter about five months and that there became due at the end of each month $690, or for the five months $3,450; that there has been paid $1,450, leaving a balance of $2,000 or thereabouts over and above all offsets and credits; that the charterer had failed to pay all the port charges and to furnish water and provisions and libellant had paid out $117 therefor, no part of which had been repaid; that payment of these sums had been demanded and refused.

Process having issued, under which part of the circus property on board was attached by the marshal, the charterer appeared as claimant and bonded the same. He filed exceptions and answer. Upon the hearing, the claimant waived the defences set up in his answer, relying only on his exceptions, which were as follows: (1) That the libellant cannot proceed in rem against the property herein attached, the same not being cargo on which freight had been earned nor merchandise subject to a lien for freight money; and that the contract between the parties was not a contract of affreightment, nor was the adventure a commercial adventure; and (2) that the libellant had not completed his contract at the time the libel was filed and the process of attachment was issued; that the charter party had not been fulfilled; that the vessel had not reached the port of New York, and that the property attached was still on board the vessel, not having been discharged; that no cause of action had arisen under this contract at the time the libel was filed and process issued.

As to the first exception, the point taken is that from the peculiar character of the goods laden on board and the use they were to be put to at the several ports to be visited, they could not be regarded as cargo to which a maritime lien would attach, nor could the adventure be considered a commercial adventure; that a maritime lien is a creation of the maritime law solely in the interests of commerce. The distinction here attempted to be drawn is certainly novel, and no authority is produced in its support. If the use to which merchandise carried on the water was to be put at the end of the voyage were the test of its being "cargo" to which the general principles of maritime law apply, as well for its protection as for its responsibility, this distinction would have been made long ago, for hardly any general ship sails from port without some articles of merchandise not designed for sale, but for the use or pleasure of the owner and shipper. The true rule appears to have been well understood by both parties to this charter, who expressly pledged the vessel to the cargo and the cargo to the vessel. It is, that all property, of whatever kind, carried by sea, whatever may be the use to which it is to be put when landed, is "cargo," and the carrying of it on ship-board is itself a commercial adventure, which clothes it with the

privileges and subjects it to the liabilities which belong to cargo by the maritime law.

As to the second exception, it is doubtless well settled as a general rule that freight under a charter party or bill of lading is not due till the cargo has been discharged; that till the cargo is discharged the voyage is not completed nor the contract of the ship fully performed. Cargo of Salt [Case No. 2,406]. But it is equally clear that by the terms of the charter party, freight may become due before the discharge of the cargo, and during the running of the charter, as in this case, at the end of every month. McGilvery v. Capen, 7 Gray, 525; Raymond v. Tyson, 17 How. [58 U. S.] 53. And while the agreement to pay freight by instalments at fixed intervals may, under some circumstances, show an intention to waive the ordinary maritime lien on the cargo therefor, as in the case last cited, yet where the charter, by which the agreement for payment in instalments is made, expressly pledges the vessel and cargo to each other for the performance of the charter party, the maritime lien for the freight cannot be held to be waived, even though the instalments are payable at a place other than that at which the vessel will probably be when the time of payment arrives. In this case, therefore, the failure of the charterer to pay the monthly instalments due prior to the filing of the libel was a breach of the charter party, for which an action would then lie, and the owner of the vessel had a lien on the cargo for his security. The libel was not prematurely filed and the process was properly issued. The libellant was not bound to wait till he had discharged his cargo. He had the right to treat the contract as broken and to sue thereon. It is suggested by claimant's counsel that if the libellant could thus libel the cargo on board at Flushing or in New York before its discharge, he could have done so at Key West or a port in the West Indies, and so have broken up the voyage or indefinitely detained the vessel. I see no reason why the owner of the vessel could not do so, if the freight already due had not been paid. Such failure to pay was a breach of the contract, and the owner of the vessel would thereby be absolved from any obligation to continue the performance of the contract on his part, if he saw fit to insist on the failure to pay as a breach of the contract. Such a detention or interruption of the voyage for the enforcement of an accrued right expressly secured to the owner of the vessel by the terms of the charter, could not be charged against the owner of the vessel as a breach of the contract. It would be caused wholly by the fault of the charterer in violating the contract on his part.

It is claimed by the counsel for the charterer that the owner of the vessel waived payment of the monthly instalments, but I think this point is neither sustained by the evidence nor is it set up in the exceptions, nor indeed in the other defences of the answer which have been abandoned.

Decree for the libellant with costs and reference to compute amount due.

FOURTEEN PACKAGES OF PINS (UNITED STATES v.). See Case No. 15,151.

Case No. 4,991.

FOURTH NAT. BANK v. NEYHARDT.

[13 Blatchf. 393.] [1]

Circuit Court, N. D. New York. June 7, 1876.

REFERENCE—ERRONEOUS ENTITLING OF THE REFEREE'S REPORT—AMENDMENT—ENTERING JUDGMENT WITHOUT APPLICATION TO COURT — STATE PRACTICE—REVIEW.

1. On a consent given in open court, a reference of an action at law was made to a referee, to hear and determine all the issues therein. The referee found for the plaintiff for a sum certain, and a judgment was entered on the report without any application to the court. The report was, by a clerical error, entitled in the district court, but it was filed in the circuit court, and was proceeded upon as if it had been correctly entitled. There was no other cause pending between the same parties, and no one was misled by the mistake. The defendant moved to set aside the judgment: *Held*, that the mistake as to the entitling might be disregarded or amended nunc pro tunc.

[Cited in Woolridge v. M'Kenna, 8 Fed. 663.]

2. It was not irregular to enter the judgment without an application to the court, such being the practice of the courts of the state.

3. Suggestions as to the proper mode of obtaining a review of the decision of a referee, where a judgment is entered on his report without having been presented to, or considered by, the court.

[At law. Action by the Fourth National Bank of Chicago against Joseph Neyhardt.]

Stanley, Brown & Clarke, for plaintiff.

David Wright, for defendant.

JOHNSON, Circuit Judge. This is a motion to set aside a judgment in an action at law, entered upon a report of a referee, without any application to the court. The order of reference was made by the court upon consent given in open court, and thereby the action was referred to Isaac M. Lawson, as referee, to hear and determine all the issues therein. The referee heard the cause and made his report, finding certain facts which are set out, and that the plaintiff had suffered damages, by reason of the matters found, to the amount of $12,161.43. He further finds, as a conclusion of law upon the facts found, that the plaintiff is entitled to recover judgment in the action, against the defendant, for the said sum of $12,161.43. By a clerical error, this report was entitled in the district court. It was filed in the clerk's office of the circuit court, and proceeded upon as if it had been correctly entitled.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

No other cause was pending between the same parties, and no one was misled in any manner by the mistake. Under these circumstances, I think the mistake may be disregarded, or amended nunc pro tunc.

The question upon the merits is, whether judgment can be entered without an application to the court. In the case of Heckers v. Fowler, 2 Wall. [69 U. S.] 123, it was held that a reference by consent, in an action at law, could be made in the circuit court of the United States, and that a judgment could be entered without application to the court, upon the report of the referee, where such was the stipulation of the parties, and the order of the court thereupon, in making the reference. The act of June 1, 1872 [17 Stat. 196], adopting the state practice for the time being, in actions at law, which is now contained in section 914 of the Revised Statutes, is, I think, at least equivalent to the clause of the stipulation in Heckers v. Fowler, and authorizes the entry of judgment upon the report of the referee, without any application to the court.

The only difficulty which the matter presents grows out of the fact, that there is, in the circuit courts of the United States, no division into special and general terms, as there is in the state courts of New York. This presents some embarrassment in respect to preserving the right of review of the decision of the referee; for, it is quite probable, that the supreme court of the United States would not examine exceptions to a referee's report, which had never been presented to nor considered by the circuit court. But, if the exceptions taken to the referee's report were brought before the circuit court by proceedings taken under, or in analogy to those authorized by, section 987 of the Revised Statutes, or those provided when a trial is by the court without a jury, and its judgment obtained upon those questions, and entered at the foot of the judgment roll, or inserted therein, it appears to me that the difficulty would be obviated.

In any event, the judgment was not irregular, in being entered without an application to the court, founded on the referee's report, and the motion to set it aside on that ground must be denied.

FOURTH NAT. BANK v. PAPIN. See Case No. 12,239.

Case No. 4,992.

FOURTH NAT. BANK v. WALKER et al.

[24 Int. Rev. Rec. 211; 10 Chi. Leg. News, 323.]

Circuit Court, N. D. Illinois. 1878.

TRANSFER OF SECURITIES—RIGHTS OF GUARANTOR—ESTOPPEL.

Held, that a guarantor of commercial paper has the right, as guarantor, to take up such paper and transfer his claim as guarantor, to the parties from whom he obtained the means with which to take up the paper. The court states how the parties in this case would be estopped by their acts.

On the tenth day of August, A. D. 1869, S. J. Walker borrowed of Sarah Maher, wife of Hugh Maher, $50,000, and secured the same by causing Henry H. Walker, his brother, to execute two promissory notes, of that date, each for $25,000, and falling due three years after date, respectively. He also caused H. H. Walker to execute two certain trust deeds to John G. Rogers, as trustee, each of said trust deeds securing one of said notes. It does not clearly appear whether said two trust deeds were altogether upon the same premises, or upon different pieces of property. The premises which were conveyed by the trust deed, although standing of record in the name of H. H. Walker, were in fact, the property of S. J. Walker, and the indebtedness so secured was, in fact, the indebtedness of S. J. Walker, the former holding the title and executing the papers for the convenience of the latter. Both the notes in question were indorsed by Sarah Maher and Hugh Maher, her husband, and guaranteed in writing by S. J. Walker. Hugh Maher pledged both of said notes, secured as aforesaid—one with the Fourth National Bank [of Chicago] and the other with J. Irving Pearce, president of the Third National Bank, in his individual capacity. The note held by Pearce, falling due August 10, 1872, was taken up in the following manner within ten days after maturity. Pearce urged Maher, and Maher urged S. J. Walker, to take it up. On the day of its maturity or thereabouts, S. J. Walker paid thereon to Pearce, $10,000, and being unable to pay the balance, made the following arrangement with Greenebaum and Foreman, bankers, with whom he had been doing a very large business. He was then largely indebted to Greenebaum and Foreman, which indebtedness still remains unpaid, and for the security of which, among other collaterals, they held what was known as the "Price note," originally for the sum of $12,000, but reduced to $10,000, by payment or otherwise. S. J. Walker represented to Greenebaum and Foreman, that he desired the Price note upon which to raise money elsewhere, with which to aid in payment of the note held by Pearce, and that if they would surrender it to him, he would with the proceeds thereof, and other means, take up the note so secured, out of the hands of Pearce, and would in consideration thereof, deliver to them the Walker note and the security held by Pearce, in lieu of the Price note. He also represented to them that it would be a valid binding security in their hands, and that he had a right so to pledge it; and upon the faith of such representations they agreed to surrender to Walker the Price note for the purpose aforesaid, upon condition that they should receive the note held by Pearce, as

well as the trust security therefor. S. J. Walker then, on August 19, 1872, gave Pearce his check upon some bank—what particular bank the evidence does not show—with the understanding that it should go through the clearing house, and be paid the next day. On August the 20th, Greenebaum and Foreman, under the agreement stated, surrendered the Price note to Walker, who pledged or sold same to raise money thereon, and on that day Pearce sent Walker's check through the clearing house, with the $25,000 note reduced to $15,000, pinned thereto. The check was paid and the note surrendered to S. J. Walker, who delivered it, with the trust deed securing it, to Greenebaum and Foreman, who still hold and claim it as a security for the indebtedness due them from Walker, which is much larger than the amount due upon the Walker note. Neither Pearce nor Mr. nor Mrs. Maher knew how Walker had raised the money with which to pay that note. Pearce told Maher the note had been paid, and both of them so regarded it. As to the other $25,000 note so pledged with the Fourth National Bank, it fell due at the same time, but was not paid or taken up until about November 5, 1872. It was taken up and satisfied in some way by Walker, and on November 5, 1872, in satisfaction of the old note or for some other indebtedness, S. J. Walker delivered to the Fourth National Bank another promissory note for $25,000, due in two years and executed by H. H. Walker, and secured by a new trust deed. This was likewise guaranteed by S. J. Walker. The new trust deed ran to Samuel M. Moore, and covered the same property contained or described in the trust deed transferred to, and held by, Greenebaum and Foreman. The new trust deed taken by the Fourth National Bank was filed for record December 31, 1872, several months after Greenebaum and Foreman had obtained the one held by Pearce. The Fourth National Bank filed a bill to foreclose the trust deed securing the note of November 5, 1872, alleging that the security held by Greenebaum and Foreman had been paid and satisfied, and that the trust deed securing the same had consequently ceased to be a lien for the security of that note. It prayed that that deed might be declared a cloud upon the title, and as such, removed by decree, and that the premises be sold to satisfy the indebtedness so due to it.

Monroe, Bisbee & Ball, for complainant.

Rosenthal & Pence, for Greenebaum and Foreman.

Held by HARLAN, Circuit Justice. That as to Maher and wife and Pearce, the note for $25,000, held by Greenebaum and Foreman was paid. As between Greenebaum and Foreman and Samuel J. Walker, the latter was estopped by his representations to the former from alleging that it had been paid. H. H. Walker was equally estopped in view of his relations in this matter to Samuel J. Walker. But if Samuel J. Walker and H. H. Walker are to be regarded as having distinct, separate rights, then the lien claimed by Greenebaum and Foreman can be sustained upon the ground that S. J. Walker had the right, as guarantor, to take up the $25,000 note and transfer his claim as guarantor to the parties from whom he obtained the means with which to take up the note. In a suit by Greenebaum and Foreman, against the Walkers, to enforce the lien given by the trust deed, the latter would be estopped from saying that the debt had been fully paid, or from disputing the lien. The rights of Greenebaum and Foreman are none the less in this action, since the debt and lien asserted by the complainants were both created subsequent to the delivery to Greenebaum and Foreman of the Walker note and deed of trust. Greenebaum and Foreman are entitled to the benefit of the security received from S. J. Walker for such amount as was due upon the Price note surrendered to Walker.

FOUR THOUSAND AMERICAN GOLD COIN (UNITED STATES v.). See Case No. 15,152.

FOUR THOUSAND EIGHT HUNDRED AND EIGHTY-FIVE BAGS OF LINSEED (SEARS v.). See Case No. 12,589.

FOUR THOUSAND EIGHT HUNDRED GALLONS OF SPIRITS (UNITED STATES v.). See Case No. 15,153.

FOUR THOUSAND ONE HUNDRED AND TWENTY-FIVE CIGARS (UNITED STATES v.). See Case No. 15,154.

Case No. 4,993.

FOWLE v. ALEXANDRIA.

[3 Cranch, C. C. 70.] [1]

Circuit Court, District of Columbia. April Term, 1827.[2]

MUNICIPAL CORPORATIONS — AUCTIONEER'S LICENSE—FAILURE TO REQUIRE BOND—LIABILITY FOR DAMAGES.

1. Under the law of Virginia the defendant may demur and plead to issue, to the whole declaration.

2. The act of Virginia of 1796, "concerning corporations," which requires bond and security to be given by auctioneers, does not prescribe the condition of the bond, but leaves it to the discretion of the respective corporations; but when the condition has been fixed by a by-law, it cannot be dispensed with at the will of the corporation, unless that will be expressed in such a formal manner as to repeal the by-law. [See note at end of case.]

3. A corporation aggregate, having, or supposed to have, a corporate fund, is liable in an

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[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Affirmed in 3 Pet. (28 U. S.) 398.]

action at common law for negligence of its duty.

4. The inhabitants of Alexandria, as such, are no part of the corporation.

5. A judgment against the corporation cannot be levied on any inhabitant who is not a member of the common council.

6. The "Common Council of Alexandria" is an entirely new corporation erected by the act of congress in 1804 [2 Stat. 256], and derives all its powers from that act.

7. By that act, this new corporation is neither authorized to grant licenses to auctioneers nor to restrain them from exercising their business without license.

8. The old corporation erected by the Virginia statute of 1779, by the name of "The Mayor and Commonalty of the Town of Alexandria," was, by its own consent, destroyed by the repeal of that statute by the act of congress of 1804 erecting the new corporation.

9. The Virginia act of 1796, "concerning corporations," was applicable only to corporations then existing, and created no duty or obligation upon any corporation subsequently erected.

This was an action upon the case [by William Fowle], against "the common council of Alexandria," for negligence in licensing an auctioneer without taking bond and security according to the Virginia act of 1796 [Laws 1796, p. 22, c. 13], "concerning corporations," and the by-law of "the mayor and commonalty" of the 5th of February, 1800. By an act of the legislature of Virginia in the year 1779 [Hening's Laws 1779, p. 173, c. 25], the mayor, recorder, aldermen, and common councilmen, elected in the manner therein prescribed, were made a body corporate and politic by the name of "Mayor and Commonalty of the Town of Alexandria." By the Virginia act of December 22, 1796, "concerning corporations," it is enacted that "the mayor, aldermen, and commonalty of the several corporate towns in this commonwealth, and their successors, shall, upon request of any person or persons desirous thereof, grant licenses to exercise, in such town, the trade or business of an auctioneer; provided that no such license shall be granted until the person or persons requesting the same, shall enter into bond with one or more sufficient sureties payable to the mayor, aldermen, and commonalty of such corporate town and their successors, in such penalty, and with such condition as by the by-laws and ordinances of such corporate town, shall be required." By the by-law of February 5, 1800, it is enacted that "the mayor and commonalty shall grant to any person or persons desiring the same, a license to exercise the trade or business of an auctioneer, within the town; provided that no such license shall be granted, until the person or persons applying, shall enter into bond with one or more good securities, in the sum of $20,000 payable to the mayor and commonalty, and conditioned for the payment of the annual rent of $500 to the mayor and commonalty, in quarterly payments, for the said office; and for the due and faithful performance of all the duties of the same; which bond shall not become void on the first recovery, but may be put in suit and prosecuted, from time to time, by, and at the costs of any person injured by a breach thereof, until the whole penalty shall be recovered." The by-law regulates the fees and commissions of the auctioneer and prescribes his duties; one of which is that he shall, in three days after any sale made, deliver, to the owner of the goods sold, a fair account of the sale, and pay the amount of the money received, deducting therefrom his fees and commissions. By the act of congress of the 25th of February, 1804 (2 Stat. 255), "to amend the charter of Alexandria," after providing for the election of a common council, it is enacted "that the common council, so elected, and those thereafter to be elected and their successors shall be and hereby are made a body politic and corporate by the name of 'The Common Council of Alexandria,' with the usual corporate powers; and all the estate, rights, and credits now vested in the mayor and commonalty of the town of Alexandria, shall be vested in the said common council when elected, and may be recovered in their name for the use of the said town, and in like manner all claims and demands against the mayor and commonalty of Alexandria, prior to the operation of the present act, may be prosecuted and recovered against the aforesaid common council." They were authorized to appoint all officers deemed necessary for the execution of their laws; but no power was thereby given to appoint or to license auctioneers. The 12th section enacts "that so much of any act or acts of the general assembly of Virginia, as comes within the purview of this act, shall be and the same is hereby repealed. Provided that nothing herein contained shall be construed to impair or destroy any right or remedy which the mayor and commonalty of Alexandria now possess or enjoy, to or concerning any debts, claims, or demands against any person or persons whatsoever, or to repeal any of the laws and ordinances of the mayor and commonalty of the said town now in force, which are not inconsistent with this act." In June, 1817, the common council of Alexandria passed "An act to amend the act for licensing auctioneers, and for other purposes," by which it is enacted "that every person obtaining a license to exercise the business of an auctioneer within the town of Alexandria. shall annually apply for, and obtain a renewal of his license, and shall also annually renew his bond in the manner provided by law; and every person failing to renew such license, and give bond annually, shall cease to exercise the business of an auctioneer, and shall be proceeded against accordingly."

The declaration contained three counts. The first count, after setting forth the by-laws of the 5th of February, 1800, and 3d

of June, 1817, avers that on the —— day of ——, 1815, the common council of Alexandria granted a license to one Philip G. Marsteller, to exercise the trade of auctioneer in Alexandria, and continued to renew the same from year to year until the —— day of ——, 1819, during which time he sold at auction for the plaintiff goods to the amount of $——, which sum he failed to pay to the plaintiff, who recovered judgment against him for that sum, and obtained a fieri facias, which was returned nulla bona; at the time of which judgment, long before, and ever since, he was and is wholly insolvent; by reason whereof the plaintiff became entitled to the benefit of the bond and security required to be taken as aforesaid by the said "common council" previous to granting the said license, as aforesaid; yet the defendants, not regarding their duty in that behalf, but contriving, &c., did not, nor would not, take any bond and security as aforesaid, from the said P. G. M. "during the time when the transactions aforesaid, between the plaintiff and the said Philip took place, but on the contrary thereof, so carelessly, negligently, and improperly conducted themselves in the premises, that by and through the negligence, carelessness, and default of the defendants in the premises, no bond and security was taken from the said Philip to which the plaintiff can resort, and the money due to him as aforesaid is wholly lost to the plaintiff," &c. Second count: "And whereas also the said common council of Alexandria, on the 1st of April, 1815, did license and permit one P. G. M. to carry on the trade and business of auctioneer in the town of Alexandria, and so from year to year to the 1st of February, 1819, and the said Philip, in virtue of the said license and permission, did carry on the said trade and business of auctioneer in the said town during the whole of the period aforesaid, and the plaintiff believing that the said common council had well and faithfully performed their duty in taking from the said Philip, bond and security for the faithful discharge of his duty as auctioneer aforesaid, and confiding in the same, did deliver to him the said Philip, from time to time during the years 1815, 1816, 1817, and 1818, goods, wares, and merchandise to the value of $10,000 and upwards, to be sold by him as auctioneer as aforesaid; and the said Philip as auctioneer aforesaid did sell the said goods, wares, and merchandise at auction aforesaid, and did become indebted to the plaintiff, by means of the said sales at auction as aforesaid in the sum of $1,583.09, which said sum the said Philip, although often required, altogether failed and refused to pay to the plaintiff. And the said plaintiff saith that the said Philip was at the time he became so indebted, altogether insolvent and unable to pay the said sum of money, by means of which said premises the plaintiff became entitled to the benefit of the bond and security required by law to be taken by the said common council upon granting the license to the said Philip to exercise the trade and business of auctioneer as aforesaid. Yet the said common council not minding their duty in the said premises, but contriving to injure and deceive the plaintiff, altogether failed to take any bond or security from the said Philip for his license to carry on the trade and business of auctioneer for the years 1815, 1816, 1817, and 1818 as aforesaid; in consequence and by means of which said failure the plaintiff hath altogether lost the debt so due to him from the said Philip to the plaintiff as auctioneer aforesaid, and therefore the plaintiff saith he is injured and hath sustained damage to the value of $3,000," &c. The third count sets forth the act of Virginia of 1796, entitled "An act concerning corporations," and the by-laws of 1800 and 1817, and avers that the common council of Alexandria did knowingly suffer and permit the said P. G. M. to exercise the trade and business of an auctioneer within the said town from the 1st of January, 1815, to the last day of December, 1819; and during that period did take and receive from the said P. G. M. the annual sum of $500 as a rent for exercising the said trade and business of auctioneer as aforesaid, and the plaintiff believing that the said common council had taken bond and security from the said P. G. M. for the faithful performance of his duties of auctioneer, &c., did from time to time during the said period, deliver to him goods to be sold by him as auctioneer; and that he so sold them to the amount of $1,583.09, and failed to pay the same to the plaintiff; and was, when he so became indebted, altogether insolvent; by means of which premises the plaintiff became entitled to the benefit of the bond and security required by law to be taken by the common council as aforesaid; yet the said common council, not minding their duty in the premises, but contriving, &c., failed to take such bond and security; in consequence of which failure the plaintiff has lost the debt due from the said P. G. M. to the plaintiff, whereby he is injured, &c. To this declaration there was a general demurrer and joinder. The defendants were also permitted to plead sundry matters of fact in bar, under the Virginia statute of the 12th of December, 1792, § 40, which enacts "that the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence."

Mr. Taylor, for defendants, contended that no action for a tort lies against a public corporation; that the "common council" had no power to grant licenses to auctioneers either under the charter of 1779 or 1804. The Virginia law of 1796 does not prescribe the condition of the bond; it might have been only for payment of the rent or

tax. They were not bound to provide for the security of those whose goods should be sold by the auctioneer. If the plaintiff has any remedy it is rather against the individual members of the common council, than against the public body which is a municipal corporation; and would have no right to pay the damages out of the public funds; nor would it have a right to lay a tax for such a purpose. The act of 1796 only gives the power of licensing auctioneers to the mayor, alderman and commonalty of the several corporate towns within the commonwealth. That act was applicable only to corporations then existing. The corporation known by the name of "The Mayor and Commonalty of the Town of Alexandria," which then existed, was dissolved, with its own consent, by the act of congress of 1804 (2 Stat. 255), which erected a new corporation by the name of "The Common Council of Alexandria." This new corporation derived no power from the Virginia act of 1796. It had no right to require the bond. The act of 1796 requires the bond to be made payable to the "mayor, alderman and commonalty," —the by-law requires it to be made payable to the mayor and commonalty only.

Mr. Swann, contra, contended that the corporation is liable for torts done within the sphere of its powers, and has power to raise money to pay the damages. Townsend v. Susquehanna Turnpike, 6 Johns. 91; Yarborough v. Bank of England, 16 East, 6; Riddle v. Proprietors of Locks and Canals, 7 Mass. 169; Holmes v. Remsen, 20 Johns. 230; Patterson v. Bank of Columbia, 7 Cranch [11 U. S.] 306. The charter of 1804, does not repeal the Virginia act of 1796, nor the by-law of 1800.

Mr. Jones, in reply. The people of the town are no part of the corporation. The corporation is the government, the inhabitants are the governed. No action can be maintained by the governed against their governors for neglect of duty. The people are not responsible for the neglect of their government. The corporation cannot tax the people for the torts or negligence of the corporation. It is not the subject of a private action. All the powers of the new corporation are those given by the charter of 1804

Before CRANCH, Chief Judge, and MORSELL and THRUSTON, Circuit Judges.

CRANCH, Chief Judge. The act of Virginia of 1796, "concerning corporations," requires that bond and security shall be taken; the condition, however, is left to the discretion of the corporation; but that condition, when once fixed by a by-law, is necessary, and cannot be dispensed with at the will of the corporation, unless that will be expressed in such a formal manner as to repeal the by-law.

The first question is, whether the corporation is liable in an action upon the case at common law, for negligence of its duty. In the case of Yarborough v. Bank of England, 16 East, 6, it is decided that trover will lie against a corporation aggregate; a fortiori an action upon the case for negligence, which requires no evidence of any act done by the defendants, but is for a mere omission. In the case of Riddle v. Proprietors of Locks & Canals, 7 Mass. 169, it is decided that case lies against a corporation aggregate, for neglect to make the canal as wide and deep as required by statute, whereby the plaintiff suffered damage. In that case Mr. Chief Justice Parsons takes "a distinction between proper aggregate corporations and quasi corporations, such as counties and towns in Massachusetts, which are invested with particular powers without their consent. No private action can be maintained against them for breach of their corporate duty, unless such action be given by statute; and the reason is, that, having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. This burden the common law will not impose but in a case where the statute is an authority to which every man must be considered as assenting. But in regular corporations which have, or are supposed to have a corporate fund, this reason does not apply." In such cases, where an action is given by statute, it is cumulative. Is the common council of Alexandria such a regular corporation, having or supposed to have such a corporate fund? I think it is. The inhabitants of Alexandria, as such, are no part of the corporation. The judgment cannot be levied on any inhabitant who is not a member of the common council. None of the inconveniences mentioned by the court in the case of Russell v. Men Dwelling in the County of Devon, 2 Term R. 667, can occur in this case. If the corporation granted the license contrary to law, without taking the bond and security required by law, and the plaintiff has thereby sustained a special damage, I think he may maintain his action upon the case, at common law, against the corporation.

But it is said, that the "Common Council of Alexandria" is an entirely new corporation, erected by the act of congress in 1804, and derives all its powers from that act. That by that act this new corporation is neither authorized to grant licenses to auctioneers, nor to restrain auctioneers from exercising their business without license. That the old corporation, "The Mayor and Commonalty of the Town of Alexandria," which was erected by the statute of Virginia in 1779, was, by its own consent, destroyed by the repeal of that statute by the act of congress erecting the new corporation. That the act of Virginia of 1796, "concerning corporations," which imposed the duty upon corporations to license all such auctioneers as should apply

and offer the requisite bond and security, was applicable only to corporations then in existence, and could give no authority, nor impose any duty upon a corporation subsequently erected; and therefore that the new corporation had no authority, and was not bound to require the bond and security. That the by-law of the 5th of February, 1800, although not expressly repealed, was virtually of no effect, because the authority, upon which it was founded, had ceased to exist, and could create no obligation upon the "common council" to require bond and security. In this view of the case I am inclined to concur. They cannot be bound by their own by-law unless they had authority to pass such a by-law; nor can the by-law of the old corporation bind the new, when the authority upon which that by-law rested is taken away. I am therefore of opinion that the judgment upon the demurrer should be for the defendants, upon all the counts.

It may be observed, also, that the first count does not state that the said P. G. M. ever received any money for the plaintiff; nor that the plaintiff ever demanded any from him; nor does it expressly aver that the loss happened in consequence of the negligence of the defendants; nor that the plaintiff believed that security had been given. The second count does not refer to the by-laws, or to the Virginia act of 1796; nor does the plaintiff aver it to be the duty of the common council to require the bond and security; nor that P. G. M. received the money for the sales, but says that he became indebted to the plaintiff "by means of said sales." There is nothing in this count which shows the obligation of the defendants, or the title of the plaintiff. The third count does not state that the defendants granted any license, but knowingly permitted and suffered the said P. G. M. to carry on the business of auctioneer, and took no bond and security; but received the annual rent of 500 dollars. It does not state that the said P. G. M. received any money for the goods sold. This count I think is clearly bad.

Judgment for the defendants upon the demurrer.

[NOTE. Plaintiff brought error, and the judgment of the circuit court was duly affirmed by the supreme court, Mr. Chief Justice Marshall delivering the opinion, in which it was held that there is no precedent for holding a municipal corporation, established for the general purposes of government with legislative powers, liable for losses consequent on its having misconstrued the extent of its powers in granting a license, which it had not authority to grant without taking that security for the conduct of the person obtaining the license which its own ordinances had been supposed to require. Fowle v. Alexandria, 3 Pet. (28 U. S.) 398.

[For a former hearing in this case before the supreme court, which was on demurrer to the evidence, and at which the judgment of the circuit court was reversed, see Fowle v. Common Council of Alexandria, 11 Wheat. (24 U. S.) 320.]

Case No. 4,994.

FOWLE et al. v. BOWIE.

[3 Cranch, C. C. 291.] [1]

Circuit Court, District of Columbia. May Term, 1828.

PRACTICE AT LAW—FAILURE TO PLEAD—DEFAULT.

Although the term should continue beyond the rule-day, the plaintiff is entitled to judgment by default, if the defendant did not plead by that day.

[This was an action by Fowle and Daingerfield against Robert W. Bowie.] The rule to plead expired in November, 1827. The May term was continued by adjournment beyond the rule-day. The defendant pleaded in abatement on the 6th of December, 1827, during the adjourned May term.

The plaintiffs' counsel contended that it was too late, and that judgment should be entered by default.

Mr. Key, for defendant, contended that if he pleaded before the expiration of the term in which the rule was laid, he was in time.

But THE COURT (nem. con.) was of opinion that the rule-day being before the expiration of the term, made no difference; and that the plaintiffs were entitled to judgment by default.

[NOTE. See Fowle v. Bowie, Case No. 4,995.]

Case No. 4,995.

FOWLE v. BOWIE.

[3 Cranch, C. C. 362.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

CONTINUANCE—NEW TESTIMONY.

At any time before the fifth term, after the appearance term, the plaintiff may obtain a continuance of the cause upon affidavit that he has recently learned from his counsel that the documents upon which he relied are not good evidence for him, and that he wants the testimony of persons beyond sea, although a day, by consent of the parties, had been assigned for the trial.

Mr. Jones, for plaintiff, moved for a continuance of the cause upon affidavit by the plaintiff, that he has but recently learned by consultation with his counsel, that certain documents upon which he had relied, were not good evidence for him; and that he wants the testimony of certain persons in Holland.

The cause was at issue at the last term, and this day had been assigned by the court, with the consent of the parties, for the trial. This was the second term after the appearance court.

Mr. Key, for defendant, objected.

But THE COURT (nem. con.) continued the cause, it not being after the fourth term after the appearance court. See Laws Md.

[1] [Reported by Hon. William Cranch, Chief Judge.]

1721, c. 14, § 1; Id. 1730, c. 16; Id. 1787, c. 9, § 2; Id. 1794, c. 6, § 2.

[NOTE. See Fowle v. Bowie, Case No. 4,994.]

FOWLE (HANSON v.). See Cases Nos. 6,041 and 6,042.

FOWLE (McCLEAN v.). See Case No. 8,691.

FOWLE (PIERPONT v.). See Case No. 11,152.

Case No. 4,996.

FOWLE v. SPEAR.

[11 Law Rep. 130; 7 Pa. Law J. 176; 4 Pa. Law J. Rep. 145; Cox, Am. Trade-Mark Cas. 67; Cox, Manual Trade-Mark Cas. 48.] [1]

Circuit Court, E. D. Pennsylvania. Nov. 7, 1847.

TRADE MARKS—QUACK MEDICINES—PROTECTION BY COURT OF EQUITY.

1. A court of equity will not, in a contest between persons who profess to be manufacturers of quack medicines, interfere to protect the use of trade marks, by injunction.

[Cited in Tufts v. Tufts, Case No. 14,233; Heath v. Wright, Id. 6,310; Kohler Manuf'g Co. v. Beeshore, 59 Fed. 574.]

2. A complainant, whose business is imposition, cannot invoke the aid of equity against a piracy of his trade marks.

In equity. This was an application for an injunction, upon notice given to the defendant, to restrain him from using wrappers, labels and bottles, resembling those used by the complainant in his business of selling "Wistar's Balsam of Wild Cherry." The bill, filed November 7th, 1847, stated that Lewis Williams, in 1844, was proprietor and possessor of the original receipt for preparing and compounding a certain valuable medicine invented by Dr. Henry Wistar, of Virginia, called "Wistar's Balsam of Wild Cherry," and that the said Williams prepared the same, and sold it in Philadelphia, and all the principal cities in the United States, with great profit and advantage; that about the 20th of May, 1844, Williams transferred to Isaac Butts of New York, and his assignees, the sole and exclusive right to manufacture and sell the said medicine in various states and places, including all the eastern part of Pennsylvania, which right Butts, on the first of March, 1845, conveyed to complainant, together with all the apparatus and appurtenances used in manufacturing the medicine, and all stereotype plates, pamphlets and bottle moulds used in vending the same. The bill contained, as part of it, the advertisements, wrappers and labels used in advertising the medicine by Fowle, and a bottle filled with the medicine, and stamped with the words, "Wistar's Balsam of Wild Cherry. Philadelphia, I. B." was deposited with the bill, and referred to in it as an exhibit. The bill then further alleged, that the defendant, for the purpose of selling some composition which he called "The Original Dr. Wistar's Balsam of Wild Cherry," and inducing persons to purchase the same as complainant's medicine, had caused to be manufactured bottles, which exactly resembled in size and shape those used by complainant, and caused the same inscription to be stamped thereon, except two letters, "I. B.," for which defendant substituted "W. & Co." but which, as was done by complainant, defendant covered with the label he used, and also used wrappers and labels substantially the same as complainant's. The wrappers, advertisements and labels, used by the defendant, formed part of complainant's bill, and one of the bottles used by defendant was deposited with the bill, and referred to therein as an exhibit. The facts and allegations set forth in the bill were supported by the complainant's special affidavit thereto, and the affidavits of three other persons were filed in support of certain of the material facts and allegations thereof. A motion was made for an injunction upon the filing of the bill, and notice given to the defendant, who appeared to oppose it; but no answer was filed nor any affidavits read on his part.

Mr. Ingraham, for complainant, in support of the motion for an injunction.

This case being heard upon the bill and affidavits produced by complainant, the only question is, as to the relief afforded by the law. The application is to restrain the use by the defendant of the complainant's trade marks, upon the well-known principles which courts of law and equity both enforce. The principle of protection is, that every man has a right to the means of distinguishing his own property from that of another. Blofeld v. Payne, 4 Barn. & Adol. 410, where it was decided that though you sell your own goods, you cannot use a wrapper resembling that of another person, and thus represent them as his; and this principle has been applied to a case where no mistake could have been made by a purchaser. Lewis v. Langdon, 7 Sim. 421.

KANE, District Judge. Is there any case in which a court of equity has interfered to protect a quack medicine?

Mr. Ingraham. The bill alleges that this is "a valuable medicine," and that is uncontradicted; besides, it is not very easy to understand what it meant by a "quack medicine," and what is meant by a "quack" is still harder to define.

KANE, District Judge. In a late trial for libel in this city, it seemed to be the result of the understanding of the most eminent of the faculty who were examined, that a "quack" meant a practitioner who prescribed or recommended a secret medicine.

Mr. Ingraham. That is very intelligible certainly, and of easy application, for unless I am greatly mistaken, the names of

[1] [Cox, Manual Trade-Mark Cas. 48, contains only a partial report.]

the most eminent of the faculty are to be found to certificates recommending Swaim's Panacea; but the answer to the suggestion is, that if the plaintiff has no right to the claim he makes and appellation he assumes, another person cannot use his own name, if it be the same as plaintiff's, in such a way as to produce an eventual deception. Sykes v. Sykes, 3 Barn. & C. 541; Croft v. Day, 7 Beav. 84; Hine v. Lart [10 Jur. 106], 2 Sandf. Ch. 600. Damages are recovered at law in such cases. Southern v. How, Poph. 144. And equity interferes by injunction. Dolland v. Bell, Harris v. Callaghan (Rolls, 1825), and Partridge v. Fatman, circuit court of Pennsylvania, May, 1847 [unreported], were cited, and also the Case of Tom Pouce, or General Tom Thumb, in the "Tribunal de Commerce," at Paris, May, 1845; Stratton v. Roqueplan, in which Roqueplan was enjoined from using and announcing in playbills or placards, that one Duhamel would appear in the character of Tom Pouce; which name had become the property of young Stratton, and therefore no one else could use it. These cases were cited from newspaper reports. Gout v. Aleploqlu, 6 Beav. 69, note; Coats v. Holbrook, 2 Sandf. Ch. 586; Taylor v. Carpenter, Id. 603,—were also cited and commented on, and also 2 Keen, 213; 2 Man. & G. 385. It is not at all material that the acts complained of should have been knowingly done. Millington v. Fox, 3 Mylne & C. 338, which case, for the process was secret there, and Croft v. Day, decided the very point presented for adjudication, the resemblance "being sufficient to mislead the ordinary run of purchasers."

Mr. Goodman (and Mr. Guillou was with him) resisted the motion. This claim to protection of mere names is of recent origin, and may be traced to the protection afforded in England to persons who have served apprenticeships before they are permitted to work at a trade. It will not be extended here so as to protect a useless compound, by protecting the shape of bottles, and any designation that may be used to sell articles not clearly of a useful nature; and that is the answer to Croft v. Day, for there is no allegation that Day & Martin's blacking itself is protected by a patent. The case in Popham is clearly on that ground; and Lord Hardwicke's determination not to protect a complainant in the exclusive use of the stamp of the "Great Mogul" on packs of cards, any more than he would prevent "one innkeeper from setting up the same sign with another," 2 Atk. 485, proceeded upon the same principle. The spirit of our patent laws is on the same principle; it must be for some "useful" invention; and in England the doctrine has been applied in practice to publications not deemed of a meritorious character, the piracy of which will not be interfered with by injunction. The cases of Walcot v. Walker, 7 Ves. 1, and Southey v. Sherwood, 2 Mer. 438, illustrate the course of courts of equity; and the case of Pidding v. How, 8 Sim. 477, is conclusive that in this stage of the cause such a court will not interfere, any more than it will in any doubtful case. 3 Paige, 214. In addition to the cases referred to by the complainants, Eden, Inj. 70; Drew. Inj. 235; Canham v. Jones, 2 Ves. & B, 218; Daniell, Ch. Pr. 1869, 1870 (Boston Ed. 1846), and 3 Doug. 293, were cited; as also Snowden v. Noah, Hopk. Ch. 347. Besides, another ground of uncertainty in this case arises from the act of assembly of March 3, 1847 (Pamph. Laws, 198), in relation to "false stamps and labels." It is not clear that the answers to some of the interrogatories of this bill might not involve the defendant in a prosecution under that act; and the same ground upon which he could demur to any matter of that kind, will be his protection from an injunction till answer, if the court have any doubt, whether he is bound to answer at all, derived from the bill itself.

KANE, District Judge. I have considered the application for an interlocutory injunction in this case, and have come to the conclusion that it must be refused. The bill sets forth in substance, that the complainant is the manufacturer of a secret medicine, which he calls "Dr. Wistar's Balsam of Wild Cherry," and that he sells it in bottles of a peculiar form, enclosed in wrappers, which bear certain devices and directions. On one of these wrappers, which is made part of the bill, the balsam is described as "a valuable family medicine for consumption of the lungs, coughs, colds, asthmas, bronchitis, croup, whooping-cough, difficulty of breathing, pains in the side or breast, liver complaints, &c.;" to which another paper, also among the exhibits, adds "influenza, hoarseness, pains or soreness of the chest, &c." The bill then charges, that the defendant has fabricated a different medicine, and is selling it in bottles of the same form, bearing almost the same title, and enclosed in wrappers, which proclaim in the same words exactly the same virtues for the spurious, as are asserted by the complainant for the genuine, balsam. The defendant has not answered, nor filed any responsive affidavit. I should most anxiously avoid every appearance of discourtesy towards parties who have been so honorably represented before me; but speaking from the record, this is plainly a contest, real or simulated,—and whether it be the one or the other, neither the highly respectable counsel, nor the court can know, —between the vendors of a quack medicine, the elements and action of which are not disclosed in evidence. For aught that appears, it may be innocent enough; but though "valuable," as it is sworn to be, to the party who compounds and sells it, it is readily conceivable that to him who buys and takes it, it may be far otherwise. It is

not the office of chancery to intervene, by its summary process, in controversies like this; "non nostrum tantas componere," looking at the incongruous group of diseases, for which the balsam prescribes itself to public credulity, I must apply the principle of the vice chancellor's decision in Pidding v. How, 8 Sim. 477, that a complainant, whose business is imposition, cannot invoke the aid of equity against a piracy of his trade mark. The only remedy in such a case is at law. Motion dismissed.

Case No. 4,997.

In re FOWLER et al.

[8 Ben. 421.] [1]

District Court, S. D. New York. May, 1876.

OCCUPATION OF REAL ESTATE BY ASSIGNEE IN BANKRUPTCY—RENT.

Bankrupts, at the time of their bankruptcy, were in the occupation of premises, on which were an engine and some rice-cleaning machinery. After the adjudication of bankruptcy, which was on December 23d, 1874, the assignee took possession of this property, which remained on the premises till November following, when it was sold by the assignee. The landlord then petitioned to be allowed for the use and occupation of the premises, and, on a reference to the register, he gave evidence to show that the fair rental value of the premises was $600 a year, and claimed compensation at that rate. The assignee gave evidence that the value of the premises, as a store house for the property, was $200. The register reported in favor of the payment of that sum by the assignee to the landlord, for the use and occupation of the premises: *Held*, that the estate in bankruptcy should make compensation for the use and occupation of the premises, to the extent that the estate had been benefited thereby, and that the report of the register should be confirmed.

This case came before the court on a petition by Moses S. Beach, owner of premises in Furman street, Brooklyn, to be paid for the use and occupation of those premises from the date of the adjudication, December 23d, 1874, to the following November. The matter being referred to the register, it appeared, by the evidence adduced before him, that, at the time of the adjudication, the premises were in the occupation of the bankrupts [Charles R. and Edward Fowler], in their business of dealing in rice, for cleaning rice, they having therein a large amount of machinery, and a steam engine which they used in their business; and that the assignee, on his appointment, took possession of the property, which remained in the premises till it was sold by the assignee in November, 1875, for $1,000. The landlord gave evidence to show that the rental value of the premises was $600 a year, and claimed to be paid at that rate. The assignee gave evidence that the value of the premises, as a store house for the machinery, was $200. The register reported in favor of the payment of $200 to the petitioner, and gave the following opinion: "The undersigned considers that the estate in bankruptcy of a bankrupt is not chargeable for the use and occupation of a store or other premises, unless the purposes of the estate require the use and occupation of such premises, and then that the compensation for such use and occupation is to be measured by their benefit and value to the estate. Where rent is in arrear, the landlord has it in his power, at any time, to put an end to the occupation of the premises by the bankrupt or by the marshal or assignee or other officer of the court. If he is dissatisfied with the prospect of an award of compensation for the use of his premises for the purposes of the estate in bankruptcy, he may generally have his remedy by summary proceedings, under the statute. At any rate, unless under an order of the court after the filing of the petition by or against the bankrupt, there cannot be a contract, express or implied, to bind the estate of the bankrupt to pay rent, because the parties who are to pay rent, the creditors or others interested in the estate of the bankrupt, are not parties to the contract. The assignee in bankruptcy is not the agent of those parties to enter into any contract. The property of the estate of the bankrupts in the building for the use and occupation of which the claim against the estate of the bankrupts is made in the present case, produced, on the sale by the assignee, the sum of about one thousand dollars. The landlord asks from the estate of the bankrupts, for the use and occupation of his premises for the storage of this property, the sum of five hundred dollars. It is plain that it would be a reproach upon the administration of the law to allow fifty per cent. of the value of the property of the bankrupts merely for taking care of it. If, by leaving property of the estate of the bankrupt on the premises, or by advertising the lease for sale, the assignee incurs a liability for rent, it is a personal liability, and, if there is a lease, the liability of the bankrupts, upon the covenants of the lease, for rent accruing after the filing of the petition, will not, it is believed, be discharged by his discharge in the proceedings in bankruptcy. It is right, however, that the estate in bankruptcy of the bankrupts should, to the extent that the estate has been benefitted by the use and occupation of the premises, make compensation for such use and occupation. Upon the evidence on this reference, the reasonable amount of such compensation, is, in the judgment of the undersigned, the sum of two hundred dollars. The undersigned has accordingly reported that sum as an allowance for such compensation."

BLATCHFORD, District Judge. I concur in the foregoing opinion of the register.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

Case No. 4,998.

In re FOWLER.

[1 Lowell, 161;[1] 1 N. B. R. 680.]

District Court, D. Massachusetts. June, 1867.

ACT OF BANKRUPTCY—VOLUNTARY PETITION—CONCEALMENT OF ASSETS—RIGHT OF CREDITORS TO RESIST ADJUDICATION.

1. A debtor over whom the court has jurisdiction commits an act of bankruptcy when he files his voluntary petition for adjudication, and a single creditor cannot resist the adjudication by plea and proof that the debtor is really able to pay all his debts.

2. If the debtor has property concealed, the assignee is the proper person to recover it for the benefit of the general creditors.

3. Such a concealment would be itself an act of bankruptcy, and is no ground for refusing to adjudge the debtor a bankrupt on his own petition.

4. The cases in which creditors may resist an adjudication are where there is some defect in the proceedings, or the court has no jurisdiction.

5. A petition by one partner against another is quasi in invitum, and the objecting partner may show that the firm is not insolvent; though in such a case, if creditors intervened, perhaps the court might require security to be given for the payment of the joint debts before dismissing the petition.

In bankruptcy. James L. Fowler filed his voluntary petition early in June, being the thirteenth case begun under the act, and before adjudication one of his creditors filed written objections to the petition, setting out that Fowler was not unable to pay all his debts, and that his only object was to delay him in the collection of certain executions which he held against Fowler. The question whether these objections if well sustained in fact were sufficient in law to prevent an adjudication, was heard by the court.

R. M. Morse, Jr., for creditor. The district court has full equity powers under the statute, analogous to those which the supreme judicial court of Massachusetts exercised under the insolvent law. It will stay proceedings that are improperly brought, as that court has often done. Thompson v. Thompson, 4 Cush. 127. That the allegations of the petition may be contested, see Holbrook v. Jackson, 7 Cush. 136, remarks of Shaw, C. J.

A. Wellington, for bankrupt.

LOWELL, District Judge. The district court has power to hear and decide all contested questions, and to stay proceedings improvidently begun. The eleventh section of the statute [Act 1867 (14 Stat. 521)] seems to contemplate that voluntary petitions may sometimes be contested, for it provides that the register may make adjudication if there be no opposing party. But it is not the intent of the act that the court should inquire whether the petitioner is insolvent or not. When a debtor swears that he is unable to pay his debts in full, and files the requisite petition and schedules, he has committed an act of bankruptcy, and any creditor may then carry on the proceedings if the debtor shall fail to do so. His act is for the benefit of all persons interested, and cannot be retracted on the application of only one of them, with or without the debtor's consent. No notice is required to creditors before adjudication, and the judge or register is only to inquire whether the debtor owes three hundred dollars. Section 11. That he is unable to pay his debts in full and is willing to surrender all his property is conclusively proved by his petition, so far as a decree of bankruptcy is concerned. He may be, in fact, fraudulent, and able and unwilling to pay his debts; but the law takes him at his word, and makes effectual provision, not only by civil but even by criminal process to effectuate his alleged intent of giving up all his property. If I should undertake, on a preliminary hearing, to decide that the petitioner has ample means to pay his debts, but is unwilling to discover them, and should dismiss the case on that ground, I should be usurping the province of the assignee, and should surrender the very powers and remedies which the bankrupt law provides for that exigency; besides giving the single creditor, who objects in order to save some attachment or security, an advantage which the law intends to avoid. The only questions open upon a voluntary petition are those which go to the jurisdiction, such as residence, and a sum total of provable debts of three hundred dollars. It is these which section 11 refers to as being possibly contested. So where one copartner petitions and another copartner resists, the latter has an interest to retain his own property, and may show that the firm is not insolvent. A creditor has no such interest in his debtor's property as a partner has in that of his firm. His rights, except where they tend to give him a preference over the general body of creditors, are fully secured in bankruptcy. And even in case of a partnership, the court might perhaps have power to order security to be given for the payment of the joint debts before dismissing the petition.

If this creditor were the only one, and the petition were intended merely to vex and hinder him, or if all the creditors joined in a protest, and were ready to discharge the debtor, there might be some ground to stay the proceedings; but to do it at the instance of one out of several, on the ground that the debtor has undisclosed assets, would be contrary to the whole spirit of the act. There is no such effectual mode of obliging a fraudulent debtor to do justice to all his creditors, as to proceed against him in bankruptcy, and the law does not intend that he should do justice to less than all. The only objection made to this adjudication is one which, if true, would be a sufficient reason

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

for adjudging the debtor a bankrupt, namely, that he has property concealed which ought to be used in payment of his debts. Such a fact is evidence of insolvency as well as bankruptcy, and if other evidence than the debtor's petition were admissible, would tend to confirm rather than to disprove the allegations of the petition. Adjudication ordered.

[NOTE. See In re Fowler, Case No. 4,999.]

Case No. 4,999.

In re FOWLER.

[2 Lowell, 122.] [1]

District Court, D. Massachusetts. May, 1872.

BANKRUPTCY — RIGHT OF CREDITORS IN THE MATTER OF DISCHARGE—FRAUD—WHEN DISCHARGE MAY BE ANNULLED.

1. Any creditor who has a provable debt against a bankrupt may apply to the court, after a year, and perhaps earlier, to require the bankrupt to have the question of his discharge determined.

2. If a bankrupt has applied for his discharge, and given due notice, &c., but has neglected to procure an order granting the discharge, it is not usually permitted to a creditor, who neglected to file objections in due time, to come in and file charges in opposition. The rights of all parties have already been fixed, and the mere neglect to take out an order ought not to prejudice the bankrupt.

3. If, in such a case, a creditor discovers frauds, he may require the bankrupt to take his discharge, if he chooses to do so, and the creditor will then have his remedy by applying to annul it.

4. The two years within which a creditor may have discharge set aside begins when the debtor actually takes his discharge; but the previous knowledge which is to bar the creditor's right to annul, must be knowledge which he could have availed of, that is, such as he had before the return-day of the order, to show cause why the discharge should not be granted.

In bankruptcy. This bankrupt [James L. Fowler] applied for his discharge in May, 1868, which was within one year after the proceedings were begun; and on the return-day in the following month a creditor filed specifications of objection; and nothing more appeared of record until March, 1872, when a different creditor applied for an order on the bankrupt to show cause why he should not bring the proceedings to a close, and for permission to oppose the discharge, on the ground that the first objecting creditor had been settled with, in order to avoid his opposition. This applicant had not proved his debt, and had not opposed the discharge, and said he had discovered the facts only a few months before he made his application.

A. Wellington, for bankrupt.

F. Woodside, for creditor.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

LOWELL, District Judge. It appears that the plaintiff, so to call him, has a provable debt, for which an action is pending in a state court. Under section 26 of the bankrupt act [of 1867 (14 Stat. 529)], which requires all such suits to await the determination of the question of discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain it, it is my practice to permit any creditor, whether he has proved his debt or not, to apply for such an order as was granted in this case, to show cause why he should not receive his discharge, or be refused it. If this were not allowed, every state court, where any suit was pending against the bankrupt, would be obliged to inquire whether any delays that might have occurred in this court were due to the bankrupt's fault; an issue which might often be not only very embarrassing to the state court, but might lead to misunderstandings and counter orders in the different jurisdictions. When, therefore, any creditor demands it, after the lapse of the year allowed by statute, and perhaps in some cases before that time, I proceed to require the bankrupt to bring forward the case, or be refused his discharge.

I am not prepared to grant the second part of the application, and hear objections from a creditor who has neglected for so many years to take any steps in the cause. Supposing it to be true that the bankrupt has dealt unlawfully with the original objecting creditor, and has influenced his action by a pecuniary consideration, contrary to section 29, yet this is alleged to have been done long ago, and the present applicant, when he discovered the fact, did so with no view to the proceedings here. He was merely looking up the evidence here, in order to see what his rights were at common law. It seems to be in violation of sound practice to let him in to oppose the discharge at this time. All that a creditor in that situation can do is to speed the cause on the record as it stands.

I have known the argument to be advanced that a creditor should be heard against the discharge, at any time before it is actually taken out; because, if he discovers any fraud before that time, he cannot obtain a rescission of the discharge under section 34. But my opinion is that section 34 must be construed to mean, that if within two years after the actual date of the discharge, or of the order for it, a creditor applies to annul it, and proves a fraud such as is referred to in that section, and proves that he did not know of the fraud on the return-day of the order to show cause, on the bankrupt's application for his discharge, he is entitled to have it set aside. My reason is, that the return-day is the last day on which a creditor has a right to appear. It cannot be that he is to be barred of his petition to annul, by a knowledge which was too late to be of any use to him, nor that he is bound to apply to the court for

an enlargement of time, in every case in which the discharge happens not to have been issued or granted as soon as the bankrupt was entitled to have it. By intendment of law, the rights of the debtor and his creditors are ascertained on the return-day. But the debtor cannot defeat the operation of the thirty-fourth section by neglecting for two years to procure an order of discharge. It follows, as a reasonable construction of the whole section, according to its true intent, that different points of time must be considered as referred to by the two phrases, in themselves very much alike, concerning the time for applying to annul, and the time after which the creditor must have acquired his knowledge, else the discovery of a fraud during the interval, long or short, after the bankrupt's right to his discharge is fixed, and before it is actually granted, will be a casus omissus. The protection which the court has, in this precise case now before me, is that the bankrupt must make oath that he has not influenced any creditor.

Discharge to be granted, if the bankrupt files the usual certificate and oath within fourteen days; without prejudice to the right of this creditor to apply under section 34.

[NOTE. See In re Fowler, Case No. 4,998.]

FOWLER, In re. See Case No. 10,527.

Case No. 4,999a.

FOWLER v. BYRD.

[Hempst. 213.] [1]

Superior Court, Territory of Arkansas. Feb., 1833.

PLEADING—LIS PENDENS—BURDEN OF PROOF—RECORD EVIDENCE.

1. Lis pendens in chancery is created by filing a bill and actual service of subpoena.

2. At law, suing out a writ constitutes the pendency of a suit, without service of the same.

3. A plea of another action pending is an affirmative plea, and casts the onus probandi on the party pleading it, and the proof to sustain it must be record evidence.

4. When the defendant has shown the issuing of a writ for the same cause of action, he has proved, prima facie, the pendency of a suit; and it then devolves on the plaintiff to show, by record evidence, the disposition of it, parol evidence being inadmissible.

5. It would be competent to dismiss the previous writ at the time, by leave of the court, or have an order of dismissal nunc pro tunc entered of record, and thus destroy the effect of the plea in abatement; but the omission cannot be supplied by parol testimony.

Appeal from Pulaski circuit court.

Before CROSS and CLAYTON, JJ.

CLAYTON, J. This was an action of debt, brought by Richard C. Byrd against Absalom Fowler, in the circuit court of Pulaski county, in which the defence set up was a plea of the pending of a former suit for the same cause of action. The circuit court permitted the clerk to prove by parol that the writ in the former suit had been dismissed, overruled the plea, and gave judgment for the plaintiff; from which judgment an appeal was taken to this court. In chancery it is settled, that a lis pendens is created by filing a bill and actual service of the subpoena. 2 Madd. 256; 1 Johns. Ch. 566.

At law, suing out a writ constitutes the pendency of a suit, without any further step, and neither service of process, nor any other proceeding, is required to form the ground of a plea of another action pending for the same cause. 1 Bac. Abr. 23; 5 Coke, 48, 51. The plea of another action pending is an affirmative plea, and casts the onus probandi upon the defendant pleading it, and the proof to sustain it must be record evidence. 1 Saund. Pl. & Ev. 19. A record is a memorial of a proceeding or act of a court of record, entered in a roll for the preservation of it. 7 Com. Dig. tit. "Record," A. When, in this case, the defendant in the court below showed the issuing of a writ for the same cause of action, he proved, prima facie, at least, the pendency of a suit; and it then devolved on the plaintiff to prove, by competent testimony, that the suit had been disposed of, and was no longer pending. The parol evidence introduced for the purpose was not, in our opinion, legal. Brush v. Taggart, 7 Johns. 20; Hasbrouck v. Baker, 10 Johns. 248; Jenner v. Joliffe, 6 Johns. 9. Had he moved for leave to enter at that time a dismission of the first writ, or an order directing the clerk to make out upon the record a statement of the facts and dismission, as they had actually occurred, nunc pro tunc, we think upon that state of the case the plaintiff would have been entitled to succeed. But the failure to do so, and the attempt to supply the omission by parol testimony, constitutes such an error as to warrant the reversal of the judgment.

It is probable that even now, the plaintiff, by entering of record a dismissal of the first suit in the circuit court, will be entitled to have judgment in that court. Judgment reversed.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 5,000.

FOWLER v. DILLON et al.

[1 Hughes, 232;[1] 12 N. B. R. (1875) 308.]

District Court, E. D. Virginia.

BANKRUPTCY — JURISDICTION OF DISTRICT COURT IN EQUITY—JUDGMENTS AT LAW—WAR—INTEREST.

1. The United States district court, as a court of equity, having cognizance of all cases

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

and controversies between a bankrupt and his creditors, has the same power to restrain creditors in judgments at law against a bankrupt that a state court of equity would have over such creditors if the debtor were not a bankrupt.

[Cited in Hudson v. Schwab, Case No. 6,835.]

2. The power to reduce the amount of judgments at law rendered on Confederate contracts, to the equivalent in legal money, is an equitable power belonging to state courts of equity, and may be exercised in cases where bankrupts are parties defendant, by the United States district courts, sitting as courts of equity.

3. War interest being inequitable under the laws of Virginia, the United States district court, as a court of equity, may require the judgment creditors of a bankrupt to abate such interest when embraced in judgments rendered by default, before 1873.

[Cited in Harmanson v. Wilson, Case No. 6,074.]

[Suit by John S. Fowler, assignee, against John J. Dillon and others.]

At the June term of the county court of Loudon, 1871, judgments by default were obtained, one of them by the administrators of Anne Dillon, deceased, against William N. Hough, for two thousand six hundred and fifty dollars, with interest and costs; another of them against W. N. Hough and two other defendants jointly in favor of John J. Dillon, for one thousand nine hundred dollars, with interests and costs; and another by John J. Dillon against W. N. Hough and two other defendants, for four hundred and fifty dollars, with interest, and costs. At the October term, 1868, of the circuit court of Loudon, a judgment was obtained by the representative of Joshua Reed, deceased, against William N. Hough, for eighty-three dollars and forty-four cents, with interest and costs; and at the June term, 1871, of the county court of Loudon, an office judgment was obtained by the representative of Joshua Reed, deceased, against William N. Hough, for the sum of two thousand dollars, with interest and costs, subject to large credits for payments made November 28th, 1870, and December 21st, 1870. Upon these latter judgments execution went out, and were returned, or levied, so as to bind the personal property of William N. Hough; and the judgments were docketed as liens upon his real estate. Except the one specified, no part of these judgments has been paid. On the 15th day of March, 1873, the said William N. Hough was adjudicated a bankrupt in this court. All the debts on which the judgments named were taken were Confederate debts, made during the Civil War, and the consideration of them Confederate money or bank bills of banks of the Confederacy. The amounts of the debts for which the judgments were taken were never scaled down to their value in genuine money; but the judgments were taken for their full face value. All the judgments, except probably that of October, 1868, were by default, and embraced interest for the period of the Civil War. The act of assembly relieving against war interest was not passed until April 2d, 1873.

HUGHES, District Judge. The question is, can this court require the creditors in these judgments to scale these debts? The courts of Virginia, as courts of equity, have frequently interfered when their powers were invoked to rectify the amounts for which judgments at law have been taken expressed in Confederate money. And besides this prescriptive equitable power to correct mistakes in judgments, and prevent the enforcing of unconscionable claims, exercised by these courts as courts of chancery, the legislature has conferred statutory powers upon the courts in this class of cases. Recognizing the equity of thus scaling debts contracted in an inflated and depreciated currency, and in order to secure uniformity of procedure, the general assembly of Virginia, in Acts of Assembly for 1872–73, p. 219 (Code 1873, p. 982), passed laws allowing proof of the real consideration of Confederate contracts to be made; directing Confederate debts to be scaled by a fixed schedule of values; giving remedies in the courts against judgments for Confederate debts obtained after the war by default, and obtained during the war for Confederate amounts; and giving the courts power, upon evidence, "to scale the said debts and judgments" as of such date as may to the court seem right "in the particular case."

The courts of the state, as courts of chancery, have not considered that in exercising this power to adjust the amounts due upon money contracts according to principles of equity and good conscience, they were violating or impairing contracts; but have thought, rather, that they were executing them according to the real intention of parties. And the general assembly of Virginia has not, in endeavoring to fix a schedule for the graduation of contracts, thought for a moment that it was abrogating or impairing contracts; but rather that it was providing a legal basis for the private settlement of Confederate contracts, and thus preventing the necessity of carrying every such contract into the courts.

I do not, therefore, concur in the proposition of counsel for the judgment creditors of Hough, that judgments by default for the full amount of money called for by Confederate contracts are vested rights, beyond the reach of an act of assembly or a court of equity. The power of the court of chancery over judgments at law has not been disputed since the reign of James I., and extends to the proceeding at law in every stage. Story, Eq. Jur. § 886; Kerr, Inj. pp. 21–27; and Spence's Eq. Jur. p. 674. In repeated cases in Virginia have the state courts, as courts of equity, interfered to rectify the amounts recovered by judgment on Confederate contracts, by scaling them to their equitable value. And the general assembly

of Virginia has, in chapter 43, § 10, of the Code, recognized this power in courts of equity, and forbidden its abridgment, by providing that nothing in the act making provision for the correction of judgments and adjustment of accounts due upon Confederate contracts "shall be construed to take away or impair the ordinary jurisdiction of courts of equity." It has, moreover, given a remedy by summary motion in courts of law to any defendant aggrieved by judgment on default for Confederate money, rendered since March 3d, 1866. Certainly, if such judgments may be opened by summary motion on notice to the creditor, there can be no successful denial of the power of a court of equity, clothed with a prescriptive jurisdiction over contracts and judgments, which has existed for nearly three centuries, to correct judgments of the class under consideration, by enjoining creditors from enforcing them.

If, therefore, this were a court of the state sitting in chancery, upon a general creditors' bill, brought for the marshalling and distribution of the effects of an insolvent debtor, there would be no doubt not only of its power to look into the consideration of the contracts on which the judgments against Hough were obtained, for the purpose of rectifying them, but it would be its duty to do so, and to reduce the amounts to their proper value for the benefit of the creditors of the estate.

The proceeding in bankruptcy is nothing more nor less in its nature and objects than a general creditors' bill; and the bankruptcy court is in effect a court of chancery, established for the specific purpose of administering a bankrupt's estate under a proceeding which is in effect a general creditors' bill. As such, it has precisely the same powers in equity over judgments of state courts affecting the bankrupt's estate, which a state court of equity would have under a general creditors' bill, if the debtor were not a bankrupt. It is true that the bankrupt act [of 1867 (14 Stat. 517)] forbids the summary proceedings in bankruptcy to be used where third persons, other than the bankrupt and his creditors, are to be affected, and requires, in such cases, that the proceedings taken in the district court shall be plenary proceedings, in the form of a suit in equity. This requirement has been enforced in the present case; and the question is, has this court power to look into the consideration on which the debts of Hough, the bankrupt, were founded, which are the subject of the judgments that have been described?

As a court of equity, clothed with power and jurisdiction over "all cases and controversies between the bankrupt and his creditors, for the collection of assets, and the ascertainment and liquidation of liens thereon, and for the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and to effect a due distribution of the assets among all the creditors," this court has not only the same power as a state court of equity to restrain the enforcement of a judgment at law recovered against a bankrupt for an improper amount, but it is its peculiar duty and province to do so. As the state courts of equity do not hesitate, when invoked, to restrain the enforcement of judgments for the full amount of confederate contracts, it cannot be deemed an unusual or unauthorized stretch of power in a bankruptcy court sitting in chancery to do the same thing.

I have already stated the reasons which induce me to reject the idea that judgments of the class under consideration confer vested rights, and cannot be disturbed, except by violating the constitutional inhibition against impairing the obligation of contracts. Congress is not subject to this inhibition, and the courts of the United States may proceed in the discharge of the functions with which they are clothed by congress without violating it. But in this case no such objection can hold good. To correct a judgment at law so as to conform the amount recovered by it to the real intention of the parties, and render it consistent with justice and equity, is not to impair the obligation of contracts, but the reverse.

There is but one other question left for consideration; and that is whether, after judgment by default, the judgment creditor may be made to abate the interest which accrued on his debt during the period of the late civil war. I think the principle is settled in Virginia, that interest during a period of war is not recoverable except by the express allowance of the court or a jury. Judge Joynes, president of the district court of appeals at Petersburg, said in the case of Tucker v. Watson, 6 Am. Law Reg., (N. S.) 220, upon a review of the authorities on the subject: "After such an array of judicial opinion and authority, including at least one express decision of the court of appeals of Virginia, we do not feel disposed, if we were at liberty, to examine the question as an original one, and do not think it necessary to explain the various grounds on which the decisions referred to have been placed..... We are of opinion that interest during the war is not recoverable."

The laws of Virginia have, from the earliest history of the commonwealth, left the question of interest, in every contract, to the discretion of the jury. The language of Code 1849, p. 673, is: "The jury, in any action on contract, may allow interest on the principal sum due, or any part thereof, and fix the period at which such interest shall commence." The language is repeated in Code 1873, p. 1120, § 14; as taken from the act of assembly of 1872–3 (chapter 353), passed April 2, 1873. This act gives the same power over interest as to all future contracts. The same act, in another clause, gives power to the court or jury to allow or disallow interest arising dur-

ing the period of the late civil war. The same act, in another clause, provides that on any "judgment or decree heretofore rendered, which has not been paid, the defendant may, on motion, after ten days' notice to the plaintiff, cause the same to be reviewed by the court in which it was rendered, and if it shall appear from the record that the judgment embraces (war) interest, it shall be lawful for the court to cause said judgment to be abated to the extent of the interest so embraced." These provisions of statute law, all taken together, conclusively show that in Virginia interest is deemed to be a subject not of natural, but of statutory right, to be allowed to a creditor only when and to the amount prescribed by statute or by the tribunal intrusted with power over the subject. And the last clause above quoted is virtually an assertion by the legislature, that its power is so complete that judgments for interest shall not confer a vested right, which shall transcend the power of the legislature or the courts and juries to reach it.

The settled law of Virginia being not only generally that interest is subject to the discretion of a jury, but, specially, that interest during the period of war shall not be taken, except by allowance of court or jury after contest, it follows that if a judgment has gone by default for interest during the war at any time before the act of 1873, it is within the province of a court of equity to require the creditor in such a judgment to abate the interest. The judgment does not confer a vested right, and covers an inequitable claim, which it is against the policy of the law of Virginia to allow.

I return, therefore, to the question whether this court, as a court of equity, with jurisdiction and power over the creditors in the judgments under consideration, may compel those creditors to abate the war interest on their debts. If they had recovered those judgments after contest, and after the passage of the act of assembly of 1872–73, c. 353, then the subject may have been res adjudicata, and the creditors might not have been interfered with. But, as laid down by Judge Marshall, in [Marine Ins. Co. v. Hodgson] 7 Cranch [11 U. S.] 336: "Any fact which clearly proves it against conscience to execute a judgment, and of which the party enjoined could not have availed himself at the trial at law.... will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such adverse judgment."

Not doubting, therefore, the power of this court over the creditors in these judgments, and seeing that the laws of the state declare that the collection of war interest is inequitable, and that the law authorizing the disallowance had not been passed at the time that these judgments were rendered, I am of opinion that this court ought to interfere to require an abatement of the war interest on these judgments; and that it ought not to put the bankrupt or the assignee to the needless task of applying to the courts of law which rendered these judgments for an abatement of this war interest.

NOTE. The decree in this cause was affirmed on appeal by the circuit court. [Case unreported.]

FOWLER (FERRAND v.). See Case No. 4,678.

Case No. 5,001.

FOWLER v. HECKER.

[4 Blatchf. 425.] [1]

Circuit Court, S. D. New York. April 12, 1860.

EVIDENCE—FOLLOWING STATE STATUTES—ATTACHMENT OF WITNESS FOR CONTEMPT.

1. The state statutes which prescribe rules of evidence in civil cases, in trials at common law, are, by the 34th section of the judiciary act of 1789 (1 Stat. 92), made rules of decision in trials at common law, in civil cases, in the courts of the United States.

2. The provision extends so far as to make evidence competent which would be inadmissible under the rules of the common law, whether the state statute be or be not enacted subsequently to the passage of the judiciary act.

3. Accordingly, a defendant made liable by the statute law of New York, to examination as a witness for the plaintiff, is liable to be attached for contempt in not obeying a subpoena issued by this court and served on him, commanding him to attend and be examined on the trial of a civil suit at common law, pending in this court.

This was an action at common law, on trial before a referee appointed between the parties. A subpoena, issued under the seal of the court, on behalf of the plaintiff [John Fowler], directed to the defendant [John Hecker], commanding him to appear before the referee, as a witness for the plaintiff, at a time therein designated, and also requiring him to produce in evidence certain books of account, was duly served on the defendant, by the marshal, who made a return to that effect. The defendant refused to obey the subpoena. The plaintiff now, on affidavit and notice, moved for an attachment against the defendant, for contempt of court, in not obeying the subpoena. The defendant opposed the motion, on the ground that he was the party defendant to the record in the cause, and, as such, not liable by the statute laws of the United States, or the usages and practice of its courts, or the principles of the common law, to be called as a witness in the cause.

Horace Andrews, for plaintiff.
Robert B. Campbell, for defendant.

BETTS, District Judge. In McNiel v. Holbrook, 12 Pet. [37 U. S.] 84, 89, the supreme court determined that the 34th section of the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

judiciary act of 1789 (1 Stat. 92), embraces within its provisions those statutes of the several states which prescribe rules of evidence in civil cases, in trials at common law. The same principle is confirmed in Sims v. Hundley, 6 How. [47 U. S.] 1, 6. This doctrine is now followed in this circuit, in common law cases, in all instances where the statutes of the state render evidence competent which would be inadmissible under the rules of the common law, whether the state statute be or be not enacted subsequently to the passage of the judiciary act. The 390th section of the Code of Procedure of the State of New York provides, that "a party to an action may be examined as a witness, at the instance of an adverse party, or of any one of several adverse parties, and, for that purpose, may be compelled in the same manner, and subject to the same rules of examination, as any other witness, to testify either at the trial, or conditionally, or upon commission." Supposing the reference in the present case to have been legally instituted, the defendant was bound to obey the subpoena, and the cause he offers in excuse is no protection to him against the mandate. An order against the defendant for contempt of court may, accordingly, be entered and enforced against him, unless, at the adjourned day appointed for the hearing before the referee, he appears and submits himself to examination as a witness.

[NOTE. On the report of the referee to whom the cause had been referred by consent of the parties, judgment was rendered for the defendant, whereupon he brought error, and the cause was heard by the supreme court on motion of defendant in error to dismiss, which motion was overruled. Hecker v. Fowler, 1 Black (66 U. S.) 95. At the December term, 1864, the cause was again heard by the supreme court, and the judgment of the circuit court duly affirmed, Mr. Justice Clifford delivering the opinion; but the questions determined in the principal case did not arise, as the case was presented to the supreme court. Id., 2 Wall. (69 U. S.) 123.]

Case No. 5,002.

FOWLER v. MacDONALD.

[4 Cranch, C. C. 297.] [1]

Circuit Court, District of Columbia. March Term, 1833.

BILLS AND NOTES—PROMISE TO PAY NOTE OF THIRD PERSON.

A written promise, absolutely to pay the note of a third person, written at the foot of the note, is an original undertaking, and need not express the consideration.

Assumpsit, on the following note of William Duncan:

"Washington, January 22d, 1831. Four days after date I promise to pay C. S. Fowler, fifty dollars, for value received, Wm. Duncan."

"I will pay the above at maturity. Jan. 22d, 1831. S. MacDonald."

Mr. Hall, for plaintiff, cited Story's Chitty, Bills, 122.

Mr. Fendall, for defendant [Stephen MacDonald]. This is an agreement to pay the debt of another, and although it is in writing, yet the consideration is not stated. Wain v. Warlters, 5 East, 11; Fell, Guar. 318, 401; Lynn v. Lambe [unreported], and Egerton v. Mathews [6 East, 307, 2 J. P. Smith (Eng.) 389]; Saunders v. Wakefield, 4 Barn. & Ald. 595; McComber v. Clarke [Case No. 8,711], in this court at December term, 1826; Sloan v. Wilson, 4 Har. & J. 322.

Mr. Hall, in reply, cited Fell, Guar. 45, note; Packard v. Richardson, 17 Mass. 122, contra; Fell, Guar. 46, note; Leonard v. Vredenburg, 8 Johns. 29; 2 Selw. N. P. 63.

The case was submitted by the counsel.

THE COURT nem. con. was of opinion that this was an original undertaking, and that the consideration need not be in writing. Judgment for the plaintiff.

[1] [Reported by Hon. William Cranch, Chief Judge.]

FOWLER (MOORE v.). See Case No. 9,761.

FOWLER (RATHBONE v.). See Case No. 11,584.

Case No. 5,003.

FOWLER v. REDFIELD.

Circuit Court, S. D. New York. Oct. 23, 1862.

CUSTOMS DUTIES—PROSPECTIVE PROTESTS—INTEREST ON VERDICT.

1. The allowance of interest from the time of the rendering of the verdict till the judgment was proper, this court having adopted the practice of the state court.

2. The prospective protests were sufficiently explicit and direct to come within the act of congress, as has already been decided in the supreme court and in this.

[Cited in Hutton v. Schell, Case No. 6,961; Davies v. Miller, 130 U. S. 287, 9 Sup. Ct. 561.]

[See Choteau v. Redfield, Case No. 2,696; Wetter v. Schell, Id. 17,470.]

[Before NELSON, Circuit Justice.]

[NOTE. Nowhere reported; opinion not now accessible. The memorandum of the decision was secured from the record of the case.]

FOWLER (TUCKER v.). See Case No. 14,219.

FOWLER (VORE v.). See Case No. 17,003.

Case No. 5,004.

FOWLER v. WARFIELD.

[4 Cranch, C. C. 71.] [1]

Circuit Court, District of Columbia. May Term, 1830.

BILLS AND NOTES—MAILING NOTICE TO INDORSER—POST-OFFICE ADDRESS.

Notice to an indorser, if sent by mail, must be directed to the post-office of his place of residence.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Assumpsit by the indorsee against his immediate indorser of a draft by T. B. Pottinger on John E. Dorsey, at Baltimore, to the order of Thomas Mustin, indorsed by him to the defendant [Peregrine Warfield], and by the defendant to the plaintiff [Charles S. Fowler] for $300, at sixty days from September 13th, 1828. The defendant's residence was notoriously at Georgetown, D. C., where there was a post-office, distant three miles from the post-office in Washington, D. C. The notary who protested the draft at Baltimore, put into the post-office there, a notice directed to the defendant at Washington. The plaintiff proved by George Sweeny, who was then a clerk in the post-office at Washington, that it was customary, when a letter was directed to that office for a known resident in Georgetown, to forward it to the post-office there; but it was uncertain whether it would be so forwarded by the mail on the same day on which it arrived, as it might not be noticed by any one who knew that the residence of the person to whom it was directed was in Georgetown. That he knew that the defendant resided in Georgetown, but had no recollection of sending such a letter.

THE COURT (nem. con.), at the prayer of the defendant, instructed the jury, that this evidence of notice was not sufficient to charge the defendant in this action; upon the authority of the case of the Bank of U. S. v. Corcoran, 2 Pet. [27 U. S.] 121. Nonpros.

FOWLER (WARNER v.). See Case No. 17,182.

FOWLER (WASHINGTON v.). See Case No. 17,229.

FOWLER (WITHROW v.). See Case No. 17,919.

FOWLER (WYMAN v.). See Case No. 18,114.

Case No. 5,005.

FOWLKES v. FOWLKES.

[21 Int. Rev. Rec. 358; 8 Chi. Leg. News, 41.]

Circuit Court, W. D. Virginia. 1875.

REMOVAL OF CAUSES FOR PREJUDICE ON ACCOUNT OF COLOR—PREVIOUS CONDITION, ETC.

There is no law enabling a colored citizen when impeached by another citizen of the same state to remove his cause because of local influence or prejudice. This right is only given him when sued by a citizen of another state.

In equity.

Thomas S. Flournoy and Charles E. Dabney, for the removal.

James M. Whittle and E. E. Bouldin, contra.

RIVES, District Judge. Ex parte Peter Fowlkes and others, on a motion to remove from the circuit court of Pittsylvania, and docket in this court for trial, a cause pending in the former against the petitioners at the suit of the heirs of George Fowlkes, deceased. On the first day of this term the petitioners filed their application for removal, accompanied by a full copy of the record. It is admitted that their petition was was also duly filed in the state court. The motion now made to docket this cause brings before the court the question whether this removal is warranted by the act of congress, and whether this court can entertain jurisdiction in the cause. The petitioners allege that they are colored citizens of the United States, and of this state, to whom a certain George Fowlkes, deceased, late of Pittsylvania county, devised valuable lands and other property, by will duly recorded in the county court of Pittsylvania, at its December term, 1873; that afterwards the heirs at law of said George Fowlkes brought their bill in chancery against those petitioners and others to impeach the validity of said will in the circuit court of Pittsylvania; that an issue of devisavit vel non was directed and tried in said cause; a verdict found against the will; that verdict was set aside by the judges; a new trial awarded, and upon the trial the jury were hung and discharged from rendering a verdict; upon these facts the petitioners predicate their averment that "they are unable to enforce their rights in the judicial tribunals of the state on account of the prejudice that exists against them in the minds of the white population on account of their color, race and previous condition of sevitude." They further declare "their belief that if no difference existed between them and those claiming to be the heirs at law of the said Fowlkes, as to race, color and previous condition, that the juries in the state courts would have no difficulty in finding, under the facts and circumstances of the case, that the said paper writing was the true last will and testament of the late George Fowlkes." Is this application, then, in conformity with the 641st section of the Revised Statutes?

It is observable that the late comprehensive act for the removal of causes from the state courts, approved March 3, 1875 [18 Stat. 470], embraces cases only originally cognizable by the federal courts. The same is the case of removal on the ground of "prejudice and local influence." The exception to this applies to cases of public officers, civil and military, sued on account of acts in the discharge of their official duties; and to persons denied or prevented from enforcing in the courts of the state their equal civil rights of citizens of the United States, and to officers, civil and military, or other persons for their acts or refusals under authority of the civil rights act. This departure from the fundamental principle of limiting removals to cases cognizable in the federal courts, results from the duty of the government to its officers; and the obligation of congress to enforce by appropriate legislation the provi-

sions of the fourteenth amendment to the constitution. These exceptional statutes, therefore, are to be strictly construed, interpreted if practicable, in subordination to and conformity with the theory of our judicial systems, state and federal, and the provisions of the constitution.

There is no law enabling a colored citizen, when impeached by another citizen of the same state, to remove his cause because of prejudice or local influence. This right is only given him when sued by a citizen of another state. And then the affidavit is prescribed to him, namely: "That he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court." The interposition of the federal judiciary is wholly based upon this belief or apprehension; and why? Because the cause was originally cognizable in that judiciary, and its removal thereto would involve an enlargement of the jurisdiction. Had congress supposed that it had the power under the fourteenth amendment in a case between residents of the same state to give the colored citizen a right to remove his case on the ground of his belief that he could not obtain justice in the state court, why did it not use the language of the 639th section? Doubtless, the omission to use this language is due to the restricted and well guarded inhibitions of the fourteenth amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Now, when section 641 speaks of "the denial of or inability to enforce in the judicial tribunals of the state, or in the part of the state, etc., equal civil rights of citizenship, is such language to be satisfied by the declaration of a belief or apprehension that such may be the result of the prejudice of race? The latter is a state of the mind; matter of conjecture and not traversable; it may be mere suspicion. At any rate, it is vague, uncertain, and can produce no practical issue. Not so with the former: there it appears as a fact, certain and absolute and, if need be, issuable and capable of contradiction. The petition must state "the facts; of what?" manifestly of "the denial or inability to enforce;" not merely of a belief or suspicion of these facts. When we construe this language in subordination to the constitutional amendment, it seems to me it clearly points to the action of the state in one of its three capacities—legislative, executive or judicial. Ought not the petitioner in such case to designate some law, some judicial ruling, some executive act, as the denial of his equal and civil rights, or as constituting the obstacle to his obtaining them? Surely it would be a mockery to assume his "suspicions" or "belief" in place of "the facts" for which this enactment calls. So far as the record of this case shows, the petitioners are enjoying their rights under the will of George Fowlkes; it is true, they are sued in respect to them; and when they were about to lose them by the verdict of a jury, the judge interposed to shield them from the effects of prejudice, they deprecate, and now their complaint is that on a second trial the jury were hung, and the plaintiffs could not obtain the verdict they wished. They are still secure in their rights, but apprehend they may not remain so.

This enactment of congress was never designed to appease the fears or lull the suspicions of a suitor in a case wholly cognizable in the state courts; it is designed to secure him the equal protection of the laws, and his equal civil rights, when invaded by the state in any part of its administration—legislative, executive or judicial. Nevertheless, the petition does not disclose any such case; it complains of no law of the state, general or local; no judicial ruling; no executive interference; it was a fear and belief of the existence of a prejudice of race, that is obstructing or delaying a decision in favor of the petitioners. They do not allege the absence of a law for change of venue in such case. They do not complain that juries are selected contrary to the state law, to which this court is required to conform as far as practicable. The fact is, my rule is based on the state law; it uses its phraseology as to qualification, and ordains a selection by lot as nearly conformable as practicable to the state practice; the only difference is that I require a representation of the colored race in the jury box, while the state merely allows their eligibility. I can scarcely doubt that in a case like this where there is a fear of race prejudice, the state court would guard against it by an impartial composition of the jury, as is often practiced; and may, it seems to me, be rightfully demanded in this cause. If this court were to try this case they would have to do so under the laws and judicial decisions of the state, when not in conflict with the laws of the United States and judicial decisions of its courts; hence there is eminent propriety in limiting removals to cases of such conflicts pertaining to the guaranteed, equal rights of citizens.

For these reasons, I conclude that the case of the petitioners is not embraced by the terms nor the proper construction of the section of the law, under which they prefer their application; that they allege "no denial of their civil rights nor inability to enforce them in the state court" arising from any act of the state government, either legislative, executive or judicial; and hence that this court cannot assume jurisdiction of their case by removing and entertaining it here.

THE COURT, therefore, refuses to docket the case, and directs it to be remitted to the circuit court of Pittsylvania.

Case No. 5,006.

In re FOX.

[Cited in Re Jacobs, Case No. 7,159. Nowhere reported; opinion not now accessible.]

Case No. 5,007.

In re FOX et al.

[8 Chi. Leg. News, 313.]

Circuit Court, N. D. Illinois. June 19, 1876.[1]

BANKRUPTCY — SALE OF PERSONAL PROPERTY — POWER OF COURT TO SET ASIDE — RIGHTS OF PURCHASERS—NOTICE — SUPERVISORY JURISDICTION — RIGHT TO GRANT A SUPERSEDEAS — REPLEVIN IN STATE COURT.

[An order made by the circuit court, in the exercise of its supervisory jurisdiction over the proceedings of the district court in bankruptcy, may be reviewed on appeal by the supreme court.]

[See note at end of case.]

In bankruptcy. At chambers. On motion for a supersedeas from the decision of Judge Drummond, of the United States circuit court, to the supreme court, in the matter of the possession of the dredging machinery and property of the bankrupt firm of Fox & Howard. Judge Blodgett confirmed, some months ago, the sale of this property for $40,500, to Conro & Carkin, and subsequently Judge Drummond reversed the action of Judge Blodgett, and decreed the right of possession to Crane & Hodgkins, the original bidders, directing that the former account to the latter for the profits arising therefrom during the time they have used it. An application was thereupon made for an appeal to the supreme court, which was refused by Judge Drummond, who intimated, however, that if they thought an appeal would lie from his decree, where it was made under the supervisory jurisdiction given the circuit court by the bankrupt law [of 1867 (14 Stat. 517)], they could present the matter before Justice Davis. Therefore, when Justice Davis was in Chicago on the 3d inst., the matter was fully presented to him and he took it under advisement. Prior to this, however, the property was taken, on a writ of replevin issued by the supreme court of Cook county, from the possession of Conro & Carkin, on giving bonds in $80,000. This was done after the decision of Judge Drummond.

DAVIS, Circuit Justice, said this case presented no difficulty for him when it was first heard, but he had since then turned the matter over in his mind a good deal, and the first impressions he had about it had been confirmed. The only point that was argued and that he had considered at all, was whether there was such a question growing out of the exercise by the district court of its summary jurisdiction, as ought to be reviewed by the supreme court. He had come to the conclusion when he had heard the case, and reflection had convinced him that he was right, that the case ought to go to the supreme court for its opinion. He did not want to express any opinion as to whether the district court had jurisdiction in this case or not. It all turned on this point in his opinion. Nor had he read the evidence with a view to ascertaining anything in relation to the merits of the transaction. A good deal could be said on both sides of that question. It was one of great importance, and he knew of no decision in this country, either by the district court or by the United States circuit court, that exactly met it. In his own opinion there were grave doubts whether the district court had summary jurisdiction of this matter; and, although, as he had stated before, he had no fixed opinion upon that question, yet he thought it was right to the party, under the rules applicable to all courts granting a writ of supersedeas, to be allowed to take the case to the supreme court. He did not wish to go on and give his opinion at all. Although he had a strong opinion as the case exists now, he did not wish to give any at all upon the question, reserving himself free, when the case shall be argued in the supreme court, in order to pass upon it. It was very certain that the question was one that ought to be passed upon by the supreme court. If the supreme court was of opinion that the district court had summary jurisdiction in this matter, the case, of course, would be dismissed. If, in the judgment of the supreme court, the district court had not the summary jurisdiction which was invoked, then the case might be retained there, and could be disposed of at that time. Had there not been so much feeling on this subject he would have had no doubt that this was a proper case to take to the supreme court. He did not believe it was the intention of congress to give the district court exclusive jurisdiction in anything. It was neither his duty nor pleasure to pass upon any questions passed upon by the circuit or district courts except what had been brought up here to be determined now. If there was any question about this case at all, with reference to the court granting a supersedeas, there was no question that when Mr. Cooper, on behalf of Crane & Hodgkins, made an application for a writ of replevin, he was guilty of a gross contempt of court. The question as to whether these parties have been in contempt or not was for the district and circuit courts to determine.

Thereupon Justice Davis directed the clerk, Bradley, to draw up the supersedeas, in order that he could sign it. Considerable side discussion ensued between Mr. Cooper, Mr. Ayers, and Justice Davis regarding the matter. Justice Davis said that inasmuch as the property had been replevied from Conro & Carkin, contracts made, and the season pretty well advanced, he was of the opinion that it would be about the proper thing

[1] [Reversed in 94 U. S. 441.]

to place the property in the hands of a receiver until the matter could finally be disposed of. The great difficulty, he said, existed in the bad feeling between the respective parties; it was entirely wrong to go into the state court for the purpose of obtaining the property in question when it was in the bankruptcy court of the United States. That, however, was a matter, he said, between Judges Drummond and Blodgett. He thought there was not a spirit of compromise manifested by either side.

[NOTE. The appeal of Conro & Carkin was dismissed by the supreme court, Mr. Chief Justice Waite delivering the opinion, on the ground that appeals do not lie to the supreme court from decisions of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law. In this case the rights of the parties grew out of a sale made by the authority of the court under section 5065, Rev. St. The bids were received by the provisional assignee; but the court determined which should be accepted, and gave directions as to the transfer of title. Clearly, then, remarked the learned justice, "what was done as to the first and second sale was in the course of the bankruptcy proceeding, and part of that suit. As such, it was subject to revision in the circuit court under its supervisory jurisdiction." Conro v. Crane, 94 U. S. 441.

[In May, 1877, the district court ordered that Conro & Carkin have leave to withdraw the $40,500 paid for the machinery on giving proper security. The money was paid to them, whereupon Crane & Hodgkins filed a bill in the circuit court against Conro & Carkin and the assignee, charging fraud and conspiracy, etc. The circuit court rendered a decree for complainant, and Conro et al. appealed to the supreme court. The decree of the circuit court was there reversed, and the cause remanded, with directions to the circuit court to dismiss the bill. Conro v. Crane, 110 U. S. 403, 4 Sup. Ct. 102.]

FOX (AVERY v.). See Case No. 674.

Case No. 5,008.

FOX v. BLOSSOM.

[17 Blatchf. 352.] [1]

Circuit Court, D. Connecticut. Dec. 18, 1879.

MORTGAGES — LIMITATIONS — ACTION BARRED IN FAVOR OF HOLDER OF JUNIOR MORTGAGE.

1. By the law of Connecticut, the right of a mortgagee of land to foreclose the mortgage or to sue to recover possession of the land, is barred, if the mortgagor has been permitted to remain in possession of the land for 15 years at least, without paying any part of the debt or recognizing the mortgage.

2. A second mortgagee of the same land, out of possession, can bring a suit in equity against the first mortgagee, out of possession, and the mortgagor in possession, to have the first mortgage cancelled, on the ground of the bar of such statute.

In equity.

Thomas E. Graves, for plaintiff.

Edward Goodman and John J. Hill, for defendant.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

SHIPMAN, District Judge. This is a bill in equity, by a mortgagee out of possession, against a prior mortgagee and the mortgagor in possession, praying that the prior mortgage may be decreed to be cancelled, upon the ground that, more than fifteen years prior to the date of the bill, the mortgagor paid the notes secured by said mortgage, and that, for more than fifteen years, the mortgagee has had no equitable interest in the land conveyed by said deed, and that, during all said term, the mortgagor has been in full and exclusive possession of said land, adversely to said prior mortgagee, and paying no interest upon said mortgage notes. The bill was served October 30th, 1877. Said prior mortgagee has brought a cross-bill, praying for a foreclosure of his mortgage.

On or about June 6th, 1854, Orange D. Day executed and delivered to Frederick A. Blossom a mortgage of that date upon land in Killingly, in this state, correctly described in said bill, to secure five promissory notes of $1,000 each, payable respectively in four, six, twelve, eighteen and twenty-four months from said date, with interest payable semi-annually. Said mortgage was duly recorded on July 14th, 1854, in the town records of Killingly. No interest or principal has been paid upon said notes. In June, 1855, Day acknowledged an indebtedness to Blossom upon said notes. There was testimony contradicted by Day, that, in 1858, he also acknowledged an indebtedness to Blossom, but, since 1855, Day has never admitted or acknowledged an existing liability to Blossom, and has never done any act recognizing the continued existence of the mortgage, or by which an acknowledgment of an existing liability could be inferred. In December, 1868, Blossom brought against Day a petition for the foreclosure of said mortgage, returnable before the supreme court for Windham county, alleging the execution of the mortgage, and the delivery and non-payment of the notes. To this petition Day filed an answer, admitting the execution and delivery of said notes and mortgage on June 6th, 1854, and that before that date he owed Blossom $4,000, but averring that said notes were executed in pursuance of an usurious agreement in regard to the forbearance of said debt, and that said notes and mortgage were void, and denying all other allegations of said petition. The petition was withdrawn during the August term, 1870. Blossom was then in Europe, where he had been detained by sickness. Ever since 1854, Day has been in the exclusive, uninterrupted use and occupation of said land, and, since 1858, at least, has occupied said land adversely to any rights of Blossom, and has held the same not recognizing any title, equitable or otherwise, existing in said Blossom. The mortgage deed to Blossom excepts from the covenant against incumbrances "a life lease to my" (the mortgagor's) "mother." There

never was a lease to his mother, but he had executed a mortgage to William S. Day, upon condition that the mortgagor should provide or pay for his mother's (Amy Day's) support during her life. The consideration of said Blossom notes was a good considera tion, and they were not usurious. Prior to June 6th, 1854, said Blossom, Day, and one E. G. Reynolds were partners in the city of New York, under the name of O. D. Day, but the remaining allegations of the answer to the cross-bill of Blossom, in regard to the purpose for which the notes were given, and the cancellation or payment thereof by set-off or otherwise, are not affirmatively found to be true. The testimony is contradictory and untrustworthy.

Said Day, on August 27th, 1877, was justly indebted to John O. Fox, the plaintiff, in the sum of $3,000, which indebtedness was evidenced by his promissory note, dated August 11th, 1877, payable to said Fox three years from said date, with interest semi-annually, and, to secure the payment of said note, mortgaged, on said August 27th, 1877, the lands described in the bill and the same lands mortgaged to Blossom. Said mortgage was duly recorded. Fox did not examine the records, but was informed by Day and believed, that the property was free from incumbrances, except the mortgage to William S. Day for the support of Amy Day. Nothing has been paid upon said note, either as interest or principal. Day is insolvent and there is no probability that he ever will pay the note.

By the law of Connecticut, the mortgagee's right of foreclosure, in a suit at law for the recovery of possession, is barred, if the mortgagor has been "permitted to remain in possession of the premises for a period of fifteen years, at least, without payment during that time of any portion of the debt, or the performance of any act recognizing the continued existence of the mortgage." But, an acknowledgment of the existence of the debt by the mortgagor during his ownership, and within fifteen years from the time of bringing the bill for foreclosure, is sufficient to remove the bar, for, such recognition of the debt, as a subsisting debt, is a recognition of the mortgage as a security, and prevents "the time that had elapsed from being counted or considered as any part of the fifteen years' uninterrupted possession, necessary in order to bar the mortgagee's right to bring ejectment or to foreclose the mortgage." Hough v. Bailey, 32 Conn. 288; Jarvis v. Woodruff, 22 Conn. 548; Haskell v. Bailey, Id. 569; Hughes v. Edwards, 9 Wheat. [22 U. S.] 489.

It is useless to say that Day's answer in the superior court foreclosure suit was an acknowledgment of the debt, for he expressly denied that it was an existing debt, and denied non-payment of the notes, and averred that the mortgage and notes were void.

The defendant Blossom insists, as matter of law, that the plaintiff has no right to a decree, because he is out of possession, and is a mortgagee whose debt may be paid at maturity. When the mortgagee ascertains that there is an apparent but fictitious in cumbrance upon the mortgaged land, and that the safety of his mortgage is important to the safety of his debt, he has the same right to have his lien protected by a court of equity and relieved from prior nominal incumbrances which have been paid or otherwise satisfied or extinguished, which the owner has to have his title relieved from a cloud. The suit is not prematurely brought because the principal of the debt is not due. Lounsbury v. Purdy, 18 N. Y. 515. The principle upon which courts of equity act in the cancellation of invalid deeds or other invalid instruments does not depend upon the particular interest or title which is to be protected. It is sufficient if the plaintiff has some interest in or title to the land which is clouded with an invalid lien, and that his interest or title is endangered thereby. Hartford v. Chipman, 21 Conn. 488; Ward v. Chamberlain, 2 Black [67 U. S.] 430. The principle is familiar and is as clearly stated as anywhere in Martin v. Graves, 5 Allen, 601. "Whenever a deed or other instrument exists, which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties may require."

The fact that the plaintiff is out of possession does not deprive him of the right to the benefit of a bill quia timet. Martin v. Graves, 5 Allen, 601; Hartford v. Chipman, 21 Conn. 488; Lounsbury v. Purdy, 18 N. Y. 515. There are, probably, instances where a claimant out of possession should not obtain the aid of a court of equity, by a bill quia timet, to establish his right to a legal title and to the possession, against a defendant in possession with an apparently valid legal title; but, the case of a mortgagee who claims that another mortgage of record is functus officio, and has been extinguished, both parties being out of possession, is not of such a character.

Let there be a decree that the mortgage to Blossom constitutes no lien upon the lands named therein, and that said lands are freed from said nominal incumbrance, and that the cross-bill is dismissed.

FOX (BOUCICAULT v.). See Case No. 1,691.

FOX (CHILLICOTHE BRANCH OF THE STATE BANK OF OHIO v.). See Case No. 2,683.

FOX (DE VARAIGNE v.). See Case No. 3,836.

Case No. 5,009.

FOX v. ECKSTEIN.

[4 N. B. R. 373 (Quarto, 123).] [1]

District Court, D. Maryland. 1871.

BANKRUPTCY — CONCEALMENT — BONA FIDE CONVERSION OF ASSETS—CUSTODY OF PROCEEDS—INVESTMENT.

1. There is no concealment where a debtor makes a bona fide conversion of his property, and shows good faith in respect to the care of the money received therefrom.

2. A debtor will not be adjudicated a bankrupt simply because, after selling his property for the purpose of going into a new business enterprise, he does not put the proceeds into a tangible shape to prevent the same being seized on process issued out of a state court. Petition dismissed.

The allegation was that defendant, on January 4, had concealed a portion of his property, viz.: the sum of two thousand dollars, with intent to prevent its being taken on legal process, which he knew was about to issue at the suit of one or more of his creditors. The defendant excepted to this allegation on the ground that it was too general; that it did not state that any legal process was in existence, that there was no legal process which could reach money in possession, and that the act did not embrace the concealment of property which it was impossible to reach by any legal process. Objections overruled.

It appeared in evidence that the petitioner, defendant, and seven others, had given their joint and several promissory notes in the sums of two thousand five hundred dollars, and one thousand five hundred dollars, for moneys borrowed in behalf of the Scheutzen Association; that the association had made a real estate mortgage to Fox and others to secure them in this sum of four thousand dollars; that after maturity, Fox had paid the one thousand five hundred dollars in cash, and given his individual note (not yet due), with collaterals, in payment of the two thousand five hundred dollar note, and his demand against the defendant was for contribution of one-ninth part of the four thousand dollars. The defendant objected, that petitioner had not a provable claim of sufficient amount, because: First, he did not offer to surrender the security which enured to his benefit on payment of the notes, nor show that there was an overplus of two hundred and fifty dollars; second, the petitioner not having paid the two thousand five hundred dollar note in cash, but having only given for it another obligation, he could not demand from defendant his proportion of that amount; that a co-obligor has no right of contribution against his co-promisor, or co-security, unless he has actually paid the money, and therefore the petitioner's claim was not large enough to support an adjudication.

[1] [Reprinted by permission.]

Marshall & Fisher and Ross & Urner, for petitioner.

John & Albert Ritchie, for defendant.

THE COURT (GILES, District Judge), held that the security being upon the property of a third party, and not upon the debtor's, the case was not within the act; and that the petitioner having satisfied the holder of the note, it was immaterial how he had done so, and he had a demand for contribution, whether he had, in point of fact, paid it or not.

Touching the allegation, the evidence was, that seven months before the defendant had sold his real estate for two thousand dollars to his son, who gave his note, which was paid at ninety days; that the notes in question, and one other of the same character, were outstanding at the time, and had been for two or three years, and that defendant's other property was about seven hundred dollars; that defendant had sold his said real estate for the purpose of investing the proceeds in a proper business enterprise in which he expected to enter; that on payment of the two thousand dollars he handed it over to his wife, and that she had been in the habit of taking care of any large sums of money defendant had for twenty-five years; that she kept it about the house for several months, and had it on the said 4th January; that when the enterprise referred to was abandoned, defendant looked about for another investment, bought two lots in the county, built the foundations, and was in negotiation with a carpenter for the erection of several small houses when these proceedings commenced; that in December judgment had been had against defendant, and five other co-promisors by another party, on the third note referred to (of four thousand dollars); that defendant claimed to have a right of action against the petitioner for damages amounting to about his proportion of the two notes taken up by said petitioner; that on January 4th petitioner's attorney called on defendant and told him that petitioner had paid these two notes, and he had called to collect his proportion; that defendant replied that he (petitioner) was the one who ought to pay them, and that when petitioner settled his claim for damages referred to, he (defendant) was ready to pay him the difference; that the attorney then asked him what he had done with the two thousand dollars; to which defendant replied that he had it and intended to keep it.

THE COURT held that there was no concealment shown; that the conversion of his property had been shown to be bona fide; that no act had been shown further than to preserve custody of the proceeds; that the proceeds he had a right to preserve in money or not, as he pleased; that the evidence showed good faith on the part of defendant in respect to the care of the money; and that the proposition of the petitioner was

substantially that the defendant ought to be adjudicated bankrupt, simply because he had not put his two thousand dollars again into tangible property that could be seized on a fieri facias. Petition dismissed.

FOX (FARMERS' BANK v.). See Case No. 4,658.

FOX (HALL v.). See Case No. 5,932.

Case No. 5,010.

FOX v. HEMPFIELD R. CO.

[3 Wall. Jr. 243;[1] 14 Leg. Int. 148; 1 Pittsb. Rep. 372; 5 Pittsb. Leg. J. 37.]

Circuit Court, W. D. Pennsylvania. May Term, 1857.

EFFECT OF AGREEMENT TO SUBMIT TO PRIVATE AWARD.

If parties, in making a contract under which disputes are contemplated as possible, agree under seal to submit any such disputes to private arbitration, as e. g., to the award of some third person, so that his decision shall be final and conclusive on them both, it is a bar to any action on the contract that the plaintiff does not either aver and prove such award, nor aver and prove such facts as excuse it.

[Cited in Hudson v. McCartney, 33 Wis. 346.]

The plaintiff—a contractor on the Hempfield Railroad—declared in an action of covenant, on an article of agreement made by him with that railroad company, the present defendant, for the construction of a section of the road. He averred that he commenced the work according to contract and continued to prosecute the same, and was ready and willing to have completed it, but was hindered and prevented by the defendant from prosecuting and completing the work, and was thereby deprived of his reasonable gains and profits that would have accrued to him, to the amount of $50,000. He averred also that the defendants have not paid him for work which he did, the sum of $25,000.

The defendants craved oyer of the article of agreement, which on being read showed the following clause in them: "And it is mutually agreed and distinctly understood that the decision of the chief engineer for the time being, shall be final and conclusive in any dispute which may arise between the parties of this agreement relative to or touching the same; and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of said covenant; so that the decision of the engineer shall, in the nature of an award, be final and conclusive on the right and claims of the said parties; and the said engineer being a stockholder of this company shall be no objection to his exercising the trusts and power herein granted to him."

The plea averred that the supposed breaches of covenant, wrongs and injuries of which the plaintiff complained, had not been submitted to the decision of the engineer, and that the defendants have always been and still are ready and willing to submit all controversies and disputes between them and the plaintiff relative to and touching said agreement, to the final and conclusive decision of said engineer.

A demurrer to this plea raised the question, which was now before the court for decision, st., Can the plaintiff sustain this action without averring and proving an award by the engineer on the matters in dispute, between the parties, or excusing the want of it by averment and proof that it was out of his power to obtain such an award?

Mr. Shaler, for plaintiff.
Mr. Hamilton, for defendant.

GRIER, Circuit Justice. The meaning of this clause cannot be doubted, notwithstanding its rather awkward expression. The parties agree that in case any matter arise between them concerning any matter connected with their agreement, instead of resorting to the legal tribunals for their settlement, they will submit the same to the decision of the engineer, whose award shall be final and conclusive.

If the plaintiff had averred that the matters in dispute had been submitted to the arbitrator, and that he had awarded the sum of $50,000 as damages, there is no doubt he could support an action on the award, if the defendant had refused to perform it. Such contracts to submit anticipated disputes on any subjects to an arbitrator whose award should be conclusive, have sometimes been held void, for the reason (if reason it can be called) that it was an attempt to oust the supreme courts of their jurisdiction. In Scott v. Arery, 8 Exch. 487, the court of exchequer ruled a plea like the present, bad, for this reason. The exchequer chamber reversing this judgment held, that although an agreement which ousts superior courts of their jurisdiction is illegal and void, yet as the contract did not deprive the party of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained by the arbitrator, it bound the parties. This latter judgment has now been affirmed by the house of lords on the advice of four to three learned judges, and sanctioned by the recommendation of the lord chancellor, and Lords Campbell and Brougham.

The result appears to be: First, that a condition in a contract that the sum recoverable on a breach shall be ascertained by arbitrators before the parties shall sue, either at law or at equity, is not such an agreement as will be treated as invalid, or

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

as an attempt to oust the courts of their jurisdiction; and, secondly, that it is even doubtful whether there is any sufficient foundation, either in policy or principle, for the ancient and hitherto undoubted doctrine that parties cannot bind themselves by contract not to resort to the courts of law or equity. Lord Campbell stated thus emphatically his view of the main question in dispute:—"There is an express undertaking that no action shall be brought until the arbitrators have decided. There is abundant consideration for that in the mutual contract into which the parties have entered. Therefore, unless there be some illegality in the contract, the courts are bound to give it effect. There is no statute against such a contract. Then on what ground is it to be declared illegal? It is contended that it is contrary to public policy. That is rather a dangerous ground to go upon. What pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract." And his lordship subsequently traced with much disapprobation the origin of the opposite principle, which he attributed to the endless competition of the courts, and their desire to absorb litigation into their respective jurisdictions.

This obsolete dogma does not appear to have been received with approbation in Pennsylvania. In the case of Monongahela Nav. Co. v. Fenton, 4 Watts & S. 205, it was decided that "if the parties to an executory contract make a provision in it that any dispute, which shall arise between them on the subject of the contract, shall be determined by an individual named, whose decision shall be final, no action will lie for a breach of the agreement by one against the other, but they must resort to the tribunal appointed by themselves, from whose award there is no appeal." That case governs the present, as to every dispute arising "relative to or touching the agreement" declared on.

Such a clause in contracts like those constantly made by corporations for great public improvements, is absolutely necessary to prevent the corporations from being ruined by endless litigation. It should be liberally construed and not subjected to ingenious criticism in order to support the jurisdiction of courts . law and encourage litigation.

The defendant is entitled to judgment on the demurrer. [See same case [Case No. 5,011]; Snodgrass v. Gavit, 4 Casey [28 Pa. St.] 221; Wightman v. Pettis, 5 Casey [29 Pa. St.] 283; McCahan v. Remey, 9 Casey [33 Pa. St.] 535; Henderson v. Walker, 2 Grant. 36; McAdams' Ex'rs v. Stilwell, 1 Harris [13 Pa. St.] 90.] [2]

Case No. 5,011.

FOX v. HEMPFIELD R. CO.

[2 Abb. U. S. 151; [1] 13 Int. Rev. Rec. 23; 8 Phila. 639; 28 Leg. Int. 4; 3 Pittsb. Rep. 289; 18 Pittsb. Leg. J. 148.]

Circuit Court, W. D. Pennsylvania. Dec. 27, 1870.

CORPORATIONS—EXECUTION AND LEVY—JURISDICTION.

1. The act of 1870 does not repeal any of the preliminaries before levy and sale, required by section 75 of the act of 1836, in proceeding against a corporation, but is "in addition" thereto. The preliminaries required by the former act are still essential to the validity of a levy.

2. Where the supreme court of a state has, by its decree and authorized officers, taken judicial control of the property and franchises of a corporation, and ordered their sale, they cannot be taken in execution by process from any other jurisdiction.

[Cited in Adler v. Roth, 5 Fed. 899; Central Nat. Bank v. Hazard, 49 Fed. 295.]

Motion to set aside execution and levy against the defendant.

Burgwin & Shiras, for the motion.

Kirker & Schoyer, opposed.

McCANDLESS, District Judge. On November 23, 1860, the plaintiff obtained in this court two several judgments against the Hempfield Railroad Company, amounting now, in the aggregate, to a sum exceeding seventy thousand dollars.

These judgments were subsequently revived, and a fi. fa. issued, by virtue of which the marshal, on October 12, made a levy upon the road, its rolling stock and franchises, and all its property, real and personal.

The road was chartered by Pennsylvania, to run from Greensburg, in Westmoreland county, to a point on the western boundary of the state, and Virginia granted a similar charter, so as to make a continuous road from Greensburg to Wheeling. The road has only been completed and operated from Wheeling, in the state of Virginia, to Washington, in the state of Pennsylvania.

A motion is now made to set aside the execution and the levy for several reasons assigned, to two of which it is alone necessary to refer.

It is contended, and the point is well taken, that this levy under the act of 1870 [Laws Pa. 58], has been prematurely and illegally made. This supplementary act, which I hesitated to adopt as part of the process of this court, because of the sharpness of its practice, is amendatory of section

[2] [From 1 Pittsb. Rep. 372.]

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

72 of the act of 1836 [Laws Pa. 774]. It provides that in addition to the provisions of the seventy-second section, and in lieu of the proceeding by sequestration, the plaintiff may have execution by fi. fa., commanding the officer to levy the sum due of any personal, real, or mixed property, franchises, and rights of the corporation, and proceed to sell the same. It does not repeal any of the preliminaries, before levy and sale, required by section 72 in proceeding against a corporation, but it is "in addition" thereto. What is necessary to be done before you arrive at the point of sequestration, for which this process is designated to be a substitute? Section 72 provides that executions against corporations shall be executed in the following manner: The officer shall go to the principal office of the corporation during the usual office hours, and demand of the president, or other officer having charge of such office, the amount of such execution, with legal costs. If no person can be found on whom demand can be made, or if the amount be not forthwith paid after demand be made, the officer shall seize the personal property of the corporation sufficient to satisfy the debt. If no sufficient personal property be found, the officer shall levy upon the real estate of the corporation and proceed as in other cases for the sale of land. When the execution issued is returned unsatisfied, in whole or in part, then begin the proceedings by sequestration, which the supplementary act of 1850 was designed to supplant. This course of proceeding divests the statute of many sharp features which render it obnoxious to criticism, and affords the corporation ample notice of its peril, before its property and valuable franchises can be seized and sold. For it will be remembered that this levy and sale is in addition to the provisions of section 72, and was intended to relieve the creditor and the courts of the cumbrous machinery of sequestration, which was found inadequate to meet the exigency of the case. As none of these essential preliminaries have been complied with, this levy must be set aside.

Here we arrive at a consideration of graver consequence, which goes to the merits of the question submitted. Shall we, by the process of the courts of the United States, interfere with a court of competent jurisdiction, which has already assumed the control and custody of the whole property of the corporation? Conflicts of jurisdiction are to be avoided as well from necessity as from comity.

On the 27th of June, 1855, the Hempfield Railroad Company executed a mortgage to certain trustees, which, with its supplements, was given to secure the payment of the bonds of the company to the amount of one million dollars. Interest in a sum exceeding three hundred thousand dollars having accrued upon these bonds, the bondholders filed their bill in the supreme court of Pennsylvania, praying for a foreclosure and sale of the mortgaged premises, and a distribution of the proceeds among the creditors of the corporation. After some delay and much litigation, in which the validity of the mortgage was called in question, that high court, on the 10th day of April, 1869, inter alia, decreed a sale of all the property and franchises of the company upon the 1st of March next, upon the failure to pay, on the 30th of the present month, the coupons ascertained to be due.

It was urged with much force at the argument, that the plaintiff decedent in this case being a contractor who had expended his time and labor in the construction of the road, by virtue of the act of 1843, the mortgage must be postponed, and as to him was utterly null and void.

Whatever may be the merits of his claim as to priority under the statute, the validity of this mortgage cannot be controverted in a collateral proceeding here or elsewhere. The judgment of the supreme court as to its binding force, whether this question as to the act of 1843 was raised or not, is conclusive upon this and all other courts. The plaintiff is at liberty to contest his priority yet, in that forum, upon the question of distribution. The fact that his claim has passed into judgment in a court of the United States, does not deprive him of the rights of a creditor in the tribunals of the state.

The supreme court of Pennsylvania having, by its decree and authorized officers, taken judicial control of the property and franchises of this corporation, and ordered their sale, they cannot be taken in execution by process from any other jurisdiction. Mr. Justice McLean, in [Hagan v. Lucas] 10 Pet. [33 U. S.] 401, says, the first levy, whether it was made under the federal or state authority, withdraws the property from the reach of the process of the other. A most injurious conflict of jurisdiction would be likely often to arise between the federal and state courts, if the final process of the one could be levied on property which had been taken by the process of the other. Property once levied on remains in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under a different jurisdiction. Similar doctrine is held in [Williams v. Benedict] 8 How. [49 U. S.] 107; [Wiswall v. Sampson] 14 How. [55 U. S.] 52, 374; and in [Marks v. Dickson] 20 How. [61 U. S.] 503. Judge Agnew, also, in Robinson v. Atlantic & G. W. Ry. Co. [66 Pa. St. 160], adheres to the same rule. And as it will be borne in mind that a part of the property levied on in the present case is in the state of Virginia, and beyond our territorial jurisdiction, we may adopt his language, that "if the property may be taken piecemeal, the remedy of the creditors under the mortgage

would become worthless, or at least greatly imperiled."

The fi. fa. having regularly issued to collect the fruits of the judgment, although wanting in the preliminaries to the levy for its proper execution, it may be said there is no good reason why the court should recall it. But, as pending the decree of the supreme court, the plaintiff can take nothing, except litigation, by his writ, it is set aside.

Rule absolute, and the levy and execution set aside.

[NOTE. See Fox v. Hempfield R. Co., Case No. 5,010, and Fox v. Seal, 22 Wall. (89 U. S.) 424, for further litigation relating to the same matters.]

FOX (HOLMEAD v.). See Case No. 6,628.

Case No. 5,012.

FOX et al. v. HOLT et al.

[4 Ben. 278;[1] 36 Conn. 558.]

District Court, D. Connecticut. July 27, 1870.

POWERS OF MASTER — DISCHARGE — SAILING ON SHARES — LIABILITY OF OWNERS FOR HIS CONTRACTS—FREIGHT — DELIVERY OF CARGO — SUPPLIES—MORTGAGE—BILL OF LADING.

1. Where a corporation, owning fifteen sixteenths of a vessel, voted to discharge the master of her "unless he pays $200, on what he now owes this company," but the master still remained in actual possession of the vessel, which was then absent from her home port, and on her return he was actually displaced: *Held*, that, till such actual displacement, he must be deemed to have been master of the vessel.

2. Where the vessel had been employed in carrying stone from Connecticut to port out of that state, and had been accustomed to take return cargoes, for which the master had been accustomed to execute contracts of affreightment, and this practice was known to the owners: *Held*, that the vessel was a general freighting vessel as to these return cargoes, and, as to them, the master must be deemed clothed with the ordinary powers of masters of general freighting vessels.

3. Where a master described himself as such in the body of a bill of lading and signed it with his own name: *Held*, that the fact, that he did not add the word "master," after his signature, was of no importance.

4. Where the master of a vessel, who was also part owner, was sailing her on shares, in an employment as above stated, and took a cargo of stone to New York, and went up the Hudson river for a cargo, and the vessel was there frozen in, and the master, leaving her with the mate as ship-keeper, returned to his home at Deep River, Conn., and, while there, agreed with residents of Deep River, to bring a load of coal for them, from Rondout to Deep River; and in the spring he received the coal on board, signed a bill of lading for it and sailed for Deep River, and, on his arrival there, was displaced from the command of the vessel, and another master put in charge, who offered to deliver the coal to the consignees, if they would pay the freight, and they refused to pay the freight, but offered to give security to pay it "if they were liable," and thereafter all the coal was delivered to the consignees except thirty-seven tons, which was retained on board, and with which the vessel sailed to Portland, and landed it there, giving notice to the consignees, that it was at their disposal whenever the freight should be paid; and the consignees filed a libel against the owners of the vessel, for their refusal to deliver it; and it appeared that, when the vessel arrived at Deep River, the master was indebted to the consignees for supplies, some of which had been furnished to the vessel, some to the master's family, and some to the family of the mate, on the master's order: *Held*, that the master could bind the owners, by taking the coal on board, and signing the bill of lading.

5. The owners of the schooner generally were not liable to the libellants for any of the indebtedness of the master to them, except for that portion which was for implements for necessary and permanent use on board the vessel.

[Cited in Schultz v. Bosman, Case No. 12,488.]

6. The owners were justified in detaining part of the cargo till the freight was paid; but they should have seen to it, that they retained no more than was necessary.

7. As the value of the thirty-seven tons, retained, exceeded the amount of the freight, the respondents were liable to the consignees for the excess, together with the amount for which they were indebted to the libellants for supplies furnished to the vessel, directly.

8. As the master had agreed to deliver this coal to the libellants, at a stipulated freight of $2 a ton, in discharge of the debt due from him to them, part of which they could not have recovered in a suit in admiralty against him, as it did not rest on a maritime contract, and he had received the cargo under that contract, he became bound to its performance, and was personally liable for its failure, and a decree must be rendered against him, for the amount of the debt.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 137; McKay v. Ennis, 37 Fed. 231.]

9. It is the duty of a shipmaster, where a consignee refuses to pay the freight, to land the goods and store them with some competent third party, subject to the consignee's order on payment of the freight. If there is no such competent party at the port of discharge, the master should probably land the goods at the nearest port, where such competent party can be found. But he must act prudently and in good faith, in view of all the circumstances.

[Cited in The Scandinavia, 49 Fed. 662.]

[In admiralty. Suit by Henry Fox and John S. Lane against Hubert B. Holt and the Middlesex Quarry Company.]

D. Chadwick and A. P. Hyde, for libellants.

S. L. Warner, for respondents.

SHIPMAN, District Judge. This was a libel in personam against the respondent Holt, as master, and both the respondents, as owners of the schooner Daniel Russell, a domestic vessel, belonging to Portland, in the state of Connecticut, within the collection district of Middletown, and registered at the latter port. The suit is to recover damages for the breach of a contract of affreightment, in the failure to deliver a part of a cargo of coal shipped at Rondout, in the state of New York, and to be delivered at Deep River, in the state of Connecticut. The amount in controversy is not

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

large, but the principles involved are of interest to persons owning, navigating, and dealing with domestic vessels employed in the coasting trade. As the facts in the case are peculiar, a somewhat extended statement of them may be useful.

The Daniel Russell is one of a number of vessels owned in great part by the Middlesex Quarry Company, a corporation located at Portland, and engaged in quarrying stone, and delivering the same at various ports beyond the limits of this state. The quarry company own fifteen-sixteenths of this schooner, and, on the 10th of March, 1865, Holt became the owner of one-sixteenth, by bill of sale from one White. On the same day a new enrollment was taken out of the collector's office at Middletown, in which Holt is described as master. He took charge of her as such, and the answer admits that he continued as master down to about the 30th of January, 1868. The bill of lading of the cargo was signed by him on the 31st of March, 1868. The quarry company deny that he was master at the latter date, and also that he signed the bill of lading as master. On the facts before the court, he must be deemed master on the day the bill of lading was signed. He had been master for several years preceding this contract. "Being once master, he must be deemed still to hold that character, until some overt act or declaration of the owners displaced him from that station." The Tribune [Case No. 14,171]. He is described in the enrollment as master. "The enrollment is evidence of what it declares at the time it was made, and it may be presumed that the same facts exist until a change is shown." Jordan v. Young, 37 Me. 276, 280. Of course, neither the fact that a person was master at a particular time, nor that he is so described in the enrollment, or any other of the ship's papers, is conclusive evidence that he was so at any subsequent date, however little remote. If he was afterwards displaced, the fact can be shown. In order to effectually displace him, so that he can no longer bind the vessel or owners, it is not necessary that his formal discharge should come to the actual knowledge of others. If he is legally deprived of his command, and disconnected from the ship, that determines his authority. If he is legally discharged, but in fact continues in command, he is a mere usurper, and all persons having knowledge of his discharge are bound by it, and can make no contract with him binding on the ship or owners. But there is no evidence, in this case, that Holt was discharged from the command of the Daniel Russell prior to his receiving this cargo on board, under this bill of lading. It is true, the quarry company have proved the following vote, passed by them March 10th, 1868: "Voted, to discharge H. B. Holt from the captaincy of schooner Daniel Russell, unless he pays $200 on what he now owes this company." But this vote is both conditional and vague. It was not a discharge, but a mere threat that he would be discharged, unless he should pay two hundred dollars on his indebtedness. When he was to pay that amount, in order to save his place, the vote does not specify. This vote was never communicated to these libellants, or at least, not till this cargo was received on board the schooner at Rondout. There was a correspondence between Holt and the quarry company's agent, about the subject matter of this vote, but there was no overt act, or declaration to the world, by either, which could bind third parties. Indeed, the only material fact proved, bearing on this point, is this conditional discharge, until the schooner had arrived at her port of destination with the coal on board, when, before the delivery of any part of it, Holt was discharged absolutely, and displaced from his station. Until this latter act, he must be deemed to have been master.

The objection that he did not sign the bill of lading, as master, is untenable. He described himself, in the body of the instrument, as master, and signed the same with his own name. The fact that he did not add the word "master" to his signature is of no importance. If he was in fact master, with the authority to contract for the delivery of the cargo, and the latter was laden on board, the vessel and owners would be liable in case of a breach of the agreement, even had there been no bill of lading signed. "It is the fact, that the goods are shipped, and not the written acknowledgment of it,—the obligation to carry them safely, and not the written contract,—that creates the liability and fixes the jurisdiction of the court." Ben. Adm. § 286; The Peytona [Case No. 11,053]. Of course I am here speaking of the contract, in its ordinary legal aspect, to carry and deliver this cargo laden on board, and not the peculiar agreement in relation to the mode of payment, which the libellants rely on to support the main feature of their claim. The cargo was in fact laden on board, the voyage performed, and a portion of it actually delivered. The question whether the owners are liable for the non-delivery of the remainder, would be the same, if there had been no bill of lading at all. The pertinent enquiry here is, not what was the form of the bill of lading, but whether Holt was master of the vessel, and thus had the authority to receive the coal on board, and bind the vessel and owners to transport and deliver it.

I now come to the more important part of this controversy, in reference to which, a detail of the facts is necessary, in order to properly present the questions which arise. The primary business of this schooner was transporting stone from Portland, to ports out of this state. In addition to this, she was, unless ordered home light by the agent of the quarry company, accustomed to take return cargoes, and deliver them at other ports. These return cargoes were not always taken from the ports, at which the stone was delivered, but often from other places. The port

of delivery of a return cargo was not often, or at least not always, on the direct route of the voyage home, and, of course, a deviation from that route was sometimes made. The master had been accustomed to make and execute contracts of affreightment for these return voyages. His last trip down, before the close of navigation on Connecticut river, was from Portland to New York. He delivered his cargo of stone at the latter place, and not being ordered home light, went a short distance up the Hudson river, to Cold Spring, after a load of iron, to be taken to Fall River, in Massachusetts. The cold weather caught the schooner at Cold Spring, where she was frozen in, and laid up for the winter, or till she should be released by a thaw. The mate was left in charge as shipkeeper, and the captain returned home to Deep River in this state, where he and the libellants reside, and remained there through the winter.

The practice of the captain, to take return cargoes in the manner stated, was well known to the agent of the quarry company. He testified on the hearing, that Capt. Holt had taken the schooner up the Hudson river, in the summer of 1867, for freight. It is true, he added, that it was stupid for him to take her there, at the time he did, in December of that year. But that error in judgment could in no way affect third parties, dealing with the schooner through the master. That was a question between the master and owners alone. This practice of the master, to take return cargoes in the manner already stated, permitted as it was by the owners, made his schooner a general freighting vessel, so far as these return freights are concerned, and, as to them, the master, in judgment of law, must be deemed clothed with the ordinary powers of masters of general freighting vessels. No private instructions from the quarry company to him, could abridge these powers, so far as third persons, without notice, are concerned.

While the vessel was thus frozen in, at Cold Spring, and the master was at home, at Deep River, sometime during the latter part of the winter, he agreed with the libellants to bring the load of coal in question from Rondout to Deep River, provided he could get released from his Fall River engagement. On the 31st of March, 1868, at Rondout, and while in the actual possession and command of the vessel, he received the coal on board, signed the bill of lading, and sailed for Deep River, where he arrived on or about the 6th of April. While at the latter place, and before any part of the cargo was delivered, he was, as already stated, displaced from the command of the vessel, by the quarry company, and another master put in charge. The latter offered to deliver the coal to the libellants, provided they would pay the freight. The libellants declined to pay the freight, but offered to give security to pay, if they were liable. Of the peculiar character of this offer of security I shall have occasion to remark hereafter. The master, acting under the direction of the quarry company, declined to accept it. Then commenced a correspondence, and a series of manoeuvres by the parties, which need not be detailed here, as they are of no importance in settling the legal questions in this case. The libellants continued to demand the coal, and finally, on or about the 20th of April, the master delivered, and the libellants received, all the cargo except thirty-seven tons, which he declined to deliver until the freight was paid. The libellants demanded the whole, and renewed the offer of security, which they had made at first. This was not accepted, and the thirty-seven tons have not been delivered, but are still retained as security for the freight money, and for this refusal to deliver, the libellants have brought this suit.

The first question to be disposed of, in this part of the case, is whether Captain Holt had the authority to make the contract, embraced in this bill of lading, for this is the one upon which the suit is founded. Some confusion crept into the argument of the case, by confounding this contract with the agreement made by Captain Holt with the libellants, during the winter, at Deep River. It was insisted by the quarry company, that the master could not, under the circumstances, bind the owners by a contract for the future employment of the vessel. That may be conceded. But he could, and did bind them, by receiving this coal on board, and signing this bill of lading. And, as already remarked, it is this contract, upon which the libel is founded, and the duty of the parties under it is to be determined by the settled rules of maritime law. The claims set up by the libellants, as to the mode of paying this freight, will be considered hereafter. For the present, therefore, I lay out of the case, the agreement made by the master with the libellants at Deep River, during the winter. The master, both by the rules of maritime law, and by the course of business, long pursued by him, with the knowledge of the quarry company, in regard to return freights, had full power to receive this coal on board, and sign the bill of lading. The vessel then became bound to the cargo, and the cargo to the vessel, for the faithful performance of the contract by both parties. This is familiar law.

The next question is, whether the owners of the schooner were justified in detaining part of the cargo until the freight was paid. This point is entirely free from doubt. They could have detained the whole, if they had so chosen, as the lien of the owners of the vessel attached to the whole as security for the freight money. No principle is better settled, both at common law, and by the maritime codes, than that which holds that the ship owner, and the master as his agent, have a lien on the goods carried in their ship, for the freight. Indeed, a late writer remarks that this has never been denied. Pars. Mar. Law, 1, 125. Of course they have

the right to retain the merchandise until this lien is discharged, for, unless there is some special agreement to the contrary, the lien is lost by the delivery of the goods. In the case of Drinkwater v. The Spartan [Case No. 4,085], Mr. Justice Ware remarks: "The general right of the master and owners to retain the merchandise for the freight due upon it, has not been denied. It is too well established to admit of doubt. It is a principle of the general maritime law, the common law of the commercial world, sanctioned by all the maritime codes, ancient and modern, and confirmed by numerous decisions of the highest courts, both in this country and England. Nor does there appear to be any difference in principle, nor is any recognized in law, whether the merchant takes the whole vessel by charter party, or sends his goods in a general ship. The lien of the owners is as perfect for the hire of the vessel stipulated in the charter party, as it is for the freight stipulated in the bill of lading." This doctrine is recognized by Mr. Justice Story, in the case of Certain Logs of Mahogany [Id. 2,559]. In the latter case, it is stated that, by the maritime law, the shipper has a right to have the goods unlivered, so that he can examine them to ascertain whether they are damaged or not. But this point does not, and could not arise in the present case. This cargo was all anthracite coal, which was not susceptible of damage. The existence of the lien of the master and owner on the cargo, for freight, is also recognized in Raymond v. Tyson, 17 How. [58 U. S.] 53. In that case, and many others, it is said that this lien may be waived without express words to that effect, if there are stipulations in the charter party, inconsistent with the exercise of the right of lien, or when it can be fairly inferred that the owner meant to trust to the personal responsibility of the charterer. See, also, The Eddy, 5 Wall. [72 U. S.] 481. I shall hereafter consider whether there is anything in this bill of lading, or in the agreement relied on by the libellants, inconsistent with the right of lien, which was binding on the owners of this schooner.

The authorities generally state that this right of detention continues "until the payment of, or security for, the freight." It is claimed by the libellants that they offered security, and, therefore, complied with the rule, and were, consequently, entitled to delivery. It becomes necessary, therefore, to determine whether they offered the security contemplated by law. I assume that they tendered such security as they proposed to give, and thus clear the case of all technical difficulties. What security did they tender? A statement of the prior dealings between the libellants and Captain Holt, with the admissions of the former, will, of itself, furnish an effectual answer to their principal claim in this case. It appears from the testimony of one of the libellants, together with a transcript from their books, which they put in evidence, that on the 6th of November, 1867, Captain Holt was indebted to them to the amount of $30.03. This I assume to be for supplies furnished him for use on board of the vessel, though the evidence is not very clear on this point, and the items are not given. Under the same date he is charged $14.76, which, from the items, and the statement of the libellants, appears to have been supplies and provisions for use on the vessel. November 27, 1867, the captain is charged with $25.15 for amount paid the mate on the captain's order. November 28th, $13.88 is charged, and the articles are stated by the libellants to have been for provisions for the schooner. December 19th, a small charge of $1.50 appears in the account, but whether the article was for the schooner does not appear. From December 23rd to December 30th, $31.92 is charged, and the libellant Lane testifies that this amount was for supplies furnished the captain's family. December 30th, $15.55, for goods delivered to the mate on the captain's order. From January 7th to January 29th, 1868, $29.54, supplies to the captain's family. January 30th, cash $50, paid the captain. February 6th to 26th, $27.07, for family supplies. March 28th, $60.64. This latter amount was for supplies furnished the mate's family, on the verbal order of Captain Holt, while the former was at Cold Spring, in charge of the schooner as shipkeeper. I may have omitted some small items, but this is substantially the account of the libellants as it stands on their books, and was explained by the testimony of the libellant Lane, with the exception of a small bill of items, amounting to $9.84, for implements and small furniture for the schooner. There is also a credit on the general account of $30.10. Now the agreement made between the master and the libellants, at Deep River, some time during the winter, and I infer, from the evidence, about the 30th of January, 1868, was that Holt should bring a load of coal for the libellants from Rondout to Deep River, as soon as navigation opened, provided he was not held to his Fall River engagement, and that the freight money should be applied on this account, and thus extinguish it as far as it went. When, therefore, the libellants offered security for the freight, it was, to use the language with which they accompanied the offer, "for the freight for which they were liable," or, as stated by the libellant Lane, "if they were legally liable." The latter testified on this point as follows: "I considered that we had performed our part of the contract—that we had paid for the freight. We agreed to give security to pay if we were legally liable." It is obvious that this was practically nothing more than an offer of security to pay the freight if the owners should be able to establish their claim to it at the end of a lawsuit. It was in no sense such a security to

pay the owners, or the master then in charge of the schooner, the freight earned by the carriage of this coal, as the law contemplates, and they were justified in refusing to accept it, and in declining to deliver the coal until the freight was paid or properly secured.

The assumption of the libellants that the owners of the schooner generally were liable to them for this debt of Holt, and that therefore they had a right to delivery of the cargo, without other payment, was clearly an error. In the first place, they charged the account on their books alone to Holt, and not to the schooner, or her owners generally. It is true that this is not a conclusive circumstance, but one that an adequate explanation might overcome. If the supplies were furnished on the credit of the master, instead of that of the vessel or her owners, then the former is alone liable. This would be true, whatever might have been the character of the supplies furnished. In the second place, no liability could attach to the owners generally for the supplies furnished Captain Holt for this vessel, under the circumstances. He was running her under a special contract to victual and man her himself, and this was known to the libellants. The libellant Lane, in his testimony, said: "I understand that coasting vessels, on Connecticut river, to and from other ports, are run on this plan. The captain victuals and mans the vessel, and takes a certain share of her earnings, after such deductions as are agreed upon. The share of the captain depends not upon custom, but upon special agreement." This was, in general terms, the arrangement of Holt with the owners. In victualing and manning the schooner, he was acting on his own account, and not as the agent of the general owners. To that extent he was owner pro hac vice, and could not bind the owner for supplies. Webb v. Pierce [Case No. 17,320]; Mayo v. Snow [Id. 9,356].

This doctrine has been recognized by the supreme court of the United States, although the latter tribunal has held that the owner pro hac vice can, in case of necessity, and when in a foreign port, hypothecate the vessel for repairs and supplies, although he cannot bind the owners personally. Thomas v. Osborn, 19 How. [60 U. S.] 22, 30. I do not overlook the fact that in Webb v. Pierce, already cited, the master had entire control of the vessel, and power to direct her movements and employment; and that this arrangement was deemed by the court a severance of the usual relation of principal and agent which ordinarily exists between master and owners. In such a case even persons who have no actual notice of the arrangement cannot contract with the master for supplies so as to bind the owners personally. In this case Holt had substantial control over the freighting business on his return voyages; but I do not rest this point on that circumstance. It is sufficient that these libellants knew that he was running this vessel under an agreement with the general owners by which he and not they were to victual and man her. In that matter he was, within the libellants' knowledge, acting as principal, and not agent. It follows, of course, that these libellants could not charge the owners generally for these stores and provisions delivered to the master, or on his order, to the mate. As this could not be done directly, the liability could not be created indirectly by an arrangement with the master that the future earnings of the vessel should be applied to the payment of this debt against him. The master of a vessel has no power to pledge the freight for his private purposes. Keith v. Murdoch [Case No. 7,652]. The offer of the libellants, therefore, to give security for the freight on this coal "if they were legally liable" was a conditional offer, resting upon the baseless assumption that they had already paid the amount due, and were, therefore, not liable at all. No such offer as that could entitle them to delivery. If the words "as agreed" written in the bill of lading after the printed words "they paying the freight for the same," refer to this agreement to apply the freight on this debt of Holt, they cannot be allowed to alter the result, for the master had no authority to make such an agreement, and this the libellants must be presumed to have known. This disposes of the principal claim set up by the libellants; but there seem to be so many vague notions afloat in the vicinity of Connecticut river, touching the liability of domestic vessels and their owners for supplies contracted for by the master, that it may be well to say a word on that subject in connection with the facts developed in this case.

It will be noticed by the account of the libellants and their testimony, already referred to, that a considerable portion of the supplies furnished were not for the schooner at all. They were advanced to the master while he was off duty, at home, and his vessel lay in a foreign port disabled for the winter. They were supplies, not for the schooner Daniel Russell, but for the family of Captain Holt. To call such a transaction furnishing supplies to a vessel is little short of absurdity. As well might a builder charge the owners of a vessel for repairs on the master's house, or a physician for services in curing his children. Indeed, such advances, wherever the vessel might be, and however employed, and whether the master be merely master, or owner pro hac vice, have no relation to her—are not for her benefit, and are not chargeable to her owners, nor can the debt for them be made a lien on the ship. It is elementary law that the only supplies for which a ship or its owners are liable, when contracted for by the master, are those which relate to the ship itself or to her navigation and use in the business of the voyage.

They must be fit and proper for her, and pertain to her wants, necessities and business as an instrument of commerce. Parsons in his work on Maritime Law remarks, "One general limitation of the power of the master to bind the owner by the contracts he makes for him is this: they must relate to the condition, or the use and employment of the ship, and be within the usual duty and business of the master." Volume 1, p. 383. In Rocher v. Busher, 1 Starkie, 27, Lord Ellenborough remarked in regard to money advanced to the master: "The money supplied must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigencies of the case, as for the payment of duties or other necessary purposes." Chief Justice Abbot, in his work on Shipping (page 175, Story & Perkins' Ed.), after citing Lord Ellenborough's remark, adds: "And it must be advanced expressly for the use of the ship, otherwise, although expended for that purpose, the owner will not be responsible for it to the lender."

The necessaries which a ship may need in the course of her voyage, of course include victualing for the crew, and such funds as the master might require for the payment of their wages then due. But the notion that while a vessel is laid up in a foreign port, a merchant residing in the state to which she belongs, can charge the owners for supplies furnished the master for the use of his family residing at the latter place, has no foundation in law or good sense. Indeed such supplies are not chargeable to the owners under any circumstances, in the absence of an agreement on their part to that effect.

The same principles are applicable to the advances made to the mate upon the order of the captain, while the former was in charge as shipkeeper at Cold Spring. It is possible that this mate at Cold Spring in charge of the schooner, might have obtained there, on the credit of the owners, such supplies and necessaries as were wanting to enable him to perform his duty and protect the vessel; and if he could not have obtained them on the credit of the owners, might have bound the vessel itself: though this point is not clear. The Harriet [Case No. 6,097]. But if he chose to rely on advances made at a home port, even for his wants there, he should have applied directly to the owners, and not to the master. But, as already remarked, supplies to his family at Deep River were in no sense supplies to this vessel at Cold Spring, and the owners are not responsible for them, although they were, as it is claimed by the libellants, advanced on the order of the master.

It necessarily follows that there is no liability on the owners of this vessel generally for the supplies and provisions furnished Captain Holt while he was master. So far as victualing and manning the vessel was concerned, he acted for himself, and not the owners. Even if he had been in a foreign port he could not have obtained supplies on the credit of the owners, though the necessities of the vessel might have required them. He could only have bound the vessel itself, by a tacit or direct hypothecation. This is the doctrine of Thomas v. Osborn, 19 How. [60 U. S.] 22, already cited. To the same point is Freeman v. The Buckingham, 18 How. [59 U. S.] 182. This rule would apply to the case under consideration, even had the articles purchased by Holt been for the vessel and consumed on board of her. As to those advanced to him for the use of his family when the vessel was laid up, under no circumstances could the owners have been made liable for them without their express consent. As to the $50 cash paid Holt January 30, that stands upon no better ground. To be sure the libellant Lane says that this sum was advanced to him as part of the freight money on this coal, which he was to bring at the opening of navigation. But there is no evidence that it was intended to be employed, or was in fact employed, in promoting the voyage. The master was at home. The vessel was frozen in and laid up at a foreign port. The fair inference is that the captain wanted this money for his own private purposes. For that we have seen that he could not pledge even a present freight of his vessel. A fortiori he could not pledge her future earnings.

As already remarked, the account of the libellants shows a small bill of $9.84 furnished the schooner on the order of Captain Holt, for small articles, of a character pertaining to what may be called her furniture. They were not provisions for her crew, but implements for necessary and permanent use on board. They were furnished during the summer of 1867, while the vessel was pursuing her voyages. They were articles required for immediate use, and though furnished at a home port, it was at a place twenty miles distant from the residence of the principal owner. Such articles, immediately needed for current use, I think the master could, in the absence of funds in his hands, obtain, even in a home port, at this distance from the owner's residence, upon the credit of the owner. In Jordan v. Young, 37 Me. 276, 280, the court say: "The master of a vessel can do all things necessary for the prosecution of the voyage. But this authority does not usually extend to cases where the owner can interfere, as in a home port. If the vessel be at a home port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, then the occasion authorizes the master to pledge the credit of the owner." But it must not be inferred from this that the authority of the master to bind his vessel, or pledge the credit of her owners, for supplies and repairs is without limit. It was remarked by Dr. Lushington, in the case of The Druid, 1 W. Rob. Adm. 391, 399,

that "in all causes of action, which may arise from circumstances occurring during the ownership of persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against the ship, where the owners were not themselves liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship, and the responsibility of the owners, in such cases, are convertible terms; the ship is not liable if the owners are not responsible, and, vice versa, no responsibility can attach upon the owners, if the ship is exempt, and not liable to be proceeded against." Now, it is quite true that this doctrine is not of universal application in this country. We have already seen that in cases where the master, pro hac vice, contracts for supplies, even in a foreign port, he may bind the ship, but cannot pledge the personal credit of the owners. But ordinarily, where the master simply represents the general owners, I apprehend that the doctrine laid down by Dr. Lushington is the true one. As an eminent admiralty judge, his decisions command the highest respect. In view of this doctrine, it will be instructive to look at the state of the law in this country as to the extent of the master's power to create a lien on his ship for repairs and supplies. This is well stated in 3 Kent, Comm. 169, 170: "In this country, it was formerly, and rather loosely, declared in some of the admiralty courts of the United States, that the person who repaired or furnished supplies for a ship, had a lien on the ship for his demands. But the doctrine was examined, and the rule declared with great precision, by the supreme court of the United States, in the case of The General Smith, 4 Wheat. [17 U. S.] 438, and reasserted in the case of The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409. The rule of the English common law is explicitly adopted, that material men and mechanics, furnishing repairs to a domestic ship, have no particular lien upon the ship itself, or its proceeds in court under a decree of sale, for the recovery of their demands, with the exception of the shipwright who has possession of the ship. As long as he retains possession, he has a lien for repairs. The distinction is, that if repairs have been made or necessaries furnished to a foreign ship, or to a ship in the port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for its security, and he may maintain a suit in rem, in the admiralty, to enforce his right. But in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed by the municipal law of that state, and no lien is implied unless it is recognized by that law." By the municipal law of this state, no such lien is created or recognized. Buddington v. Stewart, 14 Conn. 404. Under this doctrine of the supreme court of the United States, it is clear that the master can create no lien on the ship for repairs and supplies in a port of the state to which she belongs, and where her owners reside. The question arises, can he bind the owners personally by such a contract? The authorities on this point, though somewhat numerous, are not very uniform or consistent. But they undoubtedly imply exceptions to the rule laid down by Dr. Lushington, and their general tendency is to support the doctrine that the owners are personally responsible for such repairs and supplies, ordered by the master, "as are reasonably fit and proper, and apparently necessary to enable the vessel to navigate the sea, and perform her voyage in safety," though obtained in a home port, and especially in one at some distance from that at which the owners reside. Jordan v. Young, 37 Me. 276; 1 Conk. Adm. (2d Ed.) 74, 75. The question of the liability of the owners for repairs and supplies furnished on the order of the master at the port of their residence would not often arise, for such acts of the master would usually be known to the owners, and his authority to make the contracts presumed.

Another point raised by the pleadings in this case, and discussed on the argument, was whether Holt, at the time of his dealings with the libellants, was a part-owner of the schooner. This question is not important, in the determination of the case, for his power as master was not enlarged by his being part owner, so far as these transactions are concerned, unless with reference to the payment of the shipkeeper while the vessel was laid up at Cold Spring. He left the mate in charge, at small wages, and informed the agent of the other owners of the fact. The payment of his wages at any particular time or place was not a matter of necessity. Supplying his family, at Deep River, was not a duty of the owners. It was indeed, their duty to pay him his wages, but there was no necessity for Captain Holt to pledge their credit for that purpose, and, under the circumstances, he had no authority to do so. The principal owners lived near Deep River, were abundantly responsible, and an application to them could have been made with promptness and ease. The service of the shipkeeper did not relate to the navigation of the vessel, nor did the supplies furnished relate to her care and supply, and there is no principle known to the law which can bind the owners to pay this debt contracted by Holt. The latter, certainly, could not as part-owner, in a home port, pledge the future earnings of the vessel to a third party making the advances. Whether one part-owner can bind another at all, in a home port, for repairs and supplies to the vessel itself, without specific authority, is still an open question. 1 Pars. Mar. Law, 90.

But, to prevent misapprehension hereafter, it must not be inferred that this court assents to the claim set up by the quarry company,

that Holt is not to be deemed a part-owner, because he had mortgaged his share in the vessel. They set up in their answer, and proved, a mortgage to them by Holt of his interest, to secure the payment of five hundred dollars, or so much thereof as might be found due on final settlement, and also to secure any earnings of the vessel that might thereafter become due from Holt to them. This mortgage was dated September 5th, 1866; but no possession was taken by the mortgagee under this mortgage. The relation of the mortgagor and mortgagee, to all the rest of the world, remained the same. Holt still continued in possession as part-owner and master. Under these circumstances, he is to be deemed a part-owner, as to third parties contracting with the vessel in regard to freight or supplies, just the same as if no mortgage had been given. The mortgagee of a vessel, out of possession, is never in this country, regarded as the owner. If he were, very serious consequences would follow. He would then become personally liable for supplies and repairs. "But it is well settled in our law, that a mortgagee out of possession is not liable for supplies and repairs. And it is equally well settled, that the holding of a conditional bill of sale, or having the mere legal title to a vessel, does not, of itself, render a party liable. The law presumes the credit to be given to the party in possession as acting owner, and as long as he remains in possession, with the consent of the holder of the legal title, and manages and controls the vessel, and receives the profits, he is, for all practical purposes, the owner. So far as he is concerned, the law treats the mortgage as if it had no existence." Fland. Shipp. §§ 400, 401. In this case, the quarry company merely held the legal title as security for the obligations of Holt to them. The practical ownership, as to third parties in their dealings with the vessel, remained the same as if no mortgage had been given. 1 Pars. Mar. Law, 116.

I come now to the question as to what decree is proper to be rendered in this case. I have already disposed of the question of the lien of the owners on this coal for the freight money, and their consequent right to detain it until the same was paid or secured. This lien attached to the whole cargo, and the master might have landed it at the port of delivery, and placed it in charge of a third person, and, if the freight money continued to be withheld, the owners of the vessel could have kept it in that condition, or libelled it, had it sold by a decree of the court, and thus obtained the freight money. They, however, chose to deliver a part and detain the rest. The lien on the part delivered was, of course, extinguished by delivery. After some doubt, I am inclined to the opinion that the lien for the whole freight may be considered as remaining on that portion of the cargo detained. It was broken coal, in bulk, belonging to one owner and consignee. That a part was detained, instead of the whole, was no injury, but a benefit to the shipper and consignee. Abb. Shipp. (Story & Perkins' Ed.) p. 461, note 2. The remaining portion, which was not delivered, was never landed at Deep River at all, but was taken away by the schooner, and left at Portland, and notice given to the libellants that it was at their disposal whenever the freight should be paid. The proper course would have been to land this remainder at the port of delivery, and place it in charge of a third person, subject to the libellants' order, on their paying freight. But this point was not made a question on the trial. The whole struggle was over the liability of the owners to deliver, without further or other payment of freight than the advances made to Holt.

As the owners of the vessel undertook to sever the cargo, and retain only so much as would secure the freight money due, and took this quantity away, they should have seen to it that they took no more than was necessary. They detained and removed thirty-seven tons, worth, as I find from the evidence, three hundred and seventy dollars. The freight on the whole amounted to two hundred and forty-six dollars. As they show no necessity for thus taking the amount not delivered away from the port of the consignee, they substantially converted it to their own use, and must be held liable for any excess of its value over the amount of the freight. This excess was one hundred and twenty-four dollars. To this I will add the $9 84, for which they are indebted to the libellants for supplies furnished the vessel directly—the whole, with interest from April 20th, 1868, to the present time, amounting to $152 06. Let a decree be entered for the libellants for that amount, with costs, against both the respondents. Holt is liable for the balance of the libellants' account. Though much of the account against him would not have been recoverable in a suit in admiralty, brought directly upon it, as it did not rest on a maritime contract, yet he bound himself, as master, to deliver this coal at the stipulated freight of two dollars per ton, in discharge of the debt due from him to the libellants. He received the cargo, and then became bound to the performance of his contract, which he failed to complete. He is therefore personally liable for his failure. Let a decree be entered against him separately for $279 50.

NOTE (by Judge Shipman). It will be noticed, that there is no formal discussion, in the above opinion, of the legal character of the act of the master in carrying away a portion of the cargo from the port of delivery, named in the bill of lading. No notice of this point was taken by counsel. But it will be seen, by reference to the closing part of the opinion, that it was held to be the duty of the master, on the refusal of the consignee to pay the freight, to land the cargo at the port of delivery, and place it in charge of some third party, subject to the consignee's order on payment of freight and charges; and that removing it to another port, without showing any necessity therefor, was practically an illegal act, and a conversion

of that part of the cargo. For this act I held the owners liable for the full value of the coal thus removed, at the local price, deducting freight. To prevent, however, any erroneous inference being drawn from the omission to discuss the point on principle and authority, it may be well to state, that the rule undoubtedly is, that where the consignee refuses to receive the cargo at the port of delivery and pay the freight, the master should then land and store it with some other party, subject to the order of the consignee or owner, on the payment of freight and charges. I applied this rule, several years ago, in an important case in the district court for the Southern district of New York. Atlantic & P. Guano Co. v. The Robert Center [Case No. 630]. The same doctrine is laid down by Mr. Justice Story in Arthur v. The Cassius [Id. 564]. See, also, The Convoy's Wheat, 3 Wall. [70 U. S.] 225. In Arthur v. The Schooner Cassius, Mr. Justice Story remarks: "If the consignee refused to receive the cargo after it was landed, and to give a bill on New York for the freight, then it became the duty of the master to place the same in the hands of some trustworthy person for the security of his lien for the freight, and subject thereto, for the benefit and account of the owners. But no right, even under the circumstances, could exist on the part of the master to sell the cargo, unless it was perishable, and might otherwise have been lost or have perished, which is not proved, or pretended by the answer. A fortiori, if the master had no right to sell at Velasco, he could not have a right to carry the cargo to New Orleans, and sell it there; since it is just as clear that there was no necessity therefor. This act, therefore, in carrying it to New Orleans, was a gross breach of his duty, and the sale a tortious conversion of the property. It might, perhaps, have admitted of a different construction, if the cargo could not have been landed at Velasco, or there deposited in safety for the owners; or if the sale at Velasco or New Orleans had become indispensable from the perishable nature and condition thereof. Such a case has not been made out; and, therefore, it need not be decided on the present occasion."

It is obvious that cases may arise where, on refusal of the consignee to receive the cargo, it may be the right of the master to leave it at some other port than that named in the bill of lading, especially where the consignee is also the owner. If the latter refuse to receive the cargo and pay, or secure the freight money, and no person can be found at the same port to receive it, it is clear that the master should not be shut up to the alternative of tying his vessel to the dock to rot, with the cargo on board, or delivering it to the consignee, thus losing his lien. I apprehend that, in such a case, the master might safely leave the cargo at the nearest port to the residence of the consignee, at which a person could be found who would take charge of it. It is true that this difficulty would not occur where the port of delivery was one of considerable size and business, as, in such a port, persons could be found who would receive and store the cargo, and hold it subject to freight and charges; but in a very small place, like the one where this coal was to be delivered, this very embarrassment might arise.

Where the consignee is not the owner, and refuses to receive the cargo, it should be stored at the port of delivery by the master on account of the owner, if any one can be found who will receive it. If no one can be found at that port who will take charge of it, a more embarrassing question will arise as to what disposition the master should make of it. He cannot sell it unless it is perishable, or to save it from certain loss. Shall he store it at a place nearest the port of delivery named in the bill of lading, at which a person can be found to receive it, or shall he return it to the shipper or owner? It would be difficult to lay down a rule in advance, which would furnish a safe solution in all cases of questions of this character. In such a dilemma the master must act prudently and in good faith, in view of all the circumstances. If the owner be within reasonable distance, and yet not within easy communication, so that he can take his direction, it might be best for the master to return him the cargo. Yet it is clear that this would not be his duty where the owner resided at a distant port. The same may be said in regard to his returning it to the shipper, where the latter was not the owner, even though he might be the owner's agent. A cargo might be shipped by a merchant at London for a port on the Pacific coast of America. The owner of the cargo might reside in New York. On a refusal of the consignee at the port of destination to receive the cargo and pay the freight, the master, finding no one else at that port to receive it, and being unable to communicate speedily with the owner or shipper, would doubtless be authorized to land and store the cargo at the nearest proper and convenient port, having reference to his own convenience, and the apparent best interest of the owner. This would seem to be his only safe course. To return the cargo to London, or send it to New York, would be ruinous to the owner, as well as beyond the duty of the master. Leaving it, therefore, with a responsible party, at some proper adajcent port, would, I apprehend, be a discharge of the duty of the master, and exonerate the ship and her owners. Of course, the master should then notify the owner as expeditiously as possible.

Case No. 5,013.

FOX v. The LUCY A. BLOSSOM.

[4 West. Law Month. 415.]

District Court, N. D. New York. Feb. Term, 1854.

MARINE INSURANCE — SUBROGATION — ABANDONMENT BY ASSURED—DAMAGES ARISING FROM COLLISION—ESTOPPEL.

1. Where the owner of a vessel sunk by a collision, recovers the full value of the vessel in admiralty, on the ground that the vessel is totally lost, and is actually paid the amount of such decree, the title of the submerged vessel passes to the party paying its value, on the familiar principle "Solutio pretii emptionis loco habitur," which may be rendered, substantially, Payment of the price operates a purchase of the thing.

2. The application of this maxim is not confined to those cases where the property has passed into the hands of the party paying, as recoveries in actions of trespass and trover, where the property has been actually taken or converted; but seems to extend to all cases where the value has been demanded and paid. The better opinion is, that it is not the recovery of a judgment that operates the change of property, but the demand and payment of value, with or without a judgment.

3. The rule applies in the case of a compulsory payment or payment by virtue of a legal obligation, though the party paying was a corporation, incapable in law of making a direct purchase. The application of this principle to various legal relations considered.

4. When a vessel, insured, has been sunk by a collision with another vessel through the fault of the latter, and pending an action brought by the insured against the owners of the vessel in fault, for the injury, claiming the full value for a total loss, the assured abandons to the underwriters, who accept the abandonment, the action proceeds for the benefit of the latter:

and, upon the principle of the maxim above cited, where the defendants pay the judgment or decree for the full value, the title of the underwriters to the submerged vessel passes to them.

5. And when, in such a case, after payment made by the defendant to the plaintiff of the amount of the judgment or decree without notice of the abandonment, the vessel is raised by the defendant, the original owner is estopped, in an action brought by him against the original defendants, from denying his title at the time of the judgment, and relying on a title subsequently acquired from the underwriters.

[This was a libel by Watson A. Fox against the brig Lucy A. Blossom and against Henry C. Walker and others, claimants.]

John Ganson, for libellants.

W. H. Greene, for defendants.

HALL, District Judge. This suit was instituted for the purpose of establishing an alleged title to the brig Lucy A. Blossom, her tackle, &c.; and of obtaining the possession and claimed to be the rightful owners thereof, under an adverse title.

The facts in the case are substantially as follows: On the 18th day of November, 1851, the brig Blossom—then being the property of the libellant—was run into and sunk by the steamer Niagara. The Niagara was then owned by Charles M. Reed, Esq., but was running under a charter to the New-York & Erie Railroad Company, and she was victualed, manned, managed and controlled, wholly by the agents of that company. On the 4th of December, 1851, the libellant in this suit filed in this court, his libel against the Niagara, her tackle, apparel, and furniture; and thereby alleged that by the collision referred to, the said brig, and the freight or the cargo on board of the same, became wholly lost to the libellant; and that it occurred through the negligence, unskilfulness and fault of those in charge of the Niagara. The Niagara was thereupon arrested, and Reed, her general owner, appeared and defended. After a hearing on pleadings and process, this court adjudged and decreed that the collision in the libel mentioned occurred as therein stated, and that the brig Lucy A. Blossom was thereby lost; that the libellant should recover $7,755.-20 for his damages and also his costs of suit; and that if the said damages and costs were not paid into court in ten days, the Niagara her tackle, &c., should be sold to satisfy the decree. The court intended to give, and by this decree, did give, to the libellant full damages for the total loss of the vessel; upon the basis that such vessel having been sunk, was of no value; or that her value was so entirely speculative that it ought not to be taken into consideration; and it was conclusively established by the testimony, given on the hearing in this case, that the court intended to give to the libellant, by way of damages, the whole value of the property sunk; and that its award of damages was made on that basis. From this decree against the Niagara, an appeal was taken by Reed, her owner; but a few days after the appeal had been perfected the whole matter was settled, and Reed, the general owner and claimant of the Niagara, gave the libellant his drafts on the New-York & Erie Railroad Company for the full amount of the decree. These drafts were accepted and afterwards paid by the railroad company; and when given by Reed and accepted by the company, they were taken and received by the libellant in full payment and satisfaction of the decree. The appeal was of course abandoned upon the decree being thus fully settled and satisfied.

At the time of the collision, the Blossom was insured by "The New-York Protection Insurance Company," of Rome, N. Y., in the sum of six thousand dollars. She was valued at eight thousand dollars in the policy issued on such insurance, but an insurance beyond the sum of six thousand dollars was forbidden by the terms of such policy. About the time that the libellant filed his libel against the Niagara, he gave notice of the loss of the Blossom by the collision, and that he abandoned the vessel to the company as a total loss. There is no direct proof of an acceptance of this abandonment, and it is doubtful whether the testimony authorizes the inference that the abandonment was ever accepted by the company. A short time after this notice of abandonment was given, the insurance company failed, and its assets passed into the hands of assignees. The libellant had had other dealings with the company, in respect to other insurances; and after the settlement and satisfaction of the decree in the collision suit, as hereinafter mentioned, the libellant settled with the assignees of the insurance company in respect to all the dealings between him and the company, (including the insurance upon the Blossom), and then took from the assignees of the company an assignment of all their interest in the Lucy A. Blossom, her tackle, apparel and furniture. The assignee who made this settlement, was informed at the time it was made that a decree had been obtained against the Niagara, but he stated on his examination as a witness in this suit, that he was unable to say that he then knew, or had been informed, that the decree had been paid or satisfied. The vessel remained submerged until the spring of 1852; and until after the payment of the decree in the collision suit and settlement between the libellant and the insurance company. Early in the spring of that year, both the libellant and the New-York & Erie Company, intimated an intention to make efforts to raise the sunken vessel, and the agent of the company made a contract with certain parties to raise her for the benefit of the company. This became known to the libellant, and, as soon as these contractors proceeded to the vessel for the purpose of raising her in pursuance of

their contract, he caused notice of his claim to the ownership of the Blossom to be served on the persons employed in the effort to raise her. He also gave notice of his intention to prosecute any one who should interfere with the vessel in violation of his rights. The Blossom was nevertheless raised by the persons employed by the New-York & Erie Railroad Company, and afterwards sold by that company to the claimants in the present suit. They repaired her at great expense, after which she was taken from their possession under the warrant of arrest issued in this suit.

Under this state of facts, it was claimed by the advocate for the claimants and respondents that, by the recovery and payment of the decree for the value of the sunken vessel, the property therein passed to the New-York & Erie Railroad Company, or to Reed, the owner of the Niagara; and that the libellant had no right of property in the vessel after such payment, and he cited 2 Kent, Comm. 388, and note c, 380; 2 Bouv. Inst. 148; 8 Cow. 43; 2 Bailey, 466; Hopkins v. Hersey, 7 Shepley [20 Me.] 449; 2 Starkie, Ev. 1169; 1 Rawle, 121, 273, 285; 12 Pick. 202; 4 Esp. 251; 3 Barn. & C. 196; [Comegys v. Vasse] 1 Pet. [26 U. S.] 214; 2 Kent, Comm. 334–336, 360.

On the other hand, it was insisted—1st. That the principle established by the cases which decide that when a defendant in an action of trespass or trover, pays a judgment for the value of a chattel which he has tortiously taken and converted to his own use, only applies in cases where the possession has been changed and the action is brought to recover damages for the unlawful appropriation of the chattel; and not when it was brought, as in the collision case referred to, to recover damages for an injury to the chattel, the possession not being changed. 2d. That the New-York & Erie Company had no right to purchase a vessel or take the title to the brig; that therefore the title could not pass to them, and could not leave the original owner of the vessel until it passed to another; that Reed was not personally liable for the damages decreed in the collision suit, and did not pay them; nor were they paid for him, or for his benefit; and that therefore the title did not pass to Reed. 3d. That the vessel having been abandoned to the insurance company, the title to it was vested in that company at the time the decree was obtained and paid; and that it could not, therefore, pass in consequence of the payment made to the libellant; and that the title the libellant now sets up was subsequently acquired, and can not be affected by the payment.

Other questions in respect to the right of the court to entertain jurisdiction of the questions presented, and to the right of the libellant to demand possession of the Blossom until payment of salvage and of the costs of subsequent repairs, were raised and ably argued by the advocates of the respective parties; but it is unnecessary to discuss those questions, as the case will be disposed of upon the principal question—that of title—raised in the suit.

The existence of the principle which transfers to the defendant, in an action of trover or trespass, the title to a chattel which he has wrongfully appropriated, whenever he pays the judgment for its value, recovered against him in consequence of that appropriation, is not denied. It is, however, insisted that it is not applicable in a case like the present; and this is the first question to be decided in this case. The principle itself is founded in natural justice and equity and we accordingly find it distinctly recognized in the earliest authentic code of laws to which we have access. In the law promulgated from Mount Sinai we find it declared: "And if a man shall open a pit, or if a man dig a pit, and not cover it, and an ox or an ass fall therein; the owner of the pit shall make it good, and give money unto the owner of them, and the dead beast shall be his. And if one man's ox hurt another that he die; then they shall sell the live ox and divide the money of it; and the dead ox also they shall divide. Or if it be known that the ox hath used to push in time past, and his owner hath not kept him in; he shall surely pay ox for ox; and the dead shall be his own." Exodus, xxi., 33–36. In the civil law, the same principle is recognized. Coop. Just. lib. 4, tit. 1, §§ 15, 16. The common law courts have uniformly recognized the principle from the reign of James I.; but some judges have held that the title passed upon the recovery of the judgment, while others have adopted the more reasonable doctrine that the transfer takes place only upon satisfaction of the judgment. Brown v. Wootton, Cro. Jac. 73; 2 Kent, Comm. 387, 388, and note, where the cases are referred to and discussed; Curtis v. Groat, 6 Johns. 168; Osterhout v. Roberts, 8 Cow. 43.

I can not think that the form of the action determines the principle. In the cases of judgment and satisfaction in trespass, trover, detinue and replevin, it would now be applied without hesitation; and these are, perhaps, the only form of action at common law, in reference to which the question has arisen in the form in which it is presented in this case. The Mosaic Code had as little respect for forms of action as the present New York Code of Procedure, and the cases to which the former code applied this principle, as well as the cases to which the civil law applied it in the sections before referred to, were cases in which the possession of the property was not necessarily in the party by whom the price for value was to be paid; nor was its appropriation to his own use essential to its application. In Lacon v. Barnard, Cro. Car. 35, the right of the parties was determined, not upon the form of the action, but upon the question whether the defendant in the prior action of trespass had recovered damages in lieu of the property—that is, its estimated value. The court in

Curtis v. Groat, while declaring that the "recovery ought to have been distinctly for that specific chattel before the rule could apply." also declared the principle on which the rule was based. It was then said by the court: If a trespasser takes a chattel into his own possession, and the owner sues and recovers damages for the specific chattel so taken and detained, the recovery and execution done thereupon will change the property by operation of law, on the principle "Solutio pretii emptionis loco habitur" (Jenk. Cent. 56, 189, Case 88); and this seems to be the rule, both in the French and in the civil law, where the transfer by such means is considered as a complete and absolute title (Pothier, Traité du Droit Propriété, No. 464, Dig. 1, 35, 63). This principle of "solutio pretii emptionis loco habitur," is variously, and perhaps, it may be truly said, frequently applied, in the courts of common law and equity. The doctrine of subrogation may, I think, be traced to this principle. In many other cases, where no suit has been brought, the principle is properly and uniformly applied. The indorser or guarantor of a promissory note, which he has transferred to another, by indorsement or other writing, is undoubtedly reinstated in his ownership whenever he pays the note in discharge of his fixed liability as such indorser or guarantor; the party who duly pays a bill or note, after an acceptance by him, supra protest for the honor of an indorser, becomes the owner of the bill as to all parties standing before him for whose honor he pays; one of several underwriters upon different policies covering the same risk, who pays the whole amount insured, has a claim for contribution against the others (Lucas v. Jefferson Ins. Co., 6 Cow. 635; Newby v. Reed, 1 W. Bl. 416; Wiggin v. Suffolk Ins. Co., 18 Pick. 155); the underwriter who has paid a loss occasioned by an unlawful capture of a ship insured, or by the negligence of the master, pilot, &c., has a right of action, even in the name of the assured, for reimbursement of the loss he has sustained (Phil. Ins., 3d Ed., §§ 2008, 2009); the underwriter on the life of a debtor, who had paid the loss to the assured, is entitled to an action against the assured for any amount he may receive from the executors or administrators of the party whose life was insured on account of the debt, to secure which the policy was made (Id. §§ 1729, 2010). And these are all, as I understand it, instances of the transfer of rights of property or rights in action, in accordance with this principle. It is also in accordance with this principle that the underwriter is entitled to the property insured when the assured has been voluntarily paid or has recovered, or has obtained satisfaction upon a judgment, for a total loss without an abandonment (Phil. Ins., 3d Ed., §§ 1495, 1511; Arn. Ins. p. 1185, § 410), and that an abandonment (and of course the receipt from the underwriter of the whole sum insured on the basis of a total loss) is in law a transfer to the underwriter of all claims against third parties on account of negligence or misconduct occasioning the damage to the subject insured, or the destruction of it, by a peril insured against (Phil. Ins., 2d Ed., 1711).

The same principle has doubtless been applied, in analogous cases, in the admiralty courts; for in questions of this character, relating to the title of property, the admiralty almost uniformly adopts the doctrines which prevail in the common law and equity courts. I have not, therefore, sought for similar cases in the reports of the decisions of the admiralty courts, but have endeavored to find a case, or cases, like the present, in which the doctrine we have been considering has been discussed or applied. Perhaps I have not been sufficiently diligent in the search, and, at all events, I have been able to find but a single case bearing directly upon the question now presented. The case referred to is that of The Columbus, 3 W. Rob. Adm. 158; and in that case the question was whether the registrar and merchants had properly allowed a libellant in a cause of collision, the whole value of his vessel, by way of damages. The vessel of the libellant had been sunk by the collision, but before the proceedings were commenced in the court of admiralty, the sunken vessel had been raised at the expense of the owner of the vessel which had caused the injury, and carried into Rye harbor. Notice thereof had been given to the agent of the libellant, with an intimation that the owner of the Columbus was ready to deliver up the same and that he would not be responsible for any further damage or expense incurred by her remaining unrepaired in the harbor. No notice was taken of this intimation, and the suit in admiralty was subsequently commenced. The registrar and merchants reported the full value of the vessel, by way of damages, as for a total loss; and this report was, after discussion and argument, confirmed by the court. In delivering his opinion in that case, Dr. Lushington, as I think, sanctioned the principle for which the advocate for the respondents has contended, not only in declaring that the report ought to be confirmed, but also when he declared that Mr. Fletcher, the owner of the vessel by which the libellant's vessel had been sunk, was, as the case then stood, entitled to have the vessel; or her proceeds, if he thought proper to make application for her sale under the direction of the court.

Without referring to other authorities or enumerating other cases in which the principle we have been considering has been substantially applied, I shall hold that the recovery and satisfaction of the decree in the collision case, if the libellant had been still the owner of the injured and submerged vessel, would have transferred the title to the sunken vessel to the party paying the same. As between the libellant and Reed, the pay-

ment of the former decree was made by the latter, but if it had been made in fact and in law by the New-York & Erie Railroad Company, I do not think the objection that such company had no legal right to make a direct purchase of the vessel, could avail. If the law could not cast the title upon the company by reason of their inability to take such title, then the payment must be deemed to have been made by Reed, or in his behalf, and the title to have vested in him; but I can perceive no legal objection to the vesting of the title in the railroad company. But it is said that the title to the vessel was in the insurance company, in consequence of an abandonment and acceptance; and that, consequently, the title could not pass by the payment to Fox, the libellant in this and the collision suit. I have already stated that it was at least doubtful whether there was any proof of an acceptance of the abandonment, but I propose to assume that the abandonment was accepted, and then consider the question which the case will, after that assumption, present. From the time of the abandonment and acceptance, the suit against the Niagara necessarily proceeded for the benefit of the insurance company; for the right of action had, by the abandonment and acceptance, been transferred to the company (Phil. Ins., 3d Ed., 1711); and when the decree was recovered and paid, the claim of Fox, the libellant in this and the collision suit, for the amount insured, was fully discharged, and he held the balance above that amount as a trustee for the company. The right of action and the decree then belonged to the insurance company, and the payment made to the libellant was made for their benefit, and upon that payment, thus made for their benefit, the title passed from them in accordance with the principle we have been considering. The insurance company's interest in the vessel resulted from the loss and subsequent abandonment and acceptance, and their consequent legal liability to pay as for a total loss under their policy; and when that total loss was paid, and more than paid, to the libellant by the payment and satisfaction of the decree, the libellant could have no further claim against the company, but the company could probably have recovered from him what he had received over and above the amount to which he was entitled under the policy. In short, the principle "Solutio pretii emptionis loco habitur," which would have transferred the absolute title to the vessel to the insurance company, if they had paid a total loss under their policy, applies with equal force between the insurance company and those who actually pay the loss by paying the value of the vessel under the decree; for the insurance company actually received the price of the vessel through the present libellant as their trustee or agent. Besides, the suit had been prosecuted and the decree recovered in the name of Fox, the libellant, and there is no proof that Reed or the railroad company knew that the right of action had been assigned or transferred to the insurance company before the payment of the decree. And this is enough to make the payment binding on the company and operate to transfer the title to the vessel, even if there had been no subsequent confirmation of the acts of the libellant in prosecuting the suit to a decree in his own name.

But as between the present libellant and the parties here maintaining their rights derived from the railroad company and Reed, the libellant is estopped from averring that he had abandoned and thus assigned the sunken ship and the right of action for the collision, to the insurance company. The parties liable for the injury, and against whom the assigned right of action and decree existed, paid the libellant the amount of such decree, believing him to be entitled to receive it; and he accepted that payment without disclosing the fact of the assignment or transfer. Under such circumstances he is clearly estopped from setting up his own want of title at that time to defeat any right which the parties paying would have acquired by their payment in case his right and ownership had continued. The libel must be dismissed with costs.

Case No. 5,014.

FOX v. PAINE et al.

[Crabbe, 271.] [1]

District Court, E. D. Pennsylvania. June 18, 1839.

SHIPPING — REGISTRY AND ENROLMENT — PART OWNER—FOREIGN VESSEL—VOYAGE DISAPPROVED BY PART OWNER—SECURITY.

1. E. F., a part owner of a vessel, known to be so by the other owners, not having, when he became a part owner, complied with the acts of congress, such omission not being for purposes of fraud or concealment, one of the other owners obtained an enrolment of the vessel, swearing that he and some others, totally omitting E. F., were sole owners. E. F. is entitled to ask the court for security, from the other owners, for the safety of the vessel on a voyage not approved by him.

[Cited in The Marengo, Case No. 9,066.]

2. An omission in the registry and enrolment of an American vessel does not make her foreign, but, at best, only deprives her of her American privileges.

3. It is not unlawful for Americans to be part owners of a foreign ship; but she will not become entitled thereby to American privileges.

4. Where the owner of one-eighth of a schooner disapproved of a voyage sanctioned by the other part owners, the court ordered the other part owners to secure the dissentient in double the value of his share.

[Cited in The Marengo, Case No. 9,066; Coyne v. Caples, 8 Fed. 640.]

The libel in this case alleged that the libellant [Evan Fox] was the owner of one eighth part of the schooner [Lodemia and Eliza]; that the

[1] [Reported by William H. Crabbe, Esq.]

other owners, to wit, Levi Paine [the master], William S. Reed, William Murphy, and Isaiah Dunlap, were about to send her to sea, on a voyage to New Orleans, against the consent of the libellant; and prayed for security in the usual way, to the amount of the libellant's interest in the schooner, conditioned for her safe return. Stipulations having been given to abide by the decree of the court on the petition, the vessel was allowed to proceed to sea. The application was, at first, resisted on the ground that the libellant had no interest or ownership in the schooner. A supplemental answer was afterwards filed, setting forth that, although the libellant might hold a bill of sale, for one eighth of the schooner, from John Compton, a former owner, yet that, as neither the libellant nor Compton had complied with the requisitions of the acts of congress, not having delivered to the collector of the port the former enrolment of the schooner, nor applied to the secretary of the treasury for an order on the collector to grant a new enrolment and license, not having taken and transmitted to the proper collector, the oath or affirmation required by law, they, or either of them, were not entitled, by the law of the land, or the practice of the court, to ask the interposition and aid of the court in the manner set forth in the libel. It appeared that the libellant had not, on his becoming a part owner, complied with the requisitions of the various registry acts, &c.; that his omission to do so was not for any purpose of fraud or concealment; that the bill of sale, from Compton to the libellant, was drawn up by an officer in the custom-house where the schooner was subsequently enrolled; that William Murphy, another part owner, had caused the schooner to be enrolled as being the sole property of himself together with Levi Paine, William S. Reed, and Isaiah Dunlap, he making oath to that effect; and that, at the time of such enrolment, the interest of the libellant in the schooner was fully known to the other part owners.

St. G. T. Campbell, for libellant.

The interest of the libellant, and the jurisdiction of the court are undoubted. The only question is, whether or no the libellant has forfeited his right to come into court, by any act or omission on his part; that is, by not having his name inserted as an owner on the enrolment and license? There is nothing in the act of 31st December, 1792 (1 Story's Laws, 269), respecting enrolments and licenses, which deprives the party of the right to come into this court. No fraud has been intended upon the revenue here; the bill of sale to the libellant was drawn by a custom-house officer, at the very place where the vessel was enrolled, and it is by the neglect of that officer that the libellant's name has been omitted from the documents. The libellant is in fact a part owner, whatever the enrolment or license may say, and, as such, has a right to the protection of this court. The other owners, by omitting to put his name in the papers, cannot deprive him of his rights, most especially against themselves. Bronde v. Haven [Case No. 1,924]; Strelly v. Winson, 1 Vern. 297; Graves v. Sawcer, T. Raym. 15.

G. M. Wharton, for respondent.

The libellant has neglected or refused to comply with the laws of the United States, in regard to the ownership of vessels, and yet he comes into court to claim all the privileges and rights of an owner according to law. Act Feb. 18, 1793 (1 Story's Laws, 285); Act Dec. 31, 1792 (1 Story's Laws, 268), §§ 3–5, 11, 14; Act March 2, 1797 (1 Story's Laws, 453). The libellant has endangered the national character of the vessel by not complying with the fifth section of the act of 1792. In England, the law makes all bills of sale of vessels void, unless the revenue regulations are complied with; but here the vessel only loses her national character and privileges. The libellant is not the part owner of a national vessel, and therefore this court will not aid him.

Mr. Campbell, for libellant, in conclusion.

All the other part owners knew of the libellant's interest. In regard to the alleged violation of the fifth section of the act of 1792, the time therein allowed has not yet expired. If a citizen of the United States was part owner of a prize, he could come into court and ask for such security as is now demanded.

HOPKINSON, District Judge (after stating the facts as above). The ownership of the libellant has been made out very clearly. The schooner appears to have been built by one John Compton, for himself and others. On the 15th of September, 1838, he executed bills of sale to the other owners, in the proportions to which they were respectively entitled, to wit, one fourth to William S. Reed, one fourth to William Murphy, one eighth to Levi Paine, and one eighth to Isaiah Dunlap, the other one fourth remaining his own. On the 15th October, 1838, Compton transferred one eighth of the schooner, that is, one half of his fourth, to Evan Fox, the libellant, for the consideration of $669 96. There is nothing to impeach the validity or fairness of this sale; on the contrary, there is positive proof that Fox gave full value for it. The interest of Fox, to the amount stated in his libel, being thus established, the defence is left on the ground set forth in the supplemental answer, that is, that the libellant does not appear to be an owner of the schooner in her enrolment and license, and has not complied with the requisitions of the revenue laws. We must recollect that this is not a question between the United States and this vessel, or her owners, or any of them; nor a question of the rights of this vessel, or her owners, in navigating her under the laws of the United States, nor to what privileges she is entitled

under those laws. It is a question between the owners themselves, and their rights against each other.

It is in full evidence that the respondents well knew of the purchase, by the libellant, of one eighth part of this schooner, from the same person, Compton, from whom they derived their title. The officer of the custom-house at Bridgetown, where she was built, also knew of the bill of sale from Compton to Fox, it being drawn by him. It seems, also, that Fox applied at the custom-house of this port, to have his name inserted in the enrolment and license of the schooner, and produced his bill of sale, but was told that, as all the owners resided in another district, new papers could not be granted here. There was, therefore, no attempt at fraud or concealment by Fox, either from the other owners, or the government. The right of Fox, and the agreement between him and Compton, by which he obtained it, were well known to the other owners. Yet, in April last, William Murphy, one of the owners, went to the custom-house at Bridgetown, and there swore that he, together with Levi Paine, William S. Reed, and Isaiah Dunlap, were the sole owners of the schooner, wholly omitting the name of Fox. Now, putting Fox out of question, how are these respondents the sole owners? They have shown title to but three fourths. Whatever right Compton had not transferred to Fox, he assigned to his creditors, on the 26th October, 1838, eleven days after his transfer of one eighth to Fox. We find, then, that Murphy, well knowing of Fox's right, goes to the custom-house, and swears that he, Paine, Reed, and Dunlap, are the sole owners of the schooner, and gets the enrolment and license, accordingly; and now, when Fox claims, against them, his right as a part owner, they tell him he has lost it, because his name is not in the enrolment and license. And why is it not there? By whose act was it omitted? Did Murphy give Fox notice of his intention to take out the enrolment and license, and to omit his name? Never. It is impossible for any court to sanction such a defence, unless under the imperative commands of the law. The omission in the registry and enrolment of this schooner, does not make it, in point of fact, a foreign vessel. It can but deprive her of the privileges of an American, but her ownership is, in truth, American.

Granting that the omission of the name of Fox has deprived the vessel of American privileges, whose fault was it? . If a fraud has been committed on the revenue laws, whose fraud was it? Certainly not the libellant's. He had no part in the false statement made at the custom-house; it was not known to him. There was a double deception practised by Murphy; first, on the custom-house, and then on Fox, and now Murphy attempts to visit the consequences of his illegal act on the libellant. But suppose the consequence of this omission were even to convert the schooner, in point of law, into a foreign ship. Is there anything unlawful in an American citizen becoming a part owner of a foreign ship? Certainly not. He cannot claim for her American privileges; but, as between the owners, their rights are the same. These owners have entered her as an American ship, the tonnage duties have been assessed as such, and they cannot now be allowed to tell this court that their knowingly omitting to insert the libellant's name in her license, has deprived her of her national character.

It is ordered and decreed, that William Murphy, William S. Reed, Isaiah Dunlap, and Levi Paine, enter into stipulations in the sum $1340, being double the estimated value of one eighth part of the said schooner Lodemia and Eliza, to Evan Fox, the libellant, owner of the said one eighth part, for the return of the said schooner to the amount of the share of the said Evan Fox; and, unless they shall do so, they do severally consent that execution shall issue forth against them, their heirs, executors, administrators, goods, and chattels, wheresoever the same shall be found; and upon this being done, by sufficient sureties, the said schooner shall be released from arrest.

FOX v. REVENUE CUTTER NO. 1. See Case No. 11,713.

FOX (ROCHE v.). See Case No. 11,974.

FOX (SHANNON v.). See Case No. 12,706.

FOX (UNITED STATES v.). See Cases Nos. 15,155 and 15,156.

Case No. 5,015.

FOXALL v. LEVI.

[1 Cranch, C. C. 139.] [1]

Circuit Court, District of Columbia. Aug. 6, 1803.

SURRENDER OF BANKRUPT BY HIS BAIL.

A bankrupt, surrendered by his bail, during the time allowed for his examination, will not be committed in execution.

Stewart was surrendered in discharge of his bail [Levi]; and being prayed in commitment, produced a summons from commissioners of bankruptcy in Baltimore, dated August 4, 1803, to appear, &c., on the 5th of August, and the 25th of August, 1803, and the 15th of September next.

Upon which THE COURT refused to commit him in execution. The summons was simply signed by the commissioners, stating themselves as such. There was also a certificate that he did attend yesterday at Baltimore agreeably to his summons. See the bankrupt law of the 4th of April, 1800, § 22 [2 Stat. 19], which declares that the bankrupt shall be free from arrest; and on producing the summons or notice under the hands of commissioners, shall be discharged, if arrested.

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[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 5,016.

FOXALL v. McKENNEY et al.

[3 Cranch, C. C. 206.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

CONSTRUCTION OF WILL.

1. Coffee in a bag, wine in bottles, and brandy in a cask, laid in by the testator for the current use and consumption of himself and family, did not pass, under a bequest to the testator's wife, of "all his furniture, and other household effects, in both of his residences," "to be held and occupied by her, for her sole and separate use and benefit, provided she should continue to reside in either of the said residences, and for life, if she should so long continue to reside therein." The bag, bottles, and cask go with their contents, as incidents thereto.

2. The words, "all my servants," were limited to house servants, by the intention of the testator, as gathered from other parts of the will.

3. A bequest of the use of the testator's "property" in a certain baking business, comprehends the use of the testator's servants employed therein.

This was a bill in equity, filed by Mrs. [Catherine] Foxall against the executors of her husband's will, and certain trustees under her marriage settlement, for certain provisions of coffee, wine, and brandy, which had been laid in by her husband for the current use and consumption of the family; and also to obtain the use of his servants, who had been employed in a baking business carried on under the superintendence of his son-in-law, Mr. McKenney; and to be reimbursed her travelling expenses from England, where her husband died, to the United States. This cause was heard in this court at the same time with the two causes of Foxall v. English and English v. Foxall, which were decided by the supreme court of the United States, in 1829. 2 Pet. [27 U. S.] 595. This cause, however, was not carried up.

Before CRANCH, Chief Judge, and MORSELL, Circuit Judge.

CRANCH, Chief Judge. The third bill, namely, Foxall v. McKenney et al., presents three questions: 1st. Who is entitled to the coffee, wine, &c., laid in by Mr. Foxall for household consumption? 2d. Are the trustees entitled to the use of the servants employed exclusively in the bakehouse? 3d. Is the plaintiff, Mrs. Foxall, entitled to be repaid by the defendants her travelling expenses from England to Georgetown?

1. As to the coffee, wine, &c. By the marriage settlement she was to have, for life, the dwelling-house and appurtenances in Georgetown, his "household goods, implements, and utensils of household, china, linen, family carriage, and pair of horses," then (4th November, 1816) in his dwelling-house in Georgetown; and the trustees were to hold the same in trust; to permit Mrs. Foxall "to occupy and enjoy" the dwelling-house and appurtenances; and "to hold, use, and enjoy the said household furniture, implements, and utensils of household, china, linen, carriage, and horses, for and during the term of her natural life, if she shall so long continue to reside in the said dwelling house, to and for her own sole and separate use and benefit;" and after her decease, or ceasing to reside therein, upon trust for Mrs. Foxall's executors, administrators, and assigns. By the will, after confirming the marriage settlement, he bequeathed to his wife $500, as a temporary "provision for her support, until the enjoyment of the provisions of the settlement should accrue to her." He also gives her, "for her own use absolutely," certain plate in the house at the time of his death. He also gives her the use of all his servants, during the remainder of their time of servitude. He also gives her a right to select either his town or country residence, "or to continue in the occupation and enjoyment of both. the same as they had been occupied and enjoyed by himself;" his "desire being to promote the personal comfort of his wife," and that the occupation by her, of both residences, should be as his had been. He declares that his book-case, and books therein, shall be considered as forming a part of the household furniture, limited to her by the settlement; "and if she shall choose to continue the occupation of both residences," he gives and bequeathes to her all his "furniture, and other household effects, in both residences, not included in said settlement, to be held, used, and enjoyed by her, in the same manner, and upon the same terms, and for the same time, as the furniture and other household effects included in the said settlement;" but if she shall choose Spring-Hill, (the summer residence,) instead of the house in town, he then gives her power "to take and remove such part of his furniture and other household effects in his town-house, and carry the same with her to Spring-Hill, to be held and enjoyed by her in the same manner, in every respect, as the furniture and other household goods in his said dwelling-house; and as to such part thereof as she should not remove to Spring-Hill," he directs that the same shall sink into and form part of the "residuum of his estate." At the time of Mr. Foxall's death, there remained in his dwelling-house in Georgetown a small quantity of coffee in a bag, and some wine in bottles, and brandy in a cask, the whole value of which was $458.48, after deducting $20.06¼ for the bottles, &c., which coffee, wine, and brandy had been laid in by Mr. Foxall for the current use and consumption of himself and family, and not for sale. Mrs. Foxall, after her return from England, where her husband died in December, 1823, having determined to continue the occupation of both residences, (viz., the house in town and Spring-Hill,) took possession of

[1] [Reported by Hon. William Cranch, Chief Judge.]

the same and all the household effects in both, including the coffee, wine, and brandy; and the question now is, whether these family stores, or provisions, passed to her under the bequest of "all his furniture and other household effects in both residences, not included in the settlement; to be held, used, and enjoyed by her, in the same manner, and upon the same terms, and for the same time, as the furniture and other household effects included in the said settlement," that is, "for her sole and separate use and benefit," provided she continued to reside in either of the said houses, and for life if she should so long continue to reside therein. The intention of the testator is the ruling principle of construction in expounding a will. If the words are, in their usual import, extensive enough to carry the thing in question, but may be so construed as not to carry it, the intention of the testator must be sought by a comprehensive view of the whole will, and the circumstances in which the testator was, at the time of making it.

The words, "goods and chattels," are the most comprehensive terms of description for passing personal property by will; yet they may be restricted by the context. Thus in Crichton v. Symes, 3 Atk. 61, the words "all my goods, wearing apparel of what nature and kind soever, except my gold watch," were restricted to household goods and furniture, there having been a legacy of £50 given by the same will to another legatee; which showed the intention of the testator not to give every thing to the first legatee; it appearing also that the household goods, furniture, wearing apparel, and watch, together with the £50, constituted the whole personal estate, except about £16. And in Woolcomb v. Woolcomb, 3 P. Wms. 112, one devised to his wife "all his household goods, and other goods, plate, and stock, within doors and without," and bequeathed the residue of his personal estate to J. S. It was contended that the words "all other goods," carried the whole personal estate; but the lord chancellor was of opinion that such a construction would make void the bequest of the residuum; and that it seemed reasonable that the words "other goods" should be understood to signify things of the like nature with household goods, "to the end the whole will might have its effect; and consequently that the money, cash, and bonds should not, in this case, pass by the word 'goods,' but should go to the residuary legatee." In the case of Pratt v. Jackson, 2 P. Wms. 302, the words "household goods, utensils, and household stuff," in a marriage settlement, were held, by the house of lords, upon appeal, to carry only such as were in the dwelling-house of the husband, who lived in London, and not the beds, &c. in a marine hospital in Portsmouth, where he provided for sick and disabled seamen, under a contract with the government; these beds, &c. being considered rather as stock in trade than household goods.

These cases, and many others which might be cited, show that words, which are, of themselves, large enough to include the thing in question, may, by their associates, or by the context, or other circumstances, be so far contracted as to exclude that thing; and they are all examples of the rule that "the intention of the testator is to govern the construction of the will."

In the present case, if the coffee, wine, and brandy were bequeathed to Mrs. Foxall, it must be because they are included in the expression "household effects." These words do not seem to comprehend more than the words "household goods;" and they are used by the testator himself as equivalent terms; and in the marriage articles he has repeatedly used the words "household furniture" as equivalent to "household goods." By his will, he declares that his book-case and books therein shall be considered "as forming a part of the household furniture which is limited to" his wife by the settlement; and if she shall choose to continue the occupation of both residences, he gives her "all his furniture and other household effects, in both his said residences, not included in the settlement; to be held, used, and enjoyed by her, in the same manner, &c. as the said furniture and other household effects, included in said settlement." The indiscriminate use which he makes of the expressions "household furniture," "household goods," and "household effects," seems clearly to prove that he considered them synonymous; and by limiting his wife to the use of the "household effects" bequeathed, in the same manner, upon the same terms, and for the same time, as the "household effects" included in the settlement; it is strongly to be inferred that they were to be effects of the same kind. It had been decided, nearly a century before the date of this will, by Lord Chancellor Talbot, in the case of Slanning v. Style, 3 P. Wms. 334, 335, that malt, hops, beer, and ale, "which are victuals, and whose use is in their consumption, cannot, in their common, natural sense, be taken to be household goods, and pass under that denomination." And the case is much stronger where the use of the household effects is limited to the life of the legatee. In a still earlier case (Mich. T. 1729) Trafford v. Berrige, 1 Eq. Cas. Abr. 201, case 14, it was holden that where a man devised to his niece "all his goods, chattels, household stuff, furniture, and other things, which then were or should be in his house at the time of his death, and some time after died, leaving about £265 in ready money in the house, this ready money did not pass; for, by the words 'other things,' shall be intended things of like nature and species with those before mentioned." It is evident, by the various clauses of the will which have been cited, that it was the intention of the testator to

give Mrs. Foxall those things only, of which there could be a use for life, and which might remain in specie at her death; and that such as would be consumed in their use were not in his contemplation; and therefore he could not intend to give them. And, although from the general tenor of the will, and the solicitude it manifests to provide for the personal comfort of his wife, we may suppose that if these household stores of coffee, wine, &c. had been the subject of his thoughts, he would probably have given them to her; yet as it seems manifest that he did not think of them, and that he has not, in his bequest, used such expressions as, according to settled rules of construction of wills, will comprehend them, I am compelled to say that they did not pass to her by the will. I am also of opinion that the bag, the bottles, and the cask, go with the coffee, wine, and brandy, as incidents thereto.

2. The 2d question arising upon this bill, is, whether the trustees are entitled to the use of the servants who had been exclusively employed in the bakehouse in the lifetime of the testator. The clause of the will under which Mrs. Foxall claims them is in these words: "Also I give to her the use of all my servants during the remainder of their time of servitude." After this and several other specific bequests and devises, and subject thereto, he bequeaths and devises, to his trustees, whom he also appoints his executors, all his property of every kind, with the most ample powers to manage the same. Then comes the following clause, under which the trustees claim the use of the bakehouse servants: "And whereas I am now carrying on the baking business, in Georgetown, under the care and superintendence of my said son-in-law, Samuel McKenney, who accounts to me," &c., "now I do hereby declare my mind and intention to be that my said trustees do and shall, in their discretion, continue to carry on the said business after my death, for such time as they shall think it proper and prudent; and to use and employ my property therein, under the care and superintendence of the said Samuel McKenney, in the same manner as the same is now carried on by me and superintended by him," &c. &c. The servants in the bakehouse were literally Mr. Foxall's servants, and had a limited time to serve; and the words of the bequest to Mrs. Foxall are extensive enough to comprehend them, and she is entitled to the use of them, unless the general expression "all my servants" can be limited by the intention of the testator as discovered by a consideration of the other parts of the will. The 1st clause of the will confirms the marriage settlement; the 2d gives his wife $500 in addition to the settlement; the 3d gives her certain articles of plate; the 4th gives her the use of the servants; the 5th gives her the use of both his residences. These provisions seem all to be made in pari materia, and to have had the same object—the personal comfort of Mrs. Foxall in the residences she was to continue to occupy as he had done. They all relate to the household establishment, and to the small farm at Spring-Hill, which she was to occupy as a "retreat merely." For these purposes the bakehouse servants had not been used, and seem not to have been contemplated by the testator in the bequest, to his wife, of the use of his servants. I think therefore that she is not entitled to the use of the bakehouse servants.

3. The 3d question, arising upon this bill, is, whether Mrs. Foxall is entitled to be repaid, by the defendants, her travelling expenses from England to Georgetown. I see no part of the will which justifies such a claim; and therefore am of opinion that it cannot be allowed.

FOXALL (TURNER v.). See Case No. 14,255.

FOXCROFT (MALLETT v.). See Case No. 8,989.

FOY (FLEMING v.). See Case No. 4,862.

Case No. 5,017.

FOY et al. v. HUNTER et al.

[9 O. G. 542.]

Circuit Court, S. D. Illinois. Feb. 14, 1876.

PATENTS—SKIRT SUPPORTERS, ETC.

[This was a bill by James H. Foy and Lavinia H. Foy against George H. Hunter and others for the alleged infringement of certain patents. See Foy v. Hunter, Case No. 5,019.]

TREAT, District Judge. This cause coming on to be heard upon the pleadings and proofs therein, and Mr. Thos. H. Dodge appearing for the complainants, and filing an original stipulation, signed by the defendants, waiving any further defense therein, it is now, at this day, ordered, adjudged, and decreed: (1) That the several letters patent, viz: letters patent No. 45,296, dated the 29th day of November, 1864, granted to Lavinia H. Foy, for improvement in corset skirt-supporters; and reissue letters patent No. 4,831, granted to Lavinia H. Foy, assignor, by mesne assignment, to herself and James H. Foy, for improvement in skirt-supporting corsets, March 26, 1872, the original letters patent [No. 39,911] having been granted September 15, 1863; in the bill of complaint in this cause mentioned and set forth, are good and valid letters patent, and that the complainants became vested with the exclusive right in and to the said letters patent, and each of them as in said bill alleged and claimed. (2) That the said defendants have infringed upon the said complainants in their exclusive rights under said letters patent aforesaid, as in said bill set forth, and by the

testimony in this cause set forth and proven. (3) And it being admitted and agreed, by the stipulation aforesaid, that all the damages due to the said complainants for the infringements aforesaid, excepting one dollar damages and one dollar profits, have been settled and paid to the full satisfaction of said complainants; it is further ordered, adjudged, and decreed that the said defendants, their attorneys, agents, servants, and workmen be perpetually enjoined during the lifetime of the said letters patent, and each of them, from making, manufacturing, selling, or using, in violation of the said letters patent, and each of them, any corset skirt-supporters containing the said inventions of the said Lavinia H. Foy, in the said letters patent, and each of them, set forth and described, and that an injunction issue accordingly. (4) And it is further ordered that the said defendants pay to the said complainants their costs of this suit, to be taxed, together with one dollar damages and one dollar profits; and that the said complainants have execution therefor according to the course and practice of this court.

[NOTE. For another case involving this patent, see Foy v. Hunter, Case No. 5,018.]

Case No. 5,018.

FOY et al. v. HUNTER.

[9 O. G. 543 (No. 1).]

Circuit Court, S. D. Illinois. Feb. 14, 1876.

PATENTS—INFRINGEMENT—SKIRT SUPPORTERS.

[This was a bill in equity by James H. Foy and Lavinia H. Foy against Alexander M. Hunter for the alleged infringement of certain patents.]

Thos. H. Dodge, for complainants.
Winfield S. Coy, for defendant.

TREAT, District Judge. This cause coming on to be heard upon the pleading and proofs therein, and Mr. Thomas H. Dodge appearing for the complainants, and filing an original stipulation, signed by the defendant, waiving any further defense therein, it is now, at this day, ordered, adjudged, and decreed: (1) That the several letters patent, viz: letters patent No. 22,532, granted to Damase Lamoureaux, assignor to Alexander Douglas and Samuel S. Sherwood, January 4, 1859, and extended for seven years from and after the 4th day of January, 1873; letters patent No. 39,910, granted to Lavinia H. Foy, September 15, 1863, for improvement in corset skirt-supporters; letters patent No. 45,296, dated November 29, 1864, granted to Lavinia H. Foy, assignor to James H. Foy, for improvement in corset skirt-supporters; reissue letters patent No. 2,654, granted to James H. Foy and Lavinia H. Foy, assignees, by mesne assignments, of Lavinia H. Foy, June 18, 1867, for improvement in corset skirt-supporters, the original letters patent[1] having been granted September 15, 1863; and reissue letters patent No. 4,831, granted to Lavinia H. Foy, assignor, by mesne assignments, to herself and James H. Foy, for improvements in skirt-supporting corsets, March 26, 1872, the original letters patent[1] having been granted September 15, 1863; as in the bill of complaint in this cause mentioned and set forth, are good and valid patents, and that the complainants became vested with the exclusive rights in and to the said letters patent, and each of them, as in said bill alleged and claimed. (2) That the said defendant has infringed upon the said complainants in their exclusive rights under said letters patent aforesaid, as in said bill set forth, and by the testimony in this cause set forth and proven. (3) And it being admitted and agreed by the stipulation aforesaid that all the damages due to the said complainant for the infringements aforesaid, excepting one dollar damages and one dollar profits, have been settled and paid to the full satisfaction of said complainants; it is further ordered, adjudged, and decreed that the said defendant, his attorneys, agents, servants, and workmen be perpetually enjoined during the lifetime of the said letters patent, and each of them, from making, manufacturing, selling, or using, in violation of the said letters patent, and each of them, any corset skirt-supporter containing the said invention of the said Damase Lamoureaux, and the said inventions of the said Lavinia H. Foy, in the said several letters patent set forth and described, and that an injunction issue accordingly. (4) And it is further ordered that the said defendant pay to the said complainants their costs of this suit, to be taxed, together with one dollar damages and one dollar profits; and that said complainants have execution therefor, according to the course and practice of this court.

[NOTE. For another case involving this patent, see Foy v. Hunter, Case No. 5,017.]

Case No. 5,019.

FOY v. HUNTER et al.

[9 O. G. 543 (No. 2).]

Circuit Court, S. D. Illinois. Feb. 14, 1876.

PATENTS—INFRINGEMENT—COMBINED CORSETS AND BUSTLES.

[This was a bill in equity by Lavinia H. Foy against George H. Hunter and others, heard at the same time with Foy v. Hunter, Cases Nos. 5,017 and 5,018. The bill in each case was for an injunction, which was granted as prayed, according to a stipulation of the parties.]

TREAT, District Judge. This cause coming on to be heard upon the pleadings and proofs therein, and Mr. Thos. H. Dodge ap-

[1] [No. 39,911.]

pearing for the complainant, and filing an original stipulation, signed by the defendants, waiving any further defense therein, it is now, at this day, ordered, adjudged, and decreed: (1) That the letters patent granted to Lavinia H. Foy, May 1, 1866, for improvement in combined corsets and bustles, No. 54,323, in the bill of complaint, in this cause mentioned and set forth, are good and valid letters patent; and that the complainant became vested with the exclusive right in and to the said letters patent, as in said bill alleged and claimed. (2) That the said defendants have infringed upon the said complainant in her exclusive right under said letters patent aforesaid, as in said bill set forth, and by the testimony in this cause set forth and proven. (3) And it being admitted and agreed, by the stipulation aforesaid, that all the damages due to the said complainant for the infringement aforesaid, excepting one dollar damages and one dollar profits, have been settled and paid to the full satisfaction of said complainant; it is further ordered, adjudged, and decreed that the said defendants, their attorneys, agents, servants, and workmen be perpetually enjoined during the lifetime of the said letters patent, from making, manufacturing, selling, or using, in violation of the said letters patent, any corset skirt-supporter containing the said invention of the said Lavinia H. Foy, in the said letters patent set forth and described, and that an injunction issue accordingly. (4) And it is further ordered that the said defendants pay to the said complainant her costs of this suit, to be taxed, together with one dollar damages and one dollar profits, and that the said complainant have execution therefor according to the course and practice of this court.

Case No. 5,020.

FOY v. TALBURT.

[5 Cranch, C. C. 124.] [1]

Circuit Court, District of Columbia. March Term, 1837.

JUSTICE OF THE PEACE — JURISDICTION OF ACTIONS AGAINST EXECUTORS—EFFECT OF JUDGMENT.

1. A justice of the peace has not jurisdiction of an action against an executor; and money paid by the defendant in such a case, while in commitment upon a ca. sa. issued upon the judgment of the justice, was money paid by duress, and may be recovered in an action for money had and received.

2. A judgment of a justice of the peace, being in part for a matter not within his jurisdiction, is void in toto.

3. The plaintiff cannot, in an action before a justice of the peace, recover upon a cause of action different from that stated in the warrant.

This was an action for money had and received, to recover money paid by the plaintiff [Mordecai Foy] while in commitment upon a ca. sa. issued upon a judgment of a justice of the peace against the plaintiff as executor de son tort of a living man, for damage done to land.

R. J. Brent, for defendant [Jane Talburt], contended that money paid under valid process cannot be recovered, and cited 5 Wheeler, 89; Selden, 72; Cobb v. Curtiss, 8 Johns. 367; White v. Ward, 9 Johns. 231, 232; Phillips v. Hunter, 2 H. Bl. 414; Brisbane v. Dacres, 5 Taunt. 144, 160; Marriot v. Hampton, 7 Term R. 269; 1 Wheeler, 232; Walker v. Ames, 2 Cow. 428; Norfolk v. Gantt [2 Har. & J. 435], in the court of appeals in Maryland.

Mr. Bradley, contra, admitted the law as cited; but it does not apply to a judgment void because the court which rendered it had not jurisdiction of the cause. It is not, then, valid process; but wholly void.

The jury having been sworn, THE COURT, at the motion of Mr. Bradley, instructed the jury, that if, from the evidence, they should be of opinion that a judgment was rendered in this case by a justice of the peace against the present plaintiff as executor, and that upon such judgment a ca. sa. was issued, and the plaintiff committed to prison, and that while there he paid the said judgment and costs, then the said money was paid by duress. Verdict for the plaintiff, $54.15.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 5,021.

In re FOYE.

[2 Lowell, 399.] [1]

District Court, D. Massachusetts. March, 1875.

BANKRUPTCY — PROVABLE DEBTS — COSTS OF ATTACHMENT IN DIVORCE PROCEEDINGS AGAINST BANKRUPT.

The costs of an attachment, laid by the wife of the bankrupt in a libel for divorce, are not provable in the bankruptcy, and are not an equitable charge against the assets in the hands of the assignee.

[In bankruptcy. In the matter of George F. Foye.]

R. M. Morse, Jr., for petitioner.
C. Blodgett, for assignee.

LOWELL, District Judge. The bankrupt's wife sued for a divorce, and by order of one of the justices of the court in which that cause was pending, passed in accordance with a statute of Massachusetts, she attached his personal property, to answer any decree for alimony, and incurred large costs in the custody thereof. Before that suit was decided, the husband became bankrupt, the attachment was dissolved, and the chattels came to the possession of the assignee. The wife now applies for an order that her costs may be paid her in full.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

The insolvent law of Massachusetts provided, that, when an attachment should be dissolved by the proceedings of the defendant in insolvency, and the plaintiff proved his debt, his costs should be a privileged claim upon the assets. Gen. St. c. 118, § 127. In Fortune's Case [Case No. 4,955], I worked out an equity in favor of attaching creditors, for their costs incurred in putting the property into the custody of the law, for the general benefit.

It is insisted, on behalf of the petitioner, that she has an equity like that which was admitted in Fortune's Case. I do not think so. She has no provable debt, and whatever she may hereafter recover in the way of alimony, and for costs, will be a valid debt against her husband, notwithstanding his discharge in bankruptcy. In the case cited, the debt and costs would have been barred; and the costs were not even provable as an ordinary debt, and unless they could be paid by a sort of equitable privilege, they could not be paid at all. Besides, the action in behalf of the wife is not one which I could presume, as in the case cited, to have been intended for the general good. It was brought for a quasi tort, and tended to diminish the fund which would have inured to creditors. Suppose a writ of replevin is brought against the bankrupt claiming all his personal property, but the action is finally decided in favor of his assignees, it might be argued that, but for the replevin, the bankrupt would have squandered his estate, and therefore the costs ought to be allowed. It seems to me that the statute of Massachusetts adopted the true equity. Some bankrupts, indeed, may not be discharged, and then the debt and costs might be recovered; but those cases form a very small fraction of the whole number. If the bankrupt is discharged, those plaintiffs whose debts or demands are not provable, have, to be sure, lost their original security, which is a hardship; but, on the other hand, they hold their full claim, and may levy it out of the future acquisitions of the bankrupt. The debt not being a provable one, its incident is not so, either as privileged or otherwise. Petition denied.

FOYE, In re. See Case No. 9,823.

Case No. 5,022.

FOYE v. DABNEY et al.

[1 Spr. 212.] [1]

District Court, D. Massachusetts. Jan., 1853.

SEAMEN — WRONGFUL DISCHARGE IN FOREIGN COUNTRY—MEASURE OF DAMAGES.

1. Wrongful discharge in a foreign country.
2. Measure of damages.

[Cited in Coffin v. Weld, Case No. 2,953.]

This was a libel by the second mate of the bark Ithona, against the owners, claiming wages for the entire voyage for which he shipped. This case was tried at the same time, and on the same evidence, as Foye v. Leckie [Case No. 5,023], with the further fact that the second mate, after his discharge, shipped on wages, at Trieste, in a vessel bound to New York, and voluntarily left that vessel at Leghorn.

J. H. Prince, for libellant.

R. H. Dana, Jr., for respondents.

THE COURT held, that the discharge of the second mate was not voluntary on his part, but coerced by the illegal conduct of the master, and that he was entitled to compensation as for a wrongful discharge. That the measure of damages was not, necessarily, his wages for the whole voyage. See Hunt v. Colburn [Case No. 6,886]; Sheffield v. Page [Id. 12,743].

His contract wages and expenses were allowed, up to the time when he might have reached his original home port, deducting what he had actually earned, or might have earned, on his passage home.

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

Case No. 5,023.

FOYE v. LECKIE.

[1 Spr. 210.] [1]

District Court, D. Massachusetts. Jan. 1853.

SEAMEN—PUNISHMENT OF SECOND MATE—IMPRISONMENT.

1. Where a master orders a second mate to slush the masts, or to take in light sails, as a punishment, when no offence has been committed that would justify it, the second mate has a right to refuse obedience.
2. The master has no right to imprison him, for such refusal.

This was a libel for damages, by the second mate, against the master of the bark Ithona.

It appeared that the libellant shipped for a voyage, from Boston to the Mediterranean and back; that when a few days out, the master found fault with the manner in which he had sewed a rope upon an old sail, and ordered him as punishment, to slush the mast. This order he refused to obey; the master gave him time to reflect, telling him, that if he did not obey, he should be put in irons. He then ordered him to go aloft, and take in the top-gallant studding-sail, and furl the royal. This order he also refused to obey. At the time he told the master, that if he would put him forward, he would obey these orders. The master then put him in irons, and he remained in irons, until the arrival of the vessel at Trieste, when he applied for his discharge, and was discharged before the consul, but without wages. While in irons, he was allowed the use of his state-room, and of the quarter-deck, and was set free at meal

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

times, and whenever else it was necessary. It was also understood between him and the master, that he could come out of irons, whenever he would promise to perform any seaman's duty that the master might order. These terms he refused to comply with, but was willing to be turned forward.

A number of ship-masters were examined, as experts, as to the extent of the duties of a second mate, in vessels of this size.

J. H. Prince, for libellant.
R. H. Dana, Jr., for respondent.

SPRAGUE, District Judge. It is not necessary to lay down any general rule, fixing the limits of a second mate's duty. Slushing masts and taking in light sails, are parts of a seaman's duty, but not usually assigned to able seamen, if there are light hands on board, and never to a second mate, unless in an exigency, and when all the men are otherwise employed. The experts agree in this. It is argued, that the second mate is a workman on board, and must, at the discretion of the master, do any part of the duty of a seaman, when not in command of a watch. I do not deem it necessary to go into the inquiry, how far the second mate is bound to slush the masts and take in light sails, when ordered to do so, in the fair exercise of the discretion of the master; for in this case, it is plain, that the order was given, not for the performance of a necessary duty, but as a punishment, when there had been no offence which could justify it. The officer had a right to protect himself and his rank. He did not do so by formidable resistance. He submitted quietly to the penalty of his refusal.

I am of opinion, that his imprisonment was wrongful, and that he is entitled to compensation. It appears that the libellant has also instituted criminal proceedings against the master, which are still pending. I shall give no damages beyond the mere indemnity for the wrong done.

Decree for $100 and costs.

See Smith v. Jordan [Case No. 13,068]; The Sarah, Stu. Adm. 88, 89.

FOYE (UNITED STATES v.). See Case No. 15,157.

FOYLES (DOBBIN v.). See Case No. 3,942.

FOYLES (KING v.). See Case No. 7,792.

Case No. 5,024.

FOYLES v. LAW.

[3 Cranch, C. C. 118.] [1]

Circuit Court, District of Columbia. May Term, 1827.

EXECUTION—STAY—WRIT OF ERROR—SUPERSEDEAS—CA. SA.—INJUNCTION.

1. The court will not order an execution against bail to be stayed because a writ of error has been taken out by the principal, which is still pending in the supreme court, it not having been taken out in time to be a supersedeas; nor will they grant an injunction for the like cause.

2. If the party is taken upon a ca. sa. an injunction will not relieve him.

3. If a defendant is brought in upon a ca. sa. and not committed in execution, and the execution "not called by consent," it seems that the plaintiff cannot have another execution.

[This was an action by Foyles, for the use of Smallwood, against Thomas Law, special bail of J. D. Barry.]

A writ of error had been sued out by Barry to the original judgment against him, but too late to be a supersedeas; and a ca. sa. against him having been returned non est, a scire facias against Mr. Law as his bail was sued out, and a ca. sa. awarded thereon against him upon which he was arrested, and brought into court by the marshal.

THE COURT, upon motion, refused to order the execution against Mr. Law to be stayed until the writ of error to the original judgment should be decided in the supreme court of the United States.

Mr. Law then filed a bill for an injunction.

Mr. Worthington, for Mr. Law, contended that it was not too late, and that an injunction to stay further proceedings at law would justify the marshal in discharging Mr. Law from the arrest upon this execution; and he cited the case of West's Ex'r v. Hyland, 3 Har. & J. 200, to show that after a return of cepi upon a ca. sa., if no other entry be made on the record; and the plaintiff take no further steps, either by praying the defendant in commitment, or defaulting the sheriff, or by stating, on the record, that the plaintiff, by consent of the defendant, "elected not to call the execution," the plaintiff may have a new ca. sa.[2]

CRANCH, Chief Judge. But in the present case the plaintiff does not elect not to call the execution, but has called upon the marshal to return the writ; and it is now returned "cepi," and the plaintiff prays that the defendant may be committed in execution. The equity relied on in the bill is, that there is error in the original judgment; that the plaintiff expected that the case in error would have been decided before the plaintiff at law could obtain an execution against the complainant; that if the money should now be paid to the plaintiff at law, there will be great trouble, delay, and expense in getting it back, and risk of losing it altogether.

All the equity of the case may be resolved into the negligence of the principal debtor, in not obtaining a supersedeas in proper time; and of the bail, in not producing his

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] It appears in the record of the case of West's Ex'r v. Hyland that the defendant had escaped from the first ca. sa., and therefore the court refused to quash the second ca. sa. See 7 Pet. [32 U. S.] 677.

principal upon the return of the scire facias. I do not think there is equity enough to justify the court in depriving the plaintiff at law of his legal remedy; no fault can be imputed to him. Nor do I think that an injunction to stay further proceedings at law in the case, can avail the complainant; for there is nothing remaining to be done to enforce the judgment. The plaintiff has gone the whole length, and the marshal has nothing further to do. If the court should refuse to order the defendant, Mr. Law, to be committed in execution, I doubt very much whether the plaintiff could have a new execution. A ca. sa. is the highest execution the party can have. When the body is taken on a ca. sa., and the writ is returned and filed, it is an absolute and perfect execution of the highest nature against the defendant, and no other execution can afterwards be had against his lands or goods, except where a person dies in execution; in that case, his lands and goods are liable to satisfy the judgment, by the statute of 21 Jac. I. c. 4; 3 Bl. Comm. 415.

The case of West's Ex'r v. Hyland, cited by Mr. Worthington, is reported without argument, or reasons given for the judgment of the court. It is probable, however, that it was considered as a case within the statute of 1789, c. 42, by which, if a plaintiff elect not to call a ca. sa. at the return term, with the assent of the defendant, he may have a new ca. sa.; and the election of the plaintiff, and the assent of the defendant, not to call that ca. sa., must have been proved to, or presumed by, the court, from the silence of both parties. See the case of West's Ex'r v. Hyland, cited in 7 Pet. [32 U. S.] 677, in Appendix. This is not a case coming within that statute; and if the court should refuse to commit the defendant in execution, at the prayer of the plaintiff, I do not think, as I before observed, that he could have a new execution.

I also think that the injunction must be refused, because it has nothing to operate upon. There is no proceeding at law to be stayed. The judgment is executed; and because, if it should operate as a discharge of the defendant from this execution, the plaintiff cannot have another. Injunction refused.

Case No. 5,025.

FRALOFF v. NEW YORK CENT. & H. R. R. CO.

[10 Blatchf. 16.] [1]

Circuit Court, S. D. New York. May 15, 1872.

CARRIERS OF PASSENGERS — LOSS OF BAGGAGE — VALUABLE LACES—ACTION BY MARRIED WOMAN—MEASURE OF DAMAGES.

1. In an action against a common carrier, to recover for the loss of laces contained in a trunk, the baggage of the plaintiff, as a passenger, it appeared that none of the laces had been purchased by the plaintiff, and that they were purchased by no one, at least within living memory, but were inherited or received by gift, and were many years old: *Held*, nevertheless, that their value must be ascertained by a money standard, based on evidence, and could not be assessed upon conjecture, and that, in the absence of such evidence, nominal damages only could be given.

2. The action was properly brought in the name of the plaintiff, she being a married woman.

3. The laces were reasonable apparel and baggage, reference being had to the social position and wealth of the plaintiff, the state of her health, and the object of her journey to this country from abroad.

[This was an action at law by Olga de Maluta Fraloff against the New York Central & Hudson River Railroad Company.]

Thomas C. T. Buckley and James W. Gerard, Jr., for plaintiff.

Theron R. Strong, for defendants.

SHIPMAN, District Judge (orally charging jury). The plaintiff in this suit seeks to recover of the defendants the value of certain laces which she claims to have lost out of her trunk, while it was in the custody of the defendants, and in course of transportation over their road, from Albany to Niagara Falls. She alleges, that she bought a ticket for herself, as passenger, on the 4th of November, 1869, delivered her trunk, or caused it to be delivered, to the defendants, at their baggage car, in Albany, and received from them a check therefor; that both herself and trunk passed over the route that day, reaching Niagara Falls some time after midnight; and that, on her arrival at the latter place, her trunk was found to be in a damaged condition. Of these facts there does not seem to be any serious dispute.

But the plaintiff further claims, that, when she delivered her trunk to the defendants, it was in good order, and securely fastened, and that it contained the laces which she has described in her deposition. This the defendants deny; and they say that the evidence on this point is not sufficient to warrant you in finding that these laces were in her trunk at the time they received it from her at Albany. On this point the burden of proof is on the plaintiff. I do not propose to rehearse the evidence. You will remember it, especially as it was very fully and recently commented on by counsel on both sides, and say whether or not you are satisfied that the laces in question formed part of the contents of the trunk at the time it was placed in the baggage car at Albany. If they did not, then the defendants are not liable in this action, and your verdict should be for them. If, on the other hand, you are satisfied that the laces did constitute a portion of the contents of her trunk when it was received by the defendants, and that they constituted a part of her reasonable and ordinary baggage, then your verdict must be for the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

plaintiff. This is very obvious. The defendants admit that they are common carriers of passengers over the route in question; and, as such, they are responsible for all reasonable and proper baggage of those they transport, while it is in their custody. They are bound to return it to the traveller in substantially the same condition as that in which they received it, and no excuse can exonerate them from the non-performance of this duty, except the act of God or the public enemies, neither of which are pretended in this case. It is immaterial, then, if these laces were in fact abstracted from the trunk while in the defendants' custody, by whom it was done, if it was not done by the plaintiff herself, or by her assent or connivance.

You will have no difficulty in disposing of this part of the case. The evidence is not long or complicated, and you will readily determine whether or not the articles alleged to have been lost by the plaintiff were, or not, delivered to the defendants at Albany, and lost while in their custody. If you find the claim of the plaintiff in this respect true, you will, as I have already intimated, find a verdict for her. The question will then arise as to what amount of damages she is entitled to. This is a very important question, and yet one upon which there is very little proof upon which you can lawfully act. This renders it proper that I should submit some considerations to you in regard to the condition of the evidence as to value.

The plaintiff, in her deposition, describes the character and quality of the laces which she says she lost, to some extent, but she fixes no value which can be any guide to you, acting as you are under oath, and bound to come to definite results upon definite evidence, or upon such evidence in regard to facts, as alone would warrant you in deducing a definite price. The plaintiff states, that she purchased none of these laces, and that they were purchased by no one, at least within living memory; and it is inferrible from her statements, that there is no one living who can testify as to the cost of their manufacture. She says that they were made many years ago, and were inherited by her from her grandmother, or received by way of gift from her aunts. Nor is the plaintiff able to testify as to the value of similar laces which, to some limited extent, are sold in the markets of the world. Vague hints, such as that attributed to the empress, that they were worth a kingdom, or the evidence of some of the plaintiff's witnesses, that they were very beautiful, unique and exquisite, furnish no reliable guide by which you can fix a definite price. The defendants, if liable, are only liable for the value of these laces at the time they were lost, and that value is to be ascertained, if at all, by a money standard. Neither courts nor juries are permitted to assess values upon conjecture. They must have proof of value, or evidence of such facts as will warrant a deduction of the value with reasonable certainty. This is peculiarly true in regard to articles like these laces, the character and value of which are not generally known. According to the statement of the plaintiff, she possessed the only specimen of one kind of this lace, except a similar one belonging to the queen of England. It is obvious, therefore, that, before you can say, by your verdict, what the value of these lost articles was in November, 1869, you must have some specific information on that precise point, and it must come from witnesses, or some one witness who is competent to speak on the subject. The counsel for the plaintiff claims, that you can find sufficient evidence of that character in the statements of Mrs. Carter, who has been before you. And it is true that Mrs. Carter gave some evidence as to the value of laces which bear the same name as some of those which the plaintiff alleges that she lost. This evidence is very meagre, and I admitted it with considerable hesitation. But it is before you, for your consideration, and it is the only evidence in the case which approximates to any precise valuation. Counsel on both sides have referred to it, in their arguments to you, and have submitted to me computations based upon her evidence. You will remember her statements. Upon some laces of the same general character she did give the prices. I was compelled to restrict her testimony to the narrowest width and the poorest quality, for the reason that no specimens of the plaintiff's laces were here, to be submitted to her inspection and judgment. You will recollect what the plaintiff said about the quantity and character and variety of the laces which she claims to have lost. You will also recollect the values which Mrs. Carter gave of the similar kinds, upon which she expressed an opinion; and you must arrive at their value as best you can. I think it my duty to say to you, that, by no computation, however liberal, based upon Mrs. Carter's prices, can the value of the laces in question, to which Mrs. Carter's estimates refer, exceed one thousand dollars. I do not say that it would reach that sum, but I do say that it will not exceed it. In regard to the laces upon which Mrs. Carter could fix no price, which the plaintiff lost, (if she did lose them,) she will be entitled to nominal damages only.

I have been thus particular in directing your attention to the peculiar condition of the evidence on this question of damages, because, an error on your part on this point might render this trial fruitless of any good result. Had the plaintiff produced in court the specimens of the laces which she referred to in her deposition, and which were marked as exhibits, but not attached to her deposition, and satisfied you that they fairly represented those she lost, there would have been some definite evidence before you, from which you could ascertain their value. That she has not done so is, in judgment of law, her

own fault, and the consequences of that fault cannot be visited upon these defendants.

On the question, whether the action is properly brought in the name of the plaintiff, she being a married woman, I charge you in the affirmative. On the question to which counsel have called my attention, and requested me to instruct you, as to whether the lost laces were reasonable apparel and baggage, reference being had to the social position and wealth of the plaintiff, the state of her health, and the object of her journey, I have no remarks to submit to you, inasmuch as, by the proofs in the case, so far as they go, the value and character of this ornamental apparel was not greater than any respectable lady, traveling in a foreign country, might reasonably carry in her trunk.

You will consider the evidence before you, in the light of these instructions, and return such a verdict as that evidence will warrant, adding interest to the principal sum, from November 4th, 1869, to the present time, at the rate of seven per cent. per annum.

The jury were discharged without agreeing on a verdict.

[NOTE. At a subsequent trial the jury returned a verdict for the plaintiff for the sum of $10,000. Motion for a new trial was denied (Case No. 5,026), and the judgment of the circuit court was affirmed by the supreme court in New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24.]

Case No. 5,026.

FRALOFF v. NEW YORK CENT. & H. R. R. CO.

[12 Blatchf. 484;[1] 48 How. Pr. 535; 21 Int. Rev. Rec. 124.]

Circuit Court, S. D. New York. April 1, 1875.[2]

CARRIERS OF PASSENGERS — LOSS OF BAGGAGE — VALUABLE LACES—REASONABLE AND ORDINARY WEARING APPAREL.

1. On the trial of a suit against a railroad corporation, to recover the value of certain laces, forming part of the contents of a trunk, which the corporation transported as the baggage of a passenger, who went by the same train with the trunk, the jury were instructed, that they were to decide, as a question of fact, under the rules defined by the court, whether or not the laces in question were baggage; that the responsibility of a carrier could not be maintained to the extent of making him responsible for such unusual articles as the exceptional habits or fancies, or the idiosyncrasies, of some particular individual, might prompt that individual to carry; that liability was limited to responsibility for such articles as it was customary or reasonable for travelers of the same class or tastes, in general to take with them for such journeys as the one which was the subject of inquiry; and that they could find a portion of the laces to have been reasonable baggage and the remainder not. The jury found a verdict for the plaintiff for $10,000. A motion was made by the defendants for a new trial, on the ground that the verdict was contrary to the evidence: *Held*, that, as the jury must have found that the laces, to the value of $10,000, were baggage, and, as their verdict was sustained by credible testimony as to such value, it was conclusive.

[See note at end of case.]

2. Whether the laces in question were the wearing apparel of the plaintiff, and were reasonable and ordinary wearing apparel to be carried by her as baggage, was a question of fact for the jury.

[See note at end of case.]

[This was an action at law by Olga De Maluta Fraloff against the New York Central & Hudson River Railroad Company to recover the value of certain laces alleged to have been abstracted from the baggage belonging to the plaintiff while in course of transportation over the defendant's road. At the first trial the jury were unable to agree, and were discharged. Case No. 5,025.]

James W. Gerard, for plaintiff.

Elliott F. Shepard, for defendant.

WALLACE, District Judge. This is a motion, upon a case made, for a new trial. The action is by a passenger, to recover for baggage lost while in charge of the defendant. The jury rendered a verdict for the plaintiff, for $10,000.

The facts upon which the verdict of the jury is predicated are so unusual, and the amount of the recovery, in view of the nature of the action, is so exceptional, that this motion deserves and has received careful consideration; but, notwithstanding the very elaborate and able argument of the defendant's counsel, and my own inclination to dissent from the conclusions of the jury, upon one of the vital questions of fact, I am convinced that the case presented is not within the rules which authorize a verdict to be set aside as contrary to evidence.

Credible testimony was given which authorized the jury to find the following facts: The plaintiff was a Russian lady, of high rank and large estates, who, for some time prior to coming to the United States, had been traveling in Europe, spending her time mainly in its principal capitals. Partly for health and partly for pleasure, in September, 1869, she determined to visit the United States, and left England, under the escort of one Webber, as a traveling companion, and came to New York City. While in England, her baggage comprised twelve trunks. Of them she brought here four large and two small ones, containing wearing apparel for her own use, of great variety and quantity, and of very expensive quality. Included in her wearing apparel was a large quantity of rare and valuable laces, which she had been accustomed to wear occasionally at home and during her travels in Europe, and which she valued at $200,000. She contemplated extensive travels in this country, and brought with her about $15,000, for her expenses, but had no fixed plans as to the duration or details of

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Affirmed in 100 U. S. 24.]

her travels. After staying several weeks in New York City, she commenced her travels here, and started for Chicago, intending to visit various places on the way, designing not to return to New York, but to decide, after arriving at Chicago, where she would go, contemplating, in a general way, going to New Orleans, Havana, California, and, possibly, Rio Janeiro, or to some of those places. She carried with her, from New York, one large trunk, a small trunk, a hat box, four satchels, a bag containing jewelry, and a cage of birds. She took with her the laces in question, which were packed in the large trunk. This contained several trays, the laces being in the fifth one from the top. Webber accompanied her. They stopped at the Delavan House, in Albany, for a day or two, and the large trunk was allowed to remain, during that time, in the baggage room of the hotel, locked up with other baggage. Webber went to the trunk once or twice, by the plaintiff's request, and procured from it articles which she wanted. Just before it was taken from the hotel to the defendant's depot, by the hotel porter, Webber returned these articles to the trunk. He then saw the package in which the laces had been folded by the plaintiff when she packed her trunks. He locked the trunk, and, soon after, it was delivered by the porter to the defendant's baggage agent, and was checked for Niagara Falls, whither the plaintiff and Webber went by the same train as did the baggage. The trunk was in good condition when delivered to the defendant's agent. When it arived at Niagara Falls, the locks were broken, the contents disturbed, and the plaintiff refused to receive it until it was examined to ascertain if the contents were safe. Upon examination, it appeared that the laces were missing, although nothing else had been taken. Articles of great value were necessarily exposed to view before the laces could have been abstracted from the trunk. As to the value of the laces, the jury were authorized to find a verdict for a very small sum, or for $62,000. Some of the laces were collars and handkerchiefs, and others were flounces, corsages, and dress trimmings, of various kinds. Although a large amount of testimony was elicited on the part of the defendant, tending to contradict many of these facts, and, upon some of them, strongly discrediting the plaintiff's case, I am constrained to hold that there was sufficient evidence to authorize the jury to find them substantially as above stated.

Among other things the jury were instructed, that they were to decide, as a question of fact, under the rules defined by the court, whether or not the laces in question were baggage, and, in this connection, the court charged as follows: "The responsibility of a carrier cannot be maintained to the extent of making him responsible for such unusual articles as the exceptional habits or fancies, or the idiosyncrasies, of some particular individual, may prompt that individual to carry. That liability is limited to responsibility for such articles as it is customary or reasonable for travellers of the same class or tastes, in general to take with them for such journeys as the one which is the subject of inquiry." They were also instructed that they could find a portion of the laces to have been reasonable baggage, and the remainder not.

I have summarized these facts, and referred to the instructions mentioned, for the purpose of presenting satisfactorily the salient features of the case in regard to the question which has impressed me as the most serious one—whether the jury could properly find that the property for which the plaintiff has obtained a verdict was reasonable and ordinary baggage.

The jury must have found that laces of the value of $10,000, carried by a traveller, with a large assortment of other articles of apparel, for personal use, are reasonable and ordinary baggage, for the loss of which a carrier, to whom they have been delivered, without notice of their value, is responsible. On first impression, the statement of this conclusion raises a somewhat violent presumption against the correctness of the verdict. No precedent for a recovery so large has been found, and, if it is sustained, it is difficult to ascertain where the limit of a carrier's liability exists. Nevertheless, if the question was properly left to the jury to decide, as one of fact, the value of the articles was peculiarly for their consideration, and abundant testimony was before them to sustain the conclusion they reached. The difficulty, in this case, lies in the character of the articles for the loss of which the action was brought. They were claimed to be a portion of the plaintiff's wearing apparel. If they were such, within all the cases, they were baggage, unless they were so valuable and rare as to exclude them from that category. What is wearing apparel, must necessarily be a question of fact. What is reasonable and customary wearing apparel, to be carried by a traveller upon a particular journey, must, also, be a question of fact. I know of no case where this has been held to be a question of law. The conflict in the authorities arises when we pass beyond these articles, to inquire what other property is baggage. By some of these authorities it is held, that the broad question is one for the jury to determine, both as to character and value, depending upon the tastes and habits of the traveller, his pecuniary circumstances, his position in society, and the conveniences and necessities of the particular journey, and that their decision cannot be disturbed (Rawson v. Pennsylvania R. Co., 2 Abb. Pr. (N. S.) 220; McGill v. Rowand, 3 Barr [3 Pa. St.] 451); while, by others, it is held to be one of law for the court; and in these we find an irreconcilable conflict in its determination. Thus, money for travelling ex-

penses has been excluded (Grant v. Newton, 1 E. D. Smith, 95), and allowed (Merrill v. Grinnell, 30 N. Y. 594); jewelry excluded (Richards v. Westcott, 2 Bosw. 589, and The Ionic [Case No. 7,059]), and allowed (McCormick v. Hudson River R. Co., 4 E. D. Smith, 181); pistols excluded (Chicago, R. I. & P. R. Co. v. Collins, 56 Ill. 212), and guns allowed (Van Horn v. Kermit, 4 E. D. Smith, 453); manuscripts excluded (Hannibal Railroad v. Swift, 12 Wall [79 U. S.] 262), and allowed (Hopkins v. Westcott [Case No. 6,692]). An examination of these cases justifies the remark, that the limit of the carrier's responsibility seems as uncertain when left to be ascertained as a question of law by the court, as when left to the inquiry of a jury. Holding, as I do, that, whenever the article in controversy is, or may be, wearing apparel, a question arises for the determination of the jury as to whether, upon the facts in the particular case, it was such as the traveller was entitled to carry as baggage, it follows, that the finding of the jury, when sustained by credible testimony, must be conclusive. If the court can set aside the verdict, because it appears that the property was of greater value than the judge deems it reasonable that a traveller should carry, the question is no longer one of fact for the jury, but one of law for the court. If it is to be decided as matter of law, what standard of value is to be adopted? Illustrated by the present case, when the jury have found that the value of the plaintiff's property was $10,000, or that such of it as, under the circumstances, she was entitled to carry, was of that value, is it to be said it must be set aside, whereas, if it had been $1,000, or $3,000, the law would sanction the recovery? If so, it is the duty of the court, instead of instructing the jury that they are to determine what, in the particular case, is reasonable and customary baggage, to instruct them that the value or amount must not exceed some arbitrary limit defined by the court. To this proposition I cannot assent. If carried to its logical conclusion, it would abrogate the functions of the jury with reference to questions of this class. On the other hand, if the views I have expressed are a correct exposition of the law, the carrier is exposed to the hazard of most onerous responsibilities. In this case, the verdict might have been for $62,000, and it could not have been said that the verdict was contrary to the evidence, as to the value of the property lost. It would be difficult to conceive that any facts would justify such a recovery for loss of baggage. Undoubtedly, the case would be rare where such a verdict would not indicate prejudice, partiality or misconception on the part of the jury; and, in such case, under its general power over verdicts, the court could set it aside. But, had it been for that sum here, I am not prepared to say that it could not be sustained, in view of the extraordinary features of the case. As is said by the supreme court of Pennsylvania, in McGill v. Rowand, supra, it is not obvious in what manner the court can restrict the quantity or value of the articles that may be deemed either proper or useful for the ordinary purposes of the traveller, because, in the nature of things, it is susceptible of no precise or definite rule, and, when there is an attempt to abuse the privilege, the court must rely upon the intelligence and integrity of the jury, to apply a corrective. If carriers are unwilling to assume the liabilities which they may incur if this rule is adopted by the courts, they must resort to such regulations, in regard to the transportation of baggage, as are sanctioned by law, or appeal to legislation for protection.

I have not deemed it necessary to refer to any other of the many grounds upon which it is urged a new trial should be granted. I entertain no doubt that, upon the other questions of fact, there was sufficient evidence to justify the conclusions of the jury. As to the rulings of the court upon the trial, those of importance were quite maturely considered, and, upon examination, meet my approval now. The novelty and importance of the questions involved render the case one eminently fit for the consideration of a higher tribunal, and to its consideration these questions should be remitted.

The motion for a new trial is, accordingly, denied.

[NOTE. The defendant brought error, and the judgment of the circuit court was affirmed; Mr. Justice Harlan delivering the opinion, in which it was held: "1. In absence of legislation, or of special regulations by the carrier, or of conduct by the passenger misleading the carrier as to value of baggage, the failure of the passenger, unasked, to disclose the value of his baggage is not, in itself, a fraud upon the carrier. 2. To the extent that articles, carried by a passenger for his personal use when travelling, exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer. 3. Whether a passenger has carried such an excess of baggage is not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance as to the law of the case. And its determination of the facts—no error of law appearing—is not subject to re-examination in this court." Mr. Justice Field, Mr. Justice Miller, and Mr. Justice Strong dissent. New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24.]

FRAME (MYERS v.). See Case No. 9,991.

FRAME (PEEK v.). See Cases Nos. 10,903 and 10,904.

Case No. 5,027.

FRANCE et ux. v. AETNA LIFE INS. CO. (two cases).

[20 Pittsb. Leg. J. 170; 2 Ins. Law J. 657; 18 Int. Rev. Rec. 32.]

Circuit Court, E. D. Pennsylvania. May 16, 1873.[1]

LIFE INSURANCE — INSURABLE INTEREST — MATERIALITY OF REPRESENTATIONS IN RESPECT TO HEALTH — QUALIFIED ANSWERS — AGE—ESTOPPEL.

1. A sister, although a married woman and in no way dependent upon a brother for support, and to whom he is in no ways indebted, has an insurable interest in the life of such brother.

2. Semble, that without any interest in the life of the party insured, a policy taken out in the name or for the benefit of a third party is valid, if the risk is truly described, inasmuch as the premium is fixed in exact proportion to the risk as described.

3. The answers to questions in an application for life insurance which, by the terms of the policy, are made part thereof as fully as if therein recited, have the effect of warranties, and if they are wholly or in any degree or respect material to the risk, false or fraudulent, the policy is void.

[See note at end of case.]

4. If in answer to a question in the application, "Has the party ever had any of the following diseases? If so, how long, and to what extent?" (one of these diseases being rupture) the reply is "None," it is for the jury to say whether he was ruptured at the time or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured; and if so, or if at the time or any such previous period he wore a truss to repress hernial extrusion, the policy was void.

[See note at end of case.]

5. The statement of a party's age in his application for a policy of insurance on his life does not import absolute accuracy, whether it be stated positively or with a qualification that it is as near as he can recollect.

6. But even when such words of qualification are added to the answer in respect to age, they do not mean that the party is of uncertain age, but of the age stated or thereabouts, and a slight or immaterial discrepancy would not avoid the policy.

[See note at end of case.]

7. But if the party were seven or even five years older than the age stated in the application, the discrepancy would not be immaterial, and the policy would be void.

8. The company are estopped from denying their liability upon a policy as to a party who has purchased it from the holder after the death of the insured, on the faith of representations made by their agent after he had received the proof of loss; provided the purpose and object of the purchaser was sufficiently indicated to the agent, and what passed between them was mutually understood as a waiver of any objections to the validity of the policy, there being no fraud or knowledge of such objections on the part of the purchaser.

9. But there is no such estoppel if the agent told the purchaser before he parted with the consideration that he had no authority to act, but that the policy would be paid if the claim was a just one.

[1] [First case reversed in 91 U. S. 510. Second case affirmed in 94 U. S. 561.]

[This was an action of assumpsit by David France and Lucetta T. France, his wife, to the use of Samuel B. Selvage, against the Aetna Life Insurance Company of Hartford, Conn., on a policy of insurance for $10,000, upon the life of Andrew J. Chew, issued in July, 1865, and was commenced in the district court for the city and county of Philadelphia, from which the defendants removed it to this court. The cause is now heard, with a like action by David France and Lucetta P. France, his wife, in the right of the said Lucetta T. France, and to her use, against the same defendant, on a policy of insurance for $10,000 upon the life of the said Andrew J. Chew, issued in September, 1865.]

Nathan Sharpless, for plaintiffs.

Christian Kneass and Samuel C. Perkins, for defendant.

CADWALADER, District Judge. These were separate actions tried together by consent, on two policies of insurance each for $10,000, made by defendants on the life of Andrew J. Chew for the benefit of his sister Mrs. Lucetta T. France. The application and the policy issued thereon in the first of above cases were dated September 13, 1865, and in the second case July 12, 1865. The applications and policies were alike in both cases, and the defences, so far as regarded the questions affecting the force and effect of the contracts themselves, were the same. There was a special and distinct question in Selvage's case arising out of his position as assignee, or alleged purchaser for a valuable consideration of the policy sued on to his use.

There were three grounds of defence mainly insisted upon: First.—Want of interest on the part of the plaintiff in the life insured. Second.—Misrepresentation and concealment of the fact that the party insured had been ruptured, and actually was so at the time the applications were made. Third.—Misdescription of the age of the party insured, making him seven years younger than he really was. The premiums on both policies were regularly paid up to the time of the death. On the policy assigned to Selvage they were all cash; on the other one-half note. The money was paid and the notes executed for the premiums by Mrs. France. As to the want of interest, it appeared that Mrs. France, at the time the policies were issued, and up to the time of trial was a married woman, and in no respect dependent on her brother whose life was insured; nor was there any evidence of any indebtedness on his part to her, either prior or subsequent to the applications for insurance.

The defendants requested the judge to charge: "That if the applications and policies were in fact made and taken out by Mrs. France for her own benefit, she must show an insurable interest in the life of Chew; and if she was a married woman and

in no way dependent on him for support; the mere fact that she was his sister did not give her such insurable interest; and that if Chew at the time the applications were made and policies issued was not indebted to her, then she had no insurable interest as a creditor in his life."

The judge declined to charge as requested, but charged as follows: "If Chew at the time of the insurance was unmarried and without issue or parent living, the insurance for the benefit of his sister was valid if the risk insured was properly described in the policies. As men of business you will see the importance of this last remark. There are persons who may be described as presumptively next of kin, and who can insure the lives of their relatives; or if any lives may be insured by any persons it is of course of paramount and indispensable importance that the risk be correctly described." The policies each contained a clause making the proposal, answers and declaration in the application part of the policies, and with a condition that if false or fraudulent the policies should be void; and the judge instructed the jury that this clause made the answers to the question part of the contracts, and they had thus the effect of warranties, and if they were wholly or in any material respect false or fraudulent the plaintiffs could not recover. The words "in any material respect," he said, must be understood as meaning in any respect or degree material to the risk insured, whether as to age, or health, or otherwise howsoever.

In answer to a question, whether the insured had ever had any of certain specified diseases, among them "rupture," and if so how long and to what extent? the insured stated in the applications "None." The defendants alleged that he had been ruptured, and was ruptured at the time of the insurances, and much evidence was given on this point, as to which the judge gave the following instruction: "If the jury believe that Chew was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured; or if at that time or within such prior period he wore a truss in order that it might repress hernial extrusion, the verdict should in either case be for the defendants. But though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet if the jury find that from 1855 or thereabouts until after the last insurance in 1865, he had no such disease, and was in all this interval in the habit of working and using bodily exercise, and occasionally dancing, bathing and traveling, and could walk long distances without being fatigued, and either did not wear a truss or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not if mentioned have increased the risk or the premium, and that there was in this respect no falsehood or wilful suppression, I cannot give the instruction absolutely that the answer 'None' to the question was untrue or false. I have doubts whether I have not charged too favorably for the plaintiffs on this point. My chief difficulty is that the next question is, whether the party is subject to 'habitual' diseases mentioned in the same, as if there were a distinction between 'habitual' and ever having had them."

Upon the third ground of defence the defendants requested the court to instruct the jury: "That if the answers in the applications to questions four and five, as to the date of birth and age next birthday of Chew were false or untrue, the policies are void, and the verdict must be for the defendants."

The judge instructed the jury as follows: "If you believe that the answers to these questions were materially untrue as to the age of Chew, the policies are void, and the verdict must be for the defendants; and if he was thirty-seven or even thirty-five years old, the difference was not immaterial. I give the instruction as requested. There are two distinct questions in the application. '4. Place and date of birth of the party whose life is to be insured. 5. Age next birthday.' A good deal has been said about the uncertainty this man was under as to his age. I cannot say that was any reason he should be careless in describing his age, but, on the contrary, he ought to have been the more careful. I agree that if he had described his age as uncertain, the defendants must have abided by the contract as made. But this is not the contract; he is not described as a person of uncertain age. As to the insurance of July his answer to question five is simply 'Thirty years.' and his answer to question four, 'Born in 1835, Gloucester county, New Jersey,' and there is interlined between '1835' and 'Gloucester county, New Jersey,' the words 'October 28th.' Mr. Scott, the agent who took the application, has explained how that occurred. He says Chew said it was as near as he could recollect, and although he states there was no doubt at all about the year, he says there was a difficulty in determining the day of the month. Now, though this application does not contain the words 'as near as I can recollect,' I think under the circumstances of the case you are at liberty to read it as if they were there. I don't think it makes any material difference whether they are there or not. As to the second application, the one in September, the answer to question four is, 'Born in New Jersey, 1835.' The fifth question is, 'What is your age next birthday?' and the answer, 'Thirty years, October 28, as near as I can recollect.' That certainly does not mean to apply to the thirty years; it means, according to fair reading, that he was born in 1835. It was the 28th October, as near as he can recollect. He signs at the foot of this appli-

cation, 'That is as near as I can remember,' applying to all the preceding questions. It is not a question of words but of fair meaning. If the man was a few months or even perhaps a year or two older than he states, it might not materially affect the risk; and even without the words 'as near as I can recollect' or 'remember,' if the difference was a slight discrepancy such as would not affect the risk, I should not think it a material difference, and certainly not when these words are contained in the application. But these words have not any indefinite meaning; they don't mean 'I am a person of uncertain age but am a person of the age of thirty years or thereabouts,' which in law means not materially different from that age."

The judge then reviewed and commented on the evidence respecting the age of the party insured, and added: "I do not see how you can decide this case upon the evidence, disregarding the fact that Chew was at least 35 or 37 years of age. If so the risk was materially misdescribed in these policies and the plaintiffs cannot recover except as to one of them, and that upon a special ground. This special ground applied to the first policy, issued in July, 1865, and upon which the second of the above suits was brought in the name of Selvage, who it was alleged, had bought this policy from Mrs. France, after the death of Chew, upon the faith of representations by the agent of defendants that it would be paid. The evidence showed that Selvage had lent Mrs. France $2,000 shortly before the death of Chew, and that the policy had been assigned to him as collateral for this loan; and that within a month after Chew's death he had paid Mrs. France the further sum of $7,280, and as he alleged, had then bought the policy absolutely from her on the faith of representations by the agent as above. The agent testified that not very long before the death of Chew there had been some intimations that there was suspicion as to the character of the risk, and that he had told Selvage that he had no authority to act, but that the claim would be paid if it was a just one."

The defendants requested the court to instruct the jury: "That if Selvage had loaned $2,000 to Mrs. France upon the security of an assignment, before the death of Chew, of this policy as collateral, the defendants could not be estopped by anything alleged to have occurred after Chew's death, from denying their liability as to this $2,000. That if before Selvage paid Mrs. France the $7,280, the agent of the company told him that he had no authority to act; that the matter was out of his hands, but that the policy would be paid if the claim was a just one, and unless Selvage fully disclosed the purpose and object of his inquiries as to the policy to the agent, the defendants are not estopped from denying their liability."

The judge gave these instructions as requested, but said that the words "fully disclosed" should be understood to mean "sufficiently disclosed to indicate the purpose and object." And added: "If the agent was the agent for the defendants to receive the preliminary proofs, and having received them knew that Selvage was negotiating with Mrs. France to purchase this policy, and by representing to him that the loss would be paid, induced him to pay her $7,280 for the assignment of it without any fraud on his part, or knowledge by him of the objections now made to his validity, then if the jury find that what passed was mutually understood and intended as a waiver of any such objections to the plaintiffs' recovery on this policy as have been made in the present trial, the jury may find for the plaintiffs on this policy, although the objections would otherwise have been fatal. There is great responsibility upon the jury on this part of the case. If you simply regard the testimony of the witnesses, it is very easy to understand the facts just as I have put them. But if you look carefully at the documents there is a great deal of difficulty in arriving at that belief. When you examine the documents you can get over the mistakes in the testimony of the witnesses. They may be partly explained perhaps by the fact of Selvage being deaf."

The judge then reviewed and commented on the testimony of the witnesses, and the documents in evidence, the letters, assignment, and the check with which the $7,280 was paid, and said: "The point in question is whether Selvage paid his money on the assurance of the agent of the company, and is in such a condition that the agent's mouth is stopped from telling the truth. Mrs. France could not confer any better title than she had herself, unless from something the agent said. What I ask your particular attention is whether the letters and the testimony together do not convince you that the only conversation that ever occurred with Selvage was before the preliminary proofs were in the hands of the company. If so you can scarcely understand the agent to have intended to waive objections."

[NOTE. In the first case, which was to the use of Selvage, the defendant brought error, and the judgment of the circuit court was reversed, and a new trial ordered, Mr. Justice Hunt delivering the opinion. It was held that the applicant for the insurance expressly agreed that the answers made by the assured to the questions put to him should be true, and that, if any of them were false, the policy issued to her should be void, and that consequently the alleged recovery of the assured from the rupture of 1846, so as to permit of ordinary bodily exercise and occasional dancing, bathing, and traveling without fatigue, should not have been given to the jury for their judgment. It was for the jury to determine whether the facts existed, and, accordingly as they determine upon that point, the one or the other result must necessarily follow. In this case the answer of the assured to the question in the application for the insurance as to whether he had ever

had certain diseases specified, including the one named, was "None," and there was no qualification. Aetna Life Ins. Co. v. France, 91 U. S. 510.

[In the second case, which was to the use of Lucetta T. France, the defendant brought error, and the cause was duly heard by the supreme court, and the judgment of the circuit court affirmed. Mr. Justice Bradley delivering the opinion. In this case the same answer was made in the application to the question respecting certain diseases, and there was also some evidence that the assured's age had been erroneously stated; but at the foot of the application, which was the one made in September, 1865, the following qualification was made: "The above is as near correct as I remember." In view of this qualification it was held that the assured must be understood as stipulating only for the integrity and approximate accuracy of his answers, and not for their absolute verity. Without this qualification, substantial error in any of the answers would avoid the policy, irrespective of the motive, but with the qualification the jury must be satisfied that the answers, or some of them, were untrue in any respect materially affecting the risk, and that the assured knew of their incorrectness. In respect to the rupture the learned justice remarked that if it appeared to have been completely reduced, so that its effects had entirely passed away, and had ceased to impair his health or to affect his capacity to take fatiguing or prolonged exercise, the jury will determine whether the answer is untrue as nearly as he could remember. Aetna Life Ins. Co. v. France, 94 U. S. 561.]

Case No. 5,028.

FRANCE v. WASHINGTON.

[5 Cranch, C. C. 667.] [1]

Circuit Court, District of Columbia. March Term, 1840.

MUNICIPAL CORPORATIONS—PROHIBITORY LICENSE TAX.

The corporation of Washington has power, under the charter of May 15, 1820, § 7 [3 Stat. 586], "to provide for licensing, taxing, and regulating" "venders of lottery tickets," although the tax may be so high as to amount in effect to a prohibition; and to require the applicant for a license to deposit the license-money in bank before the issuing of the license.

Appeal from the judgment of a justice of the peace [in the case of the corporation of Washington against Lewis H. France], for the penalty of twenty dollars, for exercising and dealing in the business and employment of a vender of lottery tickets, in the city of Washington, on the 25th of February, 1840, contrary to the by-law of the 25th of October, 1838.

The words of the charter upon this subject, are "That the corporation aforesaid shall have full power and authority" "to provide for licensing, taxing, and regulating," "venders of lottery tickets;" and "to restrain or prohibit lotteries." By the first section of the by-law of the 25th of October, 1838, it is enacted, "That it shall not be lawful for any person or persons within the limits of this corporation to exercise or deal in the business or employment of vender of lottery tickets, without having first obtained a license for such purpose from the mayor." "And that before the mayor shall grant such license there shall be paid into bank, according to the act of May the thirty-first, eighteen hundred and thiry-six, for the use of this corporation, by the person or persons applying for such license, the sum of three hundred dollars." And by the second section, it is enacted, "That if any person, or persons, shall, from and after the passage of this act, exercise, or deal in the business or employment of vender of lottery tickets, within the limits of this corporation, without having first obtained a license for such purpose, as required by the first section of this act, he, she, or they shall forfeit and pay to this corporation, the sum of twenty dollars for each and every day, he, she, or they shall so offend, to be recovered and distributed as is by law provided for the recovery and distribution of fines." By the first section of the by-law of May 31, 1836, it is enacted, "That from and after the 30th day of June next, all money due, accruing, or receivable by the corporation, except the taxes upon real and personal property, and wharfages, shall be paid by the person making the same, directly into the bank in which the deposits of the corporation are or shall be made; which bank shall issue to the person a certificate therefor; and no license shall be issued or credit given, by any officer of the corporation, for a payment made, except upon a surrender of such certificate of deposit, as hereinbefore provided."

Brent & Brent, for appellant, contended that the charter gave the corporation power to license only, not to prohibit the exercise of the business of vender of lottery tickets. That the tax of three hundred dollars amounts to a prohibition, and exceeds the power given, and is, therefore, void. They contended, also, that the corporation had no authority to require the applicant for a license to pay the money into any bank as a condition of granting the license.

But THE COURT nem. con. overruled the objections, and affirmed the judgment, with costs.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 5,029.

The FRANCESCA CURRO.

[4 Wkly. Notes Cas. 415.]

District Court, E. D. Pennsylvania. May 18, 1877.

CONSTRUCTION OF CHARTER-PARTY—COMMENCEMENT OF VOYAGE.

A vessel lying at Genoa was chartered for a voyage from Philadelphia to a British port, with the express stipulation that she should sail from Genoa during December. On Dec. 30, having procured all necessary provisions and papers for the voyage, she was unmoored and towed by a tug about three quarters of a mile, to the western side of the harbor opposite the roadway, where she again anchored. At the time a strong headwind prevented her

from going to sea, and she was unable to proceed for several days. *Held*, that although she remained under the jurisdiction of the local authorities, she had nevertheless broken ground for the voyage, and must be held to have "sailed" within the provision of the charter.

[Cited in Pedersen v. Pagenstecher, 32 Fed. 842.]

Libel for breach of charter party.

The respondents had chartered the bark Francesca Curro, then at Genoa, to sail from Philadelphia to a port in Great Britain, it being expressly stipulated that she should sail from Genoa during the month of December. The question in the case was whether or not this stipulation had been performed. It was shown by the testimony that the harbor of Genoa is semicircular, being about two miles in width from east to west, and one mile from north to south. The roadway for ingress and egress is between two moles extending towards each other in parallel lines from the eastern and western sides of the harbor and about a quarter of a mile apart. Upon December 30, 1876, all the papers necessary for departure were obtained. The bark was then lying on the eastern side of the port, where is the anchorage for merchant vessels, with anchors fore and aft, and was on that day unmoored and towed by a tug to the western side of the port, opposite the roadway, for departure, a distance of about three quarters of a mile, where she anchored again. When this movement was made the wind was blowing dead ahead, and so continued for several days. The master knew he could not go to sea until the wind changed, and lay at this second anchorage within the harbor, and, presumably, within the jurisdiction of the local authorities until January 4, 1877, when he was taken out by a tug, and proceeded on the voyage. Upon the arrival of the bark at this port, the respondents refused to receive her. The cause was reargued May 17, before Cadwalader, J., and Captain Young, who had been requested by the judge to sit with him as an assessor.

Mr. Flanders, for libellant.

It is admitted that the stipulation is a condition precedent, but it has been performed. Entire readiness to go to sea within the time fixed and an actual movement, however short the distance, in the prosecution of the voyage, is in contemplation of law a sailing if the delay arises from vis major. Arnould, Ins. p. 554; Maclachlan; Pittegrew v. Pringle, 3 Barn. & Adol. 520; Bond v. Nutt, 2 Cowp. 607; Fisher v. Cochran, 5 Tyrw. 496.

Wilson & Ward, contra.

All the books require, besides readiness, a movement with the bona fide expectation of at once prosecuting the voyage. Arnould, Ins., supra; Phil. Ins. § 773. The case of Pittegrew v. Pringle, supra, does not apply, because the ship was not ready within the time fixed. In Bond v. Nutt, supra, and Earle v. Harris, 1 Doug. 357, there was an actual sailing of five miles. Fisher v. Cochran, supra, was especially confined by the court to similar cases, viz., time policies, where there was no terminus a quo, as in this case. The case which governs this is Nelson v. Salvador, 1 Moody & M. 309. The movement cannot have been with the bona fide intention of at once going to sea, because the master admits he knew he could not do so. The direction of the movement throws no light upon the question of intention, because he could have gone in no other direction. On account of the nature of the harbor of Genoa the vessel could not be said to have been ready for sea until she had arrived at the second anchorage.

May 17, 1877. The assessor presented the following report:—

The assessor in this case having read the testimony and heard the arguments of counsel, respectfully presents, That the bark Francesca Curro was lying in the port of Genoa, under charter to sail in Dec., '76, for Philadelphia or Baltimore. On the 30th of said month she got out from among the shipping, and proceeded about three fourths of a mile towards the mouth of the harbor, and anchored; the wind was blowing from southward and eastward, which was ahead for her proceeding to sea. It continued to blow from the same quarter for several days, so that the vessel was detained thereby; she might have gone to sea with two tugs, but as the vessel was in ballast only, she was not in a condition, nautically, to contend with a head wind, on a lee shore, particularly when taking into consideration the stormy season of the year, and the lateness of the hour, 3 p. m. It certainly would have been the height of imprudence for her to have gone to sea that day, say Dec. 30, 1876.

The question for the assessor is, Was the moving of the vessel, say three-fourths of a mile, to be considered as commencing the voyage? The assessor is clearly of the opinion that it was not, but merely a shifting of berths, preparatory to getting ready for sea. Such ports as Marseilles, Pernambuco, Genoa, and many others, although small, are made capable of accommodating a large number of vessels, by the peculiar mode of arranging the same in "tiers," with two anchors out at the bow and two at the stern, what is "mooring head and stern." This method renders it imperatively necessary for vessels, when about ready to sail, to notify the harbor authorities thereof; the proper boats and number of men, with a pilot, are sent on board, who takes charge of the ship, gets up the anchors, unmoors the ship, and takes her to a convenient berth, anchors, and turns her over to the officers and crew. No vessel can be deemed as

ready for sea, from any such ports as the above, without several hours' detention, so that the anchors and cables may be properly secured, and many other things to be secured and prepared, which, in many instances cannot be performed prior to getting the ship out from among the crowd of vessels. The writer has been in many ports of the above description, and has never seen or known vessels to unmoor, get outside of the crowd of shipping, and go to sea the same day.

CADWALADER, District Judge. After the argument of this case, I asked one of the nautical experts on whom I frequently call to act as assessors, to read the papers, and let me know his opinion. I had no definite purpose to refer the case for his formal assistance. But he naturally understood the question to be such a reference, and has reported accordingly. The report may be filed.

I do not concur with him in opinion. The case, in my opinion, is less one for the decision of a nautical assessor than for consideration by the judge of a court of admiralty. I also think that the question to be decided is one rather of fact than of law. The vessel was not beyond the jurisdiction of the local authorities of the port of Genoa until the 3d of January. I am of opinion that she had, nevertheless, sailed before the end of December. Before the end of that month she was completely ready for sea, had on board all necessary papers, and had broken ground. This was not enough to constitute a commencement of the voyage. But there was in addition a certain progress made in the direction of her destination. This progress, though small, was measurable. It placed her near the mouth of the harbor, where the time, space and labor of ulterior progress were already abridged. This occurred on the 30th, and, in part of that day, and the whole of the 31st, she was only prevented by continuance of the headwind from running out. It may be that before the use of steam towage, she could not have made the progress which was actually made. But I cannot acquiesce in the suggestion that progress by the use of sails was indispensable. The commercial world is entitled to all the benefits of towage in modifying the definition of progress in such a case. Decree for libellants, with costs.

Oct. 17, 1877. On appeal the case was argued by the same counsel. Decree affirmed, with costs.

[NOTE. See Wright v. Owners of the Francesca Curro, Case No. 18,088.]

FRANCESCA CURRO, The (WRIGHT v.). See Case No. 18,088.

Case No. 5,030.

The FRANCESCA T.

[9 Ben. 34.] [1]

District Court, E. D. New York. Jan., 1877.

WHARFAGE—DOUBLE RATE—DEMAND OF PAYMENT—STAGE-BERTH—OFFSET.

1. A vessel occupied a stage-berth at a wharf, and when partly loaded was compelled by insufficiency of water to move to another berth, which made two days delay in completing her loading. The oil company that owned the wharf, had stored and were delivering the cargo on board; and they presented a bill for wharfage at full rates to the mate on board the vessel, who, as he could not read English, referred them to the master at the office of the agents of the vessel; they went there and meanwhile the vessel left the wharf. The master objected to the bill for wharfage, claiming that he was only liable to pay half rates, as for an outside berth, and that there should be a deduction made for the two days delay in loading. Suit being brought by the oil company to recover double wharfage, under the statute of the state of New York of 1875, regulating wharfage: *Held*, that the use of a stage-berth by a vessel moored to a pier is such a use of the wharf as entitles the wharfinger to full wharfage rates: but that in this case no demand of payment before the vessel left was proved that entitled him to the double rate.

[Cited in The Shady Side, 23 Fed. 731.]

2. The presentation of a bill made out in English to the mate, a foreigner who cannot read it, the wharfinger agreeing to refer it to the master as the proper person to pay or refuse, is not such a demand of payment as the statute requires.

3. The mere fact of insufficiency of water in a berth does not show fault on the part of the wharfinger that renders him liable to the vessel for damage or delay; nor can any offset be allowed the vessel in this case by reason of the delay in loading, though the wharf was owned by the company that stored and delivered the cargo, there being no contract between them and the ship as to the cargo.

An Italian vessel, the Francesca T., took in a cargo of oil from a wharf, being moored to the pier, but loading from a stage-berth, outside of two other vessels. When partly loaded she touched bottom, and had to move to another berth, which made two days delay. The company that stored and delivered the oil also owned the wharf, and collected wharfage. They presented a bill for wharfage to the mate of the vessel on board, who could not read English, and sent them to the master at the office of the agent of the vessel. The bill was not paid, as the master claimed that he was liable to pay for an outside berth only, and should also have some deduction for the two days' delay made necessary by the moving of his vessel to another berth. Before the bill was presented to him, the vessel left the wharf; and on his refusal to pay, the oil company as wharfingers filed a libel to recover double wharfage under the statute.

[1] [Reported by Roberet D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

Scudder & Carter, for libellants.
Butler, Stillman & Hubbard, for claimants.

BENEDICT, District Judge. This action is brought to recover wharfage.

The main question in the case is whether the vessel is liable as to a portion of the time while she lay at the libellants' wharf for full rates or only half rates of wharfage.

The rate of wharfage entitled to be charged by wharfingers at Long Island City, where this vessel lay, has been fixed by the law of the state of New York (Laws 1875, c. 482). The provision is as follows:

"Section 1. It shall be lawful to charge and receive within the cities of New York and Brooklyn and Long Island City wharfage and dockage at the following rates, viz: From every vessel that uses and makes fast to any pier, wharf or bulkhead within said cities, or makes fast to any vessel lying at such pier, wharf or bulkhead, or to any other vessel lying outside of such vessel, for every day or part of a day as follows: from every vessel of 200 tons burden and under, two cents per ton, and from every vessel over 200 tons burden, two cents per ton for each of the first 200 tons and one-half of one cent per ton for every additional ton, except that all canal boats navigating the canals in this state, and vessels known as North river barges, market boats and sloops (employed on river, &c.,) shall pay the same rates as heretofore, and the class of sailing vessels now known as lighters, shall be at one-half the first above rates; but every other vessel making fast to a vessel lying at any pier, wharf or bulkhead within said cities, or to another vessel outside of such vessel, or at anchor within any slip or basin, when not receiving or discharging cargo or ballast, one-half of the first above rates, and no boat or vessel shall pay less than 50 cents for a day or part of a day; and from every vessel or floating structure other than those used for transportation of freight or passengers double the first above rates (except floating grain elevators, &c.) and every vessel that shall leave a pier, wharf, bulkhead, slip or basin, without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee or person in charge of the vessel, shall be liable to pay double the rates established by this act."

It will be seen that according to this statute the wharfinger is entitled to charge the full rates fixed by the act for all vessels while using or made fast to the pier. Vessels not using or made fast to the pier but made fast to a vessel, lying at the pier, or to another vessel outside of such vessel, are chargeable with half rates when not receiving or discharging cargo. The provision contained in the words, "when not receiving or discharging cargo," is not applicable to a vessel when either using or made fast to the pier. In this case the vessel during part of the time lay at what is termed a stage berth, that is she was made fast to the pier and had a stage running from her to the pier passing between two vessels that lay between her and the pier—over which stage the vessel took in cargo directly from the pier. A vessel so moored is using and made fast to the pier within the meaning of the act and is liable to pay full wharfage while so fastened to the pier and maintaining the stage in the position described, whether engaged in receiving or discharging cargo or not. The evidence, therefore, introduced to show that on some days the vessel did not work, is immaterial.

It has been contended that it is competent for the claimants to show in reduction of the libellants' claim for wharfage that the ship lay idle part of the time, because the libellants failed to furnish cargo as rapidly as it could be laden on board. But the connection of the libellants with the cargo arose from the circumstance that they were not only wharfingers but owned an oil yard where certain oil to be laden on this vessel was stored. As warehousemen in pursuance of a contract between them and a third party they delivered certain oil from their yard to this vessel, but the vessel was no party to that contract. The libellants made no contract to furnish the vessel with cargo, nor were they under any obligation whatever to the ship in respect to her cargo, and they are not liable to answer to the ship for their acts relating thereto.

It is further contended that there should be a deduction from the wharfage bill by reason of the fact that the berth at the pier which was first taken by the vessel proved not to have sufficient water, and it became necessary to stop taking in cargo during two days, at the expiration of which time the vessel moved to a safe place and the loading then proceeded. The damages arising from this detention of two days are sought to be set off against the wharfage, by way of diminishing the compensation of the wharfingers, on account of imperfect performance of their contract.

Here the difficulty is that there is no evidence whatever of the existence of any obstruction in the water at the pier, or of any imperfection in the wharf, or of any irregularities of the bottom, upon which to charge the wharfingers with negligence or a failure to perform their contract. The delay arose from the fact that the vessel when loaded as deep as the master desired to load her, required a greater depth of water than could be obtained at the place where the vessel first made fast alongside the bulkhead. When she was loaded down to some 19 feet, she touched the bottom, and it became necessary for her to move to a place where she could have some 24 feet of water. The mere fact of insufficient depth of water at the wharf does not show fault on the part

of the wharfinger that renders him liable. See Nelson v. Phoenix Chemical Works [Case No. 10,113], decided by this court. I must therefore reject the set off.

There remains only to determine whether the libellant is entitled to double wharfage as provided in the statute. In order to collect double wharfage it is incumbent on the libellant to prove a demand of the single wharfage due, made at the vessel, of the owner, consignee or a person in charge of the vessel at the time, and before the vessel leaves the pier. And the proof of such a demand made must be clear. Here the proof is not clear. Saxton swears that he presented the bill of wharfage to the captain of the vessel on Saturday afternoon between two and three o'clock. But he made no memorandum of the demand, and I am not certain that he has any definite recollection on the subject. The master denies in positive terms that the bill was ever presented to him before his vessel left the wharf, says that the vessel was not at the wharf at all in the afternoon of Saturday, and that the presentation of the bill on Saturday afternoon was at the office of the agent in New York where for the first time he saw it. The chief mate swears that the vessel finished loading on Friday and left the wharf at 8 a. m. on Saturday. He therefore also contradicts the witness Saxton; but he says that he thinks a bill was brought to him on board the vessel before she left, and as he could not read English he told the man to present it to the captain. What the bill was he cannot say. The presentation of a bill made out in English to a mate who cannot read it, accompanied by a reference to the master as the proper one to pay or refuse the bill assented to by the presentor, is not such a demand of wharfage as the statute requires to entitle the wharfinger to demand double wharfage. Plainly the mate was justified in supposing that the demand was transferred to the master according to his suggestion, and under such circumstances he cannot be held to have refused the demand. Besides, there is no evidence that the mate was the person then in charge of the vessel.

I am therefore of the opinion that the wharfinger is not entitled to recover double wharfage. There is upon the bill put in evidence a charge for the use by the vessel of a cook house on the dock. But there is no mention of such a charge in the libel. The libel is for wharfage and nothing else. Under the libel this item cannot be considered. The libellants are entitled to recover for 14 days wharfage at full rates amounting to $119 70, and as no tender has been proved, or any sum paid into court, they are also entitled to their costs.

FRANCESTOWN SOAP-STONE STORE CO. (HENRY v.). See Case No. 6,382.

Case No. 5,031.

In re FRANCIS et al.

[2 Sawy. 286; 7 N. B. R. 359; 5 Pac. Law Rep. 213; 4 Leg. Op. 493; 7 Alb. Law J. 13.] [1]

District Court, D. Oregon. Nov. 23, 1872.

PARTNERSHIP—PARTICIPATION IN PROFITS, PROOF OF—PROOF OF WHEN DISGUISED.

1. Participation in the profits of a business is presumptive or prima facie proof that the participator is a partner in such business, and in the absence of other proof is sufficient evidence thereof, but such presumption may be overcome by showing that such profits were received by the party simply as wages for services performed, or interest for money loaned to the person carrying on such business.

[Cited in Re Comstock, Case No. 3,079. Approved in Re Ward, Id. 17,144.]

[Cited in Bosion, etc., Smelting Co. v. Smith, 13 R. I. 33.]

2. The English and American authorities examined and commented on, touching the rule announced in Waugh v. Carver, 2 H. Bl. 235, upon the authority of Grace v. Smith, 2 W. Bl. 998: "That he who shares in the profits indefinitely, shall by operation of law, be made liable to losses," and the rule denied to be law.

3. Upon the evidence, and as a matter of fact, a partnership found to exist between two parties, where the transaction was intentionally, and for collateral reasons, disguised under the cloak of a pretended loan and employment as book-keeper.

In bankruptcy.

John W. Whalley and Richard Williams, for petitioners.

W. W. Page and A. A. Northrup, for respondent.

DEADY, District Judge. On October 29, 1872, the firm of Walter Brothers filed their petition in this court, alleging that at and between the dates hereinafter mentioned, W. W. Francis and W. A. Buchanan were partners, doing business at Portland, under the name and style of "W. A. Buchanan," and praying that said "firm and its members" be adjudged bankrupts for the following causes:

I. That said firm, on September 10, 1871, made their promissory note, payable nine months after date, to the order of the petitioners, for $200, with interest at one per centum per month; and that on and after June 10, 1871, they fraudulently stopped payment of said note during a period of fourteen days.

II. That there is due the petitioners from said firm the sum of $500.29, the same being a balance of account for goods sold said firm between November 1, 1871, and October 1, 1872.

III. That on September 15, 1872, said firm being then insolvent, paid $250 to a creditor thereof, to wit: Field & Frie, of San Francisco, with the intent to thereby give a pref-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 7 Alb. Law J. 13, contains only a partial report.]

erence to such creditor, and to defeat and delay the operation of the bankrupt act [of 1867 (14 Stat. 517)].

Buchanan made default, but on November 6, Francis answered, denying in effect that he was a partner with Buchanan in any of the alleged transactions or indebtedness. On November 12 and 13 the issue was tried by the court without a jury, and reserved for decision.

The following facts are admitted or satisfactorily proven:

I. That the matters stated in the petition, except as to the allegation of partnership between Francis and Buchanan are true.

II. That on January 24, 1871, Paul Richter and W. A. Buchanan were doing business as furniture dealers and upholsterers, under the firm name of Paul Richter & Co., and that on said day said firm made an agreement in writing with said Francis, to the effect following:

1. Francis agrees to advance said Richter & Co. the sum of $3,000 "in all before June, 1871, and to also keep the books of the firm for one year from said date," unless agreement terminated in the meantime.

2. Richter & Co. agree to pay Francis interest monthly at the rate of twelve per centum per annum upon said $3,000, and any further sum which he may advance to them, and also, "as remuneration for keeping the books of the firm, a sum equal to one sixth of the net profits of the firm which shall be made during the year 1871."

3. If Francis is absent from the city, a deduction in proportion to the length of such absence to be made from his remuneration.

4. Agreement may be terminated at the pleasure of either party, on giving the other notice in writing, in which case the amount then due Francis to "be repaid in notes of firm of $1,000 each," payable at intervals of sixty and thirty days after such notice, with interest at the rate of twelve per centum per annum; and if agreement terminated before end of year 1871, Francis to be paid as compensation for keeping books a fair sum, "not less than $45 per month."

III. On August 1, 1871, Richter retired from the firm, and said written agreement was modified by a verbal one, then made between B. and F., to the effect that the latter should receive one fourth of the net profits of the business for keeping the books, but not less than $25 per month, profits or no profits.

IV. For the five months ending December 31, 1871, Francis' share of the profits amounted to $389, $250 of which was added to the $3,000 due him, and a new note, payable on demand, taken by him for the amount, with interest at the rate aforesaid, signed W. A. Buchanan; but during the year 1872 the business made no profits.

V. Francis advanced the sum of $3,000, as per agreement, in January, 1871, and the $250 left in the business as aforesaid, and kept the books until September, 1872, during which time he loaned W. A. Buchanan, to be used in the business, from $2,000 to $2,500, on current account, which was secured by sufficient collaterals, and received from the business for all the money so advanced and loaned interest monthly at the rate aforesaid, and $25 per month.

VI. Francis was not known by the creditors of W. A. Buchanan to be a partner in the business, nor did he, during the time of his employment therein, volunteer any direction or advice in the conduct of it, except for a few weeks in 1872, while Buchanan was absent from the city, when he took into his custody the daily receipt of sales, and in some instances directed the salesman whom to credit and whom not; but during this time he had written authority from W. A. Buchanan to act as his agent, which authority, however was not exhibited to said salesman, or any one else, so far as appears, until it was produced on the trial.

VII. That Buchanan was adjudged a bankrupt, individually, on the petition of one of his creditors, in this court, on October 28 and that the liabilities incurred in the business, at the time of such adjudication, amounted to $13,000 or $14,000, and that Francis' claim against Buchanan for money loaned and advanced the business was, at that time, $5,200 or $5,300.

Upon this state of facts, counsel for the petitioners insist that, as to third persons, the law conclusively presumes that Francis was a partner in the firm of W. A. Buchanan, and therefore he is liable for its acts of bankruptcy and debts.

Under what circumstances a person not ostensibly a partner is nevertheless liable as one, is a vexed question. In the language of a distinguished commentator, "The cases on this subject are not easily reconciled, nor is the language used in relation to it always admissible, or indeed intelligible." T. Pars. Partn. p. 66. And again (Id. 92), "The many cases cited in the notes to this chapter exhibit in strong light the difficulty, if not impossibility, of drawing from the decisions any definite principle or rule applicable with certainty to the question, 'Who are partners as to third persons?'"

In Waugh v. Carver, 2 H. Bl. 235, cited as the leading case on this subject (1 Smith, Lead. Cas. 1289), Lord Chief Justice Eyre held that, while upon the facts, the Carvers and Geslier were not partners inter se, and did not intend to be, still they were such as to third persons, because, by the arrangement between them, they agreed "to take a moiety of the profits of each other's business generally, and indefinitely, as they should arise, at certain times agreed upon;" and upon the alleged authority of Grace v. Smith, 2 W. Bl. 998, he laid down the rule as follows: "He who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise,

upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." But in Grace v. Smith supra, Chief Justice De Grey says: "Every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes part of the profits, he takes part of that fund upon which the creditor of the trader relies for his payment. * * * I think the true criterion is to inquire whether Smith agreed to share the profits with Robinson, or whether he only relied upon these profits as a fund of payment."

It will be observed that this latter case makes no distinction between sharing the profits definitely or indefinitely, the point for which it was cited in Waugh v. Carver, supra, but does make an entirely different distinction, that is, between sharing in the profits of a trade or relying upon them for payment, in both of which cases the degree of indefiniteness may be the same. Again, the reason given in the distinction taken in Grace v. Smith is not sufficient, because in point of fact, a person who shares in the profit of a trade, or receives such profits in payment, equally diminishes the fund on which the creditors rely.

In Ex parte Rowlandson, 1 Rose, 91, Lord Eldon said: "The ground was settled, that if a man as the reward for his labor chooses to stipulate for an interest in the profits in the business, instead of a sum proportionate to those profits, he is, as to third persons, a partner."

In Ex parte Hamper 17 Ves. 403, he said: "The cases have gone to this nicety, upon a distinction so thin, that I cannot state it as established, upon due consideration, that if a trader agrees to pay another person for his labor in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits, themselves as profits, he is a partner. * * * It is clearly settled, though I regret it, that if a man stipulates that as the reward of his labor, he shall have not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner, but if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner."

These dicta of Lord Eldon's have been very much deferred to by the courts and the profession. Parsons says: "We have reason to believe that for many years, in various parts of this country, numerous contracts of this kind have been drawn, carefully using the language which Eldon is supposed to have made safe by the distinction he asserted. Nor is it difficult to account for this. For, to say nothing of the immense authority of so eminent a judge, his words so understood, supply a clear, simple, and easily applicable rule for the avoidance of a great danger. They tell the lawyer who would draw a contract of this kind, how, by a mere formula, he can guard his clients from a great uncertainty; the inconvenience of which might otherwise suffice to prevent the proposed arrangement. As a convenient rule, much may be said of it; but as an accurate one, it must be spoken of very differently.

"It is indeed remarkable that a rule, or a distinction, to which Lord Eldon strongly objects, not merely 'doubting,' but positively affirming his dislike, and which he lays down, as he says, under the constraint of irresistible authority, should since have been generally adopted, not so much on his authority as on his assertion of preceding authority, when in point of fact no such authority can be found, or, so far as any accessible evidence goes, can now be believed to have existed."

The criterion for determining whether the agreement makes a case of compensation or partnership as to third persons, differs in these cases (Ex parte Rowlandson and Ex parte Hamper) from the one asserted in Waugh v. Carver, that he who participates in the profits of a trade, indefinitely, is liable as a partner, because he takes from the fund upon which the creditors rely; and the only reason given for the distinction between the liability of the person who contracts to take a sum equal to a share of the profits of a trade, and one who stipulates for a share of such profits, as profits, is, that the latter has a right to an account, and therefore he is liable as a partner. And this reason has been since asserted and relied on by courts and writers. 3 Kent, Comm. 25, note b; Champion v. Bostwick, 18 Wend. 184; Heinstreet v. Howland, 5 Denio, 68; Denny v. Cabot, 6 Metc. [Mass.] 92.

In reference to these, Bisset on Partnership, 14, says: "Some of the writers, and even some of the judicial authorities, on this subject appear to think they have surmounted the difficulty, by confining the rule of liability to the cases where the party would have a right to an account of the profits; but to this it may be answered, that in all cases where a person is to be paid for his services by a sum proportioned to the profits, he must be entitled to an account of the profits. If not, how is he to ascertain that he has what he has stipulated for? * * * The distinction between the cases where a participation in the profits has been held to make a man liable as a partner, and those where it has been held not to make him so liable, is certainly, at least as Lord Eldon has given expression to that distinction, so thin, that it does not appear possible, from the most careful consideration of it, to arrive at any clear, general conclusion; nor does Mr. Justice Story's attempt to reconcile the repugnancy of the various decided cases, and to bring them, as he says, 'into harmony with

each other, as well as with common sense,' appear to be very successful. If the matter were res integra, a plain and intelligible rule, and one, too, which would not be at variance with anything in the cases decided previously to Ex parte Hamper, 17 Ves. 403, would be, that those whose share of the returns of the business or adventure consisted wholly of the profits of the stock, or partly of the profits of the stock, and partly of the wages of labor, should be held liable as partners; but those whose share of the said returns consisted wholly of the wages of labor, or the interest of money lent, or a certain fixed annuity, and who had no control or voice as principals in the management of the business or adventure, should not be held liable as partners."

In discussing this supposed test of liability as a partner—the right to an account of the profits of the business—T. Parsons on Partnership, p. 92, says: "Undoubtedly every partner has a right to an account of the profits; but the converse is not true, that every one who has such a right is a partner. There are many ways in which a man may represent another, and in that right be entitled to an account, without being liable as a partner."

Hickman v. Cox, 91 E. C. L. 523, is a comparatively late English case, 1860, in which the rules given in the cases above cited seem to have been treated as erroneous or unintelligible. The case was this:

Smith and Son, prior to 1850, carried on business at the Stanton Iron Works, as ironmasters and merchants, and being involved and indebted to the defendants and others, executed a composition deed transferring their property and business to certain trustees, in trust, that they would carry on the business in the name of the Stanton Iron Co., and after paying expenses and interest on a certain mortgage whenever and as often as the net income amounted to a shilling on the pound of the indebtedness, to divide the same among the creditors in proportion to their claims, and when these were discharged to reconvey the property to Smith and Son. The deed was executed by the trustees and creditors, who thereby released the debtors. In 1855, the plaintiff, who was the proprietor of the Grafton Iron Ore Works, drew three bills for upwards of 1,300 pounds, for ore furnished the Stanton Iron Co., which were accepted by James Haywood, one of the trustees, "per procuration, the Stanton Iron Co." Afterwards the works passed into the hands of the mortgagee, and ceased to be carried on under the composition deed, when the plaintiff brought suit against the defendants as acceptors of the bills, on the ground that the creditors under the deed were partners in the business of the Stanton Iron Co., because the same was conducted by their agents, the trustees, and they had stipulated to take the profits therof.

At Trinity term, 1856, the plaintiff had judgment in the court of common pleas, the court holding on the authority of Owen v. Body, 5 Adol. & El. 28, and Janes v. Whitbread, 11 C. B. 406, that the creditors executing this deed became partners in the trade agreed to be carried on thereunder. On appeal the case was argued in the exchequer chamber in February, 1857, and judgment reserved until November, when the judgment of the common pleas was affirmed—three judges for and three against. On appeal to the house of lords, the decision was reversed (99 E. C. L. 47). The six judges who heard the argument in the house of lords, delivered opinions seriatim, and were equally divided on the question, "are the defendants liable upon the bills of exchange?"

The lord chancellor, Campbell, and the law lords, Brougham, Cranworth, Wensleydale and Chelmsford, delivered opinions to the effect that the defendants were not partners.

In the course of the opinions delivered, the supposed rule that participation in the profits of a trading concern makes one liable as a partner, was questioned and commented upon freely. Blackburn, J., who was for holding the defendants as partners, said: "The phrase taking the profits as such, is not a happy one; and there is some difficulty at times in defining what it means; but I think, at all events, it means this: It is not possible, according to the common law, to cause a trading concern to be carried on upon the terms that the advantages of a partnership, including the participation in profits and partnership lien and security over the assets of the firm, shall belong to those who have but a limited liability."

Whightman, J., who was for reversal, said: "It is said that a person who shares in net profits is a partner. That may be so in some cases, but not in all; and it may be material to consider in what sense the words 'sharing in the profits' are used. In the present case, I greatly doubt whether the creditor who merely obtains payment of a debt incurred in the business, by being paid the exact amount of his debt, and no more, out of the profits of the business, can be said to share the profits."

Pollock, C. B., who was of the same mind, said: "The question then arises, whether the interest which the creditors had in the profits to be made by the carrying on of the business under the deed, was such as to make them partners in respect to third persons. * * * If a firm were in difficulties, and a person proposed to assist them by a loan of money, engaging to receive payment out of the profits only, and to make no claim in the event of there being no profits, but stipulating that one half of the profits should be applied as they arose in payment of his debt, and that he should have power to see that this was done—would he thereby become a partner, and liable for all debts contracted subsequently to this arrangement? On this very simple state of

facts, there may possibly arise a difference of opinion; but I think a large majority of all lawyers and commercial men would decide at once that assistance so offered and so accepted, would not make the lender of the money a partner as to third persons. If he took a warrant of attorney, entitling him to enter up judgment at his pleasure, and sweep away in payment of his demand, capital, debts, profits and everything, he certainly would not be a partner; but as is said, if he limits his claim to be paid out of the profits only, his limited right to payment creates an unlimited liability. I think, my lords, there must be some fallacy in this; the conclusion, to my mind, appears so unjust and absurd, and so much at variance with natural equity."

Lord Cranworth said: "Would they (the creditors) have become partners in the concern carried on by the trustees merely because they passively assented to its being carried on upon the terms that the net income, i. e., the net profits, should be applied on discharge of their demands? I think not. It was argued that, as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person, not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in the profits affords cogent, often conclusive evidence that the trade in which the profits have been made, was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is, to say that the same thing that entitles him to the one, makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made."

Lord Wensleydale said: "A man who orders another to carry on a trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent; and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they should carry on a trade and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contracts in carrying on the trade as much as a single principal would be by the act of an agent who was to give the whole of his profits to his employer. Hence, it becomes a test of the liability of one for the contracts of another, that he is to recover the whole or a part of the profits arising from that contract, by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim, that he who takes the profits ought to bear the loss, often stated in the earlier cases on this subject—Waugh v. Carver [supra]—is only the consequence, not the cause, why a man is liable as a partner."

From the general conclusion reached in this case, that the defendants were not partners in the Stanton Iron Co., simply because they were to receive the net profits of the business, and from the opinion expressed in the H. of L., I think it is clear that the decision set aside the arbitrary rule, that indefinite or other participation in profits necessarily made one liable as a partner under any circumstances, but the fact of such participation is to be treated as evidence, more or less cogent, according to the circumstances, of a partnership.

Following the final decision in Hickman v. Cox, supra, and in consonance with the views therein expressed, the English parliament recently passed an act (28 & 29 Vict. c. 86), which provides, among other things, that a loan to a person engaged in trade, upon a written contract, that the lender shall receive a rate of interest in proportion to profits, or a share of the profits, shall not of itself constitute the lender a partner; nor shall a contract to remunerate a servant or agent of a person engaged in trade by a share of the profits, of itself render such servant or agent liable as a partner. In noticing this act, T. Parsons on Partnership, p. 93, says:

"We will add our hope and our belief that the courts of this country will regard this statute rather as declaratory of the law-merchant in respect to partnership, than as changing that law, and will apply to cases which come before them the principles upon which the statute is founded."

The American cases on this subject are also conflicting, but the weight and tendency of authority appears to be in favor of the doctrine "that a mere promise to pay out of the profits a sum of money, as a specific proportion of the profits, does not necessarily constitute the payee a partner, and gives him no interest in the profits, and no right to the profits, but only a personal claim against the promissor for such money, or for such a share of profits, after they are ascertained and may be divided." T. Pars. Partn. p. 70. In Berthold v. Goldsmith, 24 How. [65 U. S.] 542, Mr. Justice Clifford, speaking for the court, says: "Actual participation in the profits as principal, we think, creates a partnership as between the parties and third

persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits."

In support of this proposition, the cases of Waugh v. Carver and Grace v. Smith, supra, are cited, together with the rule announced therein, that he who has a share of the profits ought to bear his share of the loss. But the opinion goes on to say: "That rule, however, has no application whatever to a case of special service or agency, when the employé has no power as a partner in the firm, and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services." In other words, the participation in the profits which will make one liable to third persons as a partner, is a participation as a partner, or, in the language of the opinion, as principal—and that is the fact to be ascertained. In that case, the court held that a person who negotiated the sale of goods for another, under a contract to have half the profits and a certain compensation in any event, was not a partner as to such sales.

Mr. Justice Story believes that the true doctrine upon this subject is, that a participation in the profits is presumptive proof that the participant is a partner, and sufficient proof in the absence of all other opposing circumstances. Story, Partn. § 38.

Having reached this conclusion, I cannot, upon the facts so far stated, conclude that Francis is liable as a partner with Buchanan. For although he participated in the profits of the trade, the agreement and circumstances under which such participation took place are sufficient to modify the presumption of law that he did so as a partner or principal, and so leave it in doubt whether he took such profits only as a compensation for money loaned and services rendered, or otherwise.

It then becomes necessary to inquire further and ascertain whether, upon the whole evidence, Francis was in fact a partner or not.

Buchanan being called as a witness by the petitioners, testified that Francis was an actual partner in the firm of Richter & Co., and also in that of W. A. Buchanan, so far as the profits were concerned, but not in the losses, and that the written and verbal agreement aforesaid, and the manner of keeping the books, and the written authority to Francis to act as his agent, by which it appeared that Francis only loaned money to Richter & Co. and to W. A. Buchanan, for a certain interest, and kept their books for a share of the profits with a guarantee of a certain sum per month, were all a mere pretense and device, not intended to wrong any one engaged in business with said firms, but merely to conceal the fact of such partnership from Francis' employer, the Bank of British Columbia, it being contrary to the rules of such bank that their employés should be engaged in other business.

Francis being called as a witness on his own behalf, testified that he was not a partner in the concern, unless the agreement made him one, that it truly stated his relations to the parties and the business, and that he desired such relations to be kept secret, but did not state why. He also admitted that he was a clerk in the bank aforesaid, during the period covered by these transactions.

Paul Richter, called as a witness by the petitioners, testified that it was his understanding that Francis was a partner in the firm of Richter & Co., but he had no direct knowledge on the subject.

Dr. Cardwell, called by the petitioners, testified that after Buchanan was adjudged a bankrupt, Francis urged him to agree to a settlement for fifty cents on the dollar, and he then said that if witness would so settle he would never hear of a $600 note made by witness as an accommodation to B., and which Francis then held as collateral security for money loaned B. on account, and that B. considered their debts confidential, and would pay them dollar for dollar.

Here is a direct conflict between the testimony of the two persons who ought to know better than any one else what was the real relation between them concerning this business. Resort must, then, be had to the circumstances and other proofs of the case to ascertain the truth of the matter. Buchanan, so far as can be seen, has no pecuniary interest in the question. Francis has a large one. Buchanan may have some personal feeling against Francis, regarding him as one who, in the language of counsel, has sucked the sap out of the business; or, as the leonine partner in what the Roman lawyers called societas leonnia, in allusion to the fable of the lion—who, having entered into a hunting partnership with the other beasts of the forest, appropriated to himself all the prey. Be this as it may, he did not impress me as a witness who was inimical in his feelings towards Francis. He stated that he did not first disclose the fact of partnership. His testimony was direct and positive, and went into details of conversations between himself and Francis, with the circumstances of time and place, that gave it the semblance of probability and truth. On the contrary, Francis' testimony was brief, somewhat ambiguous—as that he was not a partner unless his agreement made him one—and consisted mainly of general denials.

Again, the fact of Francis' employment in the bank furnishes a motive, reason or inducement to disguise a partnership with this cloak of a loan of money and hiring of services.

The interest which Francis took in having the creditors settle at fifty cents on the dollar may have been prompted by mere friendship for Buchanan, but the fact that he

assured Cardwell that in such event his debt would be paid in full, or he would never hear of his note again, indicates a concern, knowledge and authority in the premises that we might expect of a person interested in the matter otherwise than as a mere creditor.

When Francis exercised the direct authority in the business that he did in the absence of Buchanan, although he had a secret writing appointing him agent, he did not deem it necessary to show it to the salesman or any one else, but proceeded to take the cash into his own custody from the till, daily, and direct who to credit and who not, with all the authority of a partner. The salesman, Mr. Lewis, don't seem to have had any question or doubt about his right to do so, independent of the writing, which he never saw or knew of, until it was produced in court.

Richter's testimony goes to establish the partnership. The particulars of the transaction don't appear to have been disclosed to him by either B. or F. But from all that he observed during the six or seven months that he was an active partner in the concern he regarded and treated Francis as a partner in the profits at least, although not in the capital stock. As to what B. told Richter, I do not consider it, because B.'s declarations upon the question of the existence of the partnership are not evidence against Francis.

It does not directly appear from the evidence what was a reasonable compensation for keeping the books. It was assumed by counsel for the petitioners, and not questioned by opposing counsel, that twenty-five dollars per month was a fair compensation, and the conclusion appears probable. Now, if Francis was simply employed to keep books, what inducement was there for Buchanan to agree to give him any interest in the profits of the business, or any other compensation beyond the twenty-five dollars per month, which he was guaranteed and paid, profits or no profits? The money put into the concern, if a loan, was drawing the highest legal rate of interest, independent of the compensation paid as bookkeeper.

This single circumstance indicates that this arrangement was either a device to cover up a partnership in the profits or a usurious loan. As it is not unlawful to be a dormant or secret partner in a trading business, and it is to loan money at usurious interest, the court ought to infer that the contingent and extra compensation for keeping the books was a device whereby Francis was to be admitted to a share in the profits as a partner.

All these circumstances considered, I think the weight of the testimony is in favor of the conclusion that Francis was a partner in the firm of W. A. Buchanan. But if, as contended by counsel for respondent, the evidence was evenly balanced, effect being given to the fact that Francis did participate in the profits, the same conclusion would follow.

As has been shown, a participation in the profits, in fact, is presumptive proof of partnership, and sufficient proof, unless overcome by other circumstances. Story, Partn. § 38. It being admitted that Francis participated in the profits of the concern, and the circumstances of the agreement at least, leaving it in doubt whether such participation was as partner or employé, the burden of proof is upon him to overcome the presumption that such profits were received by him as a partner.

Case No. 5,032.

The FRANCIS.

[1 Gall. 445.][1]

Circuit Court, D. Rhode Island. June Term, 1813.[2]

PRIZE—CONDITIONAL CONSIGNMENT OF PROPERTY—TITLE IN TRANSITU—HOSTILE CHARACTER.

1. A shipment made by an enemy shipper to his correspondent in America, to belong to the latter at his election, in twenty-four hours after the arrival thereof, is liable to condemnation as hostile property.

[See note at end of case.]

2. In war, property cannot change its hostile character in transitu.

[Cited in The Delta, Case No. 3,777.]

[See note at end of case.]

3. In the above case, an election made during the transit will not merge the hostile character of the property.

In admiralty.

Wheaton, Burrill, and Dexter, for captors.

Mr. Searle, for claimants.

STORY, Circuit Justice. The question now before the court arises out of the claim of Messrs. Dunham and Randolph of New York, who claim, as their own property, sundry bales of merchandize, shipped to them on board the Francis, by Alexander Thompson of Glasgow. The Francis sailed from Greenock about the 19th of July, 1812, for New York, and on her passage was captured by the privateer Yankee, Oliver Wilson commander. By the papers on board, the goods appear to be shipped by Thompson, and consigned to the claimants. Several letters of Thompson accompany the bills of lading. In one of them, dated the 11th of July, 1812, after speaking of the shipments, one on board of the Fanny, and the other on board of the Francis, he says, "I have exceeded in some articles, I have sent you others not ordered at all, the reason of which is, I intended to have made a small shipment on my own account, but found the circumstances such, that it would have been very apt to create confusion and mistakes. I therefore concluded to send you the whole. I assure you, nothing has been wanting on my part to get every thing done in the best manner I could, but I wish to go on the most liberal and fair principles. I leave with yourselves to take the whole of the two shipments or none.

[1] [Reported by John Gallison, Esq.]

[2] [Affirmed in 8 Cranch (12 U. S.) 354, and 9 Cranch (13 U. S.) 183.]

at all, just as you please. If you do not wish them, I will thank you to hand the invoices over to Messrs. Falconer, Jackson & Co. I think twenty-four hours will afford you ample opportunity for you to make up your minds on this point, and if you do not hand them over within that time I will of course consider that you take the whole." In other parts of the letter the same proposition is repeated. Towards the close he says, "The premium of insurance is three guineas, warranted free from capture by the Americans. I presume there is no danger of their injuring the property."

In another letter, addressed to Messrs. Falconer, Jackson & Co. of New York, dated 15th of July, 1812, after acknowledging the receipt of letters from them of the 1st and 11th of June, 1812, he observes, "The government of the United States seem really to be in earnest about war, but there was such a train of circumstances occurred (the death of Perceval, &c.) that I think would induce them to wait the final result," &c. He then goes on to state the shipments by the Fanny and the Francis, and says, "I have had an order from Dunham & Randolph sent me for about a year, to be shipped when the orders in council were removed. I have sent them more of some articles, than they ordered, and some not ordered at all, the reason of which was, &c. I concluded to send them the whole, leaving it to their option to take them to account or not, just as they pleased; but if they took any, it must be the whole of both shipments or none at all. I gave them twenty-four hours after the arrival of the first vessel, to make up their minds, and if they did not hand you over the invoice of letters in that time, I would consider they had taken the whole to account. Should they not take them, you will of course do the best you can for me." It is conceded, that the Fanny was captured by a revenue cutter of the United States, and upon her arrival in the United States, which was before the Francis arrived, she was proceeded against in the proper judicial tribunal.

It has been argued, that under these circumstances the property of the goods, at the time of the shipment, actually vested in the claimants, subject however to be divested by their subsequent refusal to accept the same. But can this, by any reasonable construction, be so held? The shipment is conceded by the shipper not to have been made in conformity with the orders of the claimants, and that larger quantities of some goods, which were ordered, and other goods, which were not ordered, had been sent; and the shipper expressly declares, that the whole must be accepted, or none. Until the acceptance then, there could be no property in the claimants, even if the intentions of the shipper had been to vest that property; because no man can be bound, against his will, to take the risk of goods, for which he has not contracted. Here, however, there was no such intention. The shipper plainly declares, that the goods were at his own risk, and on his own account, until the claimants should make their election. If the goods had been lost during the voyage, and before the arrival of the time of the election, there cannot be a doubt, that it would have been the loss of the shipper. I would adopt the language of Sir W. Scott, in the case of The Packet De Bilboa, 2 C. Rob. Adm. 133, "that it is the true criterion of property, that if you are the person on whom the loss will fall, you are to be considered as the proprietor." The argument therefore of the claimants' counsel, on this point, cannot be supported.

It has been suggested, that if the claimants can be admitted to the benefit of further proof, they will be able to show, that the Fanny arrived before the Francis, and that, previous to the capture of the latter, the claimants had made their election to receive the whole shipment. It is however admitted, that the Fanny was actually captured and brought into one of our ports, and underwent a judicial examination. It is somewhat difficult to conceive, how any election to take the property could have been effectually made, while it was emphatically in the custody of the law. But notwithstanding this objection, if I were satisfied that a legal defence could be shown to the court under an order for further proof, I should not hesitate to allow it. It is clear, however, to my mind, that the assumed defence could never prevail. At the time of the shipment the property was clearly hostile. And open and public war existed between Great Britain and the United States. By the general law, a state of war puts an end to all executory contracts between the citizens of the different countries. Whatever contract remains then in fieri is either suspended or dissolved, flagrante bello. A familiar instance is that of a contract of affreightment to the enemy country, which has been solemnly held to be dissolved by the breaking out of the war. It might therefore be exceedingly doubtful, if it were competent to citizens of the United States, after a knowledge of the war, to make or to ratify a contract with the public enemy. I do not, however, rely on this consideration. I consider it as a general principle, liable to very few exceptions, that the character of hostility impressed upon property cannot be altered during the voyage, or, as it is usually expressed, in transitu. A strong case of the application of this principle is The Danckebaar Africaan, 1 C. Rob. Adm. 107. An exception to the rule is, when the transfer is made in a time of profound peace, without reference to a contemplation of hostilities. The Vrow Margaretha, 1 C. Rob. Adm. 338. If it were necessary, I might draw in aid the principles of these decisions, because it is clear that, at the time of the shipment, hostilities had actually commenced and were in the contemplation of the shipper. The whole papers and

documents, read in this cause, point to the expectation, as one of public notoriety. And upon the ground assumed by the claimants' counsel, that the election of the claimants vested in them the property during its transit, it would follow, that the case would be comprehended within the general rule of illegal transfers, during hostilities actually existing or imminent.

But I do not rest the present claim upon this ground alone. I consider it a clear principle, that the property of an enemy, going to a neutral or a friend, to be his at his election at the end of the voyage, remains, during the whole voyage, as to the claim of belligerents, enemy's property. It is not competent for the neutral or friend, during the voyage, to change by his election the character of hostility, which is attached to the property at its shipment. During the whole voyage it must be subject to the shipper's right of stoppage in transitu; and this right, by the capture, becomes legally and effectively vested in the captors. I do not undertake to say, how the case might stand, as between the shipper and the consignee, upon such election being made; it will be time enough to decide that question when the case arises. But where the interests of third persons intervene, the right of election cannot defeat their rights; and the laws of belligerent capture would remain a mere theoretical system, if the doctrine contended for by the claimants should prevail. In my judgment, the great principles of national law require, that no secret liens, no future elections, no private contracts looking to future events, should cloak with the garbs of neutrality the property of an enemy, while sailing on the ocean. I know not that any person could foresee the alarming extent, to which the contrary doctrine would lead us. Frauds of every name and character would thicken around us and not a single bale of hostile property would swim on the ocean, but it would be covered with neutral liens, and secret and interminable contracts. Against the adoption of principles, which would lead to this inevitable result, I beg to enter my solemn dissent.[3]

In the present case, I feel myself bound to declare, that I see no fraud properly imputable to the claimants; they are innocent. But the rule cannot be relaxed in their favor: and I feel some consolation, that the loss, which will accrue, will in no event rightfully fall on them. Claim rejected. Decree of condemnation.

[NOTE. For hearings on various other claims, see The Francis, Cases Nos. 5,033–5,036.

[This case was heard on appeal by the supreme court, and was ordered to stand for further proof. The Frances, 8 Cranch (12 U. S.) 354. It came on to be heard again in 1815, when the decree of condemnation was affirmed, Mr. Justice Johnson delivering the opinion. It was held: "If a British merchant purchase, with his own funds, two cargoes of goods in consequence of, but not in exact conformity with, the orders of an American house, and ship them to America, giving the American house an option, within 24 hours after receipt of his letter, to take or reject both cargoes, and if they give notice within the time that they will take one cargo, but will consider as to the other, this puts it in the power of the British merchant either to cast the whole upon the American house, or to resume the property, and make them accountable for that which came to their hands. The right of property in the cargo not accepted does not, in transitu, vest in the American house, but remains in the British subject, and is liable to condemnation, he being an enemy." The Frances, 9 Cranch (13 U. S.) 183.]

[3] The Josephine, 4 C. Rob. Adm. 25, and The Aurora, 4 C. Rob. Adm. 218, are strongly applicable to this case.

Case No. 5,033.

The FRANCIS.

[1 Gall. 453.] [1]

Circuit Court, D. Rhode Island. June Term, 1813.

PRACTICE—COSTS.

As to costs to be taxed on several claims in one information, upon a remission of the forfeiture.

[This was the case of the ship Francis and cargo (Joseph Boyer, master), which was captured and libeled as enemy's property.]

In this and some other prize causes pending before the court, the captors had relinquished their rights to a considerable portion of the property found on board, and claimed by American citizens; and congress having passed an act [2] remitting all forfeitures under the non-importation acts,[3] upon the payment of the duties, costs, and charges, a question arose as to the costs which ought to be taxed upon each claim.

The counsel for the claimants contended that the attorney for the United States was entitled, on each claim, to the sum of $6 only; and they cited the act of 28th of February, 1799, c. 125, § 4 [1 Stat. 625], regulating his fees.

The district attorney, on the other hand, contended that he was entitled to $17 on each claim; and, to show that such had been the general practice, he introduced certificates, &c., from the districts of Massachusetts, Connecticut, New York, and Pennsylvania; and he alleged that such had also been the practice of the district court of Rhode Island.

Mr. Robbins, Dist. Atty.

Crapo & Searle, for claimants.

STORY, Circuit Justice. These prize causes have been certified to this court by the district judge, under the act of 8th of May, 1792, c. 36 [1 Stat. 275], on account of his

[1] [Reported by John Gallison, Esq.]

[2] Act Jan. 2, 1813 [2 Stat. 789].

[3] Act March 1, 1809 [2 Stat. 528]; Act March 2, 1811 [Id. 651].

having been of counsel for the United States; and I consider myself therefore as sitting, in effect, for him. On examining the act regulating fees, I confess that I was at first strongly inclined to think that, at most, $11 only were taxable against each claim; and there is certainly weight in the argument which would confine the taxation to $6. No judicial proceedings appear to have been had on the behalf of the United States, except the filing of an information or claim for the municipal forfeitures. The subsequent collateral proceedings of the parties were to obtain a remission of the forfeitures from the secretary of the treasury. But I am pressed with the uniformity of the practice to allow $17; and certainly, sitting merely for the district judge, I should not feel at liberty to disturb a practice, which seems to have obtained so general a sanction. I shall therefore allow the $17 for each claim in these causes.[4]

[NOTE. See The Francis, Cases Nos. 5,032, 5,034–5,036.]

Case No. 5,034.

The FRANCIS.

[1 Gall. 614.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1813.[2]

WAR—CONFISCATION—NATURALIZED CITIZEN DOMICILED IN FOREIGN COUNTRY—ENEMY PROPERTY.

1. A naturalized citizen of the United States, domiciled in the enemy country at the breaking out of war, is deemed an enemy, and his property is confiscable as such. The Chester, 2 Dall. [2 U. S.] 41; Murray v. The Betsey, 2 Cranch [6 U. S.] 64; Maley v. Shattuck, 3 Cranch [7 U. S.] 488; Livingston v. Maryland Ins. Co., 7 Cranch [11 U. S.] 506; The Venus, 8 Cranch [12 U. S.] 253.

[See note at end of case.]

2. If a party so domiciled puts himself in itinere, to resume his acquired country, he is deemed to have returned to its domicil. Story, Confl. Law, § 48.

[The ship Francis, Joseph Boyer, master, having sailed from Scotland for New York, July 19, 1812, with a British cargo on board, was captured by the Yankee, an American privateer, and libeled as enemy's property. Claims to portions of the cargo were interposed by various American citizens. See Cases Nos. 5,032, 5,033, 5,035, and 5,036.]

Mr. Colin Gillespie, whose claim was now under consideration, was born in Glasgow in Scotland, came to the United States in 1793, and was naturalized as a citizen thereof at New York, in 1798. In 1799, he married in Scotland, and returned with his wife to New York, where he resided until 1802, when, on account of the ill health of his wife, he went to Scotland. In 1805 he came again to New York, and having formed a mercantile copartnership with Mr. John Graham of that city, it was then agreed, for the benefit and mutual interest of the copartnership, that Mr. Gillespie should reside in Great Britain, and there transact the business of the copartnership, under the firm of Colin Gillespie & Co. and that Mr. Graham should transact their business at New York, under the firm of John Graham & Co. In pursuance of this agreement, Mr. Gillespie went in the same year to Scotland; established his house of trade there, and continued to reside there with his family until the spring of 1813, doing business as a merchant, receiving consignments of American produce, selling the same, and purchasing goods in that market to ship to the United States. During this residence in Scotland, Mr. Gillespie accepted a commission from the British government, as an officer in the local and embodied militia, which, however, he resigned in 1810. Mr. Gillespie, in his affidavit, further stated, that it was always his intention to hold to his adopted allegiance, and to do no act inconsistent with his duties to the United States; and that, as soon as he could arrange his business in Great Britain, after knowledge of the war, he set sail with his family for the United States, and now resides with them at New York. The present shipment was made in July, 1812, and the capture took place on or about the — of August, 1812.

Crapo & Searle, for claimant.
Burrill & Robbins, for captors.

STORY, Circuit Justice (after reciting the facts). Upon the foregoing facts, and the presumption that Mr. Gillespie's return to the United States is with a bona fide intention of permanent residence, the case seems entitled to a very indulgent consideration. My duty, however, requires me to apply the rules of law, and though I may lament individual hardships, I am not permitted to relax general principles in favor of them. And I take it to be clear, that the facts of this case establish the position, that Mr. Gillespie, at the time of this shipment and capture, was a merchant domiciled in Great Britain, and of course affected with its national character. He was settled there with a house of trade, and for purposes of indefinite extent and duration. Had the facts been equivocal, the circumstance, that it was his native country, would undoubtedly have been entitled to great weight, in deciding the question of domicil; for, as Sir William Scott justly observes, the native character easily reverts, and it requires fewer circumstances to constitute domicil, in case of a native subject, than to impress the national character on one, who is originally of another country. The La Virginie, 5 C. Rob. Adm. 98. Such then being the domicil and national character of Mr. Gillespie, he must,

[4] See Act 22d July, 1813, c. 14 [3 Stat. 19], respecting suits and costs in United States courts.

[1] [Reported by John Gallison, Esq.]

[2] [Affirmed in 8 Cranch (12 U. S.) 363.]

according to the settled rules of public law, be deemed to partake of the advantages and the hazards of a British merchant, in peace and in war. For all commercial purposes, it is quite immaterial, what is the native or adopted country of a party. He is deemed a merchant of that country, where he resides, and carries on trade. The Indian Chief, 3 C. Rob. Adm. 12. Under such circumstances, Mr. Gillespie must be held, so far as the present transaction applies, to be completely invested with the hostile character of a British merchant.

But it is argued, that Mr. Gillespie, having become a naturalized citizen of the United States, could not be deemed an enemy merchant, unless he continued voluntarily to reside in Scotland after a full knowledge of the war, and that, as he had no such knowledge at the time of the shipment, he is entitled to all the benefits of his American character. I should have been glad to have seen an authority, which distinctly countenanced this exception. No such authority has been produced, and as the general rule is so often and so forcibly laid down in elementary works, it is difficult to conceive, that so important an exception, if it existed, should not have attracted public notice.

It is certainly true, that a character acquired by residence, ceases with the discontinuance of that residence. And, therefore, if a party, who has resided in an enemy country, puts himself in itinere to return to his native country, wtih an intention of bonâ fide residence there, he is deemed already to have resumed his native character, although he has not actually arrived in such country. The Indian Chief [supra]. But, until he has actually so put himself in itinere the character of the country, where he resides, attaches indissolubly to him. He takes it with all its benefits and all its disadvantages. Undoubtedly, cases of hardship often arise on the breaking out of hostilities, as to native citizens, who are domiciled as merchants in the enemy country. The hardship is often forcibly pressed upon the prize court; but, as Sir William Scott observes, that the interest of friends may sometimes be involved in our vengeance upon enemies, is a matter, which it is natural to regret, but impossible to avoid. The administration of public rules admits of no private exceptions: he who clings to the profits of a hostile connexion must be content to bear its losses also. The Phoenix, 5 C. Rob. Adm. 21.

As to citizens domiciled in the enemy country, I hold it to be the established rule, that if they wish to avoid the hostile character, they must actually remove before the breaking out of hostilities. Otherwise their property then afloat will be liable to confiscation. If they do not so remove, the character of the country is completely impressed upon their property, wherever it is found, and remains until they have abandoned their residence, and then, as to all future transactions, the character of their native or adopted country returns. It is said, that there is no authority, which pointedly decides this doctrine. But it seems to me, that Dr. Robinson's note to The Ocean, 5 C. Rob. Adm. 91, fully shows the understanding of the prize courts on the subject; and the case of The Osprey, before the lords commissioners in 1795, cited in The Vigilantia, 1 C. Rob. Adm. 1, is a strong instance of its application to a neutral subject. There can be no well founded distinction in this respect between a neutral and a citizen. But independently of all authority, it seems to me that the principle obviously flows from the general rule, as to the effect of domicil, and cannot form an exception without shaking its foundations.

In the present case, if the doctrine of the claimant's counsel be true, Mr. Gillespie's property at the time of the capture, was completely protected from capture by British and American cruisers. He was certainly entitled to protection, as a British merchant domiciled in Scotland; and upon the argument of the counsel, as an American merchant also. I should have been glad to have learned, how this double character, this hostile and amicable character, could coalesce in the same person, as to the same transaction. I imagine it would be a novus hospes in the prize jurisdiction.

On the whole, I deem Mr. Gillespie, as to this shipment, an enemy merchant, and therefore reject his claim, and condemn the property as lawful prize to the captors.

[NOTE. On appeal this decree of condemnation was affirmed by the supreme court, Mr. Chief Justice Marshall delivering the opinion, in which it was held that the commercial domicile of a merchant at the time of the capture of his goods determines the character of those goods hostile or neutral. The Frances, 8 Cranch (12 U. S.) 363.]

Case No. 5,035.

The FRANCIS.

[1 Gall. 618.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1813.

PRIZE—PROPERTY SHIPPED FROM ENEMY COUNTRY—CONDEMNATION.

Case of presumptive joint shipment from the enemy country. Condemnation of the share of a partner domiciled in the enemy country. See Story, Partn. § 316, where all the authorities may be found.

[This was a case of the ship Francis and cargo (Joseph Boyer, master), which was captured by the American privateer Yankee, and libeled as enemy's property.]

Crapo & Searle, for claimant.

Bowen, Robbins, and Burrill, for captors.

[1] [Reported by John Gallison, Esq.]

STORY, Circuit Justice. The claim of Mr. John Graham to the sole and exclusive property of certain packages of dry goods is now to be heard, upon the further proof directed in the cause. On the original papers accompanying the shipment, the goods were stated to be on account of John Graham. In an accompanying memorandum, they are stated to be for John Graham & Company; and in a sub-invoice, particular packages are alleged to be for Peter Graham & Company. There are also several letters, addressed to the claimant, &c. giving information as to the goods, which seemed to point to an interest in the shippers, William Graham & Brothers of Glasgow. Upon the further proof it appears that the three firms aforementioned are composed of the same partners, namely, William Graham, John Graham, and Peter Graham, who are all brothers and natives of Scotland. William Graham is a naturalized citizen of the United States, and has resided many years in Scotland, doing the business of their house of trade there, under the firm of William Graham & Brothers. John Graham is also a naturalized citizen of the United States, and has resided many years at New York, doing the business of their house of trade there, under the firm of John Graham & Company, and also carrying on considerable other business on his own private account. Peter Graham (who has been naturalized as a citizen of the United States since the war) has for some years resided at Philadelphia, doing the business of their house of trade there, under the firm of Peter Graham & Company. The principal business of these houses is the shipment of goods between Scotland and the United States, either on their own account or on consignment. The affidavits of all the brothers are produced, and they all allege the exclusive property to be in Mr. John Graham; and attempt to explain the apparent discord of the original papers. The affidavits of their clerks are offered for the same purpose. But no original letters or orders from Mr. John Graham, or copies thereof are exhibited, to relieve the cause from the pregnant suspicions of partnership interest. The whole evidence consists of naked affidavits, although letters and orders are admitted to have passed between the parties.

I am entirely satisfied, that the present shipment having been made by the Scotch house in the ordinary course of their trade, must be held to be on joint account, unless the presumption is conclusively repelled by proof of a shipment on the exclusive account of Mr. John Graham. The best proof, which the nature of the case admits, or which is in possession of the parties, is not brought out. Here are no original orders or letters, or extracts therefrom; and certainly naked statements must be entitled to little weight, when the parties hold better evidence behind the scenes. Either, therefore, this shipment was without orders, and then it stands on joint account; or if there were orders, the latter, if produced, would demonstrate a joint interest. The voluntary suppression, or the original silence of the parties, authorize the court to adopt the same conclusion. I therefore hold Mr. William Graham as entitled to one-third part of the present shipment; and as he is a domiciled British merchant, I condemn it as lawful prize to the captors. The other two third parts I order to be restored.

[NOTE. For hearings on various other claims, see The Francis, Cases Nos. 5,032–5,034, 5,036. See Id., 8 Cranch (12 U. S.) 348.]

Case No. 5,036.

The FRANCIS.

[2 Gall. 391.] [1]

Circuit Court, D. Rhode Island. June Term, 1815.

SALE—DISCRETIONARY ORDERS TO SHIP—WHEN TITLE PASSES.

If shipment be made without, or contrary to orders, it still remains at the risk of the shippers. If a shipper have general discretionary orders to ship goods, the shipment will remain at his own risk, unless at the time of shipment, by some overt unequivocal act, he designates or appropriates the shipment to his correspondent. Until such appropriation, the property is not changed. See The Frances, 8 Cranch [12 U. S.] 354, 9 Cranch [13 U. S.] 183 (Dunham and Randolph's Claim); The Mary and Susan, 1 Wheat. [14 U. S.] 25.

[Cited in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 405.]

[Heard on the claim of Low & Co. to a portion of the cargo on board the ship Francis, captured by the American privateer Yankee, and libeled as enemy's property.]

Mr. Searle, for claimants.

Burrill & Robbins, for captors.

STORY, Circuit Justice. This is a mere question of proprietary interest. The shipment was made by Mr. Bowman Fleming of Glasgow, to his brother, Mr. John Fleming at New York. The packages are all marked with the initials BF, but neither the bill of lading, nor invoice, nor accompanying letter, express any account or risk. The natural conclusion would be, that the property belonged to the shipper. The claimants, who are merchants at Savannah, claim the shipment on their own account, and upon their urgent application, an order for further proof was made, and the original letters and documents respecting the shipment were required to be produced. They have had full warning of the extreme difficulty of their case, and ample time to remove it; and it must now be presumed, that every thing is before the court, which they could call in aid of their claim.

Considering the nature of the claim, the

[1] [Reported by John Gallison, Esq.]

evidence adduced is not so complete, as might have been reasonably expected. There are several omissions, which it is very difficult to account for, and a considerable degree of laxity in the statements of the affidavits of claim.

No specific orders are produced, to authorise the shipments; and the orders, contained in the letter of the 21st of December, 1811, would seem directly to negative it. It is a clear result of the decisions of the supreme court (The St. Jose Indiano, 1 Wheat. [14 U. S.] 208, and cases there referred to) that a shipment made without orders, or contrary to orders, is at the risk of the shipper during the voyage. The claimants attempt to support their case under the allegation, that the shipper had general discretionary orders to ship, what and when he pleased, and that there was a sort of general usage between him and them on the subject. It strikes me, that there is no sufficient evidence, to justify so broad an allegation. And if there were, in point of law, the shipment would remain at the risk of the shipper, unless at the time of the shipment, he, by some overt unequivocal act, designated or appropriated it to his correspondents. He cannot ship goods generally to a third person, and govern himself as events may turn up, either to claim the gain for himself, or to throw the loss on them. Until such appropriation, the property is not changed. It might, with as much propriety, be claimed as changed, when ordered from the manufacturers on the general account of the shipper, merely because he had a contingent intention of shipping it to his correspondents. And this also, as I apprehend, has been the doctrine asserted by the supreme court.

In the present case, there is not a scrip of paper on board pointing to an interest in the claimants. If really designed for them, it is inconceivable that no letter, ordering the trans-shipment to Savannah, was sent to the consignee. No original letters to Mr. John Fleming are produced; and although the parties, from being brothers, cannot but be presumed to have an intimate connexion (a connexion palpably admitted in all the letters of a confidential nature), there is not a line from Mr. Bowman Fleming to him, nor even an affidavit from Mr. John Fleming, to negative the presumption necessarily arising from the consignment. This gentleman has studiously withdrawn himself from all connexion with the cause, though from his residence at New York, it is difficult to conceive, why he should not have originally interposed a claim as consignee, if there had been the slightest pretence for a bona fide claim. It is impossible not to draw very unfavorable inferences from this sedulous omission of a necessary witness, who may be really deemed conductor operarum. I have a strong impression, corroborated by some of the letters, which are in the case, that if the confidential correspondence and articles of copartnership of the parties, were fully before the court, it would appear that Mr. Bowman Fleming was either a dormant partner, or a principal, in all the shipments made by him to the houses at Savannah and New York.

There is another important omission. In the letters produced, there is a perpetual reference to other letters previously written; and contemporaneous shipments are spoken of in the Fanny, and the Thomas Gibbons. These vessels were captured, and brought into the United States for adjudication, and all the letters were deposited in the prize court, or delivered to the parties. How has it happened, that not a single letter, sent by any vessel after the Francis sailed, has been produced? How has it happened, that not a copy of any paper, relative to the shipments in the Fanny or the Thomas Gibbons, has been adduced? Is it credible, that the shipment in the Francis should be stated in letters written in October, 1812, and not once alluded to in prior letters? Since there must have been letters received by the claimants, which they hold back from the court, it is not an unjust conclusion, that they would not, if shown, support the present claim.

In respect to the letters disclosed to the court, there is much to awaken jealousy. The letter of the 22d of October is doubtless genuine. But I am entirely satisfied, that it was written after a knowledge of the capture of the Francis. And I cannot but remark, that notwithstanding all these ships were captured, that circumstance is not once alluded to in the correspondence, at any time. Is it possible, that the shipper should never have expressed any solicitude on the subject? Must there not be other letters between the parties? The time elapsed after the arrival of the Francis was ample to give the knowledge of that fact in Glasgow on the 22d of October, and the letter of that date has, in the concluding paragraph, an intimation, which may be interpreted to allude to the protection of the interests, which the writer had in the shipments, made by him. The language of that letter is, in other respects, worthy of attention. The writer is very scrupulous in declaring his having made shipments, according to orders from the claimants, in the Fanny and the Francis, to his brother's address in New York. Yet, in a letter written only eight days before (on the 14th of October) there is not the slightest intimation of any shipment, except in the Thomas Gibbons. The same remark also applies to the letter of the 1st of January, 1813; and I will add, that although the originals were specially directed to be produced, a copy only of that letter is before the court. How can these omissions be reasonably accounted for, consistent with the verity of the present claim?

The letter, however, which is annexed to the invoice of the 16th of July, is that, upon which the claimants mainly rely, to support

their title; and if that letter be spurious, or not sufficiently authenticated to entitle it to credit, the court would be insensible to its own duty, if it did not reject it, and decree condemnation. That letter has not on it the slightest mark, to verify the time of its date, or of its receipt. It has neither post mark, nor ship-mark, nor mode of conveyance on it. The claimants themselves do not give any satisfactory account of it. They state, that it was received either personally, or by enclosure, from Mr. John Fleming, but do not declare at what time, or at what place it was so received. Neither is there offered any suppletory affidavit of Mr. John Fleming, to confirm the declaration, nor the original letter in which it was enclosed to him. All the other original letters from Mr. Bowman Fleming are in his own handwriting. In this letter, the signature only is his, and the body is filled up in another handwriting. The invoice, on the same paper, is asserted to be in the handwriting of his clerk; and on examination, it bears considerable resemblance to the original invoice. There is this remarkable circumstance, that in the original invoice found on board, no charges are added, which would be natural, if the goods belonged to the shipper, but in the present invoice, charges, and insurance and commissions are found. The words "Ship Francis, Capt. Boyer," on the direction of the original invoice, resemble the handwriting of Mr. Bowman Fleming, and incline me strongly to believe, that it passed through his hands. How then can we account for the omission of the charges, or of the words "the account and risk," which the new invoice of the 16th of July affects to supply?

There is another circumstance connected with this letter, which has great weight. In June, 1813, a petition was presented to the court for a remission of the forfeiture of this shipment under the act of 2d of January, 1813. In support of the verity of that petition, and of the proprietary interest, copies of the letters of the 14th and 22d of October, and of the 1st of January, were presented. The letter, which is now under consideration, was not even alluded to, much less was it presented, as the papers in this cause most distinctly show. This omission cannot be otherwise accounted for, than upon the supposition that no such letter was then in existence or in the possession of the claimants. It is incredible, that merchants in regular business should not be able to tell, when or where they receive important letters; and in this very case there is proof, that the claimants usually endorse letters received by themselves. If, as the claimants would lead us to suppose, this letter was written and sent about the 16th of July, it is somewhat singular that it should not have been filed with their claim, late as that was interposed, in October, 1812. That it never was produced until the present term, is not accounted for in any manner; and for aught that appears on it, it may have been a fabrication of but a very few months ago.

If the court should restore the property upon the footing of a letter so totally without authentication, it would voluntarily submit itself to every species of imposition. I have not the slightest doubt, that it was never written bona fide in Scotland. It would not, considering all the circumstances, be a harsh imputation to declare, that it was probably transmitted with the invoice, and in blank, to be filled up over the signature in this country, in such manner, as the friends of Mr. Bowman Fleming might deem advisable. If I had entertained any doubt, as to this transaction, I should have directed the papers and affidavits of the parties in the prize causes of the Fanny and the Thomas Gibbons to be invoked into this cause. And I should have been surprised, if some light would not have been reflected from those causes in aid of the opinion which I entertain on this subject. But as I am entirely satisfied, that the claim is utterly without satisfactory proof, I shall condemn the property as good prize to the captors.

In case of an appeal, I shall direct all the original papers to be delivered to the captors, upon their undertaking to deliver them to the supreme court, and leaving attested copies in the circuit court. It is impossible, without an inspection, to feel the full force of some portion of the difficulties of this cause.

Condemned.

[NOTE. See The Francis, Cases Nos. 5032 5035.]

FRANCIS, The. See Case No. 4,546.

Case No. 5,037.

FRANCIS v. BASSETT.

[1 Spr. 16.] [1]

District Court, D. Massachusetts. Feb., 1842.

SEAMEN'S WAGES—FORFEITURE—LEAVING VESSEL BEFORE DISCHARGE OF CARGO—TIME OF FILING LIBEL.

1. No statute prohibits the filing of any libel within ten days after the discharge of the cargo.

2. Wages are not forfeited by leaving the vessel after the voyage is ended, and before the cargo is unladen.

3. Wages in such case allowed, up to the time of leaving by reason of illness.

In admiralty.

F. W. Sawyer, for libellant.

B. F. Hallett, for respondent.

SPRAGUE, District Judge.—This is a libel in personam for wages.

The first objection by the respondent is,

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

that the libel was filed within ten days from the discharge of the cargo. But the statute only prohibits the issuing of process against the vessel within ten days—not the filing of the libel. See The William Jarvis [Case No. 17,697].

It is next objected, that here was a desertion, and consequent forfeiture of wages. The vessel arrived in Boston, and was moored in safety on Friday the third day of December last; and sometime during the evening or night of the same day, the libellant left her, and did not return. But a desertion can only be in the course of the voyage, not after its termination. Here the voyage had been ended, by the vessel's being moored in safety in the usual place. Cloutman v. Tunison [Case No. 2,907].

It is further insisted, that if there be no forfeiture, there should be a deduction from the wages of the libellant, because he absented himself without leave. The evidence shows that he was suffering from disease, to that extent which should excuse him from the performance of a contract for personal service.

Decree for the libellant for his wages up to the time of leaving the vessel.

NOTE. Whether seamen are bound by the maritime law, in the absence of special stipulations, and of any custom of the port, to perform further duties, in unlading the cargo, after mooring the vessel in safety at her last port of destination, see Swift v. The Happy Return [Case No. 13,697]; The Martha [Id. 9,144]; The Mary [Id. 9,191]; Granon v. Hartshorne [Id. 5,689]; The Eagle [Id. 4,233]; Cloutman v. Tunison [Id. 2,907]. That the seaman's leaving the vessel when she is thus moored, or refusing to perform such duties, does not incur the statute forfeiture for desertion, see cases cited above, and The Elizabeth Frith [Id. 4,361].

FRANCIS (CAMAC v.). See Case No. 2,329.

Case No. 5,038.

FRANCIS et al. v. The HARRISON.

[1 Sawy. 353; 2 Abb. (U. S.) 74.] [1]

District Court, D. California. Sept. 26, 1870.

SHIPPING—LIENS UNDER STATE LAWS.

1. A state statute, such as chapter 6 of the practice act of California, declaring vessels subject to liens for materials or supplies furnished towards their construction, repair, or equipment, and directing that demands secured by such liens shall have preference in order of payment over other demands, is valid and operative, even in its application to a domestic vessel supplied in her home port, so far as to entitle the holder of a demand within the statute to payment out of surplus proceeds remaining in the registry, after the satisfaction of maritime liens, in preference to a mortgagee of the vessel.

[Cited in The Augusta, Case No. 647; The William T. Graves, Id. 17,758; The Theodore Perry, Id. 13,879; The Columbus, Id. 3,044; The E. A. Barnard, 2 Fed. 722; The Canada, 7 Fed. 732; The City of Salem, 10 Fed. 845.]

[Cited in Atlantic Works v. The Glide, 157 Mass. 528, 33 N. E. 164.]

2. The successive decisions of the supreme court abrogating the practice of enforcing such liens by proceedings in rem, reviewed and explained.

[Cited in The Kate Tremaine, Case No. 7,622; Wilson v. Bell, 20 Wall. (87 U. S.) 219.]

[This was a suit in admiralty by John Francis and others against the bark Harrison (John Kentfield and others, interveners).]

Milton Andros, for interveners.

W. W. Cope, for mortgagee.

HOFFMAN, District Judge. The question presented in this case is whether a material man claiming a lien under the laws of this state upon a domestic vessel, is entitled to payment out of the surplus proceeds in the registry, in preference to a mortgagee of the vessel.

By the sixth chapter of the practice act of California, it is provided that all steamers, vessels, etc., "shall be liable for supplies furnished for their use at the request of their respective owners, masters, agents and consignees, and for materials furnished for their construction, repair or equipment."

The act further provides, "that said several causes of action shall constitute liens upon all steamers, vessels and boats, and have priority of payment in their order herein enumerated, and shall have preference over all other demands; provided, such liens shall only continue in force for the period of one year from the time the cause of action occurred."

If this statute be constitutional and operative, it is evident that the material man has by law a lien and right to priority of payment in preference to all other demands; and that this right must be recognized by the court which has in its possession the surplus proceeds which remain after satisfying the maritime liens on the vessel.

From the time of the decision in the case of The General Smith, 4 Wheat. [17 U. S.] 438, the supreme court has held in numerous cases that no lien was created by the maritime law in favor of material men supplying domestic ships in their home ports.

In respect to demands of this description, "the case is governed," says the supreme court, "altogether by the municipal law of the state, and no lien is implied unless it is recognized by that law." The General Smith [supra]; Peyroux v. Howard, 7 Pet. [32 U. S.] 324. It was further held that when such liens were recognized by the state law, they might be enforced in the district courts, according to the course of the admiralty.

The twelfth rule in admiralty, adopted by the supreme court in 1844, expressly provides "that proceedings in rem shall apply to cases of domestic ships where by the local

[1] [Reported by L. S. B. Sawyer, Esq., and by Benjamin Vaughan Abbott, Esq., and here compiled and reprinted by permission. The syllabus is from 2 Abb. (U. S.) 74, and the opinion is from 1 Sawy. 353.]

law a lien is given to material men for repairs, supplies, and other necessaries." No recognition could therefore be more emphatic of the constitutionality of state laws creating liens of this description, and of the jurisdiction of the national courts to enforce them.

The distinction too, between the rights created by the state law, and the remedy afforded by it, was also recognized—for the national courts enforced the right by an admiralty proceeding, in the usual form, and not in the manner prescribed by the state law.

In 1858, the twelfth rule was repealed, and proceedings in rem, in cases of domestic ships for supplies, repairs, or other necessaries, were prohibited. The reasons for the repeal of the rule are given by the court in the case of The St. Lawrence, 1 Black [66 U. S.] 522. The court says: "The state lien was, however, enforced, not as a right which the court was bound to carry into execution upon the application of the party, but as a discretionary power which the court might lawfully exercise for the purpose of justice, when it did not involve controversies beyond the limits of admiralty jurisdiction."

The court, after referring to the inconveniences of enforcing such liens in the admiralty, says: "Such duties and powers are appropriate to the courts of the state which created the lien, and are entirely alien to the purposes for which the admiralty power was created, and form no part of the code of laws which it was established to administer." Id. 531.

We have here a distinct recognition of the right of the states to create liens on domestic vessels in cases where none exists by maritime law, and to enforce them by appropriate proceeding.

In the case of The Belfast, 7 Wall. [74 U. S.] 645, which is the latest decision on the subject, it is held that the states "may create these liens, and enact reasonable rules and regulations for their enforcement."

It is apparent therefore: 1st. That the contract of a domestic material man is a maritime contract, and of admiralty jurisdiction. 2d. That it may still be enforced in the admiralty by a suit in personam; and might constitutionally be enforced by a proceeding in rem, where a lien has been by the state law engrafted on the contract. But that on grounds of convenience this proceeding has been prohibited. 3d. That liens created in such cases by state laws are valid, and the states may provide reasonable rules and regulations for their enforcement in their own courts.

It is contended that, as a necessary consequence of these propositions, the state legislatures have the right to authorize a proceeding in rem to enforce liens created by state laws, and not existing under the maritime law.

In support of this view, various authorities are cited: The Circassian, 50 Barb. 490; Id. 501; 4 Ill. 504; 4 Mo. 244; 41 Mo. 491; 2 Pars. Adm. §§ 154, 155; The Maggie Hammond [9 Wall. (76 U. S.) 435].

It is urged that in the cases of The Moses Taylor, 4 Wall. [71 U. S.] 411, and Hine v. Trevor, Id. 555, where a contrary doctrine is supposed to have been held, the liens attempted to be enforced in the state courts by a proceeding in rem, were not liens owing their existence solely to the state law, but were liens created by the general law maritime. That the question before the court was as to the validity of a pretension avowedly set up by the state courts to exercise general admiralty jurisdiction concurrently with the United States courts of admiralty. That the right of the states to authorize proceedings in rem to enforce liens created by state laws, was not in question; and that the language of the court must be construed with reference to the circumstances of the cases presented. That in subsequent cases the supreme court has explicitly declared the power and duty to enforce liens of this class, to be appropriate to the courts of the state which created the lien (The St. Lawrence, ubi supra), and that the states may provide for their enforcement, "by reasonable rules and regulations" (The Belfast, ubi supra). That the proceeding in rem is the most speedy, appropriate and effectual, if not the only practical, means of giving effect to these liens. That to deny the right of the material man to avail himself of that proceeding in a state court, and at the same time to decline to enforce his lien in the admiralty, is to leave him without a remedy, and to reduce the declaration of the validity of his lien to the announcement of a barren proposition, unaccompanied by any substantial right, or available means of enforcing it.

The force of these suggestions is admitted. It has been recognized in the cases above cited. But in my opinion the answer to them is conclusive. In the cases of The Moses Taylor and Hine v. Trevor, the general principle is established that "whenever the district courts of the United States have original cognizance of admiralty causes by virtue of the act of 1789 [1 Stat. 73], that cognizance is exclusive, and no other court, state or federal, can exercise it, with the exception always of such concurrent remedy as is given by the common law." "This," it is announced in Hine v. Trevor, "must be taken as the settled law of the court."

It is also in those cases explicitly declared that a proceeding in rem is not a remedy afforded by the common law, and therefore not within the exception which saves to suitors such concurrent remedy as is given by the common law.

We have already seen that the contract of the domestic material man is of original admiralty cognizance in the district courts of the United States. The case therefore clearly falls within the principle laid down by the supreme court. To interpolate into the doc-

trine as announced by the court, the exception in favor of proceedings in rem to enforce liens, attached by state laws to a certain class of maritime contracts, would not only be inconsistent with the language of the supreme court, and with the principles on which the decision rests, but would give rise to great embarrassments and perplexities.

If proceedings in rem are allowed in the state courts, to enforce the liens in question, all holders of maritime liens should be allowed to intervene and establish and enforce their claims according to their respective priorities. If the state courts proceed to adjudicate upon these claims, they will unquestionably be exercising admiralty jurisdiction, and might do so to any extent under cover of a proceeding initiated by the domestic lien holder. If they decline to entertain such claims, how can justice be done?

Again.—If the holder of the maritime lien should resort to the court of admiralty, a conflict of jurisdiction would ensue, for another tribunal, authorized to exercise jurisdiction in rem, would be already in possession of the vessel.

The state courts are necessarily bound to pursue exactly the provisions of the statutes under which they acquire jurisdiction. In the California act, six classes of cases are enumerated, in which alone liens are to be enforced, or, it would seem, recognized: (1) For services rendered on board vessels. (2) For supplies furnished to them. (3) For materials furnished in their construction, repairs, etc. (4) For wharfage and anchorage within the state. (5) For non-performance or mal-performance of any contract for the transportation of property or persons. (6) For injuries committed by them to persons or property.

These liens are declared to have priority in the order in which they are enumerated, and the provisions of the law embrace "all steamers, boats and vessels"—foreign as well as domestic.

When judgment is obtained against any vessel, the sheriff is directed to apply the proceeds of the sale—1st. To the payment of the wages of mariners, boatmen, etc. 2d. To the payment of the judgment and costs. 3d. To pay over any balance to the owner, master, agent or consignee, who may have appeared in the action.

The rights of salvors, the holders of bottomry bonds, and perhaps of those who have advanced moneys to the master, seem thus to be wholly ignored, while an attempt is made to fix the respective rank of liens, some of which are confessedly maritime.

The sheriff is directed in all cases, after paying any claims for wages, to apply the proceeds to the satisfaction of the judgment —that is, the payment of the particular lien on which suit is brought. The balance he is to pay to the owner of the vessel. Neither the bottomry bondholder or the salvor is authorized to intervene in the suit; nor is either allowed by the statute to attach the vessel to enforce his demand.

No provision is made for any proclamation, publication, or other notice to parties interested in the vessel, except that a summons is to be served on the master, mate, or other person in charge. The vessel is seized under a process of attachment, and the other proceedings are to be conducted in the same manner as in actions against individuals. When judgment is recovered, the vessel is sold under an execution issued to the sheriff, and the proceeds are distributed as already stated.

The supreme court in The Moses Taylor considered the action authorized by the statute of California, "a proceeding in the nature and with the incidents of a suit in admiralty," and observes, that "the jurisdiction of the courts of California is maintained on the assumed ground, that the cognizance by the national courts of civil causes of admiralty and maritime jurisdiction is not exclusive, as declared by the ninth section of the judiciary act of 1789." It was to this claim, on the part of the states, to concurrent jurisdiction on admiralty causes, that its attention was chiefly directed.

It is unnecessary to consider whether the proceeding under the statute of California has all the incidents of a suit in rem in the admiralty, or to inquire what is the nature of the title obtained by the purchaser under an execution issued in such a proceeding.

It is decided "that the statute of California, to the extent to which it authorizes actions in rem against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction," and is therefore unconstitutional. The statute has been referred to in this opinion to illustrate the difficulties which attend the exercise by state tribunals of any jurisdiction in rem or quasi in rem in cases of admiralty cognizance, and the reasonableness as well as policy of the simple and clear principle announced by the supreme court, that in all such cases the jurisdiction of the courts of admiralty is exclusive, except so far as a concurrent remedy exists at common law, and that a proceeding in rem, authorized by a state statute, is not such a concurrent remedy.

Nor is it true that if the right to proceed in rem in the state courts be denied to the material man, he is left wholly without remedy. His lien may be enforced like any other mortgage, by appropriate proceedings.

The right of prior satisfaction out of the proceeds of the sale on execution against the owner of any vessel may be conferred, on the material man, by law, and his lien may be recognized and enforced in the distribution of estates of deceased persons, or of bankrupts. It may also be recognized by courts of admiralty, when disposing of remnants and surplus proceeds in the registry. In these and other ways, the lien created by

state laws may become effectual. And it is to be supposed that it was to provisions of this character that the supreme court referred when it observed that the states might enact reasonable rules and regulations for their enforcement.

This construction of the language of the opinion in The Belfast is more reasonable than to suppose that the court referred to proceedings in rem, and thus overruled the doctrine clearly announced in The Moses Taylor and Hine v. Trevor, that such a proceeding in a state court was inadmissible in any case of which the district courts of the United States have original cognizance, as an admiralty cause.

From the foregoing, it results that the state law is invalid only so far as it attempts to authorize actions in rem, against vessels for causes of action cognizable in the admiralty; but the validity of the lien itself, especially when given by the state law in general terms, without specific conditions and limitations, inconsistent with the rules and principles which govern implied admiralty liens, is, as is said in the case of the St. Lawrence, "undoubted."

It is urged, that inasmuch as the remedy, by a proceeding in rem, afforded by the statute, is unconstitutional, the right is totally lost, and the lien created must be treated as nonexistent. But we have seen that the lien is created by the California statute in general terms: "The said several causes of action shall constitute liens upon all steamers, vessels," etc. A mode of enforcing these liens is provided, but it is not declared that this remedy shall be exclusive, nor that the courts shall refuse to recognize the liens except in the proceeding authorized by the statute.

It is probable that in all the cases where, under the former twelfth rule, liens conferred by state laws were enforced by the admiralty courts, those laws authorized a proceeding in rem in the state courts—or a suit against the vessel by name—but this circumstance did not impair the validity of the liens, nor affect the right of the admiralty courts to enforce them. A right which they still retain, though its exercise has been prohibited on grounds of expediency.

The New York statute, under which the supreme court held that an "undoubted lien" was acquired, provided, like the California statute, for an action against the vessel by name, and authorized a proceeding much more closely resembling a suit in admiralty. It results, that the states have clearly the power to engraft upon such causes of action cognizable in the admiralty, liens which, although they cannot be enforced in the state courts, by a suit in admiralty, or a proceeding in rem, are nevertheless valid, and should be recognized by this court in the distribution of surplus proceeds of any vessel sold to satisfy a maritime lien, or, by parity of reasoning, which have come into its possession under a proceeding in bankruptcy.

No question was raised at the hearing, as to the respective priorities of persons claiming liens under the state laws, and the holders of a prior mortgage recorded under the laws of the United States—for the claims of material men which accrued prior to the date of the mortgage, are sufficient to absorb all the surplus proceeds in the registry.

The fund in court, must, therefore, be applied: First, to the satisfaction of any maritime lien which has been proved. Second, to the payment pro rata of the claims of material men entitled to liens under the state law. An order to this effect will be entered.

Since the above was written, the supreme court of this state has decided that a state law authorizing a proceeding in rem by a domestic material man for supplies furnished in the home port of a vessel, is unconstitutional.

NOTE.—The foregoing decision, which seems to be the necessary result of the principles established by the supreme court, involves the anomaly of admitting the validity of a lien created by state laws, and at the same time denying the right to enforce it by the most appropriate and effectual means, viz.: a proceeding in rem. This, and other difficulties which beset the subject, owe their origin to early decisions of the supreme court, rendered at a time when the nature and extent of the grant of admiralty and maritime jurisdiction had been imperfectly investigated, and when the more liberal views with regard to the powers and duties of American courts of admiralty, which have since been adopted, had hardly been suggested.

In The General Smith it was held that no lien is implied by the maritime law in favor of persons furnishing repairs and necessaries to a vessel in a port of a state to which she belongs.

The operation of the principle thus announced, was in some degree mitigated by subsequent decisions, which held that even in the case of domestic vessels, a lien created by state laws might be enforced in the admiralty.

This remedy being now prohibited, while the power of the states to authorize a proceeding in rem in their own courts, is at the same time denied, it seems not improper to revisit the foundations of the doctrine which has produced this anomalous result, and to inquire how far it is reconcilable with the maritime law and the recent and more liberal principles established by the supreme court.[2]

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[2]By the Roman law, the privilege of those who lent money to purchase, build or repair a ship, was exclusively personal. It had no effect against those who were secured by express hypothecations. By the maritime law, every privilege imparted a tacit hypothecation or lien, which differs from an ordinary hypothecation in this, that the latter is governed by the date of the contract, while the privilege of the former is regulated by the degree of favor due to the particular claim. See The Young Mechanic [Case No. 18,180]. The liens for seamen's wages for moneys advanced on bottomry bonds, for repairs and necessities in the course of the voyage, are, therefore, preferred to that of a mortgagee prior in date. If it be admitted that the domestic material man has no maritime lien, and if the states have no power to create new maritime liens or affect

"It is," Mr. J. Ware observes, "a general principle of law extending to a great variety of cases, that a person who has by his own labor added a new value to a specific article, has a lien on that article for the value of his service. It is a right consonant to all ideas of natural equity, and is highly favored by law. 2 Kent, Comm. 496. The mechanic is considered as gaining a qualified property in the article when he has incorporated into it his own skill, care and labor.

"Another general principle is, that when this sort of confusion of goods is produced at the request of the general owner, he that has given the last increment of value to the article is entitled to be first satisfied out of the common stock. In the nature and reason of the thing, there is no difference in this respect between the mechanic and the carrier." Poland v. The Spartan [Case No. 11,246].

This right is recognized by the common law wherever the person claiming it is in possession of the article with which his labor and materials have been incorporated, and by the maritime law as giving rise to a privilege or right of prior satisfaction out of the thing itself, except where that privilege has been voluntarily renounced by an agreement incompatible with its exercise, or an exclusively personal credit has been given.

"There is nothing," says Emerigon, "which is regarded with so much favor as debts for work and labor furnished to a vessel. Commerce and the country at large are interested in them. It is right that workmen and material men should enjoy the real lien, which is given them by the 'Ordonnance de la Marine.' They cannot be deprived of it, unless it is proved that they contracted on the faith of the person and not of the thing." Emerig. Cont. Grosse, c. 12, § 3. In most of the states, the defects of the common law have been supplied by statutes. The law of California gives to artisans, machinists, builders, mechanics, material men, laborers, miners, etc., liens upon buildings, wharves, bridges, ditches, flumes, tunnels, sluices, machinery, aqueducts, etc., for which they have furnished materials or labor, and to enforce these liens, remedies partaking of the nature of a proceeding in rem have been provided. The decision in the case of The General Smith has also given rise to the statutes, by which the rights of those who supply or repair vessels have received similar protection, and the supposed defect of the maritime law has been supplied.

But this attempt to enforce rights so agreeable to our ideas of natural justice has proved in a great measure abortive. For the admiralty courts, though retaining jurisdiction of the contract in personam, decline to enforce the lien, and the state courts are without power to resort to a proceeding in rem.

That material men, that is, those who furnish material or labor in building or repairing vessels, or necessary supplies for their outfit, have, by the general maritime law, a lien on the vessel for their security, cannot be disputed.

Article 16, liv. 1, tit. 14, of the Marine Ordonnance, places the lien of material men who have furnished supplies, etc., before the departure of the vessel, in the third rank, postponing their claims only to those of mariners for wages, and those who have furnished money for the necessities of the ship during her last voyage. The ordonnance itself is said to have been "formed on the general jurisprudence of Europe, and for this purpose information was sought, at enormous expense, in all the ports of the continent." Preface to Valin's Comm. on Ordonnance de la Marine, p. 4.

"It was at once adopted by foreign nations," says Valin, "as an eternal monument of wisdom and intelligence, and it has ever since commanded the admiration of all civilians and lawyers, and has obtained the respect of every maritime state." It, therefore, affords the highest evidence of the general maritime law, as administered in the admiralty tribunals of Europe, and derived from the ancient laws of the sea. See Append. 2 Pet. Adm. p. 1; The Calisto [Case No. 2,316].

It is said by Mr. J. Ware (The Calisto, ubi supra) that this principle of maritime law is not acknowledged by the common law, and has never been received by the commercial jurisprudence of England.

Undoubtedly the English common law courts hold that although by the maritime law every contract with the master of a ship implies an hypothecation, yet that it is otherwise by the law of England, unless expressly so agreed; and this doctrine has not only been recognized by the courts of chancery, and in the distribution of bankrupts' estates, but prohibitions have been granted to the court of admiralty to stay proceedings in rem to enforce the lien given by the maritime law. Abb. Shipp. 143 et seq.

But it is not true that the principles of the maritime law, with respect to these liens, were never adopted into the jurisprudence of England, or that the court of admiralty was always forbidden to enforce them.

In the articles drawn up in the reign of Charles I. to accommodate the differences between his majesty's courts of Westminster and his court of admiralty, which were debated in the presence of the king and all the lords of his council, twenty-three in number, and which were agreed to by the judges of the courts at Westminster, and by the judge of the court of admiralty, it is provided:

"3d. If suit shall be in the court of admiralty for building, amending, saving or necessary victualing of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm." Cited in Ben. Adm. p. 51; also in De Lovio v. Boit [Case No. 3,776] in note.

In 1648, disputes having arisen between the courts of common law and the courts of admiralty, an ordinance was passed by the lords and commons assembled in parliament, defining the jurisdiction of the court of admiralty. It provided 'that the court of admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel and furniture thereof, in all causes which concern the repairing, victualing and furnishing provisions for the setting of such ships or vessels to sea." This ordinance ceased to be in force at the restoration. Prohibitions were again issued by the common law judges, and the admiralty, weary of the struggle, appears to have abandoned all further efforts to retain its ancient authority. Ben. Adm. p. 58.

Although the common law courts have thus finally succeeded in preventing the incorporation into the jurisprudence of England of the just and rational principles of the maritime law, with respect to the liens of material men, yet it clearly appears that those principles were zealously maintained by some of her ablest lawyers, and even for a considerable time adopted and enforced by the court of admiralty, with the sanction of the king's council, and of all the judges, and subsequently under an act of parliament.

The admiralty courts of America have long ceased to be governed by the arbitrary and

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their priorities, the liens under the state laws will be regulated by their date and not by the favor due them And thus in the distribution of surplus proceeds in the registry, the court might be compelled to accord to a mortgagee recorded under the laws of the United States, a preference over the claims of a material man, who might subsequently to the mortgage, have by his labor imparted a greatly increased value to the ship. See In re Scott [Id. 12,517].

irrational restrictions imposed by the common law courts of England upon the admiralty court of that country.

The maritime jurisdiction of the admiralty courts of the United States is, "that jurisdiction which commercial convenience, public policy and national rights have contributed to establish with slight deficiency over all Europe—that jurisdiction which, under the name of 'consular courts,' first established itself on the shores of the Mediterranean, and from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind." De Lovio v. Boit [supra].

The American courts of admiralty freely recognize and enforce the liens created by the maritime law in favor of shippers of goods, and of material men who supply foreign ships.

In matters of tort, the jurisdiction is determined by locality, and in those of contract by the subject matter; and it embraces torts committed upon, and contracts relating to the trade, business and navigation of not merely the sea or tide waters, but of our inland lakes, and great navigable rivers.

In the exercise of this jurisdiction, our admiralty courts are governed, not by the common law of England, but by the principles of the general law maritime, as embodied in the ancient laws of the sea, as expounded by the great jurisconsults of Europe, and illustrated and adorned by the genius and learning of the English admiralty judges in those cases in which the bigotry of the courts of common law has suffered them to retain admiralty jurisdiction, and to apply the principles of the maritime law.

But the progress towards these enlarged and liberal ideas has been slow, and marked with occasional hesitation and inconsistencies. The influence of the decisions of the common law judges of England is still discernible in this branch of our jurisprudence. We adopt the principle of the maritime law which gives to the material man a lien upon a foreign ship, and for this purpose we regard as foreign, ships, the owners of which reside in another state; but we refuse to recognize the lien of the builder or furnisher of a domestic vessel, although that lien is unquestionably allowed by the maritime law.

The received doctrine involves an even greater departure from the rules of that law—for it not only refuses to adopt them in the case of domestic material men, but by admitting a liability in personam, enforceable in the admiralty against the owners, it violates its fundamental principles and analogies.

In the infancy of modern commerce the master of a vessel was regarded as the gerant, or active partner of a societe en commandite. His contracts bound himself, and operated a tacit hypothecation of the vessel. He could bind the property committed to his charge, but he had no power to engage the private fortunes of the owners, unless under a special authority for the purpose. The creditor being thus restricted to a particular fund, the maritime law permitted him to proceed directly against it in specie, and gave him a privilege or jus in re in it as against the general creditors of, or purchasers from, the owner.

This principle, which appears to have been highly favored, and to have been recognized by nearly all the maritime codes of the middle ages, does not, says Mr. J. Ware,—The Rebecca [Case No. 11,619],—seem to have reached England, or at least was not adopted there as a general commercial custom; but its justice and policy have been recognized in recent statutes of Great Britain and the United States by which the liability of owners is restricted in certain cases to the value of their interest in the vessel and freight. The liability, therefore, of the owner on the contracts of the master was, as observed by Emerigon, real rather than personal.

Article 2, tit. 8, liv. 2, of the Ordonnance de la Marine, adopted in article 216 of the Code de Commerce, was variously interpreted by the commentators and the courts. Valin held that the owner's right to be discharged from the obligations of the master, by giving up the vessel and freight, applied only to the obligations arising from his negligence or torts. Emerigon and Pothier maintained that it embraced all obligations ex contractu as well as ex delicto. This question after much discussion, was finally settled in France, in accordance with the unanimous demand of the commercial interests, and with the approval of all the courts, by the adoption, in 1841, of the amended article 216 of the Code de Commerce. By this article, the proprietor of a ship is made civilly responsible for all the acts of the master, and for the obligations contracted by him relative to the ship or the adventure. But he may in all cases discharge himself from these obligations by abandoning the ship and freight. Rogron's Code de Com., liv. 2, tit. 3, art. 216.

This recent legislative interpretation in France of the provisions of the marine ordinance, is not cited as authority. But its unanimous approval by the French courts and jurisconsults, so thoroughly versed in the rules, and profoundly imbued with the principles of the maritime law, may be received as high evidence of what that law is. And it serves to show how repugnant it would be to its fundamental principles to hold that the master may bind his owners personally by his contracts, to the whole extent of their private fortunes, or their "land goods," without binding the ship or creating any lien upon her.

It has been suggested that the lien of the domestic material man is denied because he is presumed to have contracted on the personal credit of the owner. This is obviously not a reason, but merely a mode of stating the proposition. The presumption of an exclusive personal credit is, in the case of supplies furnished to coasters and the small craft which navigate our inland waters, in most instances, untrue in point of fact; nor can I perceive how such a presumption can now be indulged, for the supreme court in the case of The Belfast has decided that a maritime lien exists in favor of the shipper of goods, although the voyage is to be performed wholly within the limits of the state of which all the parties are residents.

If the freighter of goods on one of our river steamers, or the deck-hand, is not deemed to have contracted on the personal credit of the wealthy corporation which owns the line, with what reason can the mechanic who has repaired a steamer be presumed to have done so? The same remark may be applied to cases of pilotage and towage, which are generally admitted to give rise to a maritime lien irrespective of the residence of the owners of the vessel.

The attempt to mitigate the effects of the doctrine we are considering by treating the states as foreign to each other, and regarding vessels as "domestic," only when in the ports of the state where their owners reside, will be found, not only to give rise to insuperable difficulties, and to lead to absurd consequences, but to rest on very unsatisfactory grounds.

A few illustrations will expose its practical operation. If, for example, a person who resides in New York, where his business and credit are established, sends a vessel to be repaired in Jersey City, the mechanic will be allowed a lien, while if he sends her to Brooklyn no lien will be implied. But if the same person should in the succeeding year fix his residence in Jersey City, though he still carries on his business in New York, the case will be precisely reversed.

So if one own a vessel navigating the lakes, the mechanic will be denied a lien for repairs made at Buffalo, if the owner resides anywhere in the state of New York, while the lien will be allowed if the repairs are made at Jersey City on the order of any New York owner, no matter though he be the wealthiest and best known merchant or corporation of the city.

So, if a vessel be owned by two persons, one of whom resides at New Orleans and the other at St. Louis, between which ports the vessel plies, and at each of which the resident owner conducts her business, is the vessel to be deemed to "belong" to Missouri or Louisiana? At which of the termini of the voyage is the mechanic who repairs her to be allowed a lien? At both, or at neither?

In truth, the notion that vessels belong to the state where the owners happen to reside, or that they are to be treated when in a port of that state as "domestic vessels," seems to have been adopted on insufficient consideration. All registered and enrolled vessels, are vessels of the United States, and whether navigating the ocean, the lakes, or the great rivers of the country, are subject to admiralty jurisdiction, both in matters of tort and contract. Congress has regulated not only their registry and enrollment, and the mode in which they may be transferred and mortgaged, but has also, especially in the case of steamers, prescribed rules for their equipment and furniture, and for the transportation of passengers, and has subjected them to inspection by United States officers, and provided for the licensing of the pilots and engineers. They are thus, vessels of the United States, and are all domestic vessels, belonging to citizens of the United States.

The classification, therefore, of vessels as domestic and foreign, or quasi-foreign, according to the residence of the owner within or without the state, at a port of which they have been repaired or supplied, seems arbitrary and unsound. Especially when this classification is resorted to in but a single case, and for the purpose of excluding a lien allowed by the maritime law, and which has the most solid foundation in natural justice. Ben. Adm. § 273; The St. Iago de Cuba [9 Wheat. (22 U. S.) 409]; 5 Pet. Cond. R. 630.

Our attention has thus far been confined to the broad doctrine that no lien is implied by the maritime law in favor of domestic material men, although the supplies have been ordered by the master with the owner's consent, or by the owner himself—and when the personal liability of the owner is admitted. It may be said, however, that the master's authority ceases on his arrival at the port of his owner's residence, and that unless expressly empowered by the latter, his contracts ought not to bind the vessel.

But this restriction upon the master's authority could, at most, be imposed only when the vessel is in the place where her owner resides—her home port. "An epithet which," says Mr. Chief Justice Marshall, "has no necessary reference to state or 'other limits.'" The St. Iago de Cuba, ubi supra. On principle, the determination of the master's agency should depend on the readiness with which the owner may be consulted, the urgency of the necessity for repairs or supplies, the authority, real or apparent, which the owner may have held him out as possessing, and the means which third persons may have possessed of ascertaining the extent of the powers confided to him.

In this view, the mechanic, who by the master's order, repairs, in Jersey City, a vessel belonging to a wealthy and well-known merchant, or corporation of New York, should not be entitled to recourse against the vessel, or her owners, any more than he who makes like repairs in Brooklyn, while conversely, the New York mechanic should, under certain circumstances, have both remedies, notwithstanding that the owner may reside in a remote part of the same state.

The taking of goods on freight, the shipping of a crew, the procuring supplies for them and the vessel, as well as the making of ordinary repairs, are within the usual scope of the master's duty and authority. See Curt. Merch. Seam. p. 172. On general principles of agency, the owner and a fortiori the ship, should be bound by his contracts, unless notice, actual or constructive, be clearly brought home to the person with whom he deals, that he is exceeding the limits of his authority. And on the principles of the maritime law, the liability of the vessel, at least, for the contracts of the master, would seem unquestionable. In article 216 of the Code de Commerce, which, as before stated, was taken from the Marine Ordonnance, the liability of every owner for the obligations of the master, up to the value of the vessel and freight, is established. Under this article it is held that the ship is liable, even though the proprietor or general owner is not armateur or owner for the voyage. Rogron, Code de Comm. art. 216.

And so is our own law. For the vessel is liable in rem to seamen, freighters, etc., on the contracts of the master, although she may have been demised or chartered to one who appoints the master, or whose agent he exclusively is.

Article 232 of the Code de Commerce provides for the very case we are considering. This article, which is taken from article 17, liv. 2, tit. 1, of the Ordonnance, enacts that the captain shall not in the place of residence (dans le lieu de la demeure) of the owners or their agent, without special authorization, cause repairs to be made, buy sails, cordage, etc., or take up money for the purpose. Under this article it is held that if the captain should violate it, the proprietors would nevertheless be bound under article 216, to the extent of their interest in the vessel, i. e. the vessel would be liable, except for money taken up on bottomry.

The remedy of the owner is against the master for violation of the article, but even this, says Valin, should be subject to his right to be allowed for absolutely necessary supplies, obtained for a reasonable price, however blameable he may be for having acted without authority. Valin's Comm. tom. 1, p. 440. The fifty-fourth chapter of the Consolato del Mare, and the observations of Valin and Emerigon upon it (Valin's Comm. tom. 1, p. 369; Emerig. Cont. Grosse, Hall's Translation, p. 227) illustrate the favor with which the maritime law regards debts due for work and materials furnished to a vessel.

Both of these great jurisconsults agree that workmen employed by a master-carpenter or caulker, who has contracted with the owner, shall have a lien on the vessel for the sums due them, unless they have received actual notice of the arrangement between the owner and contractor.

On this, which is an admitted exception to the ordinary principle of domino non mandante, Emerigon observes: "The carpenters, caulkers and other workmen employed in building, together with the creditors for the timber, cordage and other articles furnished, ought to enjoy the privilege allowed to them, unless they have been warned in due time that if they do not secure the payment of their claims against the contractor, they shall have no lien on the ship. And I do not believe that a simple registry of the contracts would be considered as a notification, within the meaning of the consolato, which requires that notice should be given to the workmen and other material men, in order that they may not be deceived. Emerig. Cont. Grosse, p. 229.

If the ship is thus liable to workmen employed by a contractor, and not by the owner or master, unless warned by the latter, a fortiori should she be liable to workmen employed by the master, unless affected by a similar notice. See cc. 32, 33, Consulat de la Mer par Boucher, tom. 11, pp. 38, 39.

It is thus evident that by the principles and

analogies of the maritime law, and the "good customs of the sea," ("les bonnes coutumes de la mer," as they are called in the consolato), and on grounds of equity and natural justice, the lien of the material man who has constructed, repaired or supplied a vessel, ought to be recognized and enforced as a maritime lien by courts of admiralty. And this whether the work has been done in a port of the state in which the owner resides, or elsewhere; and whether upon the employment of the master or of the owner, or of his agent—excepting in those cases where the lien has been clearly waived, or "notice has been given to the workmen and other material men, in order that they may not be deceived."

The lien laws of the states, hitherto deemed necessary to obviate the consequences of the decision in the case of The General Smith, would seldom or never be resorted to, and the anomalous consequences of the adjudications with regard to them would disappear if it were established "that it is the ship, and not the ship of a particular owner, nor the ship of a particular flag, or national character; not a domestic ship, nor a foreign ship; not a ship in a port of a state to which she does not belong, or in which the owner does not reside, but a ship—every ship—that is bound for the bill of lading, the charter party, the wages of the seamen, repairs, supplies, materials and maritime loans." The Circassian [Case No. 2,721].

FRANCIS v. MAHN. See Case No. 5,039.

Case No. 5,039.

FRANCIS et al. v. MELLOR et al.

[5 Fish. Pat. Cas. 153;[1] 4 Am. Law T. Rep. U. S. Cts. 237; 28 Leg. Int. 333; 8 Phila. 157; 3 Leg. Gaz. 335; 1 Leg. Gaz. Rep. 291; 1 O. G. 48.]

Circuit Court, E. D. Pennsylvania. Oct. 2, 1871.

PATENTS — LIBERAL CONSTRUCTION — PRINTER'S ROLLER COMPOSITION—INGREDIENTS AND PROPORTION—REISSUE.

1. Patents are to be construed liberally, so as to sustain and not destroy the right of the inventor.

[Cited in Burke v. Partridge, 58 N. H. 351.]

2. Hence, the whole of the specification may and should be looked at, not only to learn from the description of the invention how to make it, but to ascertain what it really is.

3. It is not only where the specification is expressly referred to that the claim is to be construed in connection with it, but, as a general rule, the explanations contained in it are to be taken as the inventor's own interpreter of the meaning of his claim.

4. Where, in the body of the specification, a composition of matter is described as the product of glue, glycerine, and sugar, united in certain specified proportions, it being added that the proportions may, in some cases be advantageously varied, but the claim is for "combining glue, glycerine, and sugar, or any other analogous saccharine matter, to form a new and useful composition of matter:" *Held*, that the patent is not broadly for a substance composed of these ingredients, irrespective of the proportions in which they are combined, but for one produced in substantial or approximate accordance with the formulas given in the specification.

5. Semble, that where the original patent described a composition for printers' inking rollers as consisting of glue, glycerine, castor-oil, or any of the fixed oils, borax, ammonia, and sugar, mixed in certain approximately-specified proportions, and claimed "the use of the ingredients specified, when combined to form a composition for the manufacture of printers' inking-rollers," a claim upon reissue for "combining glue, glycerine, and sugar, or any other analogous saccharine matter, to form a new and useful composition of matter for various purposes," can not, if construed in its broadest significance, be sustained.

6. While characteristic resemblance is preserved between two compositions of matter, they may, perhaps, be considered as identical, within the meaning of the patent law, although one of them may not contain some of the constituents of the other, which are not necessary to impart to it its peculiar attributes.

7. If known elements are combined in new proportions, and the result is a product possessing distinct properties and applicable to distinct uses, this must be regarded as a patentable subject.

8. Where only approximate proportions are named in the specification for the several elements of a given composition of matter, the right to vary these proportions is not unlimited. It can only extend to any adjustment which will result in the production of a substance possessing the peculiar properties attributed to the substance described in the patent.

Final hearing on pleadings and proofs. Suit brought [by L. Francis and C. H. Loutrel against A. Mellor and H. Rittenhouse] upon two letters patent for "improved composition for printers' inking-rollers." The first patent was granted to Lewis Francis and F. W. Letmate, June 21, 1864, and reissued November 26, 1867. The infringement of this patent was expressly denied by defendants, and no proof was offered by the complainants to maintain the same. The second patent was granted to Lewis Francis, March 8, 1864, and reissued in two divisions, Nos. 1771 and 1772, September 27, 1864. Reissue No. 1772 was reissued February 28, 1865, and August 3, 1869.

The original patent of March 8, 1864, described an improved composition in the manufacture of printers' inking-rollers, the ingredients employed being "combined in about the following proportions, namely: Glue, 14 pounds; glycerine, 28 pounds; castor-oil, or any of the fixed oils, 2¼ pounds; borax, 3 ounces; ammonia, 2 ounces; sugar, 7 pounds." The glue, before being added to the heated glycerine, was to be soaked in water in which lime had been dissolved. The specification concluded as follows: "I do not wish to be understood as confining myself to the use of lime, ammonia, or borax, as any of the alkalies or alkaline earths, or alkaline compounds of any of the alkaline earths or alkalies, may be used. Neither do I intend to confine myself to the use of the ingredients employed by me in the proportions herein set forth, as, in some cases, it may be necessary to vary their proportions. * * * I claim the use or employment of the ingredients specified, when combined to form a composition for the manufacture of printers' inking-rollers."

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

The reissue of August 3, 1869, omits all reference to the use of the lime, the ammonia, the borax, and the oil, in making the improved composition, and specifies the following approximate proportions of the remaining ingredients, viz.: "Glue, 15 pounds; glycerine, 30 pounds; sugar, or other analogous crystallizable saccharine matter, 7 pounds." The claim is in these words: "Combining glue, glycerine, and sugar, or any other analogous saccharine matter, to form a new and useful combination of matter for various purposes."

The defendants, in their answer to the bill, admitted the use of glue, glycerine, and sugar, in varying proportions, in the manufacture of inking-rollers, but denied that they had used these ingredients in proportions or in a mode conforming to those specified in complainants' patent, averring that the compositions made and sold by them were substantially and materially different from those described and claimed in the patent, and were "in no wise a violation or infringement of any right or privilege validly secured to or vested in" the complainants. It was insisted by the complainants that this apparent denial of infringement was not direct and unequivocal; that the claim of the patent was to be construed broadly, irrespective of the proportions in which the ingredients were used, and, therefore, that the answer was, in fact, an admission of infringement. No direct proofs of infringement were offered. On the other hand, it was urged by the defendants that the patent should be interpreted by the formula stated in the specification, and not by the technical claim, and that, with this construction, the answer constituted a full and sufficient denial of the infringement charged.

Horace Binney, 3d, and George Harding, for complainants.

Charles Howson and Furman Sheppard, for defendants.

McKENNAN, Circuit Judge. The respondents are charged with the infringement of reissued letters patent No. 3576, dated August 3, 1869, and No. 2805, dated November 26, 1867, for new and useful compositions of matter. The original of the first of these reissues, No. 41887, was issued March 8, 1864, and was surrendered and reissued September 27, 1864, in two divisions, Nos. 1771 and 1772. No. 1772 was again surrendered and reissued February 28, 1865, which was also surrendered and reissued in its present form. No. 2805 is a reissue of No. 43192, dated June 21, 1864.

The respondents opposed a decree in favor of the complainants upon several grounds, involving the validity of the reissued patents and the novelty and utility of the alleged invention; but, in view of the state of the proofs, I do not consider it necessary or proper to consider them. Irrespective of these grounds the case must be decided against the complainants. Whatever may be the merits of their inventions, however defensible their title, they have failed to prove that the respondents are infringers.

The claim of 2805, as limited by a disclaimer of the patentees, is for a composition for printing purposes, combining glue, glycerine, and molasses. The bill alleges that the respondents have made, used, or sold a composition embodying these ingredients; but this, in the words of the interrogatory of the bill, the respondents deny. No proof is produced by the complainants of the truth of their averment, and this patent, therefore, must be put out of the case.

The claim of 3576 is for "combining glue, glycerine, and sugar, or any other analogous saccharine matter, to form a new and useful composition of matter for various purposes." With the infringement of this claim, the respondents are charged, and they answer "that they have for about —— years been engaged, in the city of Philadelphia, in the manufacture of composition for printers' inking-rollers, said composition containing, with other ingredients, the common and for many, the last twelve, years past, well known ingredients for such purpose, glue, glycerine, and sugar, employed in varying proportions, but in no case in proportions or in mode conforming to those specified in the said plaintiffs' said respective letters patent; and defendants further aver that the said compositions so made and sold by them were and are substantially and materially different from the compositions described and claimed in said plaintiffs' said respective letters patent." This answer is treated by the complainants as an admission of infringement, and no proof has, therefore, been taken in relation to it.

That the complainants have succeeded in producing a valuable composition, adapted to various useful purposes, is beyond dispute; but whether they are justified in treating the respondents' answer as a confession that they have made and used it, depends, necessarily, upon the construction of the patent.

Patents are to be construed liberally, so as to sustain and not destroy the right of the inventor. Hence the whole of the specification may and should be looked at, to learn from the description of the invention not only how to make it, but to ascertain what it really is. By the requirements of the statute, the description must be in full, clear, and exact terms; and it is, therefore, an authorized guide to an accurate comprehension of what the patentee meant to claim as his invention. It is not only where the specification is expressly referred to that the claim is to be construed in connection with it; but, as a general rule, the explanations contained in it are to be taken as the inventor's own interpreter of the meaning of his claim, and of the essential qualities of the invention protected by his patent. Turrill v. Railroad Co.,

1 Wall. [68 U. S.] 511; Curt. Pat. §§ 453, 454.

The claim in this case is for combining glue, glycerine, and sugar, or any other analogous saccharine matter, to form a composition for various purposes. In the body of the specification, the proportions in which the ingredients are to be combined are given, approximately, thus: "Glue, 15 pounds; glycerine, 30 pounds; sugar or other analogous crystallizable matter, 7 pounds."

But it is stated that "it is not intended to confine the patent to the use of the ingredients specified, in the proportions specified, as those proportions may, in some cases, be advantageously varied."

It is plain that the patent is not for the mode or process of making the composition. It is for a composition embodying glue, glycerine, and sugar; but is it broadly for a substance containing these ingredients without regard to the proportions in which they are combined, or is it for a substance produced by their conjunction in substantial or approximate accordance with the formulas given in the specification?

If the claim is to be construed in its broadest significance, it is difficult to see how this reissued patent can be sustained. It is the third reissue of a patent whose claim is for the use or employment of glue, glycerine, castor-oil, or any fixed oil, ammonia, borax, and sugar, when combined to form a composition for the manufacture of printers' inking-rollers. Now, if the composition claimed in the reissue is to be treated with reference exclusively to its constituent parts, it is not identical with the composition for which the original patent was granted. A compound of glue, glycerine, and sugar is not physically the same as a compound consisting of these ingredients, with a fixed oil, ammonia, and borax added to them. They can only be regarded as the same in another sense, as possessing like special and distinguishing properties and like adaptability to the uses for which they are designed. While characteristic resemblance is preserved, they may, perhaps, be considered as identical within the meaning of the patent law, although one of them may not contain some of the constituents of the other, which are not necessary to impart to it its peculiar attributes.

The patent, however, should be so construed as not to avoid it. That conclusion can be averted by interpreting it as claiming a composition of matter distinguished by new and useful qualities, which are the product of the conjunction of certain elements in prescribed relative proportions.

It is apparent that the complainants have produced a substance of great practical excellence, possessing peculiar and valuable properties; and that these constitute its patentable merit. The complainants can not successfully claim to be the first to compound glue, glycerine, and sugar; but they may claim to have discovered that these elements may be combined in such proportions as to yield a new product. Charles and Nelson Goodyear conferred inestimable benefit upon the world by the production of substances respectively known as hard and soft rubber. They were not the first to combine the constituents of these substances, but both were treated as original inventors, although their inventions were the product of a combination of the same elements, native India rubber and sulphur. But the proportions in which these elements were combined were different, and the result was a product possessing distinct properties, and applicable to different uses, and so they were each regarded as patentable substances.

The distinctiveness of the complainants' invention must in like manner be determined by its inherently new and useful attributes. It is described as uniting elasticity, firmness, "suction," freedom from the influence of atmospheric changes, susceptibility of recasting, and therefore of indefinite use; and that thereby it is distinguishable from other compositions used for like purposes. That these properties are due to an empirical combination of glue, glycerine, and sugar can not be maintained. They are the product as well of the graduated proportions as of the mechanical union of these ingredients. Glycerine must be used in excess of either of the other ingredients, or the compound will lack some of its most valuable qualities. And it may be said of the other ingredients that they must be employed in proper relative proportions to secure the characteristic merits of the product. These are obvious deductions from the testimony of the complainant, Francis.

As the proper adjustment of proportions, then, is essential to the efficiency of the invention, it is a reasonable construction of the patent to expound it as claiming substantial conformity to the specific proportions of glue, glycerine, and sugar, as well as their conjoint use, in producing the described result. Exact conformity to these proportions is not required, because they are stated as approximate, and the right is claimed to vary them. But this right is not unlimited. It can only extend to any adjustment of proportions which will result in the production of a substance possessing the peculiar properties attributed to the substance described in the patent. Substantial identity of result is the test of substantial conformity to the mode of combination prescribed in the specification.

The respondents deny that in making the compounds used by them they have conformed to the proportions or adopted the mode specified in the patent; and they aver that their compositions are substantially and materially different from that described and claimed by the complainants. In view of the construction given to the patent, this is not an admission of infringement, but a denial that either in the proportions or mode

of combination observed, or the result produced, the compositions made and used by them are the same as the compositions claimed by the complainants. This denial imposed upon the complainants the burden of proving the fact of infringement; but as they have furnished no proof of it, they have failed to sustain their bill, and it must therefore be dismissed, with costs.

Decreed accordingly.

NOTE [from 1 O. G. 48]. In connection with the above case there was tried the suit of Francis and Loutrel v. Mahn, upon an alleged infringement of the reissued patent No. 2,805. The invention covered by this patent and the appended disclaimer is described as consisting in "combining glue, glycerine, and molasses to form a composition for printing purposes," and certain proportions are stated as those which are "found to be advantageous, and which may be generally adopted," the claim being for "a composition, made substantially as described, for printing purposes." The denial of infringement was in substantially the same terms as in the above suit. The case turned upon the interpretation of the patent and the sufficiency of the answer, the questions arising in the same way as before. The bill was dismissed.

Case No. 5,040.

The FRANCIS ASHBY.

PACKER v. The FRANCIS ASHBY.

[3 Adm. Rec. 142.]

Superior Court, S. D. Florida. April 1, 1843.

SALVAGE—VESSEL WRECKED BY SALVORS.

[Where a vessel, while lying on a mud bank with wrecking vessels alongside and anchored near, is bored with augers and fills with water, and the guilt cannot be fixed, the court will allow only simple compensation for work and labor performed in saving the cargo and materials, except as to salvors affirmatively proven innocent.]

[This was a libel by James Packer, William Kemp, and others against the cargo and materials of the brig Francis Ashby for salvage.]

S. R. Mallory, for libellants.

G. W. McCrae, for respondent.

MARVIN, District Judge. This brig while lying on the mud bank described in the pleadings was bored with augers, and in consequence thereof she filled with water. She was subsequently stripped and abandoned. She was bored in the night. Two wrecking vessels with their crews were lying alongside at the time, and several others with crews were anchored at a short distance, and the master, officers and passengers slept on board the brig. After several days' examination of witnesses, no satisfactory evidence is adduced to ascertain or fix the guilt of this transaction upon any particular individual or individuals. But the brig was bored by some person or persons there, and as long as the guilty person remains undetected I am not disposed to reward the libellants for their services beyond a simple compensation for the work and labor performed by them. Not to compensate them at all would be confounding the innocent with the guilty to an extent that I deem unjust. To reward them by giving a salvage increased beyond a simple compensation for work and labor would impair the principle of holding the wreckers more or less responsible, according to the circumstances, for the safety of the property upon which their labor is bestowed. Important considerations of policy, too, prevent my decreeing salvage eo nomine. These I have so often expressed that I deem it unnecessary again to repeat them.

With this principle in view I order and decree as follows, to be paid out of the cargo and materials saved: To James Packer, master of the sloop George Eldridge, for himself, owners and crew for piloting the brig as described in the pleadings, $80.00. For laboring in discharging the brig during the night, himself and crew, 11 in all, $55.00. For labor during Saturday (Sunday) and Monday in discharging the brig, himself and crew, and for discharging his vessel on Tuesday, $2.00 to each man, 11 in all, $88.00. To the owners of the sloop George Eldridge for her services in bringing the cargo to this port, $50.00. To William Kemp, master of the schooner Rome, for himself and crew, 15 in all, for labor in discharging the brig and landing the cargo, 4 days at $2, each, $120.00. To the owners of the schooner Rome for her use, $50. To Saffrey, master of the schooner Sally Ann, for himself and crew, 6 in all, $48.00. To the owners of the Sally Ann for her use, $25.00. To Adams, master of the sloop Lavinia, for himself and crew, 4 in all, 4 days each, at $2.00, is $32.00. To the owners of the sloop Lavinia for her use, $25.00.

I regret that I cannot, consistently with the view I have taken of this case, compensate Captain Adams, of the Lavinia, more liberally, or by giving him a sum that would be deemed a fair salvage. He is a regular wrecker, and the salvages decreed him constitute his means of living. He is entirely exculpated by the testimony from any participation in the boring of the brig. The costs and expenses of the suit must be paid out of the cargo and materials saved.

[An appeal was taken to the court of appeals for the territory of Florida, where the following order was made, February 24, 1844:]

It is ordered, adjudged and decreed that the decree made in this cause in the court below be in all things affirmed, except as to Captain Adams, master of the sloop Lavinia, and, as to him, that there be allowed and paid to him, for himself, owners and crew, as salvage for his services rendered said cargo and materials, twenty-five per cent. upon the value of the cargo saved by him in said sloop, to be ascertained by the court below, including that already paid him, and

that the costs of this appeal be paid out of the cargo and materials aforesaid, to be taxed and allowed in that court, and let the cause be remanded to the court below to be proceeded with in conformity to his decree.

Case No. 5,041.

FRANCIS v. SLACK.

[4 Cliff. 186; 16 Int. Rev. Rec. 134.][1]

Circuit Court, D. Massachusetts. May Term, 1872.

LIMITATIONS—ACTIONS AGAINST COLLECTORS OF INTERNAL REVENUE.

Judgment for defendant was ordered in this case upon the ground that the claim of the plaintiff was barred by the act of July, 1862, as construed by the supreme court.

The case was submitted upon an agreed statement of fact, of which the following is the substance:

This is an action of contract to recover the amount of taxes assessed, under the internal revenue laws of the United States, upon the plaintiff's share in the undivided profits of two corporations, in each of which he was a stockholder, made during the years 1862 and 1863; and for the purpose of this trial it is agreed: That the defendant [Charles W. Slack] was and is the United States collector of internal revenue for the Third congressional district in the commonwealth of Massachusetts; and that the plaintiff [Nathaniel Francis] was a resident of that district. That the plaintiff, from the first day of January, 1862, till the commencement of this action, owned a certain number of shares in the capital stock of two corporations,—the Saxonville Mills and the Roxbury Carpet Company,—organized under the laws of the said commonwealth, and doing business therein. That, in each of the years from 1862 to 1869 inclusive, each of these corporations made certain profits from its business, which were not distributed in such year among its stockholders, but remained undivided in its treasury. That the plaintiff, through ignorance of the law, did not include his share of the said undivided profits in making the returns of his income for those years. That in March, 1870, an assistant assessor for the said district, by examining the returns of the said corporations to the said commonwealth, discovered that each had made profits which were not divided as aforesaid, and reported the facts to the assessor of the district, who, on the 16th of that month, sent for the plaintiff, and told him that he should have returned his share in such profits as income in each year from 1862 to 1869 inclusive. That the plaintiff replied, that he desired to pay all that was justly due to the government; and that, if he ever owed the money, he owed it still, and wished to pay it. The assistant assessor then suggested that the plaintiff might make an amended return of income for each of said years, returning his share for such year in the said undivided profits; and offered to prepare them. To this the plaintiff assented, and, when they were prepared, signed them. Before he did so, the assessor advised him to consult counsel, but he replied, that he had confidence in the assessor, and was satisfied that he would not make any demand on him which the law did not justify. That the assessor assessed upon his share in such undivided profits, realized by the said corporations during the year 1862, taxes amounting to the sum of $2,192.47; and, on his share in such profits realized during the year 1863, taxes amounting to the sum of $1,796.20. That the defendant thereafter sent to the plaintiff notices in a printed form, a copy of which is hereto annexed, and marked "A;" upon and after the receipt of which, to wit, on the 30th of March, the plaintiff paid the said taxes to the defendant, who on the same day paid them over to the United States treasury. That on or before June 1, 1870, the plaintiff filed a claim, in the manner prescribed by law, for the refunding of said taxes, a copy of which is hereto annexed, and marked "B," which was rejected by the commissioner of internal revenue on the 13th of April, 1871. That this action was commenced Aug. 25, 1871.

If, upon this statement of facts, the plaintiff ought to recover, judgment is to be entered for him for the amount to which the court shall find that he is entitled, with interest and costs; otherwise, for the defendant.

A.

February.

Third District. Monthly List. Massachusetts. United States Internal Revenue.

Boston, March 19, 1870,
Office, 8 Bromfield Street.

To Nathaniel Francis.

Div. S. Sir,—A duty or tax, under the excise act of the United States, has been assessed upon you as follows; and you are requested to pay the same at this office, No. 8 Bromfield street, between the hours of 9 a. m., and 2 p. m., on or before the last week-day of this month; and, unless paid within that time, it will become my duty to collect the same with a penalty of five per centum additional, and interest at one per centum per month.

	Dol's.	Cts.
On Income, 1862,	2,192	47.

Charles W. Slack, Collector.

The collector has received renewed instructions (Sept. 28, 1869), forbidding remission of penalty for delinquency. "The law is imperative, and leaves no discretion to either commissioner or collector in such cases."

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. 16 Int. Rev. Rec. 134, contains only a partial report.]

(A notice in this form was sent for each year, differing from the above only in the year inserted after "income," and the amount of the tax claimed.)

Moorfield Storey, C. W. Storey, and H. W. Paine, for plaintiff.

F. W. Hurd, Asst. U. S. Atty, for defendant.

CLIFFORD, Circuit Justice. The court direct that judgment be entered for the defendant, upon the ground that the claim of the plaintiff is barred by the act of congress on that behalf, as construed by the supreme court in the case of Nichols v. U. S. [7 Wall. (74 U. S.) 122]; and Collector v. Hubbard, 12 Wall. [79 U. S.] 14; Brown v. Sauerwein, 10 Wall. [77 U. S.] 218.

FRANCIS A. PALMER, The (ALLAIRE v.). See Case No. 203.

FRANCIS A. PALMER, The (HARBECK v.). See Case No. 6,045a.

FRANCIS ASHBY, The. See Case No. 5,040.

FRANCISCO, The (SOMERVILLE v.). See Case No. 13,171.

FRANCIS HATCH, The (UNITED STATES v.). See Case No. 15,158.

Case No. 5,042.

The FRANCIS KING.

[7 Ben. 11.][1]

District Court, E. D. New York. July, 1873.

TUG-BOAT AND TOW—PROPER HAWSERS.

1. A tug-boat, the K., was towing six canal-boats, three abreast, by two hawsers from the head tier, on Long Island Sound. The port hawser, not being as long as the starboard hawser, had been lengthened by a piece of stern line. The wind and sea rising, another tug-boat, the G., belonging to the same owners, took hold ahead of the first. Soon after the port hawser parted, which threw the tow out of shape, and the canal-boats in the second tier pounded together so as to receive serious injury. The G. took hold of them, and towed them for a while till the two tiers separated, when the G. took the head tier alone and the K. the hind tier, two boats in which soon after sank. The owner of one of the canal-boats filed a libel against the tug-boat to recover for the loss of the boat: *Held*, that the port hawser was insufficient for the service required of it.

2. The sinking of the boat was due to the parting of that hawser, and the tug-boat was liable for the damages.

This was a libel filed by Cary Rigney, the owner of the canal-boat Crosby, to recover for the sinking of the boat while in tow of the Francis King. The canal-boat was taken in tow by the King, to be towed to New Haven. Eight other boats were in the tow, ranged in three tiers, three abreast, and towed by two hawsers to the outside boats in the head tier. At Bridgeport the three boats in the stern tier were left, and the tug proceeded with the other six. The wind and sea rose before the tow reached New Haven, and the tug Gamecock, belonging to the same owners as the King, was signalled and took a hawser ahead of the King to help with the tow. After towing in this way the port hawser from the King to the head tier parted. It had been lengthened out by the use of a piece of stern line, of smaller size than the towing hawser, and it was this smaller line that parted. On the parting of this line the tow was thrown out of shape, and the boats pounded against each other, the libellant's boat and another boat receiving severe injuries, from which they began to leak. The Gamecock cast off her line, and coming back put out a separate hawser to the head tier of boats, and towed in this way for a time till the two tiers separated, when she took the head tier alone, and the King, coming back, got hold of two of the boats in the hind tier, one of them having broken loose from the other two, and towed them till the libellant's boat sank. There was evidence tending to show that, when the libellant was taken off from his boat, as he was by a small boat before the King took hold of her the last time, he left the cabin windows unfastened, and that the sinking of the boat was due to the waves coming in at the windows.

F. A. Wilcox, for libellant.

W. R. Beebe, for claimant.

BENEDICT, District Judge. I have examined the mass of testimony with which this case has been loaded, and from out of its contradictions and bold statements think that the following conclusions of fact can be properly drawn. And first I conceive that the evidence fails to prove that the sinking of the libellant's boat was caused by his own carelessness, in leaving his cabin windows open, so that the waves coming in through the windows caused her to sink. I have not overlooked the positive evidence of claimant's witness Marsh upon this point; but neither the matter nor the manner of his testimony are, to my mind, convincing. On the contrary, I conclude that the immediate cause of the boat's sinking was injuries sustained by her from pounding against the other boats in the tow, when the tow was thrown out of shape, and all placed in peril in the trough of the sea, by reason of the breaking of the port hawser. The sea was heavy and the motion of the boats in the trough of the sea abundant to account for the sinking of the two boats which were lost, of which the libellant's boat was one. I cannot doubt, upon the evidence, that, if the hawser had not parted, all the boats would have reached New Haven in safety, and that the parting of the hawser was the cause of the disaster. This

[1] [Reported by Robert D. Benedict, Esq., and Lincoln Benedict, Esq., and here reprinted by permission.]

breaking of her hawser casts upon the tug the responsibility of the loss which resulted therefrom. The transportation of tows of loaded canal-boats in the waters of the Long Island Sound involves much danger and corresponding responsibility. Tow-boats engaged in that business must be competent in power and equipped with hawsers of sufficient strength to hold their tows in any weather ordinarily to be anticipated in that navigation. The canal-boats are frail, and their safety in any sea-way is dependent upon the union of many boats in one compact mass, which, when kept moving together, properly lashed, experience has shown to be able to withstand all weather necessarily experienced in navigating the Sound. This union, which is the source of their strength, is maintained by the power of the tug applied by means of the hawsers, and, in any case of disasters arising from a failure of the hawser, it is incumbent upon the tug to show plainly that its failure arose from no defect in quality or size. In this case the hawser which parted was an old hawser of short length, which was eked out by bending on to it part of a 4-inch stern line. In order to hasten the tow when near New Haven, to the power of the Francis King was added the power of the Gamecock. To that strain the smaller line proved unequal, and it parted, whereby the tow was at once thrown out of shape in a chopping sea. This parting of the port hawser was the real cause of the loss of the libellant's boat, and for its failure the Francis King is responsible.

It has been strongly argued that the tow remained in shape and intact, until after the King had cast off the tow and the Gamecock had taken hold, and that the subsequent sinking of the Crosby cannot, therefore, be charged upon the Francis King. In point of fact, when the Crosby sank, she was in tow of the Francis King, for the King again took hold of her after she had broken away from the tow. But the truth of the case is that injury sustained by the boat, while the boats were disarranged and pounding in the trough of the sea, was the cause of her sinking, and that arose from the breaking of the Francis King's hawser. After an examination of all the evidence, and in spite of the inaccuracy of some of the libellant's statements of fact, and of the extraordinary circumstances under which the evidence of the witness Pierce was given in his favor, I am forced to the conclusion that it was not through any fault of the libellant, nor by reason of any unforeseen and inevitable peril of the seas, that his boat was sunk, but because the tug-boat undertook to conduct the tow with a hawser insufficient for the purpose to which it was applied.

The decree must, therefore, be for the libellant, with a reference to compute the amount of his loss.

[NOTE. For further proceedings, see The Francis King, Case No. 5,043.]

Case No. 5,043.

The FRANCIS KING.

[7 Ben. 380.][1]

District Court, E. D. New York. July, 1874.

TUGBOAT AND TOW—DAMAGES—CARRIER—MASTER—INJURY TO CARGO.

1. The master of a vessel may recover damages for injuries inflicted upon cargo on board of his vessel as a common carrier.

2. A tug was held liable for the sinking of a canal-boat loaded with coal, which she was towing. On a reference to ascertain the damages, it appeared that part of the cargo was raised. There was evidence that the consignees of the cargo had released the owners of the tug, but not the libellant, who was master of the canal-boat, from any claim for damages arising out of the sinking of the cargo. *Held*, that the libellant must have a decree for the cost of raising the cargo, as well as his other damages, but that the respondents might have that item stricken from the decree on filing satisfactory proof that the libellant also had been released from such claim.

This was a libel by the master and owner of a canal-boat to recover damages for the sinking his boat while in tow of the Francis King. The court held the tug responsible, and ordered a reference to ascertain the damages. [See Case No. 5,042.] The proofs were completed before the commissioner, but before he made his report he died. Thereupon, the court ordered the question of damages to be heard before the court on the evidence taken before the commissioner. It appeared on the evidence that the boat was a total loss; that part of the cargo was raised for certain salvage, and that the consignees of the cargo had released the tugboat and her owners from all claim for damages by the injury to the cargo.

Benedict, Taft & Benedict, for libellant.

Platt, Gerard & Buckley, for respondents.

BENEDICT, District Judge. The proofs show the amount of damages caused by the accident in the pleadings mentioned to be as follows: The value of the boat, as a total loss, $2,000; the value of personal effects lost, $200; the amount of freight, $205, and the costs of raising the cargo, $640. As to this latter item, although no doubt exists as to the general rule that the master of a vessel, entrusted with cargo for transportation, may recover for damages received by that cargo while in his custody, in the present case the evidence indicates that the consignees of the cargo may have relinquished all claims for such damages.

As to this item, therefore, I shall permit the claimants to insert a provision in the decree that the item shall be stricken from the decree when they file satisfactory proof that the libellant is released from liability by reason of injury to said cargo. Let a decree be entered in accordance with this opinion.

[1] [Reported by Robert D. Benedict, Esq., and Lincoln Benedict, Esq., and here reprinted by permission.]

FRANCIS KING, The. See Case No. 17,355.

FRANCIS PALMER, The (HARBECK v.). See Case No. 6,045a.

FRANCIS SKIDDY, The (HOVEY v.). See Case No. 6,741.

Case No. 5,044.

The FRANCIS WRIGHT.

[7 Ben. 88.] [1]

District Court, S. D. New York. Jan., 1874.[2]

CHARTER—AGENT—UNSEAWORTHY BOILER — LOSS OF CARGO—NEW TRIAL.

1. The owners of a steamship at New York chartered her to D. & P. of Philadelphia, "for the term of six months, to run between Philadelphia or New York and Galveston, &c., &c." The charter party contained the following covenants on the part of the owners: (1) That "the said vessel, in and during the said voyage, shall be kept tight, staunch, well-fitted, tackled and provided with every requisite for such a voyage;" (2) that "the whole of the vessel (with the exception of the necessary room for the sails, cables) shall be at the sole use and disposal of the charterers during the voyage aforesaid;" (3) that the owners "will take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the charterers may think proper to ship." The charter also contained the following covenants on the part of the charterers; (1) "To man, coal and victual steamer, and pay all expenses of every nature (including port charges, &c.) connected with the running of the steamer, except insurance on vessel and repairs;" (2) to pay for the charter of the vessel $:5 a day, "vessel to be delivered to the owners at the expiration of this charter, in the same order and condition as she is now in, less the ordinary wear, and charterers to take and deliver the steamer at New York." There were also in the charter the following provisions: "Owners to nominate, and charterers to appoint, chief engineer, to be paid by charterers at rate of $125 per month. Charterers to appoint captain, subject to the approval of the owners." In accordance with this charter, a captain and chief engineer were appointed, and the vessel was taken to Philadelphia, where the charterers fitted her out with a refrigerating apparatus, and put on board of her about 260 tons of ice and sent her to Galveston, to bring a cargo of fresh beef in the refrigerator to Philadelphia. On the voyage out, some of the tubes of the boiler gave out, and some repairs were put on the boiler at Galveston. A cargo of fresh beef was taken on board, and the vessel started on her return voyage on the 31st of October, 1872, at 11 a. m. At 7 p. m. of that day, she stopped because 20 out of the 144 tubes of her boiler were leaking. She had to put back to Galveston to obtain a proper tool with which to make repairs, and she lay there till November 7th, thus losing full 7 days of time. She then sailed again, and put into Key West for coal, losing 24 hours thereby. She left Key West on November 15th, at 2.30 p. m., and arrived at Philadelphia on November 22d, at noon, with 26 tubes of her boiler plugged up. At Key West 20 tons of ice were purchased and put on board. Between Key West and Philadelphia, the beef was thrown overboard, as spoiled. The charterers filed a libel against the steamer, to recover for the loss of the cargo, charging that the beef was spoiled in consequence of the delay caused by the unseaworthiness of the boiler: *Held*, that, under the charter, the owners were bound to keep the boiler in proper condition, through the captain and chief engineer as their agents, and remained in possession of the vessel for that purpose, through those officers as their agents.

[See note at end of case.]

2. The boiler and its tubes were not kept in proper condition, and from that cause the voyage was delayed and prolonged.

3. The burden of proof was upon the charterers, to establish that the beef was spoiled and lost in consequence of this delay.

4. On the evidence, they had failed to establish this, the inference from the evidence being that the cargo, if good at Key West, was spoiled afterwards either from the want of ice, more of which could have been purchased at Key West, or from the inability of the refrigerating apparatus to prevent the spoiling.

[See note at end of case.]

5. A new trial is not ordered in an admiralty suit, on the mere ground of oversight in not putting in evidence which might have been put in.

In admiralty.

Benedict, Taft & Benedict, for libellants.

C. Donohue and T. B. Stillman, for claimants.

BLATCHFORD, District Judge. On the 13th of September, 1872, the libellants, Duncan & Poey, entered into a written charter party with Woodhouse & Rudd, owners of the steamer Francis Wright, then at New York, whereby Woodhouse & Rudd charter the steamer to the libellants "for the term of six months, to run between Philadelphia or New York and Galveston, or any intermediate safe port in the United States, or any foreign port not prohibited by the insurance," with the agreement that the libellants are to have the privilege of cancelling the charter at the expiration of three months, on giving Woodhouse & Rudd fifteen days' notice and the payment of $1,500 bonus. The instrument then sets forth the following agreements by Woodhouse & Rudd: (1) That "the said vessel, in and during the said voyage, shall be kept tight, staunch, well-fitted, tackled, and provided with every requisite for such a voyage;" (2) that "the whole of the said vessel (with the exception of the necessary room for the sails, cables) shall be at the sole use and disposal of" the libellants "during the voyage aforesaid;" (3) that Woodhouse & Rudd will "take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as" the libellants "may think proper to ship." The instrument then sets forth the following agreements by the libellants: (1) "To man, coal, and victual steamer, and pay all expenses of every nature (including port charges, etc.) connected with running of the steamer, except insurance on vessel and repairs;" (2) to pay to Woodhouse & Rudd, for the charter of the vessel, "eighty-five dollars per day. United States currency, due daily, but payable at the ex-

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

[2] [Affirmed. See note at end of case.]

piration of each and every month, in New York—vessel to be returned to the owners, at the expiration of this charter, in the same order and condition as she is now in, less the ordinary wear, and charterers to take and deliver the steamer at New York." Then follow these provisions: "Owners to nominate, and charterers to appoint, chief engineer, to be paid by charterers at rate of one hundred and twenty-five dollars per month. Charterers to appoint captain, subject to the approval of the owners. It is also agreed that this charter shall commence at New York on the 18th of September, 1872. If, from any derangement of machinery, steamer is delayed, the time lost is not to be paid for by charterers, and in case of such derangement (if any), owners to have privilege of cancelling charter. In case of any wreckage, towage or salvage accruing to the vessel whilst under this charter, one-half of said earning to be paid to the owners of the steamer."

In accordance with the terms of the charter party, John A. Sherman was appointed chief engineer of the vessel, and Henry Denison was appointed her captain. She was taken to Philadelphia, and there the libellants fitted her with a refrigerating apparatus, to bring a cargo of fresh beef from Galveston, Texas, to Philadelphia. They put on board of her at Philadelphia a general cargo of merchandise, and proper fuel, and about 260 tons of ice, the latter to be used in connection with the refrigerating apparatus, to preserve the fresh beef on the homeward voyage. She left Philadelphia for Galveston on the 3d of October, 1872, and arrived at Galveston on the 17th of the same month.

The libel alleges, that, during the voyage from Philadelphia to Galveston, the vessel gave evidence of unseaworthiness, by having a number of her boiler tubes blown out, and by great and unusual leaking in her boiler tubes, which rendered it difficult to make steam on the vessel, by reason of the water from the blown out and leaking tubes escaping into the furnaces, and affecting and diminishing the fires therein, by reason whereof the steamer was unable to attain her usual and proper speed, and was 14 days in making the passage from Philadelphia to Galveston, instead of ten days, which is the full, usual and ordinary time for a steamer of that capacity to make such voyage; that, when the vessel arrived at Galveston, Woodhouse & Rudd, through their agent and representative, the chief engineer of the vessel, were requested to make the proper and necessary repairs to the boiler and its tubes, in order that there might be no further delays after the cargo of fresh beef was laden on board, and that the vessel might make the return passage in 10 days; that the chief engineer promised that all necessary and proper repairs to the boiler and its tubes should be made, but they were not made, by reason whereof the steamer, having on board about seventy tons of fresh beef, was, on the 31st of October, 1872, being then four hours at sea out of Galveston, on her voyage to Philadelphia, compelled to put back to Galveston for repairs, by reason of the tubes of the boiler again blowing out and leaking badly, and was detained at Galveston seven days thereafter in repairing some of the tubes; that the steamer again left Galveston, for Philadelphia, on the 7th of November, 1872, and was 15 days making the voyage, owing to the unseaworthy condition of the steamer, some of the tubes blowing out and others of them leaking so badly that the boiler could with difficulty make steam, and thereby the speed of the vessel was greatly reduced below what her ordinary speed would have been if her boiler tubes had been kept in a proper and seaworthy condition; that, by reason of the detention of the steamer at Galveston, while making repairs, and by reason of the detention of the steamer in making her passage from Galveston to Philadelphia, owing to the unseaworthy condition of the boiler tubes, and by reason of the hot water which escaped from the defective boiler tubes, and was negligently allowed to run into the bilge of the steamer and melt the ice in the refrigerator, where the fresh beef was stowed, the beef became damaged, spoiled and entirely lost to the libellants; that Woodhouse & Rudd did not perform their covenant, that the vessel, in and during said voyage, should be kept by them tight, staunch, well-fitted, tackled and provided with every requisite for such a voyage; that the value of the fresh beef at Philadelphia was $23,000; that, by reason of the failure of Woodhouse & Rudd and the vessel to comply with said covenant, the fresh beef has been wholly lost to the libellants; and that, at the time of the making of the charter party, Woodhouse & Rudd knew that the steamer was chartered by the libellants for the purpose of carrying fresh beef from Galveston to Philadelphia, and also knew that the steamer was in an unseaworthy condition as regards her boiler and its tubes. The libel claims $30,000 damages against the vessel and her owners.

The answer of Woodhouse & Rudd, as claimants, sets up that the libellants had the entire charge and possession of the vessel, and denies that the chief engineer was the agent or representative of the claimants, and avers that the repairs which the claimants were bound to make were made, and that the steamer was, so far as the claimants were bound to do so, kept as called for by the charter party, and denies all the allegations of the libel on which the libellants claim a recovery.

It may not be difficult to hold, that, under the charter party, the claimants were bound to keep the boiler and its tubes in proper condition during the voyage, through the master and the chief engineer, as their agents; that the claimants remained in pos-

session of the vessel for such purpose, through those officers, as their agents for such purpose; that the boiler and its tubes were not kept in proper condition; and that, from that cause, the voyage was delayed and prolonged.

By the charter party, the claimants agree to keep the vessel, while on a voyage named in the charter party, well-fitted and provided with every requisite for such a voyage; and it is agreed that the libellants shall not pay any expenses of repairs. To enable the claimants to discharge such duty, it is provided that they shall have the nomination of the person who is to be chief engineer, and that no appointment of a captain shall be made otherwise than subject to their approval. The chief engineer was nominated by them, and the captain was appointed with their approval. The claimants assumed absolutely the obligation referred to. They either deprived themselves voluntarily of all means of fulfilling it, by not having any agent on board to attend to its fulfillment, or the officers referred to must be regarded as being in the interest of the claimants, through their mode of appointment, for the purpose of seeing to the fulfillment of such obligations.

The claimants contend that the libellants were in the exclusive possession of the vessel. But the provisions that the vessel shall be at the sole use and disposal of the libellants, and that the libellants shall man, coal, and victual her, and pay her running expenses (except insurance and repairs), and return her at the expiration of the charter in proper condition, less ordinary wear, and take and deliver her at New-York, and pay one-half of her salvage earnings to the claimants, are not at all inconsistent with a fulfillment by the claimants of the agreed duty of keeping the vessel well fitted and provided with every requisite for the voyage, or with such possession by the claimants, through the captain and chief engineer, appointed in the manner prescribed, as would enable the claimants, through those officers to represent them in that regard, to see that the agreement was performed.

That the boiler and its tubes were not kept in proper condition during the voyage is established by the evidence. The boiler was not seaworthy. Whatever its apparent condition was when the vessel left Galveston the first time, with her cargo of beef on board, subsequent events and the result show that the boiler was unseaworthy. There was no cause to produce the blowing out and leaking of the tubes, but the inherent defects of the boiler. Having left Galveston on the 31st of October, at eleven o'clock a. m., the vessel was stopped at seven p. m., because 26 out of the 144 tubes in her boiler were leaking. She lay until ten a. m. on the 1st of November, making repairs, and then returned to Galveston, and remained there making further repairs till seven a. m. on the 7th of November, thus losing full seven days of time. The return to Galveston was necessary in order to obtain a proper tool with which to make the repairs. On the voyage from Philadelphia to Galveston the vessel was stopped at sea, on the 8th of October, for five and a half hours, to make repairs on the boiler and engine, and on the 12th for two and a half hours, to plug leaking tubes, and on the 17th for two hours, for repairs to the boiler. This indicated a condition of things which required that the boiler should be thoroughly repaired before starting on the return voyage. But the repairs made were not thorough, as shown by the result. The return to Galveston was the result of the co-operating judgment of the captain and the chief engineer, that such return was necessary. On the return voyage the vessel put into Key West, arriving there at three p. m. on the 14th of November. During the passage to Key West the boiler leaked, though there was no stoppage. The vessel left Key West on the 15th, at 2.30 p. m. On the 16th and 17th the boiler leaked. On the 18th the vessel stopped for seven and three-quarter hours, and stopped up three tubes, and on the 21st she stopped for four and a half hours, and stopped up one tube and repaired three others. She arrived at Delaware City, three and a half hours below Philadelphia, at noon on November 22d, with twenty-six of her tubes plugged up.

The quarters of beef were on slatted racks in a refrigerating room in the hold of the vessel. In such room was a box, standing on the floor, about four feet square and eight or nine feet high. This box was replenished with ice from time to time. By machinery outside of the room, the air of the room was driven through the box, and into contact with the ice, and out again into the room, constantly circulating. There was no opening into the room except by a hole in the top, and there was an opening into the box from the outside of the room, to replenish the box with ice, from the general depository of ice elsewhere.

The difficult question in the case is, as to whether it is satisfactorily shown that the beef was spoiled and lost through the causes set forth in the libel. The burden of proof is on the libellants, to show this. The averment of the libel is, that, by reason of the detention of the steamer at Galveston, while making repairs, and by reason of the detention of the steamer in making her passage from Galveston to Philadelphia, owing to the unseaworthy condition of the boiler tubes, and by reason of the hot water which escaped from the defective boiler tubes and was negligently allowed to run into the bilge of the steamer and melt the ice in the refrigerator where the fresh beef was stowed, the beef became damaged, spoiled and entirely lost to the libellants. It is not enough to show the unseaworthy condition of the boiler tubes, and that the vessel was de-

tained at Galveston to repair them, and was detained on her passage by reason of them and to repair them, and that hot water escaped and ran into the bilge, and some ice was melted from such cause. It must be shown that, but for such things, the beef would have been and was unspoiled, and merchantable as fresh beef.

Zane, the person who came in the vessel, from Galveston, in charge of the beef, testifies, that, when the vessel left Galveston the first time, the temperature of the room was 39° Fahrenheit; that, while they were stopped at sea, outside of Galveston, it rose to 46°; that, when they returned to Galveston, it was 44°; that the day before they arrived at Key West it was about 50°; that they had about 100 tons of ice when they left Galveston the first time, and about 95 tons when they left there the second time; that they had about fifteen tons left when they reached Key West; that they procured twenty tons more at Key West; that the first day out from Key West (November 16th), the temperature of the refrigerating room was about as usual, say 40°; that the next day it became 60°, and afterwards increased to 68°, when they were about at Cape Hatteras; that then the beef spoiled, and part of it was thrown overboard; and that, at that time, the ice was not quite all used up.

The libellants contend that the beef remained unspoiled until after the vessel had left Key West for Philadelphia, and that the cargo would have been landed in good merchantable order at Philadelphia before the time it, in fact, spoiled, but for the detentions specified in the libel, because, but for such detentions, it would have been at Philadelphia, unspoiled, at a time when it was at sea, unspoiled.

No complaint is made as to any loss of time by putting in at Key West. From the time the vessel left Galveston the second time (November 7th, at 7 a. m.), till she substantially reached Philadelphia (November 22d, at 3½ p. m.), was 15 days and 8½ hours. Leaving Galveston October 31st, at 11 a. m., a trip of 15 days and 8½ hours would have brought her to Philadelphia November 15th, at 7½ p. m., at which time she was at sea, having left Key West 5 hours before.

Was the beef unspoiled and merchantable at the time the vessel left Key West? Captain Denison, on his direct examination, testifies, that he saw the cook cutting some of the beef and cooking it, and the men eating it, on the Monday after leaving Key West (which Monday was November 18th); that it was on the cabin table, and eaten by some, after leaving Key West; and that it cut as if it was good. On his cross-examination, this is his evidence: "Q. Did not you, yourself, at that time, at Key West, after the attempt was made to get the beef, say it was stinking? A. I do not remember that I did. Q. Will you swear you did not? A. I will not. Q. Will you swear it was not stinking? A. I will not swear. Q. Was it not, in fact, beginning to taint? A. That is a hard question for me to answer, because I did not know the condition of it then. Q. You have been swearing to something about its condition; I ask whether it was not beginning to taint? A. I had my suspicions about it. Q. Were not you suspicious that it was beginning to taint? A. I was told it was not. Q. Did you not know that that beef was beginning to taint at that time? A. I would not swear it was good, nor would I swear it was bad. Q. You were one of the persons interested in the beef? A. I was very anxious to get it here safe. Q. Did you not state, in Key West, at that time, that it was beginning to taint, or was tainted? A. I might have said so, but I do not remember. Q. Did you not say to Mr. Sherman, your chief engineer, that the beef stank, at Key West? A. I may have said so, but I do not remember that I did; I will not swear I did not, because I said a great deal about the beef being bad. Q. Did you not say, at Key West, that it was 'all up'? A. Not that I remember. Q. You will not swear you did not? A. I will not swear I did not. Q. Did you not say, in Key West, that you were very much worried about buying the ice, as you thought it was so much money thrown away? A. I said, in Key West, that I would not buy the ice, if the party in charge did not give me a written order to buy it. Q. Did you not say it was so much money thrown away? A. I may have said I feared it; ice was so very high there, that I hated to buy it, and I thought we had enough, when we left Galveston, to see us home."

Zane, on his direct examination, says, that the beef was in good order when they arrived at Key West; that he is sure it was good the Tuesday morning after leaving Key West (which Tuesday was November 19th); that he knows it was good then because he ate of it and saw others eat of it; that he examined it himself; and that he detected indications of its spoiling the next day. On cross-examination, he says that he gave some of the beef to one of the government vessels at Key West, and it was good.

The evidence shows that this was an experimental voyage, to see whether the refrigerating apparatus and machinery would work successfully. There were 15 tons of ice left on arriving at Key West. The consumption of ice from Galveston to Key West, in 7 days and 8 hours, had been 80 tons. The running time of the vessel from Key West to Philadelphia, was 6 days and 12¾ hours, after deducting the stoppages, yet the vessel did not have over 35 tons of ice (including the 20 purchased at Key West), for use during that time. The same rate of use as from Galveston to Key West, would have required over 71 tons for the voyage from Key West to Philadelphia, instead of 35 tons. If the beef was good at Key West, these facts would tend to show that its subsequent spoiling

was due to a want of sufficient ice, or, if there was ice enough, to the inability of the apparatus to preserve the beef. Notwithstanding the delay, the libellants were bound to use all accessible means to preserve the beef. If ice was needed and could be procured, it should have been procured at Key West, and such additional expense, and not the loss of the beef, have been thrown on the claimants. It does not appear that more ice could not have been obtained at Key West. The impression produced by the evidence is that, as the ice was giving out, the beef began to spoil, and that it spoiled because the ice gave out. The first day out from Key West, the temperature of the refrigerating room was about 40°, the usual, and, as I understand from the testimony, the proper temperature. The fact that so small a supply of ice was procured at Key West, and that there was such reluctance on the part of the captain to procure what he did, looks in the direction, very strongly, of a spoiled condition in the beef, at Key West, or such a condition as made it substantially unmerchantable when it reached Key West. This is confirmed by the halting testimony of the captain. If true, then the delay before the vessel reached Key West was not the reason why the beef did not reach Philadelphia in merchantable condition, because, the delay before reaching Key West was only seven days, and the running time from Key West to Philadelphia added to the time the vessel remained at Key West was 7 days and 12¼ hours. If the beef was good at Key West, and spoiled afterwards for want of ice, the claimants are not shown to be responsible for the loss. If there was plenty of ice after leaving Key West, and yet the beef spoiled, it would indicate inability in the apparatus to prevent the spoiling, and for this it is not shown that the claimants are liable.

As to any melting of ice by hot water in the bilge, any effect therefrom to spoil the beef is covered by the views before stated. But I am not satisfied, from the evidence, that any hot water in the bilge, from the leaking tubes, had any effect to raise the temperature of the refrigerating room, or to melt any ice.

On a full consideration of the whole case, I can come to no other conclusion than that the libellants have not made out the cause of action set forth in the libel, and that it must be dismissed, with costs.

After the rendering of the above decision, the libellants applied for a new hearing, on further evidence, alleging that they had evidence to show that the beef was not spoiled for lack of ice, or for any deficiency in the apparatus, which they could have offered, if they had supposed the case was to turn on that question.

BLATCHFORD, District Judge. I have announced a decision, in this case, that the libel must be dismissed, with costs. No decree has been entered. The libellants apply for a rehearing of the case on further testimony. They state that they desire to present evidence on a point on which they say the decision turned, and that such point was not fully inquired into on the trial, and that material evidence was omitted. It is not claimed that there is any newly discovered evidence, but it is said that evidence which could have been given was not given. The case is presented as merely one of oversight, and I do not think that a retrial in such a case, in an admiralty suit, ought to be allowed. The Vrouw Hermina, 1 C. Rob. Adm. 163, 170; The Fortitudo, 2 Dod. 58, 70. An appeal will give a retrial in the circuit court, and on that the omitted evidence can be adduced. The claimants have been subjected to one trial in this court, and I think they have a right, on the facts presented, to require that the omitted evidence shall be presented, if at all, only on an appeal. The application is refused.

[NOTE. On libellants' appeal to the circuit court, the decree of the district court dismissing the libel was affirmed. (Case not reported.) An appeal was taken from this decision to the supreme court, and the decree there affirmed, Mr. Chief Justice Waite delivering the opinion. It is held that while the claimants knew that the charterers intended to use the vessel in connection with their contemplated business, they did not insist upon any higher degree of seaworthiness than that required for any other kind of transportation. They did not apply for a vessel suitable for carrying fresh beef, but merely for one suitable for navigation generally between designated ports and places. All the claimants covenanted for was that she was provided with every requisite for safe navigation, and the libellants took all the risks of the undertaking except such as arose from a general unseaworthiness of the vessel when she was delivered into their possession. Delays growing out of derangement in the machinery were to be deducted from the charter time, and the pay for the use of the vessel correspondingly reduced, but beyond that the owners were not to be bound if the vessel were actually seaworthy. The Francis Wright, 105 U. S. 381.]

Case No. 5,045.

In re FRANCKE et al.

[7 Ben. 420, note.] [1]

Circuit Court, S. D. New York. 1875.[2]

BANKRUPTCY—REARGUMENT—DECISION OF CIRCUIT JUSTICE.

The bankrupts [Charles J. and Charles F. Francke] brought this decision before the circuit court, for review, by petition of review. It was argued before Judge WOODRUFF, by the counsel for the bankrupts, there being no opposing party. Judge WOODRUFF arrived at the conclusion that the decision of the district court [Case No. 5,046] was erroneous, but he regarded the question as of such interest and importance,

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

[2] [Reversing Case No. 5,046.]

that, without announcing any decision on the merits, he ordered a re-argument of the question, with a view to having it heard before Mr. Justice HUNT and himself. If, on such hearing, Mr. Justice HUNT had concurred in the view of the district court, the decree of the circuit court would, under section 650 of the Revised Statutes, have been required to be in conformity with the opinion of Mr. Justice HUNT (as the presiding judge), though not concurred in by Judge WOODRUFF; and, in such event, it was supposed that the bankrupts would have been enabled, under sections 652 and 693 of the Revised Statutes, to carry the question to the supreme court of the United States for decision, and would have done so. In the event of a decision by the circuit court in favor of the bankrupts, the case could have been carried no further as there was no opposing party. The petition of review was accordingly reargued before HUNT, Circuit Justice, and WOODRUFF, Circuit Judge.

HUNT, Circuit Justice, delivered no opinion, but filed on the 25th of June, 1875, a decision in these words: The petition of the above named bankrupts, praying for a review of the order of the district court of the southern district of New York, refusing their prayer for a certificate of discharge from their debts, is granted, and it is ordered that a certificate of discharge be issued to said bankrupts in accordance with the provisions of the bankrupt act.

WOODRUFF, Circuit Judge, on the 7th of July, 1875, filed a decision in these words: The question in this case is of such interest and importance, that a re-argument was ordered, in the expectation, that, on a hearing before two judges, the proceedings might assume such a form that it could go to the supreme court for examination and final decision. But the conclusion of Mr. Justice HUNT, that the decision of the district court should be reversed, disposes of the matter in this court. The decree must conform to the direction filed by Mr. Justice HUNT.

A decree directing the granting of a certificate of discharge to the bankrupts was made by the circuit court, and, on the return of such order to the district court, that court granted such certificate of discharge.

Case No. 5,046.

In re FRANCKE et al.

[7 Ben. 420;[1] 10 N. B. R. 438; 6 Chi. Leg. News. 414; 3 Am. Law Rec. 298.]

District Court, S. D. New York. Sept. 1, 1874.[2]

DISCHARGE — EFFECT OF AMENDMENT TO THE BANKRUPT ACT, PASSED JUNE 22, 1874, ON PREVIOUS CASES.

On June 28, 1872, F. & F. were adjudged bankrupts, on a petition filed against them. A warrant was issued, and an assignee was appointed. On July 23, 1874, they filed a petition for their discharge. Creditors had proved their debts, but no one opposed their discharge. The assignee had assets of the estate, but it did not appear that the assets of the bankrupts were equal to fifty per cent. of the claims proved against the estate, on which the bankrupts were liable as principal debtors, nor was the assent of a majority in number and value of the creditors produced. The register certified that the debtors had conformed to their duty under the act. *Held*, that the ninth section of the amendment of the bankruptcy act, passed June 22, 1874 [18 Stat. 178], did not apply to cases of involuntary bankruptcy commenced before its passage, and that, in order to obtain a discharge, the bankrupts must comply with the requirements of the first section of the act of July 27, 1868 (15 Stat. 227).

[Disapproved in Re King, Case No. 7,781. Approved in Re Perkins, Id. 10,983. Cited in Re Sheldon, Id. 12,747; Re Montgomery, Id. 9,732; Re Derby, Id. 3,816; Tinker v. Van Dyke, Id. 14,058; Re Gifford, Id. 5,408.]

[In bankruptcy. In the matter of Charles J. and Charles F. Francke.]

Joseph Gutman, Jr., for bankrupts.

BLATCHFORD, District Judge. The bankrupts were adjudged such, as copartners, by this court, on the 28th of June, 1872, on a petition filed against them. They appeared and filed a written consent to an adjudication. A warrant was issued, and the first meeting of creditors was held on the 2d of August, 1872. On that day thirty creditors proved their debts. An assignee was elected by the votes of twenty-seven of these. On the 19th of September, 1872, the bankrupts filed their sworn schedules of debts and assets. On the 23d of July, 1874, and not before they filed a petition for discharge. By the 24th of July, 1874, forty-four creditors had proved their debts. The hearing on the petition for discharge was fixed for the 18th of August, 1874. No creditor appeared to oppose a discharge. The assignee has received moneys belonging to the estate to the amount of $9,996.22. It is not shown that the assets of the bankrupts are equal to fifty per centum of the claims proved against their estate, upon which they are liable as principal debtors; nor is it shown that the assent, in writing, of a majority in number and value of their creditors, to whom they have become liable as principal debtors, and who have proved their claims, was filed at or before the time of the hearing of the application for discharge. According to the said schedules, all of the debts were contracted after the 31st of December, 1868. Notwithstanding these facts, the register certifies that the bankrupts have "conformed to their duty, under the act of congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867 [14 Stat. 517], and the acts amendatory thereof and supplemental thereto, and have con-

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[2] [Reversed in Case No. 5,045.]

formed to all the requirements of the said act, and the acts amendatory thereof and supplemental thereto."

The first section of the act of July 27, 1868 (15 Stat. 227), amends the second clause of the thirty-third section of the said act of 1867, so as to read as follows: "In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent, in writing, of a majority in number and value of his creditors to whom he shall have become liable as a principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge." By the first section of the act of July 14, 1870 (16 Stat. 270), it is declared that the provisions of the second clause of the thirty-third section of said act of 1867, as amended by the first section of the said act of 1868, shall not apply to those debts from which a bankrupt seeks a discharge, which were contracted prior to the 1st of January, 1869.

The requirements of the act of 1868 apply to "all proceedings in bankruptcy" commenced after the 1st of January, 1869, whether the petition be one filed by, or one filed against, the debtor. Under those requirements, the right to discharges in this case is not shown. But the certificate of the register implies that it is supposed, that, because this is a case of compulsory or involuntary bankruptcy, discharges may and must, under the act of June 22, 1874, be granted, without a compliance with the requirements of the act of 1868.

The ninth section of the act of 1874 provides as follows: "In cases of compulsory or involuntary bankruptcy, the provisions of said act" (the original bankruptcy act of March 2, 1867), "and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in section thirty three of said act of March second, eighteen hundred and sixty-seven, requiring fifty per centum of such assets, is hereby repealed." The provisions of the act of 1868 were in amendment of the thirty-third section of the act of 1867.

What is the effect of the ninth section of the act of 1874? Was it intended to apply to cases commenced before the date of its passage? It does not repeal anything except the provision "requiring fifty per centum of such assets;" and the twenty-first section of the act of 1874 repeals only such acts and parts of acts as are inconsistent with the provisions of the act of 1874. Is it inconsistent with the provisions of the act of 1874, that, in the present case, it should be necessary to comply with the requirements of the act of 1868? Does the repeal of the provision "requiring fifty per centum of such assets," make the act of 1868 inapplicable to the present case?

The ninth section of the act of 1874 must be construed in connection with the other provisions of the same act. The language of the ninth section is general. It says, "in cases of compulsory or involuntary bankruptcy," and "in cases of voluntary bankruptcy." This language is satisfied by applying it to cases to be commenced after the passage of the act of 1874. That is the natural meaning of such language. It is not to be construed as applying to cases commenced before, and pending at the time of, the passage of the act of 1874, unless the intention to have it so apply is apparent from the act. The intention to have other provisions of the act of 1874 apply to cases commenced before its passage is manifested and declared by that act, and, if such intention is not declared in regard to the provisions of section 9, and if those provisions can have proper scope without applying them to cases commenced before the passage of the act of 1874, and, especially, if, to apply those provisions to such cases, would be inconsistent with the intent manifested by all the provisions of the act of 1874, considered together, then the inference is proper, that it was not intended that those provisions should apply to cases commenced before the passage of the act of 1874. The twelfth section of the act of 1874, in amendment of the thirty-ninth section of the act of 1867, in regard to cases of compulsory or involuntary bankruptcy, declares that the provisions of such twelfth section shall apply to cases commenced after the 1st of December, 1873, and prior to the passage of the act of 1874, as well as to those commenced after its passage. So, too, the seventeenth section of the act of 1874, which prescribes proceedings for a composition with creditors, prescribed them for "all cases of bankruptcy now pending or to be hereafter pending."

Under the act of 1874, in cases of compulsory or involuntary bankruptcy commenced after its passage, one-fourth in number and one-third in value of the creditors of a debtor must join in a petition against him, or he cannot be adjudged a bankrupt. The idea of the act, then, seems to be, that if such num-

ber and value of creditors bring the debtor into court, in cases commenced after its passage, he shall not be required, in order to obtain a discharge, to obtain any further assent of any creditor to his discharge or to pay any specified proportion of his debts; for, it provides, in section 9, for dispensing, in such case, with the payment of any per centum of debts, and with the assent of any proportion of creditors. The bringing of the petition is regarded, in respect to cases commenced after the passage of the act of 1874, as the assent of the one-fourth in number and the one-third in value, of the creditors, to the discharge. But, a voluntary petitioner comes into court of his own volition, and without the previous assent of any of his creditors. As to such a case, commenced after the passage of the act of 1874, the ninth section of that act declares that the debtor shall not have a discharge unless his assets shall be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, or unless one fourth of his creditors in number, and one-third in value, assent to his discharge. In regard to voluntary cases, the assent of creditors seems to be required with a view of placing the bankrupt on the same footing, as to the action of creditors, with the bankrupt in involuntary cases, the thirty per centum of assets being regarded as the equivalent of the assent. The ninth section of the act of 1874 does not contain language simply repealing, as a whole, the provision found in the act of 1868. It prescribes what per centum of assets there must be in cases of voluntary bankruptcy, namely, thirty per centum, and then repeals the provision "requiring fifty per centum of such assets." Provision being made by it for cases of compulsory or involuntary bankruptcy, and also for cases of voluntary bankruptcy, without any declaration that cases pending at the time of the passage of the act are referred to, the repeal of the fifty per centum provision may properly be regarded as a repeal of it only in pari materia with the scope of the rest of the section, with which it is joined by a copulative, and as repealing it only in reference to cases to be commenced after the passage of the act. In this view, there is nothing in the provisions of the act of 1868, as applicable to cases pending at the time of the passage of the act of 1874, that is inconsistent with the provisions of the ninth section of the latter act, because such last-named provisions have reference only to cases to be commenced after the passage of the act of 1874.

One consequence of holding that, by virtue of the ninth section of the act of 1874, discharges can be granted in this case without a compliance with the provisions of the act of 1868, would be that, in some cases of involuntary bankruptcy commenced before the passage of the act of 1874, bankrupts would have obtained discharges only on a compliance with the act of 1868, in other such cases bankrupts would have endeavored to comply with the act of 1868, but failed to obtain the assent of their creditors, and in other such cases bankrupts would have made no effort to obtain discharges because satisfied they could not obtain such assent, and yet now all bankrupts put into involuntary bankruptcy in proceedings commenced before the passage of the act of 1874, would obtain discharges without procuring any assent of any creditor. This would work a practical discrimination among involuntary bankrupts in cases commenced before the passage of the act of 1874, resulting in injustice to some or in injustice to the creditors of some—injustice to bankrupts who had complied with the act of 1868, or injustice to the creditors of those who had failed to obtain the assent required by the act of 1868. A construction which would so operate is not to be given unless imperatively indicated.

In considering the question, the fact has not been overlooked that, under the act of 1874, the requirement that one-fourth in number and one-third in value of the creditors shall join, in order to put a debtor into compulsory bankruptcy, applies to all cases commenced after the 1st of December, 1873. But such fact is of no moment. The debtor so put into bankruptcy in a case commenced between the 1st of December, 1873, and the 22d of June, 1874, must, indeed, although put into bankruptcy by one-fourth in number and one-third in value of his creditors, still comply with the provisions of the act of 1868, before he can obtain a discharge. But this is only through a failure, in the act of 1874, to relieve him from the operation of the act of 1868, and imposes upon him no burden to which he was not subject when the act of 1874 was passed.

Entertaining these views, I must withhold discharges in this case until the provisions of the act of 1868 are complied with.

[NOTE. This decision was reversed in the circuit court, and the discharge granted. Case No. 5,045.]

Case No. 5,047.

Ex parte FRANCOIS.

[3 Woods, 367.] [1]

Circuit Court, W. D. Texas. Aug. Term, 1879.

MARRIAGE BETWEEN CAUCASIAN AND NEGRO—PROHIBITORY STATUTE—CONSTITUTIONALITY.

1. A statute of the state of Texas, passed February 12, 1858, and unrepealed, prohibited a white person from marrying a negro, and for its violation inflicted a penalty upon the white person, but none on the negro. *Held*, that the law was still in force.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

2. It was not in violation of the fourteenth amendment to the constitution of the United States.

The relator [Emile Francois], who was alleged to be of the white race, and a citizen of Texas, was indicted in the district court of Travis county, Texas, for having unlawfully intermarried with a colored female who was of the African race. He was tried, convicted and sentenced to the penitentiary for five years.

The act under which the indictment was framed was passed February 12, 1858, when slavery still existed in Texas, and this act constitutes article 386 of Penal Code of Texas (Pasch. Dig. art. 2016), and reads thus: "If any white person shall, within this state, knowingly marry a negro, or a person of mixed blood, descended from negro ancestry, to the third generation inclusive, though one ancestor of each generation may have been a white person, or having so married in or out of this state, shall continue within this state to cohabit with such negro, or such descendant of a negro, he or she shall be punished by confinement in the penitentiary not less than two or more than five years."

Before being sent to the penitentiary, the relator made application for a writ of habeas corpus to the United States district judge, on the ground that his conviction was in violation of the constitution of the United States. On a previous occasion, in Ex parte Brown,[2] Judge Duval held the act in question to be no longer in force by reason of the changes wrought by the amendments to the constitution of the United States, and discharged the relator. After the decision of that case, the court of appeals of Texas, in Frasher v. State, 3 Tex. App. 263, held the act under consideration to be still in force. The legislature of Texas, at its session in April, 1879, changed the above act so as to punish both parties for the commission of the offense named in it, and the law on that subject now reads as follows: "If any white person and negro shall knowingly intermarry with each other within this state, or having so intermarried in or out of the state, shall continue to live together as man and wife within this state, they shall be punished by confinement in the penitentiary for a term not less than two nor more than five years." But the latter act above cited does not take effect until September, 1879.

C. J. Garland, for relator.
D. G. Wooten, for the State.

DUVAL, District Judge. An application similar to the present one was made to me some two years ago, in behalf of one Lou Brown, a white woman who had married a negro man. In her case the writ was granted and the petitioner was discharged. On that occasion no argument was had. The case was submitted to the court upon the facts as they appeared from the petition and the return of the officer, and with what seemed to be a tacit understanding of counsel on each side, that the prisoner ought to be discharged. Such at least is my recollection of the case. My impression then was that the act of the Texas legislature of February 12, 1858, which made it a penitentiary offense for a white person to marry a negro, was obsolete and inoperative, as having been passed when the negro was a slave, and not regarded in law as a "citizen of the United States." And if not obsolete, that it was in contravention of the fourteenth amendment of the federal constitution, and of the civil rights bill, because it inflicted a penalty upon the white person alone. At a subsequent period, the precise question came before the Texas court of appeals, in the case of Frasher v. State, 3 Tex. App. 263. That court held that the statute in question was still in force, and was not invalidated by the adoption of the constitutional amendments, or by the civil rights bill. The reasoning of the court in this case, and a more thorough consideration of the case, induce me to doubt the correctness of my first impressions when acting in the case of Ex parte Brown.[3]

The subject of marriage is one exclusively under the control of each state. Each one may pass such laws as it deems proper regulating the institution. One may forbid marriage for some causes, which would be no impediment in another, and may prescribe different penalties for a violation of the same prohibition. If a state thought proper to do so, I am not satisfied that she would be prohibited by any express provision of the federal constitution, or of the civil rights bill, from passing a law forbidding a marriage, among white persons, between an uncle and his niece, or between a Christion and a Jew, and imposing a penalty for its violation upon the man alone. If it could do this, then it could certainly forbid the marriage between a white person and a negro, and affix a penalty for the act upon the former alone. If the Texas statute punished the negro in such case and not the white person, then it would be clearly opposed to the civil rights bill, which expressly provides that the negro shall only be subject to the like pains and penalties as the white race. But is the converse of this proposition to be held as true in all cases? Upon mature consideration, I doubt whether it is so.

That the law in question is unwise and unjust—that it is repugnant to the spirit of the constitution, and of the civil rights bill, both of which contemplate the equality of all persons before the law, and the equal protection of the law to all—I have no doubt. At the same time, I am not satisfied that it vio-

[2] [See note at end of case.]

[3] [See note at end of case.]

lates the letter of either. Unless it did so, I would not feel justified in declaring it to be unconstitutional.

As respects intermarriage between the white and black races, it is very certain that such a connection would rarely occur but for the influence of the former over the latter—an influence resulting from the superior education and intelligence of the whites, and the subordinate position so long held by the colored race. For such unnatural marriages, the whites are mainly to blame, and this may furnish some excuse, if not a justification, for punishing them alone, as a means of prevention. The learned counsel of petitioner has referred me to a newspaper report of a decision lately made by the circuit court of the United States in San Francisco, as supporting this application for a writ of habeas corpus. It is the case of Ho Ah How v. Nunan [Case No. 6,546], sheriff of the city and county of San Francisco. Without attempting to analyze the facts of the case, it seems to me they are so wholly different from the present as to render the decision of the court therein wholly inapplicable.

As before stated, I regard the acts of the Texas legislature as being unjust in its discrimination against the white race, and as contrary to the spirit of the constitution; but inasmuch as it relates to a subject over which the state has complete and exclusive control, and because I doubt whether it can be properly held to be a violation of the letter of the constitution, or of any law made in pursuance thereof, the application for the writ of habeas corpus must be refused.

NOTE. The opinion of Judge Duval in the case of Ex parte Brown, above referred to, was as follows: "So far as I have been able to discover, there has been no law passed by the state of Texas since the abolition of slavery prohibiting marriage between the white and black races. The only question, therefore, presented before me is, whether this act of 1858 is now in force and operative? My conclusion is, that it is not, for the following reasons, among others: Because it was passed in the interest and for the protection of slavery before the institution had been abolished, and when the negro was not a citizen of the United States, and because it fixes a penalty upon the white persons alone. It is a prohibition based solely upon color, and operating on the white race alone. To say that this statute is now in force would be as it seems to me, to disregard the effect of the 14th and 15th amendments of the constitution of the United States, and the first section of the civil rights bill. I think it infringes on both. It is unfair and unequal in its operation, because it would visit a heavy penalty on a white citizen and none whatever upon a colored citizen for doing a certain act. Marriage between the two races is wholly abhorrent to my sense of fitness and propriety, and I presume it would be no violation of the constitution and laws of the United States—inasmuch as marriage is but a civil contract to be regulated by the laws of the several states—were the state of Texas now to pass a law forbidding such marriages, under penalties extending to both races alike. But until this is done, I think the matter must be considered as one of taste merely, and left for its control to the potent influence of public opinion."

Case No. 5,048.

FRANCONET v. The F. W. BACKUS.

[Newb. 1.][1]

District Court, D. Michigan. 1852.

ADMIRALTY JURISDICTION — SOURCES — HIRING CREW IN DOMESTIC PORT—PRESUMPTION.

1. The jurisdiction of this court in cases of admiralty does not rest upon the statute of 1845 [5 Stat. 726], but upon the constitution of the United States. It is not limited to tide waters, but embraces the lakes and navigable rivers, through which commerce is carried on between different states, or with a foreign nation.

2. When a vessel of the United States is duly enrolled and licensed, and has been engaged for years between Detroit and Buffalo, although she may have been for a short time at a foreign port, still the presumption is that her crew were hired in a domestic port.

[In admiralty. Suit by John Franconet against the propeller F. W. Backus.]

WILKINS, District Judge. This is a libel for seaman's wages, promoted by the first engineer of the propeller. The important exhibits in the libel are as follows: "That at the time of the contract for which suit is brought, and wherein the alleged services were rendered, the said vessel was and continued to be enrolled, and licensed and engaged in the business of navigation and commerce, between the ports of Detroit and Buffalo: that the libelant was employed on said boat by the agent thereof, by and for the year beginning and ending at the close of navigation in each year: that for years previous to the close of navigation of 1851, the libelant, as engineer of said vessel, rendered appropriate services in that capacity: that at the close of navigation in the year 1851, he entered upon the fulfillment of another year's services upon said vessel, and continued in that capacity until about the 17th day of December, and that he was to receive the sum of $550 per year." All these exhibits in the libel, with the exception of the last, are fully admitted and conceded in the answer filed by the intervening claimant; and even the last is conceded in a modified form by the reduction simply of $50 on the year's salary. The answer stating: "That the libelant had been employed on said propeller by respondent at the close of navigation of 1851, as first engineer for a year thereafter, and was to receive for his services in that capacity, not the sum of $550, but the sum of $500—and that, under said contract, the libelant did enter upon the performance of the services for the year for which he had been employed." These admissions in the answer obviate the necessity of any inquiry into the proposition raised in the argument, based upon the supposition that the contract with the libelant was entered into at Malden, in Canada West, and consequently constituted no lien on the vessel. The intervening claimant negotiated

[1] [Reported by John S. Newberry, Esq.]

with the prior owners of the vessel, in March, 1852, at Malden, for the controlling interest in the same, while the vessel was moored in that foreign port, but the bargain was perfected at Detroit. And there is no proof that the antecedent contract with the libelant was originally made in Canada, and such a fact will not be inferred in contradiction to the admission of the answer, from the circumstance of the vessel being temporarily at Malden, a foreign port, it is true, but a port intervening between Detroit and Buffalo, and embraced within the coasting trade of the lakes as defined in the act of congress. The jurisdiction of this court, in cases of admiralty, does not rest upon the statute of 1845, but upon the constitution of the United States, and is not limited to tide waters, but embraces the lakes and navigable rivers, through which commerce is carried on between different states, or with a foreign nation. At the time the constitution was framed, but little was known as to the extent and character of the Northwestern lakes, and in conferring admiralty and maritime jurisdiction upon the courts of the United States, it was technically understood to embrace only those waters characterized by the ebb and flow of the tide. But in The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, the supreme court of the United States have decided that these lakes are, as great inland seas, embraced within the spirit of the constitution, and that the maritime jurisdiction of the federal courts as to them does not depend upon the old common law technicality. Whether, then, the contract with the libelant, was made in Canada or not, a fact that does not appear, the vessel, being licensed under the statute of the United States, and enrolled as sailing from Detroit to Buffalo, and for years so engaged, is subject to the law governing maritime contracts, and the presumption is, that her officers and crew were duly engaged in her service in a domestic port.

On the pleadings, then, we hold that the libelant is entitled to the year's wages; that his salary as engineer commenced in the fall of 1851; that his wages constitute a lien on the vessel; and that the intervening claimant purchased the vessel, subject to such lien. By the testimony, he voluntarily left the vessel, being discharged on the 16th of September, 1852; he is therefore to receive his wages, up to that time; or—which amounts in calculation to the same thing—a year's wages, deducting two months and half, or about $100. Th only point, then, presented by the pleadings, on which there is a difference of opinion between the parties, is, as to the amount of salary for which the vessel was made liable to libelant. One of the former owners of the vessel, Theodore S. Park, swears that the contract with the libelant for the year 1851–2, was $550; that it had been $500 the year before, but the owners had raised it $50 for the year 1851–2. In contradiction to this, Capt. Langly testifies that while he navigated the vessel, the libelant repeatedly stated his wages at $500, and the clerk, Fitzhugh, in making out his bill at the time of his discharge, allowed him only $500, and to which libelant made no exception at the time. This all may be so, and yet it does not contradict the testimony of the former owner, who may have raised his wages to the amount stated, without at the time apprising the libelant, and I am more inclined to rely on the statement of the old owner as to this fact, than the evidence of Capt Langly or the clerk. Enter decree, then, as follows:

Nine months and a half, at the rate of $550 per year.....	$435 41½
Credit by payments.....	236 00
Decree for libelant, balance....	$199 41½

Case No. 5,049.

The FRANCONIA.

[4 Ben. 181.] [1]

District Court, S. D. New York. May, 1870.

COLLISION OFF POINT JUDITH — STEAMER AND SCHOONER—SPEED IN A FOG—CHANGING COURSE BLINDLY.

1. The steamer F., bound from New York to Portland, while running at the rate of seven or eight knots an hour, in a thick fog, collided with and sank the schooner M. C. T., near Point Judith. On board of the schooner, a fog horn was blown at intervals of half a minute, and the steam whistle of the F. was heard for some half an hour before the collision. Immediately before the collision, the helm of the schooner was ported and the wheel of the steamer was put hard a-starboard. *Held*, that the speed of the steamer was too great.

[Cited in The City of Panama, Case No. 2,764.]

2. As the schooner was crossing the course of the steamer from starboard to port, the proper manoeuvre for the steamer would have been to port her wheel instead of starboarding it, and, as she starboarded blindly, in ignorance of the true course and position of the schooner, and, as it turned out, erroneously, such change of her course was a fault.

[Cited in The Alberta, 23 Fed. 811.]

In admiralty.

Scudder & Carter, for libellant.

Beebe, Donohue & Cooke, for claimants.

BLATCHFORD, District Judge. This libel is filed on behalf of the libellant and the other owners of the schooner Mary C. Terbell, and of her crew, and of the owners of her cargo, to recover the sum of $27,000, as the value of the schooner and of her cargo and pending freight, and of other property on board of her, lost by the sinking of the schooner through a collision between her and the screw steamer Franconia, on the 9th of June, 1868, between 7 and 8 o'clock, a. m., during a thick fog, at a point about three miles south south-east from Point Judith. The schooner was on a voyage from Boston to New York. The steamer was bound from

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

New York to Portland, and had left New York at about 4 o'clock p. m. of the day before. The steamer struck the port side of the schooner, just aft of the fore rigging, nearly at right angles, and cut into her several feet, and she very soon sank.

The libel alleges, that the schooner was sailing by the wind, on a north-west course, with the wind west by south; that she had, for several hours previously, been on her port tack, steering in a north-westerly direction, and not changing her course, until about half a minute before the collision, when her master, observing that the steamer was bearing directly down upon him, and that a collision was imminent, and with the view of escaping it, if possible, ordered his helm to be ported, which was done; and that the schooner, in consequence, had changed her course about one point before the collision.

The answer avers, that the speed of the steamer at the time was only about half her usual rate, and was at a rate only sufficient to enable her to make her course, and that, when the vessels would have cleared, the schooner changed her course across the head of the steamer.

It is contended, on the part of the steamer, that the wind was about south-west by south, and that the schooner was, therefore, sailing about west, which would be making her course, and that she changed some eight points, so that she was heading north at the time of the collision; that the steamer, whose proper course was about east, kept it, and so struck the schooner at right angles; and that, if the schooner had not changed her course, the steamer would have passed safely to the northward of the schooner. As the steamer struck the schooner on her port side, at about right angles, if the schooner was at the time heading north, the steamer must have been heading about east. The proper course of the steamer, at the place of collision, was about east, and, therefore, if the schooner was in fact heading to the north, the steamer could not have materially changed her course to port. If, however, the schooner had been heading to the north-west and changed one point by porting, that is to north-west by north, the steamer, to have hit her at right angles, must have been heading about north-east by east, a change of about three points from east, by starboarding.

The testimony on the part of the schooner is, that her sails were trimmed by the wind and that her sheets were hauled flat aft. This last fact is confirmed by the pilot of the steamer. The testimony of those on the deck of a sailing vessel, and in charge of her sails and her helm, as to the shape of her sails, and the course of the wind, is much more reliable than the testimony of those on board of a steamer coming from a direction which makes the wind at least three points abaft the beam of the steamer. On the whole evidence, I can have no doubt that the course of the schooner, before she ported, was north-west, and that she was on her port tack, sailing within about five points of the wind, under a three or four knot breeze.

The master of the schooner was on deck, and there was a man at the wheel. The steam whistle of the steamer was heard on board of the schooner for some half an hour before the collision. The sound came from off the weather bow of the schooner. The master of the schooner kept blowing a fog horn constantly, at intervals of half a minute, nothing being visible. Suddenly, he saw the bows of the steamer about five points off his weather bow, that is, in a direction about west by south. He immediately blew his horn again, and went into the cabin and brought out a musket and fired it off. He then directed the man at the helm to port it, which was done. He called the rest of his crew from below. They came up hurriedly and lowered the schooner's boat, from the davits at her stern, and it had scarcely reached the water before the steamer struck the schooner. The lower part of the steamer near the water was visible first to the master of the schooner, the fog being thicker above. He says, that, before he ordered his helm to be ported, he saw the steamer, and noticed that she was swinging towards his bows, that is, towards the north. That is the way she would have swung, if she had been running, at the time, on a starboard helm. The testimony of the pilot of the steamer is, that the steamer was running at a speed of between seven and eight knots an hour; that the first notice he had of the proximity of the schooner, was hearing something like a man halloing; that right immediately, about two seconds after, he heard something just like a board slap in a sail, which was probably the report of the musket; that the lookout sang out to him, that there was a noise on the starboard bow, something like a whistle, fog horn; that he and a man who was in the pilot house with him immediately hove the wheel of the steamer hard a-starboard; that the steamer's engine was immediately stopped and reversed; and that they then saw the schooner coming out of the fog, across the bow of the steamer, and went into her and sank her. He also says, that, when he first saw the schooner, she was about a point on the starboard bow of the steamer. The pilot of the steamer, and the man who was with him in the pilot house, do not say anything, in their testimony, as to the effect in fact produced on the course of the steamer by putting her wheel hard a-starboard. The latter says, that he and the pilot put it hard a-starboard before the collision. For the steamer, from being on a course east, to have hit, at right angles, the schooner on a course north-west by north, would have required a change in the course of the steamer,

by starboarding, of not over three points. That the steamer did starboard is admitted. That she swung to port, by starboarding, I have no doubt. She starboarded because the noise was reported to be on her starboard bow. In fact, the schooner was crossing the bow of the steamer, from the steamer's starboard side, to the steamer's port side. Therefore, porting, and not starboarding, was the proper manoeuvre for the steamer, and, if she could have seen the schooner, she would have ported. She starboarded blindly, in ignorance of the true course and position of the schooner, and erroneously, as it turned out, and it was a fault in her to do so. On the evidence, if she had not starboarded at all, but had merely stopped and reversed her engine, the chance is that she would have cleared the schooner, by passing under her stern, or would have struck her a glancing blow, and, probably, with less damage.

But there was another and more grievous fault on the part of the steamer. She was running at too great speed. The evidence of her pilot is, that he had been hearing fog horns all along in the morning; that, about two minutes before the collision, a fog horn on his starboard bow had passed him; that he heard another fog horn on his starboard bow, about a minute before the collision; and that, within ten minutes before the collision, he had heard a fog horn on his port bow. He was at the spot where all the coasting vessels coming from the eastward, through the Vineyard Sound, enter Long Island Sound, off Point Judith. Yet he plunged on, at a speed so great, that, as this schooner, after having given all proper warnings of her position, loomed up through the fog, he could not stop or sufficiently diminish the headway of his steamer, to enable him, by the retardation of her onward movement or the divergence of her course, to avoid crushing against her and sending her to the bottom.

The collision was due to the two faults, on the part of the steamer, which have been pointed out, and there must be a decree for the libellant, with costs, with a reference to ascertain the damages.

Case No. 5,050.

In re FRANK.

[5 Ben. 164;[1] 5 N. B. R. 194.]

District Court, N. D. New York. May, 1871.

POSTPONING PROOF OF DEBTS—VOTING FOR ASSIGNEE—TRANSFER OF DEBTS—POWER OF ATTORNEY.

1. Although the proof of a debt in due form has been regularly filed with the register, and by him entered as satisfactory, yet if fraud in relation thereto is offered to be shown, the register may receive such proof before the election of assignee.

[Cited in Re Strachan, Case No. 13,519.]

2. If several creditors sell and assign their debts to one assignee after they are proved in bankruptcy, they have no further business in court, and though the proceedings be carried on in their names, the actual owner must control the debts, vote upon, and receive the dividend thereon, and can cast but one vote.

3. If a power of attorney is given to a firm, and not to either member of it, one member alone is not authorized to vote upon it in the choice of an assignee.

[In bankruptcy. In the matter of Manassa Frank.]

[2] [I, Benjamin G. Baldwin, one of the registers of said district, do here certify, that in the course of the proceedings in said matter before me, certain questions arose pertinent to the said proceedings, and were desired by counsel to be certified to the court. At an adjourned first meeting of creditors, held on the thirtieth of March last, for the election of an assignee, E. M. Holbrook appeared as attorney for petitioning creditor, and S. A. Beman appeared with letters of attorney from sundry creditors, proofs of whose debts had been filed and entered at a previous meeting; and S. Foote also appeared with letters of attorney from several other creditors whose debts had also been before proved and proofs filed. Mr. Holbrook also had letters of attorney from several creditors, proofs of whose debts had been filed by Mr. Beman, revoking their former letters of attorney given to Mr. Beman and G. A. Seixas, Esq., appeared from New York as counsel with Mr. Beman, and in behalf of the creditor firm of Eldridge, Dunham & Co. of New York, proofs of whose debt had been filed by Mr. Beman, and moved that sundry debts, represented by Mr. Holbrook and by Mr. Foote, be postponed for investigation before the assignee, and be not voted upon; and charged that since the adjournment of this meeting, which was held on the third of March, then current, the brother and friends of the bankrupt, acting in his interest, had been to see the various creditors, and represented to them that the estate of the bankrupt would not pay fifty cents on the dollar of his indebtedness, and had made persistent efforts to induce them to compromise and stop these proceedings in bankruptcy; and that they had already succeeded in buying up, perhaps with the bankrupt's money, a large number of the debts now represented by Mr. Holbrook and Mr. Foote, some before and some since proof was made in this proceeding, and which, he charged, was done for the purpose of controlling these proceedings and influencing the election of an assignee, and was, therefore, in fraud of the bankrupt act, and was a sufficient reason for postponing such debts and not allowing them to be voted upon, and he proposed to prove such charge by reading affidavits and making oral proof. Said Holbrook & Foote objected to such postponement, and insisted that nothing had been done in fraud of the bankrupt act; that the financial troubles of the

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [From 5 N. B. R. 194.]

bankrupt were destroying his health and mind, and that his friends, on that account, had examined carefully into the situation and value of his estate, and had offered the creditors to advance the money and pay as large a per cent. upon their debts as they believed could be realized upon a settlement in bankruptcy, with the hope that his mind might be relieved, and he be enabled to resume business; that several of the creditors had accepted the proposition made, and sold and assigned their debts before proof was made to Delos McCurdy, who, as such assignee, had made proof of the same in due form and filed with the register, and several who had made proof of their debts and had the same filed, had also sold and assigned them, and said Holbrook & Foote insisted that the proof of both such classes of debts, being in due form and regularly filed with the register, and by him entered as satisfactory, they cannot now be postponed, but should be voted upon and may be investigated before the assignee hereafter. I decided that, inasmuch as the offer was to show that the whole proceeding, in reference to the sale and transfer of such debts were in fraud of the bankrupt act, I would hear the proof, and if Messrs Holbrook & Foote desired to make proof in opposition, I would give them reasonable time to prepare the same, to which ruling said Holbrook & Foote excepted, and desired that the same should be certified to the judge. The counsel then agreed that the meeting should be adjourned to hear such proof, and that they would serve copies of affidavits upon each other, and the meeting was thereupon adjourned to the twenty-first day of April at one p. m. At such adjourned meeting the same counsel appeared as before, and affidavits were read and arguments made in support of the respective positions of counsel, and, after hearing the same, I decided that the proofs did not sustain the charge of fraud upon the bankrupt act, and that, as all the proof of debts on file was in due form, and nothing appeared to excite suspicion of their want of validity, I would proceed to receive votes for the election of an assignee upon all the debts represented, to which decision and ruling the counsel in favor of the postponement of debts excepted, and desired the same to be certified to the judge.

[Before proceeding to vote, it was agreed by all the counsel that certain debts represented by Mr. Holbrook and by Mr. Foote, proofs of which had been filed by the creditors, were assigned to and now owned by Delos McCurdy, in addition to the debts proved by him as assignee, and that such of those creditors as had issued letters of attorney to Messrs. Beman & Brennan, had issued new letters of attorney to Messrs. Magone & Holbrook, or either of them, and said Holbrook & Foote claimed the right to give one vote upon each of such debts in the name of the assignor, to which Mr. Seixas and Mr. Beman objected, and I sustained the objection, deciding that when a creditor sold and assigned his debt after it was proved in bankruptcy, he had no further business in court; that, although the proceedings must be carried on in his name, the actual owner and assignee must control the debt, vote upon it and receive the dividend, and that I should, therefore, receive only one vote from Mr. McCurdy or his attorney, and should decline receiving any vote from Mr. Holbrook or Mr. Foote upon those debts represented by them, and which were assigned to Mr. McCurdy, to which decision and ruling Mr. Holbrook and Mr. Foote excepted, and asked that it be certified to the judge.

[Thereupon I proceeded to take the vote for assignee, with the following result, viz.: Eight creditors, whose debts amounted to four thousand and twenty three dollars and thirteen cents, voted for Daniel F. Sofer of Malone, Franklin county, New York. Five creditors, whose debts amounted to nine thousand nine hundred and two dollars and thirty-eight cents, voted for Charles E. Clark, of Ogdensburg, New York. Nineteen claims, assigned after proof, amounting to twelve thousand two hundred and twenty-eight dollars and ten cents, were excluded from being voted upon, under my ruling aforesaid. One debt of one hundred dollars and seventy-seven cents proved, was not represented, and one debt proved of two hundred and five dollars and twenty-one cents, represented by Mr. Beman, but the letters of attorney produced, although addressed to Mr. Beman individually, contained authority in the body of it to his law firm of Beman & Brennan, not to either of them, to vote, and the other partner not being present, I declined to receive a vote upon that debt. There was no choice of an assignee, no one receiving a greater part, both in value and number of votes, and there being opposition, I certify the result into court.] [3]

HALL, District Judge. Upon consideration of the report of B. G. Baldwin, Esq., one of the registers of this court, dated May second, eighteen hundred and seventy-one, by which it appears that in the proceedings before him for the choice of an assignee herein, sundry questions arose and were desired to be certified for the opinion and decision of the judge of this court, but which were temporarily decided and passed upon by the said register, and that, under the decisions of the register, the creditors of such bankrupt proceeded to the selection of an assignee; that on taking the votes of the creditors who had proved their debts, and were present or represented at the said meeting for the choice of an assignee, it appeared that there was no choice of an assignee by reason of the failure of a majority in number and value of such creditors to vote for the same person as

[3] [From 5 N. B. R. 194.]

assignee; and, also, upon consideration of the affidavit and statement presented in connection with such report of the said register, It is now ordered, adjudged and decreed, that the several decisions of the register upon questions so certified by him, and the other questions arising in the course of such proceedings, as stated in his report, be, and the same hereby are approved and confirmed; and that Charles O. Tappan, Esq., of Potsdam, in the county of St. Lawrence, counsellor at law, be, and he is hereby appointed assignee of the said Manassa Frank, in these proceedings, in pursuance of the statute in such case made and provided.

Case No. 5,051.

FRANK v. CHETWOOD.

[9 Reporter, 6.] [1]

Circuit Court, S. D. New York. Sept. 5, 1879.

REMOVAL OF CAUSE TO FEDERAL COURT—JURISDICTION—CITIZENSHIP—PRACTICE—COUNTER CLAIM—SECTIONS 639, 914, REV. ST.

1. The test of jurisdiction is not the citizenship of the parties at the time a contract is made or broken, but at the time the action is commenced.

2. Where a suit is brought in a state court in which a counter claim might be interposed and the suit is removed into the circuit court, the same counter claim may be set up in that court.

On motion for a new trial. The action was brought in the supreme court of New York on a lease and was removed into this court.

P. J. Joachimsen, for plaintiff.

B. C. Chetwood, for defendant.

BLATCHFORD, Circuit Judge. Citizenship of the parties at the time of making the lease, or at the time of the breach of its covenants, is not the test of jurisdiction, but citizenship at the time the suit was commenced. The suit, being a suit at law, if a counter claim could be set up in it in the state court, and a judgment be had by the defendant against the plaintiff for a sum of money due under the instrument on which the suit was brought, the same counter claim may be set up and the same judgment had in the suit when removed into this court. The suit when removed is to proceed in the same manner as if it had been brought here by original process. Rev. St. U. S. § 639. A counter claim being proper in a suit in a state court, it is made proper here by section 914 of the Revised Statutes of the United States. It is an incident of bringing a suit subject to removal, that the plaintiff submits himself to the jurisdiction of this court in respect to a counter claim. The process of removal is sufficient process to give this court jurisdiction over the person of the plaintiff to award a judgment against him for the counter claim. Motion denied, and judgment ordered.

[1] [Reprinted by permission.]

FRANK (UNITED STATES v.). See Case No. 15,159.

Case No. 5,052.

The FRANK A. HALL.

District Court, D. South Carolina.

SALVAGE SERVICE—WHAT CONSTITUTES.

[Cited in Cohen's Adm. Law, 72, as having held "that if a vessel, though disabled, is manageable, and receives assistance, not with the purpose of being saved from loss, but for expedition, the fact of being disabled will not of itself make the service salvage."]

[Before MAGRATH, District Judge. Nowhere reported; opinion not now accessible.]

Case No. 5,052a.

FRANKLE et al. v. PENNSYLVANIA FIRE INS. CO.

SAME v. INSURANCE CO. OF NORTH AMERICA.

[12 Ins. Law J. 614.]

Circuit Court, D. Colorado. June 18, 1883.

FIRE INSURANCE—PREPAYMENT OF PREMIUMS—WAIVER—OBJECTIONS TO PROOFS OF LOSS.

[1. The agents mailed a policy to the insured, without requiring prepayment of the premium, merely inclosing therewith a bill in their own names for the amount. The insured did not tender payment until some 15 days later, and after a loss had occurred. The policy contained a condition that it was not to take effect until payment of the premium; but the agents were accustomed, with the company's apparent acquiescence, to deliver policies without prepayment, and they testified that they were personally liable to the company for the premiums. *Held*, that the delivery of the policy was a waiver of prepayment, and that the company was bound to pay the loss.]

[See Bang v. Farmville Ins. & Banking Co., Case No. 838.]

[2. Objections to proofs of loss, not made when the same were served, but first brought forward at the trial, will be considered as waived.]

[These were two actions by Henry Frankle and others against the Pennsylvania Fire Insurance Company and the Insurance Company of North America, respectively, to recover insurance on a stock of goods.]

Decker and Yonley, for plaintiffs.

George W. Allen and Stuart Brothers, for defendants.

Frankle, one of the plaintiffs, testified that he had nothing to do in procuring these policies. He produced the policies, which were introduced in evidence; also identified the proofs of loss that were also introduced. He gave the letter of the agents showing the transmissal of the policies from Leadville on May 6th, and the envelope showing that they arrived there the same day. Inclosed with the policies was a bill for the

premium, $40, showing that the amount was then due. There was not the least intimation in letter or bill of any credit. The policies were for one month. He said that the fire occurred on May 19th; on May 26th he sends the check of Frankle & Butler, on a Denver bank, to Streeter & Lee, Leadville, for $40, the premium. No excuse was given for this delay of from twenty-one to twenty-two days in forwarding the check, or for their sending their check, and that on a Denver bank. Butler, the other plaintiff, testified that the conversation concerning the taking of the policies was had with him in the store at Denver; that Downing, Lee and himself were the only persons present. That nothing was said about giving time for the premium. That the policies were to be for one month from the date of policies that expired on the 5th of May, and the rate was to be eight per cent. (There was no showing that the company ever had any knowledge of any agent, here or elsewhere, having at any time violated these conditions of the policy.) Did the agents have any authority to give any credit for the premium, or to insure any one without the payment of the premium as stated in the policy? The authorities are all to the effect that the burden of proving the authority of the agent lays upon the insured. Wood, Ins. §§ 17, 396, 397. In this case, however, the evidence is all one way. If we take the testimony outside of the policy, there is no conflict as regards the fact that no such authority was possessed by Streeter & Lee or any other agent. Marvin v. Wilber, 52 N. Y. 270; Bush v. Westchester Fire Ins. Co., 63 N. Y. 531. A party is conclusively presumed to have knowledge of the contents of his contract. Wade, Notice, § 43; 8 N. Y. 271; 2 Corp. 597; 7 Taunt. 646; 9 Wend. 209. But if it could be held that they did not have knowledge, plaintiffs would be in no better situation. This company offered to insure plaintiffs on certain conditions named in the contract. That was the only proposition they have made, and they had the right to fix their own terms. The plaintiffs had no knowledge of this condition, then they must say they did not assent to it. If they did not assent to it, then there is no mutuality in the contract, and consequently, upon their own showing, they are suing on a contract they cannot enforce. Let us say that there was an unconditional delivery to these plaintiffs of the contracts by the agents, and a credit of thirty days extended for the payment of the premium from the date of delivery, what result have we? Simply this: That the plaintiffs knew at the time they received the policy that the agent was acting in open and avowed disregard of and disobedience to the instructions of his principal. That he had no right whatever to deliver it or even to attempt to waive any of its conditions. Can they claim that such is a valid delivery? We have no knowledge of any court claiming the right to disregard a restriction, even if it is shown to be unreasonable. Holladay v. Dailey, 1 Colo. 466.

We feel satisfied that this court will never render a judgment against us until plaintiffs' counsel can show: First. That a man is not bound with the knowledge of the contents of his own contract. Second. That a party can assent to a condition of a contract without having knowledge of its provisions. Third. That mutuality is not necessary in a contract. Fourth. That a party seeking to recover on a contract can be heard to say that its obligations and conditions are not mutual. Fifth. That a party can be heard to say that he made a contract even to the last act, viz. the delivery of the same, and, after it is delivered as a valid and binding obligation on both parties, for the first time became acquainted with its provisions. Sixth. That a party dealing with an agent, and having full knowledge of his power and the extent of his authority, can come into a court of justice and admit that he knew the agent was violating his authority in delivering the contract, and had no authority to do so, and still claim that such delivery confers on him rights as a valid delivery.

In considering this case, there are certain classes of authorities that cannot enter into its determination. We may describe them as: First. Those where the authority of the agent is not shown either in the conditions of the policy or a notice printed on the policy. Second. That class where there was a notice printed on the policy, but no condition in it, in which case the assured might prove, perhaps, (1) that he did not see the notice prior to the waiver; (2) and possibly it might be held that, as it was simply a notice, and no part of his agreement, that he might prove it was false in fact, and that the agent did have authority. Cases falling within either of these classes are not authority here on the question of waiver. If we suppose the agents had the authority, is there any reason for saying that this policy was delivered as and for a contract of insurance? On questions of delivery the intention of the parties must at all times prevail. The intent is derived from the act and words used, and all connected facts. There is no pretense made by the plaintiffs that they were ever given credit for one moment by any words that were used. Hicks v. Goode, 12 Leigh, 479; Bowen v. Bowen, 18 Conn. 539; Gray v. Blanchard, 8 Pick. 284; Spalding v. Hallenbeck, 30 Barb. 298; Shinn v. Roberts, 20 N. J. Law, 435; Thomas v. Record, 47 Me. 500; Fraser v. Davie, 11 S. C. 56, headnotes; Inman v. Western Fire Ins. Co., 12 Wend. 452; Marland v. Royal Ins. Co., 71 Pa. St. 393; Bradley v. Potomac Fire Ins. Co., 32 Md. 108; 5 Durn. & E. [5 Term R.] 695; Lynn v. Burgoyne, 13 B. Mon. 322; 1 Allen, 294; Catoir v. American Life Ins. & Trust Co., 33 N. J. Law, 487; 103 Mass. 244; Dozier v. Freeman, 47 Miss. 647;

Thompson v. Insurance Co., 104 U. S. 252; Klein v. Insurance Co., Id. 91.

Before McCRARY, Circuit Judge, and HALLET, District Judge.

HALLET, District Judge. May 5, 1882, plaintiffs were merchants at Leadville, and a policy of insurance on their stock in trade, which they held of defendant, expired by limitation. Streeter & Lee were defendant's agents at Leadville, and Mr. Lee, of that firm, applied to plaintiffs to renew the policy. This application was made at Denver, probably on the 5th of May, if we may determine the fact from the circumstance that the policy was sent to plaintiffs on the next day. Some discussion took place at that time between Mr. Lee and plaintiffs' representative, touching the rate of insurance, which defendant intended to increase from six per cent., the rate previously paid, to eight per cent., the rate to be charged. Plaintiffs' representative was unwilling to pay eight per cent., and Mr. Lee would accept no less. The discussion resulted in an agreement by plaintiffs' representative to take a policy for one month at the increased rate, which would afford time to investigate the subject, and ascertain whether insurance could be obtained for less premium. With that understanding the parties separated, and on May 6th, Streeter & Lee mailed from Leadville the policy on which this suit was founded, addressed to plaintiffs at Denver. They inclosed with the policy a bill for the premium, in which plaintiffs were set down as debtors of Streeter & Lee for the amount. Plaintiffs received the policy in due course of mail, but did not remit the premium to Streeter & Lee until after the goods were destroyed by fire, which occurred on the twentieth day of the same month of May. Streeter & Lee refused to accept the premium, and defendant claims in this action that by its terms the policy was not to take effect until the premium should be paid. And inasmuch as the premium had not been paid at the date of loss the defendant is not bound.

It is expressly declared in the policy that it "shall not take effect before the premium is paid," and the question is how far the plaintiffs are subject to this provision. The right of the defendant to limit the authority of its agents, and to demand the premium on a policy before it shall assume any risk, is not doubted. But it seems that defendant's agents are in the habit and practice of delivering policies without payment of premiums, and apparently with the knowledge and consent of defendant. That course is practiced in Denver and Leadville, and if we may rely on some general knowledge of the business, we may add that the practice is quite general among insurance companies in this country. Defendant's agent at Denver states that he holds himself personally responsible to the company for premiums due on policies so issued, and the circumstance that in this instance the bill for premium was made out in the name of Streeter & Lee is evidence to show that they had adopted the same view. The bill is for money due Streeter & Lee, general fire insurance agents, and the company is not mentioned, except in describing the policy. These agents are selected with special reference to the important duties they are requested to perform on behalf of the company; security for good conduct in office is usually required of them; and it is not reasonable to believe that they will constantly violate instructions from their principals. The position in which they are placed, subject to dismissal at any moment, forbids any such conclusion. Insurance companies can secure obedience from their agents whenever they demand it. The pretense that this policy was delivered without authority from the defendant is not to be considered. While professing to give insurance only on payment of the regular premium therefor, defendant does, in fact, give out many policies on a short credit. If the premium is paid before loss it is cheerfully accepted—as well the part which is applicable to the time since the date of the policy, in which, according to its own construction of that instrument, it was not liable for loss, and the remainder which was not applicable to the future life of the policy. But when loss occurs before the premium is paid, the clause in the policy relating to its payment is invoked to protect the company from liability. Courts are not bound to recognize double dealing. That some of them have felt inclined to do so may be a matter for regret, but in the court to which we look for correct principles, the rule for which we contend is fully established. Miller v. Life Ins. Co., 12 Wall. [79 U. S.] 285. In that case defendant sought to escape all liability upon a clause in the policy of insurance very similar to that on which defendant relies in this case, and the court was of the opinion that the contract was complete on delivery, without payment of the premium. So, also, it is held that an agreement to insure is binding before a policy has been made or delivered, and before the time for paying the premium arrives. Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co., 19 How. [60 U. S.] 318; Insurance Co. v. Colt, 20 Wall. [87 U. S.] 560. And generally it should be said and maintained as a sound and wholesome rule of good conduct and fair dealing that upon a promise of indemnity supported by any consideration whatever, the company shall be bound, whatever may be concealed in a labyrinth of conditions and exceptions to defeat its operation. It is easy enough to withhold the policy until payment of the premium, and that course of dealing will deceive no one. But the delivery of the policy imparts indemnity in a way which most men will accept without question. We think that

the contract between these parties was complete when the policy was delivered, and the defendant is liable on it.

Objection is also made to the proof of loss, that it does not meet the requirements of the policy. But it comes too late at the trial. The rule is that objections existing at the time of the service of the proof of loss, if not then made, will be regarded as waived. Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553. Deducting the premium and interest thereon from the date of the policy, the judgment will be for the amount of the policy with interest from the time when it became due under the terms of the policy.

In another action by these plaintiffs against the Insurance Company of North America the facts are similar, and the like judgment will be entered.

Case No. 5,053.

In re FRANKLIN.

[8 Ben. 233.] [1]

District Court, S. D. New York. Aug., 1875.

ACT OF BANKRUPTCY—EVIDENCE.

Creditors alleged, as an act of bankruptcy, that the alleged bankrupt, being possessed of a stock of goods worth about $7,500, sold it to his wife for about $5,000; that he afterwards claimed to have lost the $5,000; and that the sale was made with intent to delay, defraud and hinder his creditors. The only evidence offered, to prove the allegations, was proof of a statement by the bankrupt himself that he had so sold the goods, it being a part of the same statement that he had received the $5,000 and lost it. *Held* that, if the statement was good to prove the fact of the sale, it also proved the fact of the loss, and that, in the absence of any other evidence, no act of bankruptcy was established.

[This was a petition to have Philip Franklin declared a bankrupt.]

A. Loring Cushing, for creditors.
Charles Wehle, for debtor.

BLATCHFORD, District Judge. The only act of bankruptcy alleged is, that the debtor sold a stock of goods worth about $7,500, to his wife, for about $5,000; that he afterwards claimed to have lost the $5,000; that the sale was made by him with intent to delay, defraud and hinder his creditors; and that he claims he owes only about $4,500, but is unable to pay his creditors in full, and, because of the loss of the $5,000, will not be able to pay more than 25 cents on the dollar of his indebtedness. The petition alleges that the debtor was possessed of a stock of goods of the value of about $7,500, but no passing of any such goods from the possession of the debtor to that of his wife is shown, nor any possession of them by the wife, nor the fact of any sale. It is not shown that, if there was a sale, it was not for full value, or that there was any fraudulent intent in it. The only evidence of any sale is the statement of the debtor to that effect. But it was part of the same statement, that he had received the $5,000 and lost it. The statement, if good to prove one fact, is good to prove the other. It is not otherwise shown that the debtor had the $5,000. The petition, while alleging that the debtor sold the goods for $5,000, does not allege that he did not lose the $5,000. It only alleges that he claims to have lost it. It is not shown that he did not lose it. If there were any evidence that he had the $5,000, other than his own statement, put in evidence on the part of the creditors, that he had it and lost it, he might properly be called upon to show, by his own oath, the circumstances of the loss. As it is, the creditors have proved that the debtor sold goods for $5,000 and lost the money casually or by robbery. That is no act of bankruptcy. No intent to defraud by the sale is shown. The petition is dismissed, with costs.

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

FRANKLIN, The. See Case No. 11,646.

FRANKLIN (HAMILTON v.). See Case No. 5,981.

Case No. 5,054.

FRANKLIN v. HEISER et al.

[6 Blatchf. 426.] [1]

Circuit Court, S. D. New York. June 2, 1869.

CONTRACTS—CONSTRUCTION—RECOVERY OF STOLEN BONDS—REWARDS.

Where H. made a written agreement with F., that, in case F. could recover certain bonds fraudulently obtained from H., he would pay $3,000, and the police notified H. that the bonds had been recovered, and were subject to his order, and they did not pass through the hands of F.: *Held*, in a suit brought by F., against H., to recover the $3,000, that it was incumbent on F., in order to show that he recovered the bonds, within the meaning of the agreement, to show that the police recovered the bonds through information furnished by F., and that it was not enough for F. to show that he sent communications on the subject to the police before the bonds were recovered, it appearing that the police had received other communications on the subject, as well as one from H., before the bonds were recovered.

This was an action of assumpsit, tried before the court without a jury. The plaintiff [Benjamin Franklin] was a detective police officer in Philadelphia. The defendants [Henry A. Heiser, Jr., and others] composed the firm of Henry A. Heiser's Sons, of New York. The declaration averred, that $15,000 worth of United States five-twenty bonds had, prior to the 24th of November, 1868, been feloniously abstracted from the possession of the defendants; that, on that day, the defendants agreed with the plaintiff, in consideration that he should undertake to recover the bonds, that they would, in the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

event of the recovery of the same by the plaintiff, pay to him the sum of $3,000, and that, in the event of the recovery by him of a less amount than the whole of the bonds, they would pay him in the proportion that the amount recovered should bear to the whole sum of $15,000; and that he did recover all of the bonds for the defendants. The contract between the parties was in writing, as follows: "Philadelphia, Nov. 24, '68. We hereby agree, that, in case B. Franklin, Esq., or assigns, can recover fifteen thousand of 5/20 U. S. 6% bonds, fraudulently obtained from us by J. A. Marsh, we will pay three thousand dollars, and that, in case he returns any amount of the above described bonds, we will pay in the same proportion. Henry A. Heiser's Sons." The bonds were recovered, all of them, at Memphis, Tennessee, where Marsh was arrested. The defendants obtained all of them, but none of them passed into, or out of, the hands of the plaintiff. One of the defendants went to Memphis, from New York, after the arrest of Marsh, and obtained the bonds, after four days' efforts there, from parties who had them in possession, and by the payment of $4,000. The plaintiff was not at Memphis. He started to go there, and had reached Paris, Tennessee, when he learned that Marsh had been arrested at Memphis, and had been taken to New York by officers from Memphis, and that he, Franklin, had passed them on the way. He retraced his steps, and overtook them in Indiana, and accompanied Marsh to New York, reaching there two days after the defendant who obtained the bonds had reached Memphis. That defendant had left New York for Memphis three days before he reached Memphis, having learned, by a telegraphic despatch to the defendants, from the police of Memphis, that Marsh had been arrested, and that the bonds had been recovered, and were subject to the order of the defendants, less reward and expenses. This despatch reached the defendants, at New York, on the same day that the plaintiff learned, at Paris, of the arrest of Marsh. On the 23d of November, the day before the agreement was made with the plaintiff, the defendants authorized the New York police to offer a reward of $5,000 for the recovery of the bonds. A telegraphic despatch from the police of New York, to the police of Memphis, giving Marsh's name, and age, and a description of his person, and stating the amount and character of the bonds he had abstracted, and the reward, reached the police in Memphis on the 24th of November, before the agreement with the plaintiff was made. The defendants themselves, on the 25th of November, at half-past 11 o'clock a. m., sent from New York, to the police at Memphis, a telegraphic despatch, as follows: "Marsh left Philadelphia, by evening train, on 23d. He started for house of J. Ferguson, his uncle, in your city. Arrest him, and hold him till arrival of B. Franklin, Philadelphia detective, who leaves to-day." The plaintiff made no communication to the police of Memphis until 7 o'clock p. m., on the 25th of November, when he sent a telegraphic despatch to them from Philadelphia. He left Philadelphia, for Memphis, at 11 o'clock p. m., the same day. In addition to the written agreement, the defendants furnished the plaintiff with $500, to defray the expenses of himself and of Marsh's brother, who was to accompany him, to Memphis. This sum, or so much as should not be expended, the plaintiff was to retain in any event.

Charles M. Da Costa, for plaintiff.
John E. Burrill, for defendants.

BLATCHFORD, District Judge. On the facts in this case, I think it is incumbent on the plaintiff, in order to show that he recovered the bonds, within the meaning of the written agreement, to show that the police of Memphis, who notified the defendants that the bonds had been recovered and were at Memphis, subject to their order, less reward and expenses, recovered them through information furnished by the plaintiff. It was easy, if the fact was so, for him to have done this, by producing the testimony to that effect of the police officers of Memphis, who arrested Marsh and obtained the bonds. No explanation is furnished on that subject by the plaintiff, except merely to show that he sent the despatch of November 25th, from Philadelphia, and several despatches afterward from various places on his way to Memphis, which gave a description of Marsh, and particulars as to when he left Philadelphia and Cincinnati for Memphis, and as to the number of his ticket, and which were received by the police of Memphis before Marsh's arrest. The case would be different n the absence of the despatch from the police of New York, of November 24th, and of the one from the defendants of November 25th. The action, therefore, so far as it is founded on the special contract, fails.

There are in the declaration counts for work and labor, &c., being the common counts. But, on the evidence, the plaintiff was to be entitled to nothing but the $500 he received, unless he should recover the bonds or some of them. Therefore, he can recover nothing in this suit, on a quantum meruit, for the services he rendered.

I find for the defendants.

FRANKLIN, The (SWAIM v.). See Case No. 13,660.

FRANKLIN v. TERRY. See Case No. 9,361.

FRANKLIN, The (UNITED STATES v.). See Case No. 15,160.

Case No. 5,055.

FRANKLIN v. WARD et al.

[3 Mason, 136.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1822.

GARNISHMENT.

A judgment debtor is not liable to be attached as a garnishee under the foreign attachment act of Rhode Island.

[Cited in Smith v. Miln, Case No. 13,081; Thomas v. Woolridge, Id. 13,918; Henry v. Gold Park Min. Co., 15 Fed. 650.]

[Cited in Burnham v. Folsom, 5 N. H. 567; Williams v. Boardman, 91 Mass. 571.]

This suit was removed from the state court under the act of congress. The garnishees made a disclosure in substance as follows: At September term, 1821, of the supreme court of Rhode Island, Ward & Goodale recovered judgment against them for $1.378.87 damages, and $61.59 costs of suit. Previous to the issuing of the execution on that judgment, the original writ in the present case was served on them. Afterwards execution issued on the judgment returnable to the next term, and on that execution they paid $195.34 in part of the judgment; and the supreme court ordered execution to stay for the residue of the judgment to abide the decision of the circuit court in this suit. The sum of $195.34 was the amount of the counsellor's and attorney's fees in the original action of Ward & Goodale against them. That previous to the judgment the garnishees had entered into arbitration bonds with Ward & Goodale to refer the cause, and to pay in a certain manner stated in the bonds the sum for which judgment should be entered upon the award of the referees. The question for the court was whether the garnishees were entitled to be discharged upon a disclosure which depended on this point; whether a judgment debt was attachable under the foreign attachment act of Rhode Island.

Thomas Burgess, for garnishees.

Mr. Tillinghast, for plaintiff.

The former cited Laws R. I. Dig. 1798, p. 208; 2 Mass. 91; 3 Mass. 121; 4 Mass. 238; 7 Mass. 152; 4 Durn. & E. [4 Term R.] 313, note. The latter cited Pollard v. Dwight, 4 Cranch [8 U. S.] 421.

STORY, Circuit Justice. By the foreign attachment act of Rhode Island (Dig. 1798, p. 208, § 4), if the garnishees are discharged upon their disclosure, the suit is to be dismissed against the principal, as well as against the garnishees. The question is whether a judgment debt, on which execution may presently issue, is liable to be attached on a foreign attachment. My opinion is, that it is not. The cases cited from the Massachusetts Reports are directly in point upon the construction of an act of that state, substantially like that of Rhode Island. My judgment proceeds not upon these cases alone; but upon the principles which they contain, which seem to me founded in law and general justice. Suit dismissed.

[1] [Reported by William P. Mason, Esq.]

FRANKLIN (WOOD v.). See Case No. 17,946.

FRANKLIN AVENUE GERMAN SAV. INST. (LEE v.). See Case No. 8,188.

Case No. 5,056.

FRANKLIN BANK v. HIPKINS et al.

[2 Cranch, C. C. 315.] [1]

Circuit Court, District of Columbia. May Term, 1822.

WITNESS—JOINT DEFENDANT IN DEFAULT.

In a joint action of debt upon a promissory note, if one of the defendants suffer judgment to go against him by default and a writ of inquiry be executed, he is not a competent witness, upon the issue joined by the other defendant.

Debt against Lewis Hipkins and Bartholomy Rochford upon their joint promissory note. Judgment was rendered against Hipkins by default, and a writ of inquiry executed.

On the trial of the issue against Rochford, his counsel, Mr. Taylor, offered to examine Hipkins as a witness for Rochford; and cited Chapman v. Graves, 2 Camp. 333, note; Ward v. Haydon, 2 Esp. 552.

THE COURT (nem. con.) rejected the witness; because the action being joint, the judgment must be joint; and if, upon the trial of the issue against Rochford the verdict should be in his favor, there can be no judgment against Hipkins.

FRANKLIN CANAL CO. (CLEVELAND, P. & A. R. CO. v.). See Case No. 2,890.

FRANKLIN, The ELLA. See Case No. 2,160.

FRANKLIN FIRE INS. CO. (BETTS v.). See Case No. 1,373.

FRANKLIN HEMP & BAGGING CO. (COCKER v.). See Cases Nos. 2,930 and 2,931.

FRANKLIN HEMP & FLAX MANUF'G CO. (COCKER v.). See Case No. 2,932.

FRANKLIN INS. CO. (HOLTZMAN v.). See Case No. 6,649.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 5,057.

FRANKLIN INS. CO. v. LORD.

[4 Mason, 248.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

RESPONDENTIA—CONDITION PRECEDENT—CONSTRUCTION.

1. In a respondentia bond for 10,000 dollars, on goods on board of the brig S. from Boston to St. Petersburg and back, there was a clause, that the brig was to have on board, on both passages, the amount lent in goods. There was also a memorandum, executed at the same time, but not referred to in the bond, that the bills of lading should be indorsed to the lenders as collateral security. The brig was lost upon the return voyage, having goods on board of the value of 9,000 dollars only. The lenders sued the bond, and claimed payment of the 10,000 dollars, because the full amount of goods was not on board, and because the bills of lading were not indorsed to the lenders. It was *held*, that these acts were not conditions precedent, the omission of which was sufficient to justify a recovery in toto; but the lenders were entitled to recover the difference in amount, between the sum lent and the sum on board at the time of the loss.

2. How instruments of respondentia of this sort are to be construed.

This was an action on a respondentia bond and agreement, to secure to the libellants the sum of 10,000 dollars, loaned by them upon the outward and homeward cargoes of the brig Somers, bound from Boston to Copenhagen and St. Petersburg, and back to a port of discharge in the United States. The brig and cargo were totally lost upon her homeward voyage; and the libellants claimed a return of the whole amount loaned, upon the ground, that the stipulations, contained in the bond and agreement, were not complied with on the part of the respondent [Tobias Lord]. The material facts, as proved on the trial, and the points taken by the counsel in argument, fully appear in the opinion of the court.

J. T. Austin, for libellants.

A. Peabody, for respondent.

STORY, Circuit Justice. This is a suit in admiralty in personam, upon a respondentia bond and agreement. I do not recite the form of the bond and agreement, but shall advert to such parts only as have been adverted to in the argument. The bond is dated in June, 1825, in the penalty of 20,000 dollars, to secure the re-payment of 10,000 dollars lent "upon the specie, goods, wares, and merchandise, laden or to be laden on board the brig Somers, of Boston, &c. bound from Boston to Copenhagen and St. Petersburg, at and from thence back to a port of discharge in the United States, with the usual liberty to touch and trade for refreshment on the outward and homeward passages." The condition of the bond is, that if the vessel shall do and shall proceed on the voyage, &c. and end it at or before the expiration of six calendar months, the casualties of the seas excepted, "having on board the stipulated amount in value, in specie or merchandise, as the case may be, on the respective passages outward and homeward," and if the said Lord, his heirs, &c. shall and do, within sixty days next after the end of the voyage, pay the 10,000 dollars, with the stipulated interest; or if, during the voyage, a loss of the ship by fire, enemies, men of war, or other casualties, shall unavoidably happen, and the said Lord, his heirs, &c. shall account for and pay a just and proportionable salvage on all said specie, goods, wares, and merchandises, of the said Lord, on board of the said vessel, and on all other goods, specie, wares, and merchandise, which he, his heirs, &c. shall therefrom acquire during said voyage, and shall ship on board the said vessel, and shall not be unavoidably lost as aforesaid, then the obligation to be void. There is a separate memorandum, under the seals of the parties of the same date, indorsed on the back of this bond, upon the special terms of which I do not at present comment, it being sufficient to state, that there is an express stipulation, that the bills of lading of the goods on the voyage, out and home, shall be indorsed to the Franklin Insurance Company, as collateral security for the loan. The brig went upon the voyage, and upon her return voyage was, together with her cargo on board, totally lost by the perils of the seas. It is admitted, that upon the return voyage, goods short of the value of 9,000 dollars were put on board, being the proceeds, though not the whole proceeds, of the outward cargo. The libel demands the payment of the whole 10,000 dollars, upon two grounds; first, that on the outward as well as homeward voyage, there was not on board the stipulated sum of 10,000 dollars on account of the borrower; and, secondly, because there was a breach of the agreement in not indorsing the bill of lading, on either voyage, to the libellants, nor a consignment to them on the homeward voyage, according to the agreement. These are contended to be breaches of the contract, which subject the borrower to the full penalty of the bond; or more properly to that, as security for the re-payment of the 10,000 dollars.

If this were a case pending on the common law side of the court, and proper pleadings were interposed, it would undoubtedly be necessary for the defendant (Lord) to show a strict compliance with the terms of his bond in order to save the forfeiture. Whether in such a court, in a hearing in equity, after the forfeiture was found, the party might not obtain just relief according to the real intention of the parties to the contract, I do not pretend to decide. In a court of equity he would certainly be entitled to such relief, and nothing would be decreed to the libellants but what, ex aequo et bono, they are fairly entitled to. The construction of the meaning and terms of

[1] [Reported by William P. Mason, Esq.]

the contract would be, or at least ought to be, the same in both courts. A court of admiralty, within the sphere of its jurisdiction, acts upon the principles of a court of equity, and administers its remedies accordingly. So far as the claim proceeds upon the non-compliance with the stipulations in the memorandum, it is certainly not a case even at common law for the enforcement of a strict right to the 10,000 dollars. That memorandum constitutes no part of the condition of the bond, not being referred to, or incorporated into it, either in terms or intention. It is an auxiliary, but collateral and independent, agreement. It sounds in covenant, and in covenant only, and the parties can recover, for breaches of it on either side, only to the extent of the damage and injury done to them. A court of common law would give it no farther operation. It is certainly not entitled to a more favorable view in a court of equity. It is very clear in this case, from the answers and evidence, that there was no intentional and fraudulent omission to deliver the bills of lading, or to withhold the consignment. A bill of lading was in fact delivered of the outward cargo, but it was, obviously by mistake, not properly indorsed. There is no question, that it was the intention of all parties, that the libellants should have a complete lien on the cargo during the whole voyage, as security for the loan. In this respect it differs from the case of Busk v. Fearon, 4 East, 319, and the right to enforce this lien would, in the most ample manner, be recognized in a court of admiralty. If there had been a fraud practiced upon the libellants, I, as one, would have gone far to give the most complete relief. And if now it could be shown, that the omission had damnified the libellants, to the extent of that injury, they ought to receive compensation. But no damage has been shown; and indeed, as to the outward cargo, as it was consigned to the supercargo for sale and returns, an actual lien would have been of no serious avail.

Then, as to the other stipulation, that on both voyages there shall be 10,000 dollars on board. It is denied that there was not an entire compliance with the stipulation on the outward voyage. The fact is, that Mr. Lord put on board a cargo to this amount, purchased and belonging to himself. Afterwards, and before the vessel sailed, his son, a young man, without property, and dependent upon him, expressed a desire to have one fourth part interest in the cargo. The father assented, that he might, if he wished. Nothing further was done by the father. But in consequence of this conversation, a clerk in the store, without the knowledge of the father, made out the heading of the invoice, three quarters for the father and one quarter for the son. The bills of lading had been already made out in the name of the father alone, and signed by the master, and were never altered. No charge was made in the books of the father against the son; no security was given by him for the amount, and nothing afterwards occurred between the parties to confirm the bargain. Under these circumstances, which are testified to in a manner which commands belief, I cannot say, that any interest in the cargo passed to the son. He made no payment, gave no security, had no credit on the books, and received no delivery; and the bargain, if it were one, was merely in fieri, and unexecuted; for until payment, or security, or credit given, the father must be deemed the legal owner against all persons. He was the original owner, and purchaser, and shipper, and his interest could not pass by so loose a proceeding as that insisted on. In short, the natural interpretation of it is, that the father intended not so much to part with any property in the shipment, as to allow his son a quarter part of the profits, or charge him with a like proportion of the loss of the voyage. There were some subsequent proceedings after the loss of the vessel, from which it is attempted to be shown, that there was a fraudulent endeavour to suppress the real facts on this point. I do not think it is established in evidence; and if it were, it would not overcome the strength of the other facts, as they have been proved by testimony which I must deem unexceptionable.

We may then pass to the consideration of the remaining part of the case. The defendant has paid into court a sum equal to what he supposes to be the deficiency of value on the return voyage, and the interest; and the only question is, whether the stipulation is absolute, so as to compel him to pay the residue of the 10,000 dollars. The clause in question is found in the condition of the bond. It is argued, that it constitutes an essential part of the condition, on compliance only with which the penalty is saved. If it does not require this interpretation, it is argued, in the next place, that it operates as a warranty, and in this view is equally conclusive upon the party. I am of opinion, that if it does not operate as a condition, it ought not to be held as a warranty from the nature of the stipulation itself, as well as from the effect of the explanatory memorandum. The latter sounds only as a mutual covenant on the same subject matter; and there is no reason to give a broader construction here for any purposes of justice. Then let us see, how it stands on the letter of the bond, as a condition. It is found in one only of the alternative clauses in the condition of the bond; for there are two, one of which looks to the entire completion of the voyage by the parties, the other to the failure of the voyage by some of the accidents provided for. The performance of either alternative saves the bond. The clause, "having on board the stipulated amount in value, &c. on the respective

passages," &c. is found only in the former, and not in the latter. If we take it then in the connexion in which it stands, as a qualification of the first alternative, as the casus foederis has not arisen by the performance of the voyage, it has no bearing upon the defendant. He is saved by the other alternative, a loss having occurred which was absolutely total. To reach the argument of the libellant, it is necessary for the court to insert the same clause in the latter alternative, or to bring it down to the latter as a distinct clause, applicable to both. Whatever reason there might be to do so, for the purpose of adjusting equities between the parties, there is none why a court should studiously aid one party in enforcing a penalty against another, when it did not stand necessarily in the letter of the bond. At common law I am of opinion, that the rigid construction, now contended for, could not and ought not to prevail.

But I am not willing to rest this case upon this mode of reasoning. The contracts of bottomry and respondentia are mercantile contracts of long use and frequent application, and entitled to be expounded, at least in a court of admiralty, in a liberal manner, so as to meet the intentions of the parties, and to subserve the cause of general justice. We may call in aid the laws and usages of other nations to assist in the interpretation, as containing the general sense of the commercial world on the subject. My opinion is, that upon general principles, a contract of respondentia, under circumstances like the present, is to be considered as a contract to risk so much of the amount lent, as shall be covered by the property on board. If goods to the full amount of the loan are on board, the whole loan is at risk; if a less amount, then the risk is pro tanto. I cannot understand it as a rational interpretation of the object of the parties, that unless all is risked, none shall be risked. They may, indeed, so stipulate; but it is not to be inferred from the general terms of a contract, which speaks only of the value intended to be put on board, and kept on board during the voyage. Great inconveniences might otherwise arise. A party hires 10,000 dollars to proceed to a foreign port for sales and returns, stipulating that there shall be this amount on board. Now it may turn out, that the goods come to a falling market, and the proceeds are less than the shipment. Is he, in such a case, to pay the whole respondentia premium for the homeward as well as the outward voyage, although no risk is run upon the latter? Suppose half of it is lost by a peril of the seas on the outward passage, is the condition then to be understood to be broken on his part, and an obligation created to pay the whole amount borrowed, with the interest, because, by the very perils taken by the lender, the property is less than the amount stipulated, for the rest of the voyage out, as well as home? It appears to me unreasonable to put such a construction upon such contracts, drawn up by mercantile men, and of course dealing in those loose and inaccurate expressions, which the haste and necessities of business excuse, if they do not justify. It appears to me far more just to consider the stipulation, as to value, to be a covenant, that the amount shall be on board during the voyage; and that if it is violated to the prejudice of the lender, then he shall receive compensation. But that as to the amount on board, the risk is to be run, and the maritime interest so far shall be earned. A different course would be as inconsistent with the promotion of good faith, as of public convenience. Suppose the risk is run, and the voyage terminated successfully; is it to be endured, that at the end, the borrower may come forward, and demand a total discharge from all the maritime interest, because at some time during the voyage, there was a small deficiency of the value? It would be immaterial, whether it was a deficiency of ten dollars or five thousand. In either case, if the understanding of the contract is, that the value on board is an absolute condition or warranty, the principle would operate a discharge of the borrower. Such cannot, it appears to me, be the fair interpretation of such a contract; and least of all of one which stipulates, in the event of loss, for a proportionable salvage. The doctrine of the French law conforms to that which I have stated, and I consider it, in the absence of all opposing authority, evidence of the rule generally held by the mercantile world. In a case of this nature, the doctrines supported by such men as Valin, and Pothier, and Emerigon, are entitled to great weight. Emerigon lays down the principle in the following terms: "Where the borrower is unable or unwilling to ship goods to the value of the sum borrowed, the contract, in case of loss, shall be diminished in proportion to the goods shipped, and shall only be valid as to the surplus, for which the borrower shall pay interest according to the custom of the place where it was executed, together with the principal. If the ship arrive safe, there shall be no more due than common interest, and not maritime interest on the excess above the value of the goods shipped." See Hall's Emerig. Mar. Loans, p. 149; 2 Valin, lib. 3, tit. 5, art. 14; 15 Poth. h. t., note 39; Commercial Code of France, bk. 2, tit. 9, art. 329; 2 Emerig. Cont. Grosse, p. 495, c. 6, § 1. I adopt this doctrine, and follow it on the present occasion. Upon these principles, the cause will be referred to a commissioner to ascertain whether anything is due to the libellants more than what has been paid into court. If anything is due, the libellants are entitled to a decree for the amount, with costs; if not, the libel is to be dismissed, without costs, for the defendant. Decree accordingly.

Case No. 5,058.

ESTATE OF FRANKLIN SAV. FUND SOC.

[31 Leg. Int. 173;[1] 10 Phila. 276.]

District Court, E. D. Pennsylvania. May 27, 1874.

BANKRUPTCY—INSTRUCTION TO ASSIGNEE—DISPUTABLE RIGHTS.

Where no question of disputable right exists, assignees in bankruptcy cannot obtain the instruction of the court, whether to do a proposed act, which, if proper on their part, would be within their own discretion and power on the administration of their trust.

In equity.

BY THE COURT. The amount due by the bankrupt corporation to the depositors, is believed to be $859,000, with accruing interest. The available assets in the actual possession and control of the assignees are estimated by them at $520,000, or about 60 per cent., which is, perhaps, however, a high valuation. I understood one of the assignees to say, in court, that he considered it too high. Assuming its correctness, the probable deficit would be $339,000, or nearly 40 per cent. without any computation of interest. The deficit may be much greater. It is important, therefore, to consider the recourse of the assignees in bankruptcy to other property, which is in the nominal ownership or control of the defaulting treasurer of the bankrupt company.

This property, as he estimates it, is of the value of $284,000. The amount of his debts to others than the company has been very differently stated by him at different times. He now states the amount of those other debts to be, $42,437, of which he represents $25,900 to be unsecured. But $4,200 of the unsecured, and $12,000 of the secured amounts, together $16,200, are alleged to be due to one of the persons whose neglect of duty, when directors of the company, is considered by the assignees to have enabled the treasurer to abstract the funds. The past relations of other alleged creditors may also be such as to render them responsible, in whole or in part, for his defaults. All the claims included in the $42,437 will probably, more or less, for various reasons, require scrutiny. From the papers exhibited, it may be inferred that his estimate of the value of the property as $284,000 is partly speculative and prospective, requiring for its realization two years or more of time, with favorable contingencies. Independently of any rebate for loss of interest from delay, the estimate, being his own, may be very high. But the dependency must, at worst, be very valuable.

The assignees appear to assume that this treasurer's present liability for his embezzlements and other breaches of trust, is only for the amount of the anticipated deficiency of the assets now in possession. Arithmetically, as between the assignees and the depositors, this may not be an incorrect way of considering the matter, because the greatest value of all the property in this person's nominal ownership, as yet discoverable, appears to fall short of the smallest estimate of such deficiency. But, as between the assignees and himself, his legal and equitable relation is altogether different. It is that of primary responsibility for the whole original amount of the funds abstracted, and for the gains and profits, or for interest if the gains and profits cannot be discovered. Under the auxiliary jurisdiction of the circuit court, a suit in equity in that court has already been instituted by creditors against him and others, in which the assignees may become complainants if they have not already done so. In the present stage of that suit, the bill is amendable, as of course, in the clerk's office. The amount of his primary liability, if the assignees limit their demand to the monies fraudulently abstracted with legal interest, is already ascertained by his own written admissions in his examinations in bankruptcy. The lowest primary amount is the sum of the unpaid deposits, less only the few dollars which were on hand at the commencement of the proceedings in bankruptcy. He is not entitled to any credit for pretended investments when made, because none were made honestly in the name of the company. The decree in equity will be primarily for the full pecuniary amount. He will be entitled from time to time to reasonable credits for nett cash when realized by the assignees. But this will not prevent them from issuing execution in the mean time, on the decree, for the unpaid part of the sum primarily due. Such a primary decree will not, nor will, under proper equitable direction, such an execution, preclude the complainants from obtaining, under proper amendments and adaptations of their bill, the further specific relief to which they may be equitably entitled. The property in question may be classed under three heads: (1) Property traceable as investments, products or substitutes of the funds abstracted by him: (2) Property acquired with funds of uncertain source: (3) Property which was acquired by him before any of his embezzlements, or is otherwise provable to have been acquired with funds not of the bankrupt company. Under the first head, all the investments, products or substitutes which are traceable, however often or variously changed in form, or name, can be followed and reclaimed. Under the second head, if, through confusion or obscurity caused or promoted by acts or omissions of the wrongdoer, the tracing or ascertainment becomes difficult, all doubts ought to be resolved against him, as the party putting out the light, or otherwise occasioning the difficulty. Every legal and equitable presumption is against such a party. On this principle the injunctions in the pending suit

[1] [Reprinted from 31 Leg. Int. 173, by permission.]

in equity were granted in a general form. Under the third head, the ultimate remedy is by execution only. But the property cannot be put out of reach of an execution. With reference to his debts to other creditors, the case may be considered under the same three heads, but not in the same order of succession. Under the third head, and perhaps also under the second, the recourse of the assignees against such portions of the property as cannot be considered investments or products of, or substitutes for, funds of the company, will be to give to the pending suit the form, in this part of it, of a creditors' bill. As to such property, they will sue therefore, as well on their own behalf, as on that of such of his other creditors as may become parties to the bill, and may establish their respective demands. Under the first head, as to property acquired originally or derivatively with funds of the company, the exclusive right of the assignees cannot be impaired by the existence of the other debts. But, in order to simplify the litigation, the assignees may, as complainants, be willing, perhaps ultimately, to waive, even in this respect, their strict rights. In favor of the fraudulent party himself, these rights of course cannot be waived. Nor can the concession be made by the assignees in favor of his other creditors, unless on reasonable and equitable conditions. But, under such conditions, property which cannot, as between the assignees and this defaulter, be considered his estate, may perhaps be so treated in favor of other creditors, by way of concession, to promote equality and promptness of distribution. In the meantime, the bankrupt law [of 1867 (14 Stat. 517)], would, if there were no injunction, prevent any preferential disposition of his property for the benefit of such other creditors. If he should attempt it, proceedings in bankruptcy against him could be instituted so as to frustrate the attempt. The papers exhibited by the assignees, indicate that he has already threatened, or proposed, such a preferential disposition. This will, under a properly framed amendment of the bill, furnish an additional reason for continuing the injunction till the final hearing of the cause.

The final hearing cannot be long deferred, because the proofs will probably consist almost wholly of admissions by defendants in their own examinations heretofore taken. The assignees now report that this treasurer of the bankrupts has fully recognized his liability for any deficiency which may be ascertained to exist, and has proposed "to mortgage or assign to them his individual property to meet the same." By "his individual property" is meant of course the property and effects of which he is the nominal owner. In the report of the assignees, they proceed to describe the offer, which appears, by their description of it, and by the suggested form of a deed annexed, to be very different in substance from what the introductory words above quoted might seem to import. It is in essential respects objectionable. He proposes a trust only "to secure the payment of any deficiency that shall be ascertained in the assets of the corporation bankrupts to pay all obligations due by the same." This language of the proposed deed is, to say the least, extremely equivocal on the question whether a primary liability on his part, or only an eventual accountability would be secured. The question whether the trust would be available at all, until the assignees shall have themselves fully accounted for assets already in their possession, would thus be open to litigious contention.

Again, there is to be a compulsory postponement for two years of the definitive execution of the proposed trust. This would be repugnant to the nature of the trust vested in the assignees. They may, indeed, in their discretion, postpone its execution as to subjects requiring delay. But they should not surrender their discretionary power. Their general duty is to make the assets available with the least possible delay. Moreover, the deed provides that the trust is to be saddled, for the two years, with an irrevocable agency of the defaulting treasurer himself. This may, perhaps, not have been intended. The intention may have been only to bind him to render service in such an agency, if it should be required of him by the assignees. If so, the language used would need careful reformation. But I do not think that they ought even to be authorized to delegate any authority whatever to him.

A peculiarly objectionable provision, also proposed, is that which would, on the execution of the deed, release him absolutely from his indebtment and liabilities. If this man, however guilty, should make all the atonement in his power, future forbearance on the part of the assignees might not be improper. If he should make an unconditional assignment or mortgage, of all his nominal and actual estate, for the equal benefit of all his creditors, forbearance might be accorded, unless other frauds be hereafter discovered. But the forbearance ought to be discretionary on the part of the creditors represented by the assignees. I think, however, that such property, nominally his own, as he may effectually transfer, might be credited absolutely to him at once, on account of his debt, at a certain valuation; and this valuation might reasonably be a liberal one. But a release of the excess of the debt, without receiving any equivalent, ought, when we regard the manner in which the debt was incurred, to be considered out of the question. The moral objections are insuperable. But, independently of them, such a release would be impolitic. It would probably embarrass the recourse of the assignees against the company's former directors for neglect of their duty. Such directors might object, that the release was of the party who, having used the funds

which were abstracted, was primarily liable. His son, and his nephew, in whom respectively the legal estate in parts of the property is vested, would, on their executing the proposed deed, be also released from all demands of the assignees. For this the reasons may be sufficient.

Another proposed provision to which I have already, in part, alluded, is that, of the property valued by him, as above, at $284,000, certain portions which he values at $48,000, shall be set apart for the preferential security of the other creditors whose debts he now computes at $42,437. Under this head a separate trust is proposed. Objections to the complexity of this part of the plan are answered in the report. They will not be considered here. The substantial objection is different. It is the preferential character of the proposed security for the exclusive benefit of those other creditors. I have already suggested that, so far as their demands can be established as valid, they ought perhaps to stand on a footing of equality. But why they should be preferred, to the exclusion of the assignees, no reason has been suggested.

Some other objections it is not necessary to specify. They would be consequent, in principle, upon those which have been stated.

The assignees report the proposed arrangement, expressing "their willingness to close with the proposition;" and ask the court's "instruction whether or not they shall accept the same." Here they mistake, I think, the judicial function of which they invoke the exercise. This court of bankruptcy is legislatively made a court of summary equitable jurisdiction over them, and over their trust. Therefore, independently of any special provisions of the bankrupt act, the court could, by way of direction to them, as trustees, decide any question of legal or equitable right, which could be contentiously discussed for opposing interests. But here no such question properly arises. The assignees have power, on their own responsibility, to perform the act in question, unless it would involve a breach of trust. A trustee cannot obtain the direction of a court of equity as to the mere administration of his trust, in matters within his own discretion or power. But assignees in bankruptcy are not simple trustees. They are also in a certain sense, officers of the court of bankruptcy. Therefore, to prevent misconception, I state the objections which suggest themselves. So much for the general question.

The question may next be considered under the bankrupt law. The 17th section enacts that the assignee may, under the direction of the court, submit to arbitration any controversy arising in the settlement of demands against the estate, or of debts due to it; and may, under such direction, compound and settle any such controversy by agreement with the other party as he thinks proper, and most for the interest of the creditors. There is no other provision of the act which can be cited on the question, and this provision does not apply to it. There is no suit or demand against the estate, and no controversy whatever as to a debt due to it. On the contrary, the report of the assignees expressly affirms that the treasurer unqualifiedly admits his liability for the debt. The only question is an undefinable one, which they seem to apprehend may arise in making available their judicial recourse for an indisputable demand. If the enactment of the seventeenth section applied at all, it would be necessary for the assignees to take unequivocally upon themselves the direct responsibility of recommending the arrangement, as in their opinion, a proper one. This they have not done; and they seem to have advisedly omitted doing it. If they had certified their opinion that it would be proper, and I had been able to take cognizance of the question, I could not have concurred in their opinion.

I do not think, on the mere ground of expediency, that the additional protracted and complex trusts proposed would be likely to relieve the estate from litigations, or to expedite its distribution. I see no reason that a decree in the present suit in equity may not be speedily obtainable. There will, in the mean time, be every facility for occasional interlocutory directions. Nevertheless, it would, of course, be highly expedient that the purposes of that suit should be attained through a proper submission of the guilty defendant. I have already intimated to what extent the assignees, upon his making such imperfect atonement as may still be in his power, might be justifiable in according future forbearance to him. But they should not allow him to impose arbitrary conditions upon those who are sufferers from his delinquencies. Nor should he exact compensation for rendering to the sufferers any service within his power.

It is to be recollected that the questions which have been considered, are entirely unconnected with the collection, disposal, or distribution of the assets now in possession, which are of the estimated value of $520,000. It was admitted, on the argument, that such collection, disposal or distribution of them could not be facilitated or expedited by the proposed arrangement, if it had been carried into effect. I have only to add, that if the estimate of $520,000 is too high, or too low, there should be a reappraisement, in order that the unfortunate creditors may not have incorrect expectations. The assets consist mainly of securities whose value does not, like that of merchandize or stocks, depend upon fluctuations of a sensitive market; and there will, under efficient administration, be no danger of sacrifice.

[NOTE. See In re Franklin Sav. Fund Soc., Case No. 5,059.]

Case No. 5,059.

In re FRANKLIN SAV. FUND SOC.

[1 Wkly. Notes Cas. 42.]

District Court, E. D. Pennsylvania. Oct. 21, 1874.

PRACTICE—ORDER FOR SALE—SPECIAL ORDER TO PERFECT UNNECESSARY.

N. L. Sharpless, for assignee, moved the court for a special order for leave to execute and deliver assignments of certain mortgages sold by the assignees under a former order giving them power to sell.

THE COURT granted the motion, though considering the order unnecessary under the circumstances.

[NOTE. See Estate of Franklin Sav. Fund Soc., Case No. 5,058.]

Case No. 5,060.

The FRANK MOFFAT.

[2 Flip. 291;[1] 11 Chi. Leg. News, 114.]

District Court, E. D. Michigan. Nov. Term, 1878.

TOWING—COLLISION—EVIDENCE—LACHES—RELATION BETWEEN TUG AND TOW—CONFLICT OF EVIDENCE.

1. Where a collision occurred between a propeller that was aground on the St. Clair Flats and a tow that was bound up, the propeller was condemned for not exhibiting a proper light and the tug because it failed to stop. The schooner that was towed was adjudged faultless.

2. Looking to the business of towing as ordinarily conducted upon the lakes, the relation between the tug and the vessel towed is that of master and servant. The tug furnishes her own crew, regulates the length of the line and the movements of the vessels, the order in which the tow shall be made up, and determines the number of the tow, irrespective of the wishes of the master of the vessel towed. Each vessel is liable to third parties for her own negligence; no further, but in certain events they may be jointly liable.

3. Where there has been no change of ownership the libellant is not debarred of his action if he commences his suit within the time prescribed by the statute of limitations; and there is no laches because two years' time has elapsed since the collision.

4. The general rule, that where there is a conflict of evidence with regard to what has taken place upon a vessel, the testimony of her own master and crew shall be believed in preference to that of an equal number of witnesses observing her movements from another vessel, does not apply to the exhibition of a light.

The propeller Colorado, while on a trip from Buffalo to Chicago ran aground on the north bank of St. Clair river, at about 8 p. m., on the 15th of November, 1873. This was in a bend or bayou of the channel, at some distance from the range of lights on the flats to the place where the ship canal enters. Lying there with her stern out slightly in the channel, and though having a space of between 300 to 600 feet on her starboard side, she was run into by the tug Frank Moffat while ascending the river, having in tow the schooner Sunrise, at about 4 a. m. of the morning of November 16. When the tug struck the Colorado she drew along upon that vessel the Sunrise, which also struck the propeller on her port quarter, inflicting serious damages. The collision was brought about by the negligence of the tug, for if she had ported at a proper distance she would have safely passed. The tug endeavored to fasten the blame on the propeller; insisting that she displayed no light.

F. H. Canfield, for libellant.
Geo. E. Halliday, for respondent.

BROWN, District Judge. I am satisfied there is no fault to be imputed to the schooner. The line connecting her with the tug was only 120 to 125 feet in length, and as the tug did not check until very close to the propeller, the utmost vigilance and activity on the part of the schooner in porting, would not have enabled her to clear the propeller. There is no evidence that any warning was given by the tug, although the mate swears that he thinks he told the watchman to go and sing out to them. With a longer line and with an earlier observation of the propeller on the part of the tug, the schooner might have ported in time to avoid her, but, under the circumstances of the case, it was obviously impossible.

It is also claimed that the tug was acting simply as the agent of the schooner, and that the schooner is solely responsible for the negligence of the tug. There are a number of English cases cited, as lending countenance to this doctrine, but upon a careful examination, I find they do not sustain it to the extent claimed. In The Duke of Sussex, 1 W. Rob. Adm. 270, the action was brought against a tug for damage occasioned by the vessel in tow colliding with another vessel. It was held that the vessel in tow, having a licensed pilot on board, and no error or negligence being established on the part of the crew of the tug, she could not be held liable. Following the general rule in England, that a vessel is not liable for a collision occasioned by the act of a licensed pilot, it was held that as the steam tug only executed the orders of a pilot on board the vessel, and was guilty herself of no negligence, she could not be held responsible. To the same effect is The Duke of Manchester, 2 W. Rob. Adm. 470. In The Gypsey King, Id. 542, Dr. Lushington states the English law as follows: "Now I have, upon former occasions, already expressed my opinion, that a vessel in charge of a licensed pilot, whilst in tow of a steam tug, is, under ordinary circumstances, to be considered as navigated by the pilot in charge; that if the course pursued by the steam tug is in conformity with his directions, and a collision takes place, the pilot

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

is responsible, and not the owner of the vessel or of the steam tug. If, on the contrary, the steamer disregard the directions of the pilot, and the collision was occasioned by her misconduct, the owners of the ship would, in that case, be responsible in this court, as for the act of their servant; and they must seek their redress against the owner of the steam tug in some other action."

There is no case, however, even in England, holding directly that a steam tug, controlled by her own officers and men, would not be liable if she herself were guilty of negligence in bringing about the collision. In the case of Smith v. The Creole [Case No. 13,033], the principal American case supposed to support the English doctrine, Mr. Justice Grier observed, "When canalboats or other like vessels are towed by steamboats, it is usually under a contract which puts the towed vessel wholly under the direction and control of the officers of the steamboat. In such cases the steamboat would be liable for any collision occasioned by the negligence or want of skill of her officers, but when the steam power has been hired to tow larger vessels in or out of port, the contract is different, and creates a different state of responsibility. The towboat in such case, is the servant of the ship, and in the exercise of its physical power, is bound to obey the orders of the master or pilot who has command or control of the ship. If the towboat obeys the directions of the pilot or the master of the vessel, he is responsible for the consequences. If the ship is brought into collision with another vessel, by the unskillfulness or disobedience of orders of the officers or hands on the towboat, its owners are liable to the owners of the vessel or person who employed them, but not to third parties."

I think this and later cases, holding the principal responsible instead of the servant, proceed upon the hypothesis that the negligent act on the part of the tug was committed in obedience to orders from the officers of the ship, and are not founded upon the general relation between them of master and servant.

The rule which governs this case is laid down in Sturgis v. Boyer, 24 How. [65 U. S.] 123, and repeated in The Maria Martin, 12 Wall. [79 U. S.] 44, in the following language: "Where the officers and crew of the tow, as well as the officers and crew of the tug participate in the navigation of the vessel, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly, may be liable for the consequences, according to the circumstances, as the one or the other or both jointly were either deficient in skill, or culpably inattentive or negligent in the performance of their duties. See, also, The John Frazer, 21 How. [62 U. S.] 184; Sproul v. Hemmingway, 14 Pick. 1; The Belknap [Case No. 1,244].

As the business of towing is conducted upon the lakes, I regard the relation between the tow and the tug as that of master and servant. The tug engages usually for a lump sum, to tow the vessel from one point to another. She furnishes her own crew, pursues her own course, regulates the length of the line, the movements of the vessels, the order in which the tow shall be made up, and determines the number of the tow, usually irrespective of the wishes of the master of the vessel. It is true, the vessel in tow has certain duties also to perform, she must keep a careful lookout, follow in the wake of the tug, have her lights properly burning at night, and do all she can to avoid a collision in case of danger. In the performance of these services, the tug is plainly a "contractor" within the definition of that word. Shear. & R. Neg. § 87. In such cases each party is responsible for his own negligence. If, by the negligence of the tug, the tow is drawn off her course, the tug is responsible. If, by the negligence of the vessel she sheers out of her course, she is alone liable. It is a case where both participate in the movements of the tow, and both are concerned in its direction. I think all of the cases where the tug has been exonerated, have been those where the act of negligence committed by her was in obedience to an order given by an officer in charge of the vessel. In such case the vessel would clearly be liable and the tug exonerated.

The objection that the lien has been lost by the laches of the libellant, in failing to bring his action within a reasonable time, is untenable. The collision occurred the 16th of November, 1873, and the action was commenced on the 10th of November, 1875; about two years after the cause of action arose. Had the tug in the meantime been sold and passed into the hands of a bona fide purchaser, without notice of this claim, I should have held the lien lost. But where no change of ownership has taken place, I see no reason why the libellant should be debarred of his action if he commence his suit within the time prescribed by the statute of limitations.

The liability of the propeller depends solely upon the question whether she was exhibiting a proper light at the time of the collision. On the one hand her crew swear that the usual anchor light was displayed upon the flagstaff, and that there was also a globe lantern standing upon the companion way in such a position that it could be seen by a vessel approaching from behind; but their testimony is not of the most trustworthy nature, as all but one man seem to have been below at the time of the collision. On the other hand, the master, mate, lookout, and engineer of the tug, all swear that no light was displayed; and two of them, at least, saw the propeller at some distance; were intently watching her to find out what she was, and would certainly have seen a

light if it had been exhibited. I do not think the general rule, that when there is a conflict of evidence with regard to what has taken place upon a vessel, the testimony of her own master and crew shall be believed in preference to that of an equal number of witnesses observing her movements from another vessel, applies to the exhibition of a light. This is a matter about which none of the crew can speak with any certainty, except those who were on deck, and even they might very easily overlook the extinguishment of a light, while the crew of an approaching vessel, keeping a proper lookout, could hardly fail to discern a light, if one exhibited. The night of the collision was a cold one, and I deem it not at all improbable that the oil might have become congealed and the light either have been extinguished or become so dim it could be seen but a short distance off. There is also evidence tending strongly to show that, after the collision occurred, a light was run up on the flagstaff of the propeller—a thing which would probably not have been done had there been a sufficient one already. At the time of the collision, there was also complaint made by the crew of the tug to the master of the propeller, that she was lying there without a light, and some one remarked that it was a pretty time of night to put up a light. Upon the whole, I think the evidence preponderates in favor of the theory that the propeller was not exhibiting a proper light at the time of the collision. While the absence of such a light in a bright moonlight night would probably not have occasioned a collision, considering that the night was a dark one, though not cloudy, I cannot say it did not contribute to the collision in this case. Indeed, I think it very improbable that it would have occurred if a proper light had been exhibited. A fault proven to have been committed is presumed to have contributed to the collision, and the want of a proper light has always been considered a fault of the gravest description. I think it should require a clear case to satisfy the court that it did not aid in bringing it about. The Thomas Lea, 3 Asp. 260; The Victoria, 3 W. Rob. Adm. 49; The Saxonia, Lush. 410; The Olivia, Lush. 497; The Indiana [Case No. 7,020]; The St. Charles, 19 How. [60 U. S.] 108; The Osprey [Case No. 3,763]; Nelson v. Leland, 22 How. [63 U. S.] 55; The Ariadne, 13 Wall. [80 U. S.] 475; 1 Pars. Shipp. 550. I must therefore hold the propeller to have been in fault.

I think the tug was also clearly in fault. The evidence is uncontradicted that the propeller was seen some time before the collision occurred. The mate says: "I could see something looming up before me in the dark. That is the first intimation I had of it. I called the watchman's attention to it and he said it looked like the broadside of a barn. Then I saw that we were getting pretty close to her, and checked her down and stopped her; put my wheel a-starboard. I saw it was my only chance of not striking her. I took it to be a small vessel of some kind, I did not know what. I was so close to her I saw it was the only thing I could do. * * * Not more than half a minute elapsed from the time I saw the Colorado to the time I checked the speed of the tug; may be not that long. If I had known that it was a propeller, I don't know that there was anything to prevent me from porting my wheel, and clearing her, but I did not have my lights ranged and could not tell, and so I starboarded my wheel. If that had been a vessel sailing up the river I would have put my wheel to starboard."

John Hiller, the watchman, says: "Mr. Edwards called my attention to this black spot, or something dark, it looked to him, and asked me if I knew what it was, and I supposed it to be, when I first saw it, a bunch of rushes. I passed some queer remark about it; said it looked like the side of a barn or something in a joking way, and I stood forward with him; in a few minutes our light shone on the propeller's stern so we could see it, it looked like a sail, the stern did, to me. Mr. Edwards checked the boat down immediately and I made the remark that I thought it was a small boat, a fishing boat or yacht of some kind; it looked like a small sail. Mr. Edwards checked the boat down and put his wheel starboard, and stopped her soon after he checked her, * * * I don't think she could have been more than 100 or 150 feet from the propeller when she was checked down, probably further; I could not say exactly."

John Thomas, the engineer, says: "My first knowledge was a bell rung and I got out of bed to see what was the matter, as I usually do when we go over the flats. I looked out and I could not see anything but a white glimmer, which I thought was a sail, so we checked the engine back very slow. I told the second, he was standing by the engine, to check her slow, and by and by we got a bell to stop, and by that time we ran alongside. * * * It could not have been a very long time after we got the bells to check before we got the bell to stop; I could not tell exactly. It might have been half a minute or it might have been close on a minute for aught I know."

The master of the propeller testifies that the propeller could have been seen three or four lengths of herself without lights. To the same effect is the testimony of the first engineer.

I think it evident from this testimony, that the mate and lookout of the tug must have discovered the propeller very soon after passing the range lights at the bend, and at a distance of from 800 to 1,000 feet. Failing to discover exactly what it was, and mistaking it, perhaps, for a bunch of rushes, it was nevertheless incumbent upon them at once to stop until its character had been de-

termined. If a steamer makes an object or hears a hail ahead of her, the character or position of which the officers are unable to fix, it is their duty to stop until the doubt is resolved. The Hypodame, 6 Wall. [73 U. S.] 216. She has no right to plunge blindly forward and encounter dangers, the magnitude of which she is unable to discern. This applies with even greater force to a tug, since she is unable to back or to use any extraordinary efforts to avoid a collision, without endangering a collision between herself and her tow.

I think it quite probable there may have been a mistake in the range lights at the head of the canal, and that not only the starboarding of the tug, but the grounding of the propeller may be attributed to that. Although it is denied by the officers of the propeller, it is perhaps the most probable solution of her getting aground, and of the otherwise inexplicable movement of the tug. But the question of fault does not hinge upon this. It was the duty of the tug at once to stop when she made out the dark object ahead of her. Instead of this, she kept on for some considerable time, and apparently did not even check until the lights of the tug reflected back from the stern of the propeller, developed the fact that it was a vessel. The tug then first checked. Even then, prompt porting might have avoided the collision. Certainly the tug cannot claim the excuse of a wrong order given in a moment of imminent peril, since by her negligence in failing to stop, she had brought herself into that predicament. There must be a decree apportioning the damages, and referring it to a commissioner to assess and report the same.

Case No. 5,061.

FRANZ & POPE KNITTING-MACH. CO. v. BICKFORD.

[18 O. G. 734.]

Circuit Court, E. D. Pennsylvania. Oct. 31, 1879.

PATENTS—VALIDITY.

Letters patent No. 99,426, dated February 1, 1870, granted to William Franz and William Pope, and reissue patent No. 7,368, dated January 20, 1868, granted to Thomas Crane for improvements in knitting-machines, found to be valid.

In equity.

Strawbridge & Taylor and B. F. Thurston, for complainant.

Frost & Coe, for defendant.

McKENNAN, Circuit Judge. The bill in this case is founded upon five several patents. At the argument, however, the complainant limited its claim to recover to two of these patents—viz., reissued patent No. 7,368, to Thomas Crane, dated January 20, 1868; patent to William Franz and William Pope, No. 99,426, dated February 1, 1870. I am satisfied by the proofs in the case that the complainant is entitled to a decree affirming the validity of these patents, and that the defendant is shown to have infringed the second claim of patent No. 7,368 and the fifth claim of patent No. 99,426. Let a decree, therefore, for an injunction and an account be prepared accordingly.

Decree: And now, to wit, October 31, 1879, this cause having been heard upon pleadings and proofs and argument of counsel for the respective parties, it is ordered, adjudged and decreed that letters patent of the United States, reissue No. 7,368, dated October 31, 1876, to Thomas Crane, assignor to the above-named complainant, for improvement in knitting-machines, and letters patent of the United States to William Franz and William Pope, No. 99,426, dated February 1, 1870, for improvements in knitting-machines, are good and valid. That the title to said letters patent and each of them is duly vested in said complainant, and that said letters patent are infringed by the said defendant as to claim 2 of said reissue No. 7,368 and claim 5 of said patent No. 99,426. That the defendant, Dana Bickford, his servants, workmen, agents, clerks, and attorneys, be perpetually enjoined and restrained from making, using, or vending any knitting-machine or apparatus described and claimed in said reissue No. 7,368, claim 2, and original letters patent No. 99,426, claim 5, or either of them. That the complainant do recover of the defendant, Dana Bickford, the profits and gains made and received by him in consequence of the infringement and violation of the exclusive rights of the complainant under said reissue No. 7,368, dated October 31, 1876, and said original letters patent No. 99,426, dated February 1, 1870, together with the damages the said complainant has sustained thereby, together, also, with the costs of prosecution of this cause against said defendant. And this cause is referred to Robert N. Willson, Esq., as master, to compute, ascertain, and assess said profits, gains, and also the damages to the said complainant and to take the proofs thereof and report the same to the court, with leave to the complainant to move the court upon notice to increase said profits and gains and damages that may be assessed and reported by said master.

Case No. 5,061a.

FRANZ & POPE KNITTING-MACH. CO. v. LAMB KNITTING-MACH. MAN-UF'G CO. et al.

[19 O. G. 1000.]

Circuit Court, E. D. Pennsylvania. March 15, 1881.

PATENTS—INFRINGEMENT—WANT OF DEFENSE.

When the validity and infringement of the letters patent are supported by statement of facts admitted by defendant, who also admits the want of any valid defense, the judgment must be for complainant and decree accordingly.

In equity.

Strawbridge & Taylor, for complainants.
John R. Bennett, for defendants.

BUTLER, District Judge. And now, March 15, 1881, this cause having been brought to final hearing, proofs on the part of the respective parties having been taken and closed in said cause, the said cause having been submitted to the court upon the statement of the plaintiffs' case by counsel for complainants and the statement by defendants' counsel admitting the want of any valid defense to the said case on the part of said defendants, and admitting the validity and the infringement of the several letters patent mentioned as in the bill of complaint stated, it is ordered, adjudged, and decreed that reissue letters patent No. 7,368, dated October 31, 1876, to Thomas Crane, assignor to the above-named complainants; letters patent No. 105,187, dated July 12, 1870, to William Franz and William Pope; letters patent No. 123,687, dated February 13, 1872, to William Franz and William Pope; letters patent No. 102,529, dated May 3, 1870, to William Franz and William Pope; letters patent No. 99,425, dated February 1, 1870, to William Franz and William Pope; all for improvements in knitting-machines, are good and valid; that the title to said letters patent in each of them is duly vested in said complainants, and that said letters patent are infringed by the said defendants and each of them; that the defendants and each of them and their servants, workmen, agents, clerks, and attorneys be perpetually enjoined and restrained from making, using, or vending any knitting-machines or apparatus described and claimed in said letters patent or either of them; that the complainants do recover of defendants the profits and gains made and received by them in consequence of the infringement and violation of the exclusive rights of complainants under said letters patent and each of them, together with the damages the said complainants have sustained thereby, together, also, with the cost of prosecution in this case against said defendants. And this case is referred to Robert N. Willson, Esq., as master, to compute, ascertain, and assess said profits and gains, and also the damages to the said complainants, and to take the proof thereof and to report the same to the court.

Case No. 5,062.

The FRANZ SIGEL.

[14 Blatchf. 480.] [1]

Circuit Court, S. D. New York. June 11, 1878.[2]

COLLISION—BETWEEN STEAM VESSELS.

The steamboat W. had the steamboat S. off her starboard side and the courses of the two vessels crossed. The pilot of the W. saw that the S. must encounter a cross tide, and that it would affect her movements. He made no allowance for this and did not give the S. sufficient room. A collision ensued between the two vessels. *Held*, that the W. was wholly in fault.

[Cited in The Fred W. Chase, 31 Fed. 95.]

This was an appeal from a decree of the district court [of the United States for the Southern district of New York], in a suit in rem, in admiralty, dismissing the libel. [Case No. 5,311.] About noon of July 19, 1871, the steam propeller Franz Sigel, of ninety tons burden and seventy-five feet in length, having on board a cargo of sugar and so loaded as to be a little by the head, was on her way up the East river, at a slow rate of speed, from Prentice's stores, Brooklyn, below Bridge street, to the foot of Gold street, Brooklyn, above Bridge street. The weather was fair, the tide strong ebb and the wind fresh down the river. The course of the Sigel was under the Brooklyn shore, not far from the ends of the piers, so as to avoid the strength of the tide. She had been long employed as a steam lighter in the harbor of New York and was well known. Her course at the time was the one she usually took when employed as she then was, with an ebb tide and such as those engaged in similar business were accustomed to take under like circumstances. The George Washington, a side-wheel steamboat running on a ferry between Oliver street slip, New York, and the foot of Bridge street, Brooklyn, was at the same time on a trip from New York to Brooklyn. The distance between the two slips is about one mile and the Brooklyn slip is further up the river than that on the New York side. The ebb tide in the East river strikes the New York shore above Corlears' Hook and then sets across to a point near the foot of Gold street, Brooklyn. From there it follows down the Brooklyn shore to a tight dock, known as "Long Dock," situated next above the ferry slip and but a short distance from it. This dock extends into the river about ten feet beyond the ferry slip, and about seventy feet beyond the docks above, between it and Gold street. When the tide reaches this dock it strikes off with great force toward the New York shore. This movement of the tide is regular and well understood by all engaged in business upon the river in that vicinity. Skilful navigators always make their calculations to counteract its influences. Upon leaving her New York slip, the Washington headed up the river, under the New York shore, until she reached a point some distance above her Brooklyn slip, when she rounded to and commenced crossing the river, relying upon the wind and tide to carry her down abreast her slip by the time she was ready to enter it. This was proper navigation and the course usually pursued under like circumstances of wind and tide. After the Washington had rounded to and while

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

[2] [Affirming Case No. 5,311.]

she was still under the New York shore, her pilot discovered the Sigel on his starboard side, two or three piers below the bridge street slip. He then gave two blasts of his whistle, which were not heard on the Sigel and were not answered. The river at that point is about two thousand feet wide. The Sigel kept her course, and, when she was about abreast the ferry slip, the engine of the Washington was stopped, she being, at the time, near the middle of the river and heading so as to enter her slip. Nothing more was then done to arrest her progress and she went ahead under the influence of her former headway and the force of the wind and tide upon her port broadside. After the Sigel had passed the ferry slip, she struck the cross tide which set out from Long dock. This took her bodily out into the river and turned her bow somewhat off her true course. The Washington was then above the Sigel and above her slip. On striking the cross tide, the full power of the engine of the Sigel was put on, and she was forced through the strength of the current and straightened upon her course. Her pilot, then discovering that there was danger of a collision, rang his bell to stop and back, but, before stern way could be got on her, she struck the Washington on the starboard side, just forward of the wheel, producing the injury complained of. As soon as the pilot of the Washington saw that the Sigel was being carried out by the tide, he, for the first time, rang his bell to stop and back, but, before the headway of the boat was stopped, the collision occurred.

Welcome R. Beebe, for libellants.
Henry T. Wing, for claimants.

WAITE, Circuit Justice. Upon the facts, I am clearly of the opinion that the collision was caused solely by the fault of the Washington. She saw the Sigel off her starboard side, and the courses of the two vessels crossed. It was the duty of the Sigel, therefore, to hold her course, and of the Washington to keep out of her way. The pilot of the Washington saw that the Sigel must encounter the cross tide, and that, with her speed and load, it would necessarily affect her movements. It was his duty, therefore, to make the necessary allowances for this, and to see that the Sigel had sufficient room to do whatever was required. That he failed in this, is evident from the fact, that, as soon as the Sigel took the sheer, he rang his bell to back, and only between three and four turns of the wheel had been made before the collision occurred. In the meantime, the Sigel had overcome the force of the current and straightened herself up on her course. I agree entirely with the district judge in the views which he took of the case [Case No 5,311], and a decree may be prepared dismissing the libel with costs.

FRASER, In re. See Case No. 5,068.

Case No. 5,063.

FRASER et al. v. HUNTER et al.

[5 Cranch, C. C. 470.][1]

Circuit Court, District of Columbia. Oct. Term, 1838.

BOUNDARIES—EVIDENCE—EXTENT OF POSSESSION—LOCUS IN QUO—PARTIES—PROOF—JOINT ACTIONS.

1. When the question is upon a disputed boundary line, the court will not permit hearsay evidence to be given that a particular object (such as a spring), was on the land of one of the parties.

[Applied in South-West School Dist. v. Williams, 48 Conn. 508.]

2. The possession of a person claiming title without definite metes and bounds, will not, in law, be deemed to extend beyond the actual possession proved.

3. A husband, who has conveyed all his estate to a trustee for the sole and separate use of his wife, may join with her in an action of trespass quare clausum fregit, and in law would be entitled to the damages recovered, although in equity he might be considered as receiving them in trust for the separate use of the wife.

4. A deed of bargain and sale by a person not in possession conveys no title.

5. There must be actual possession by the plaintiff, of the locus in quo, at the time of the supposed trespass.

6. The plaintiff must prove every abuttal set forth in his declaration. Boundaries may be proved by hearsay.

7. All the plaintiffs must have a right to recover, or none can recover. There must be a joint cause of action.

Trespass quare clausum fregit.

Mr. Brent, for plaintiffs [A. R. Fraser and W. S. Alexander and wife], offered to prove by a witness, that some years ago, Simon Summers, an old and legal surveyor of the county of Alexandria, who is now dead, showed the witness a line of Chapman's land, under whom the defendants [Alexander Hunter and Robert Ball,] claim to hold, at or near Hall's Spring, and stated to the witness that Hall's Spring was on the land of the Alexanders; to which evidence the defendants objected, and THE COURT (THRUSTON, Circuit Judge, absent), refused to permit the same to be given; to which refusal the plaintiffs took a bill of exceptions.

The plaintiffs offered in evidence a trust deed, dated April 20, 1807 (under which the plaintiffs claim), from the plaintiff W. S. Alexander to Baldwin Dade (the father of Mrs. Alexander, wife of W. S. Alexander, and one of the plaintiffs), conveying "all his right, title, and interest in any lands lying between the lines north six west, and north seventeen west, supposed to be the west boundary of Howison's patent," without describing his claim by metes and bounds; and contended, that as they had proved Mrs. Alexander's possession east of the disputed line, such possession was evidence of his pos-

[1] [Reported by Hon. William Cranch, Chief Judge.]

session up to the line north seventeen west, including the land in dispute.

CRANCH, Chief Judge, was of opinion that as the deed did not describe the lands conveyed by W. S. Alexander to Mr. Dade, by metes and bounds, his possession could not be considered as extending beyond his actual possession proved. Ellicott v. Pearl, 10 Pet. [35 U. S.] 442.

MORSELL, Circuit Judge, was of opinion that the deed should go to the jury with such parol evidence as had been given.

The plaintiffs, however, gave subsequent evidence of acts of possession, by cutting wood for fuel and other purposes, on the disputed lands, by the son of the plaintiff Walter S. Alexander, about sixteen years ago, and then THE COURT (THRUSTON, Circuit Judge, absent), permitted the deed to be read in evidence to the jury.

THE COURT also permitted the following question to be asked of the plaintiffs' witness, Mrs. Zimmerman: "Do you know, by general reputation, any of the lines, or boundaries, or corners, of Mr. Walter Alexander's land?" She answered, "No;" but said that Hall's Spring was generally reputed to be on Alexander's land; but THE COURT said that that was not admissible evidence. They, however, permitted her to be asked whether Hall's Spring was generally called "the head of long branch," that being one of the calls of Robertson's patent. See Leland v. Wilkinson, 6 Pet. [31 U. S.] 317; Ellicott v. Pearl, 10 Pet. [35 U. S.] 412.

THE COURT also permitted the declarations of the plaintiff W. S. Alexander, to be given in evidence by the defendants, although he had conveyed all his estate to a trustee for the sole use of his wife, (who is also a plaintiff,) it being an action of trespass quare clausum fregit, and not a real action; and the damages, so far as his wife is to participate in them, will, at law, become the property of her husband, although in equity he might be considered as a trustee of them for her separate use.

Mr. Taylor, for defendants, moved the court to instruct the jury, that upon the plaintiffs' evidence they cannot recover. 1. Because one of the plaintiffs, by their own showing, has no interest. After his deed to Dade, W. S. Alexander was only the agent of Dade, and of his wife, and in that character cannot maintain an action for a trespass; and if an improper party is one of the plaintiffs, it is a misjoinder, and there must be a nonsuit. 1 Chit. Pl. 54; Goodtitle v. Morgan, 1 Term R. 758. 2. Because the plaintiffs have not proved possession at the time of the supposed trespass. Com. Dig. 377, tit. "Trespass," B. 3; Wells v. Prince, 4 Mass. 64; Stuyvesant v. Tompkins, 9 Johns. 61; Dunham v. Stuyvesant, 11 Johns. 569; 5 Dane, Abr. 553, 554; Wilde v. Cantillon, 1 Johns. Cas. 123; Graham v. Peat, 1 East, 244.

R. J. Brent, contra, admits that if there has been a misjoinder it is fatal. But this is not a misjoinder, because in all actions to vindicate the rights of the wife against a stranger, the husband must be joined, although he has no personal interest in the event of the suit. Cookson v. Castline, Cro. Eliz. 96; Weller v. Baker, 2 Wils. 423.

The deed of trust for the benefit of the wife cannot be set up to defeat her right of action. She as cestui que trust has a right of action for a trespass upon her possession, and her husband "must be joined for conformity." Hopkins v. Ward, 6 Munf. 38; Ricard v. Williams, 7 Wheat. [20 U. S.] 59; Smith v. Lorillard, 10 Johns. 347; Catteris v. Cowper, 4 Taunt. 547; Ewen v. Burnett, 11 Pet. [36 U. S.] 53; 7 Com. Dig. 510, tit. "Trespass," B. 2. Possession alone is sufficient to support the action against a mere wrong-doer. Graham v. Peat, 1 East, 246. Mrs. Alexander is one of the heirs at law of the deceased Baldwin Dade, the trustee, and is also the cestui que trust, and is therefore properly made one of the plaintiffs; and if she is entitled to sue, her husband must also be made a plaintiff. Brotherson v. Hodges, 6 Johns. 108; 1 Saund. note g; 2 Tuck. Bl. Comm. 218; Harper v. Charlesworth, 4 Barn. & C. 574; Catteris v. Cowper, 4 Taunt. 546; Ellicott v. Pearl, 10 Pet. [35 U. S.] 442. To constitute actual possession, it is not necessary that there should be any fence or inclosure on the land. Id.; Ewen v. Burnett, 11 Pet. [36 U. S.] 52; Lessee of Sicard v. Davis, 6 Pet. [31 U. S.] 139, 140; Jackson v. Lunn, 3 Johns. Cas. 118; Hunt v. Wickliffe, 2 Pet. [27 U. S.] 204; Alexander v. Pendleton, 8 Cranch [12 U. S.] 462; Jackson v. Wheat, 18 Johns. 44; Ricard v. Williams, 7 Wheat. [20 U. S.] 105; Lessee of Clarke v. Courtney, 5 Pet. [30 U. S.] 354, 356.

Mr. Brent proposed to ask young Mr. Alexander (who had testified that about sixteen years ago he had gone upon the land now in dispute and cut wood upon it), whether, at the time of his going upon the land in dispute he did so under a claim of title by his father and mother up to the line N. 17 west, the supposed west line of Howison's patent; but

THE COURT (MORSELL, Circuit Judge, contra,) refused to permit the question to be asked, because no title was shown by metes and bounds up to that line, and therefore there can be no constructive possession to that line.

Mr. Coxe in reply, as to the defendant's motion to instruct the jury that the plaintiffs cannot recover upon their evidence, contended that the plaintiffs must prove all their abuttals, which they have not done. Martin v. Kesterton, 2 W. Bl. 1089; 5 Dane, Abr. 594; 2 Salk. 453; 2 Chit. 388, note n; Bull. N. P. 89. The deed from W. S. Alexander to Dade, under which the plaintiffs claim, is only of his interest in any lands in Howison's patent lying between the lines north 6 west, and north 17 west; and bounded on

the north by Mason's land, on the west by the Glebe, and on the east by Custiss's land. There is no evidence that the locus in quo is in Howison's patent, nor is that patent located on the plat. There is no evidence that it is bounded on the north by Mason's land, nor on the west by the Glebe, nor on the east by Custiss's land. It is admitted that possession alone will maintain trespass against a mere wrongdoer; and the plaintiffs, if they can recover in this action, must recover upon their possession alone, for they have not made out a title. There is no evidence of any possession by Fraser; and as all must have a joint cause of action, or none can recover, it is evident that the plaintiffs cannot recover in this action. Besides, there is no evidence that Alexander was in possession at the time of his deed to Dade. And a deed of bargain and sale without possession in the bargainor is void. There is no evidence of possession until about the year 1822, and the deed was made in April, 1807. Peters v. Condron, 2 Serg. & R. 83; Wickham v. Freeman, 12 Johns. 183. Mr. Alexander had no possession at the time of the supposed trespass, and therefore is improperly made a plaintiff in the cause. Starr v. Jackson, 11 Mass. 519; 15 Petersd. Abr. 148.

As to the abuttals, Mr. Brent cited Roberts v. Karr, 1 Taunt. 497, and Durgin v. Leighton, 10 Mass. 56.

THE COURT (nem. con.) was of opinion that the plaintiffs could not recover upon the evidence, for the reasons stated in the argument of the defendant's counsel. The plaintiffs became nonsuit, acquiescing in the opinion of the court.

Case No. 5,064.

FRASER v. WELLER et al.

[6 McLean, 11.] [1]

Circuit Court, D. Michigan. June Term, 1853.

EJECTMENT—STATUTE OF MICHIGAN—SPECIAL PLEAS—DEMURRER—NEW TRIAL.

1. The ancient forms of the action of ejectment having been modified by the statute of Michigan, and a new mode provided, that mode must be pursued.

[Cited in Hyatt v. Challiss, 55 Fed. 268.]

2. Special pleas in this mode are not allowed. A demurrer, on this ground, must be sustained to a special plea. The statute gives a second trial, as a matter of course, if the motion be made to set aside the first judgment within three years.

3. A new trial thus granted, which vacates the judgment, the party cannot bring a new suit in this court. Having sought the special remedy under the statute, in the state court, he cannot abandon it.

[Cited in Cunningham v. City of Milwaukee, 13 Wis. 123.]

[1] [Reported by Hon. John McLean, Circuit Justice.]

[This was an action at law by Alice Fraser against Charles Weller and others.]

Mr. ——, for plaintiff.

Mr. Hawkins, for defendants.

OPINION OF THE COURT. This is an action of ejectment. In addition to the general issue, Weller, the defendant, pleaded that the grantor of the plaintiff had heretofore instituted an action of ejectment against the defendant for the same premises, in which a trial was had, and a judgment rendered for the defendant in the state court. To this plea the plaintiff replied, that the said judgment had been set aside and a new trial granted. The defendant demurred to this replication; and assigned as cause of demurrer, that the Revised Statutes of 1846 abolished the ancient forms in the action of ejectment, and authorized a statutory action; and that by section 35 it is declared that the judgment in the action should be conclusive. But that the thirty-sixth section authorized the court to grant a new trial, under certain circumstances, and declared that not more than two new trials shall be granted. The statute provides that the defendant, in the action of ejectment, may demur, or plead the general issue and give special matter in evidence. No special pleas, therefore, can be allowed. The demurrer to the plea is, therefore, sustained.

THE COURT intimated that the special remedy given by the statute must be pursued. The first judgment in ejectment is final, unless within three years a motion is made to set aside the judgment, and the costs of the first trial are paid. This motion was made within the time limited, and the costs were paid, so that the judgment was vacated, under the statute. And the question arises whether under such circumstances, the suit may be brought in this court. If the first judgment had not been set aside, under the statute, it would have been final. It was set aside without cause, on the motion being made within the time limited. The judgment was vacated under the statute, which was a part of the proceeding authorized; this being done, the party is not at liberty to resort to this tribunal. It would be a fraud upon the law. For aught that appears, the first judgment could not have been set aside, except under the provisions of the statute. This remedy having been claimed under the statute, the party is bound to go on with another trial. Having set aside the bar to another suit, he does so, under an obligation to pursue the special remedy under the statute. He cannot claim the remedy in part, to his advantage, and then abandon it to the injury of the other party.

Case No. 5,065.

FRASER v. WOLCOTT et al.

[4 McLean, 365.] [1]

Circuit Court, D. Illinois. June Term, 1848.

PARTNERSHIP—NOTE SIGNED WITH FIRM NAME AFTER DISSOLUTION.

At law.

Mr. Smith, for plaintiff.

Mr. Powell, for defendant.

OPINION OF THE COURT. This was an action of assumpsit. The defendants pleaded non-assumpsit, and that the note was signed by Goodwin as a partner of Wolcott, in both their names, when they were not partners. By the eighth section of the Revised Statutes of 1845, it is provided, that in "actions upon contracts, expressed or implied, against two or more defendants, alleged to have been made or executed by such defendants, as partners, or joint obligors or payers, proof of the joint liability or partnership of the defendants," etc., [shall not in the first instance be required to entitle the plaintiff to judgment], unless a plea be filed under oath, denying the execution of the instrument by the defendants. The oath is appended to this plea. It appears the defendants were formerly partners, but that their partnership had been dissolved before the execution of this note. Non-suit.

Case No. 5,066.

FRATES et al. v. HOWLAND.

[2 Lowell, 36.] [2]

District Court, D. Massachusetts. Aug., 1871.

SEAMAN'S WAGES—WHALING VOYAGE.

1. The stipulation which was introduced some years since into the usual form of shipping articles for whaling voyages, that the owners shall have the right to ship catchings home, on freight, is beneficial to both parties, and is valid.

2. When such catchings had been shipped home, and the owners in good faith and in the exercise of their best judgment had kept them, unsold, hoping for a rise in the market, *held*, they were not bound to account for them at their value when they arrived.

3. Whether, after receiving such catchings, they would not be bound to stop any charges for interest on advances to the seamen, quaere?

[This was a libel for wages by John Frates and others against Edward W. Howland.]

The thirteen libellants were part of the crew of the ship Cornelius Howland, on a whaling voyage, which was prosecuted mainly in the Arctic Ocean. The ship left New Bedford in November, 1867, and returned in May, 1871, having shipped home by other vessels the oil and bone taken in the seasons of 1868 and 1869, most of which remained unsold at the return of the vessel. The shipping papers contained an article which was introduced into these contracts about fifteen years ago, and is now printed in all of them, as follows: "It is understood and agreed that the master shall have the right to ship catchings home or elsewhere at any time during the voyage, and that the net proceeds, after deducting freight, insurance, and expenses incident to the sale and settlement of the same, shall bear interest from and after the sale until the termination and making up the settlement of the voyage." And that if the ship herself earns freight, it shall be divided proportionately in like manner with the catchings. It was proved that the season in the Arctic Ocean was so short, and the distance from New Bedford so great, that this kind of whaling could not be prosecuted to advantage from that port without the power of shipping home the catchings, which enabled the vessel to follow the business for several successive seasons before returning home. Upon the articles, the lay of each seaman below the rank of boatsteerer was entered as the three hundred and fiftieth; but the pleadings set up, and it was admitted to be true, that every one signed an additional paper, which was annexed to the articles, by which it was agreed that if he should satisfactorily perform his duties on board the ship, and return in her to New Bedford, there should be paid to him, after deducting seventy-five dollars, but not deducting any charge for fitting, discharging, or interest on the home bill, the difference between the lay mentioned in the articles, and a much better one mentioned in this contract. The questions argued at this time were, whether the owners were bound to account for the catchings which had been sent home at their value when they arrived, which was much greater than it was at the return of the ship; and whether the crew were bound to submit to the deduction of seventy-five dollars, in accordance with the special contracts. The catchings had been kept on hand for a rise in price.

G. H. Palmer and C. T. Bonney, for libellants.

The catchings were sent home for sale, and should have been sold within a reasonable time, or at all events credited within a reasonable time, so that they might bear interest.

The stipulation that seventy-five dollars shall be deducted from the agreed lay is void.

E. L. Barney, for respondent.

The owners of the ship may exercise their best judgment in deciding upon a sale. The object of the shipment is not so much for sale, as for enabling the vessel to continue her voyage in the best manner. The owners may be likened to trustees, who are bound to exercise their best discretion. The seventy-five dollars is instead of the usual charges.

[1] [Reported by Hon. John McLean, Circuit Justice.]

[2] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

LOWELL, District Judge. I am not aware of any law which requires the original contract of seamen in the whaling service to be in writing; because the voyage is not "foreign" within the act of 1790 [1 Stat. 145]; Taber v. U. S. [Case No. 13,722]; The Atlantic [Id. 620]; Curt. Merch. Seam. 60. But the statutes of April 4, 1840 [5 Stat. 370], and July 20, 1840 [5 Stat. 394], which concern the treatment of seamen on a voyage, and their discharge, and even the shipment of men in the course of the voyage, as well as the return of seamen to the home port, are applicable to this branch of business. Bates v. Seabury [Case No. 1,104]; The Antelope [Id. 484]; The Louisa A. [Id. 8,530]. So that if there is a written contract, as there always is and should be, the act of 20th July, 1840, requires a true copy of it to be taken by the master; and this is, for all consular purposes, conclusive evidence of the contract, and regulates the dealings between the parties in the course of the voyage; and men shipped during the voyage, if shipped at a consular port, have the right to require a compliance with the eighth clause of the act. In this case the paper signed by the foremast hands did not state their contract truly; and although there may have been no necessity that the men should sign articles, yet it was fraudulent conduct on the part of the agent to induce them to sign two different contracts, one of which only, and that the false one, was furnished to the collector and carried on the voyage. So far as the parties are concerned, the objections to such a course are many. A seaman might be disabled, or might be discharged at a foreign port by consent, and the consul could not know how the settlement should be made with him. The reason given in the argument, that the owner in case of desertion would be bound to pay the forfeited wages to the United States, and wished to deceive them, does not recommend itself very strongly to the consideration of a court of justice. It was testified that owners sometimes promise a slightly increased lay, on conditions like those found in this contract, as a premium for good conduct; and I do not know that there is any objection to this, if done in good faith, and if the original lay is a fair and honest one agreed to by the parties. But the same intelligent witness who spoke of this custom, had never heard of any such difference as that between one three hundred and fiftieth and one two hundred and tenth, nor of any real lay as small as the former. It is plain that the shipping articles are a mere fiction in this particular.

Under these circumstances, I must, of course, construe these special contracts, made for the exclusive benefit of the owners, most strongly against them, and set aside any conditions that may be oppressive.

Both parties have agreed, that, for the purposes of this case, the lays mentioned in the special contracts are to be the basis of settlement; but the men dispute the deduction of seventy-five dollars. It appears that this was in lieu of certain charges, which are said to be usual; namely, for fitting and discharging the vessel, and for interest and insurance on the advances. Judge Sprague has repeatedly disallowed all of these charges excepting interest; and I do not see how I can allow them, unless it shall appear that some changes in the shipping articles or in the course of trade have changed the aspects of the question, which I neither affirm nor deny, for I am not informed upon the matter. I should be glad to have all question of charges carefully examined before the assessor, if the parties are willing to assume the burden. See Lovrein v. Thompson [Case No. 8,557]; Bates v. Seabury [Id. 1,104].

The other question is one of great importance and of some difficulty. The evidence shows, and the libellants admit, that what is now article 9 of the ordinary contract, authorizing the master to ship home oil and bone, is useful and advantageous to all parties, if, indeed, it is not essential to the prosecution of the particular sort of enterprise undertaken in this case; and I have recognized its validity in former cases. The decision of Judge Sprague, that under the older form of contract all such shipments were at the risk and expense of the owners, may have led to the change. But the question now arises for the first time, whether the owners are bound to sell the oil and bone on its arrival. It has been repeatedly decided by my predecessor, and by me, that the owners must account for the oil brought home, on its arrival, and cannot wait for changes of market. The main reason for this decision is, that the seamen cannot wait the issue of the mercantile enterprise after their own part in it is ended. Their right is to wages regulated by the catch, and these wages are payable on the return of the vessel. The owners retain the property in the oil, and need not sell it, if they account for it at the cash value. Under the ninth clause, the oil and bone are to be shipped home for sale; but is there any time at which the sale must be made short of the return of the vessel, or other termination of the voyage? Upon reflection, I am not able to fix any time short of that. The main purpose of this clause appears to be to exclude the conclusion that the owners are bound to get the oil home at their own expense; for there is coupled with the agreement that they may ship oil on freight, the further stipulation, that if their vessel earns freight in a similar way the seamen shall share it. The owners have a certain quantity of oil which they might, perhaps, bring home, but which it is convenient to send home. I should probably hold that they were bound to insure it, and that, if lost, they must account for its value. But when it reaches home, it seems to me they may hold it as part of the proceeds of the

voyage, if in good faith and in the exercise of their own best judgment they deem it wise for all parties to do so. It is not a consignment; and the seamen would, perhaps, have no right to order the owners to sell or not to sell; though this I do not decide. If instructions were sent on, the owners would be likely to follow them, because the seamen could not then complain of the result. When the market is falling, as has now been the case for five years, the result of holding is most unfortunate. But on a rising market it would be different, and I must fix some definite and absolute rule. Either they must always sell, or they may always control the latter. I cannot see my way to the decision that they must do the former. The argument was much pressed, that one consideration operating with the seamen to accept article 9 as part of their contract was, that a fund was thus put into the owners' hands to stop the charges of interest and insurance upon the advances. I admit that there is force in this argument; and it may be that the interest and insurance on advances, if otherwise valid, ought to cease from the time that the owners have in their hands any oil or bone from which they might have reimbursed themselves, if they had chosen to do so. This is one of the points which may come up hereafter. Interlocutory decree for libellants. Wages to be assessed.

Case No. 5,067.

FRAYSER et al. v. RUSSELL.

[3 Hughes, 227.] [1]

Circuit Court, E. D. Virginia. April, 1878.

EQUITY—POWER TO ENJOIN COLLECTION OF TAXES.

Though it is true that courts of equity of the United States cannot enjoin an officer of the United States from collecting a tax, yet there are circumstances under which such collecting officers may be enjoined from claiming moneys of citizens and levying for them as if for taxes.

[Cited in Kensett v. Stivers, 10 Fed. 527.]

[In equity. This was a bill for an injunction by L. H. Frayser & Co. against Otis H. Russell, United States collector of internal revenue for the Third district of Virginia.]

The original bill set out the following case: "Your complainants, L. H. Frayser & Co., show to the court that they are engaged in manufacturing tobacco in the city of Richmond, in the state of Virginia, and were so engaged prior to and on the 3d of March, 1875, and ever since. That on the morning of the day last mentioned they had in their factory 15,001 pounds of tobacco, which they had manufactured and placed in boxes according to the usage of their business; that they had sold the same to be shipped to purchasers, stamped according to law, and accordingly they applied to the proper officers of the United States at Richmond for the stamps to put on said boxes according to law, bought, paid for the same, and placed them upon said boxes, and then according to contract shipped the same, and placed said tobacco out of and beyond their control. That after the said tobacco was so shipped, and had so passed from under their control, the said Otis H. Russell, collector as aforesaid, named above as defendant, informed them that he claimed on behalf of the United States an additional tax of four cents per pound, amounting to the sum of $604.04, and required and demanded of your complainants payment of the same, upon the ground that on the night of the 3d of March congress had passed an act [of 1875 (18 Stat. 339)] imposing that additional tax; but your complainants no longer had said tobacco. They had lawfully parted with the same, after they had complied fully with all the requirements of the revenue officers of the United States, and paid the cost of stamps provided by law to be put upon said tobacco; and not only in compliance with the law had those stamps been sold to your complainants, but also in accordance with specific instructions of the commissioner of the revenue of the United States, who had directed (prior to that time) the collector to sell the stamps at certain rates, which complainants paid, till further orders, and no such further orders were received by said collector till after your complainants had shipped their tobacco as aforesaid. That the contract under which they shipped said tobacco required them to ship it stamped according to law, both contracting parties well knowing what the cost of stamps was. With this contract they complied, and the other parties were bound to them only for the amount paid for said stamps. If, then, there is any additional sum to be paid on said tobacco by your complainants, it will necessarily entail a loss to that extent upon your complainants, while, if demanded of them while the tobacco was unsold, the fact that the additional sum was to be paid would properly have been provided for in said contract, so that in any event, under the facts stated, it would be inequitable and unjust to require your complainants to pay a tax on tobacco which they don't own and which they had parted with, after complying with all the requirements of the law, and the regulations of the department controlling such cases. Your complainants are advised that while they have no right to institute any suit to restrain the assessment or collection of any tax of the United States, they insist that the tax assessed upon said tobacco, while in their possession and their property, has been fully paid, and that the revenue laws of the United States do not contemplate that the United States officers shall continue to assess upon property which has passed from the possession of the original owner, or rather upon him, a tax in addition to that which has already been assessed and paid

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

according to law. They insist that this is no assessment of a tax upon property; that it is simply an arbitrary demand upon them for a sum of money which they are not bound to pay, because they have not the property so assessed, and in so doing the collector is arbitrarily and illegally and inequitably perverting the authority given him by law, and using the same to oppress and harass your complainants. And they further state that the said Russell, collector as aforesaid, is threatening to levy, or cause a levy to be made, upon the property of your complainants for the amount of $604.04, as aforesaid, and unless enjoined will proceed to do so to the great injury of your complainants. To the end, therefore, that your complainants may be relieved in the premises, they pray that the said Russell, collector as aforesaid, be made defendant to this bill and answer its allegations; that he be enjoined from proceeding to levy upon the property of your complainants, or either of them, or from collecting in any way said sum of money or any part thereof, and also to enjoin any other officer of the United States from so proceeding. And may it please your honor," etc. An injunction was temporarily awarded under this bill and was afterwards made perpetual.

H. H. Marshall, for complainants.
L. L. Lewis, U. S. Atty., for collector.

After the final order, the United States, by Mr. Lewis, filed a bill of review, on which the court delivered the following opinion:

HUGHES, District Judge. The bill and bill of review sufficiently show that after certain manufactured tobacco had been properly stamped at the rate of twenty cents per pound, and then sold and transferred to purchasers by the manufacturer, an additional four cents per pound were demanded by the collector, and a levy upon other property of the manufacturer threatened for this four cents. The injunction complained of in the bill of review was granted to prevent such a levy.

It is true that the collection of a tax by an officer of the government cannot be enjoined, and that all taxes due must be paid, and that the person paying them, when wrongfully levied, must resort to a suit against the collecting officer for the recovery of them. And if the collector here had in the first instance required stamps to the extent of twenty-four cents per pound to be placed upon the tobacco mentioned in the bill, and on a refusal to do so by the manufacturer had threatened to seize that tobacco, and in this attitude of the affair a bill of injunction to restrain him had been brought, the court might not have granted the injunction.

But in this case the proper tax had already been paid by the manufacturer, and he had sold and delivered the tobacco on which the tax was due. As to him the matter had been terminated, and he had passed from his ownership the tobacco which had been taxed. The collector's demand upon him afterwards for four cents a pound, which he called an additional tax, was a demand for what this court has solemnly and finally in another case adjudicated not to be a tax. See Salmon v. Burgess [Case No. 12,262]; affirmed in 97 U. S. 381. Besides, the course for the collector to pursue, even if this latter four cents had been a proper demand as a tax, was marked out to him by section 3371 of the Revised Statutes of the United States. The collector did not take the course directed by law in a case where "the proper stamps" had not been used, and the proper tax had been "omitted to be paid." His threatened levy was for what was not a tax; and it was threatened to be made in a manner which set at naught the provisions of section 3371. It was a clear case for the exercise of the restraining power of the court; and was not a case falling either within the letter, or spirit, or intention of section 3224.

There was another ground on which the court felt authorized and impelled to grant the injunction. A case was before it at the time, in which it had become its duty to pass upon the question whether the payment of the tax of twenty cents a pound upon manufactured tobacco, which was required by the law as it stood until 9 o'clock p. m. on the 3d of March, 1875 (the payment having been made in the early part of that day), discharged the tobacco thus stamped of all taxes imposed by laws then in force. This question had been raised by the collector against numerous manufacturers in Richmond, and a multitude of suits were impending, all turning upon this question of law. Although this fact did not appear in the pleadings, yet it was well known to the court, and its desire to prevent a multitude of suits turning upon a question of law then about to be adjudicated, furnished a strong inducement to the court to enjoin the collector from making the levy then threatened. Thus, not merely with reference to the rights of the complainant in the bill, but also as a measure of sound public policy, the court was justified in granting the injunction; and the bill of review will be dismissed.

For like reasons the bills of review in the cases of A. M. Lyon & Co., John K. Childrey, and Robert W. Oliver will be dismissed.

Case No. 5,068.

In re FRAZER.

[18 Alb. Law J. 353; 25 Int. Rev. Rec. 226; 6 Reporter, 357; 3 Cin. Law Bul. 668; 7 Wkly. Dig. 129; 10 Chi. Leg. News, 390; 7 Cent. Law J. 227; 26 Pittsb. Leg. J. 147.]

Circuit Court, E. D. Michigan. Aug., 1878.

COURTS—JURISDICTION—CITIZENSHIP—PROBATE MATTERS.

1. Under an application for the transfer of a probate case to the federal court under the

act of 1875 [18 Stat. 470], *held*, that after a decree in the probate court was made the application was too late.

2. All those connected with the suit on each side must be citizens of different states from those on the other side.

3. A federal court has no jurisdiction of a probate matter.

[Cited in Reed v. Reed, 31 Fed. 52; Smith v. McKay, 4 Fed. 354.]

Motion to remove the matter of the probate of the will of A. D. Frazer from the probate court of Wayne county, Michigan, to the United States circuit court. The probate court had made a decree admitting the will to probate, from which contestants took an appeal to a higher state court. Thereupon the proponents made this motion.

W. Jennison, for proponents.

H. M. Duffield, contra.

SWAYNE, Circuit Judge. The case was fully and ably argued before me upon both sides. I have examined it with care, and my conclusions are as follows:

1. Aside from other objections, the application for the removal of the case to the federal court was made too late. It should have been made before the decree of the probate court was entered, and the appeal taken to the higher state court. Thereafter the right of removal was at an end; the delay was fatal. Such an application cannot be made to an appellate court. Stevenson v. Williams, 19 Wall. [86 U. S.] 572; Vannevar v. Bryant, 21 Wall. [88 U. S.] 41; Lowe v. Williams, 94 U. S. 650. There was no waiver of this objection by the proponents. The order for the issue of a writ of certiorari to bring up the full record was made by the federal court sua sponte. The proponents were in nowise actors touching its issue.

2. The proponents are all citizens of Michigan. There were six contestants in the probate court. Four of them were citizens of Michigan, and two of other states. All of them appealed to the state circuit court. The four who were citizens united in one appeal, and the two not citizens in another. The latter only petitioned that court for the removal of the case, and gave the requisite bond. The only question presented in the appellate court was as to the mental capacity of the testator, and the validity of the will. The court directed the same issue to be made upon each appeal as if they were separate cases. Upon an application to the supreme court of the state for a mandamus to vacate an order of consolidation made by the state circuit court, it was held that the two appeals constituted inherently and necessarily but one case, and must necessarily be tried together, and that hence no order of consolidation was needed. This was obviously correct. The case, as presented, was a unit and indivisible. The question to be tried was a single one, and affected alike all concerned, by whomsoever raised. The result must necessarily be final and dispose of the entire controversy. Lingan v. Henderson, 1 Bland, 236.

If the removal was well made, the anomaly will follow that each court may try the validity of the will at the same time independently of the other, in the absence of indispensable parties, and opposite results may be reached. In one court, the will may be held valid, and invalid in the other, and for this state of things there can be no remedy. For the purposes of this case it may be conceded that the 12th section of the act of 1789 [1 Stat. 79], and the acts of 1866 and 1867 [14 Stat. 306, 558], re-enacted in the Revised Statutes of the United States (section 639, cls. 1, 2, 3), are not repealed by the act of 1875 [18 Stat. 470].

(a) The case was not removable under the section first named, because it was always held under that provision that all the plaintiffs must be citizens of the state where the suit is brought, and all the defendants citizens of other states. Dill. Rem. Causes, 17, 18.

(b) Nor under the act of 1866, because it is not a suit brought "for the purpose of restraining or enjoining" the contestants. Nor can there be "a final determination of the controversy so far as concerns" them, "without the presence of other defendants in the cause." Shields v. Barrows, 17 How. [58 U. S.] 130.

(c) Nor under the act of 1867, commonly known as the "Prejudice and Local Influence Act," because the removal was not applied for upon either of those grounds, and neither was alleged by the petitioners.

(d) The act of 1875: This act contains two clauses proper to be considered. It declares (1) that "any suit" * * * "in which there shall be a controversy between citizens of different states," etc., "either party may remove said suit into the circuit court of the United States." Further: (2) "And when in any suit," etc., "there shall be a controversy which is wholly between citizens of different states, and which can be fully decided as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States," etc.

Viewing the first of these extracts in the light of the past adjudications, and in the absence of any expression from the supreme court, I feel constrained (whatever might be my judgment under other circumstances), to hold that the term "party" is collective, and means all the plaintiffs and all the defendants, and that all on each side must be "citizens of different states" from those on the other side. See Dill. Rem. Causes, 29, 30. This latter construction of the phrase "party" derives support from the second paragraph quoted. In regard to that paragraph it is sufficient to say that this "controversy" is not "wholly between citizens of

different states," and cannot be "fully determined as between" the parties before the court. There are other contestants whose presence is indispensable. They are not, and it is believed cannot be, present as parties in this litigation in the federal tribunal.

3. A federal court has no jurisdiction in cases of proceedings to establish a will. In Gaines v. Fuentes, 92 U. S. 10, the supreme court said: "There are, it is true, in several of the decisions of this court, expressions of opinion that federal courts have no probate jurisdiction, referring particularly to the establishment of wills, and such is undoubtedly the case under the existing legislation of congress."

By this ruling I am bound, and it is conclusive of the case. See, also, Broderick's Will, 21 Wall. [88 U. S.] 504; Du Vivier v. Hopkins, 116 Mass. 125; Yonley v. Lavender, 21 Wall. [88 U. S.] 276; Tarver v. Tarver, 9 Pet. [34 U. S.] 174; Fouvergne v. New Orleans, 18 How. [59 U. S.] 470; [Adams v. Preston] 22 How. [63 U. S.] 473, 478. Whether the proceedings here in question is a "suit," within the meaning of the several removal acts, is a question not necessary to be considered. Cause remanded.

Case No. 5,069.

FRAZER v. CARPENTER et al.

[2 McLean, 235.] [1]

Circuit Court, D. Michigan. Oct. Term, 1840.

WITNESS — COMPETENCY OF MAKER OF BILL OF EXCHANGE IN ACTION BETWEEN HOLDER AND INDORSERS—RELEASE OF COSTS — IMPEACHMENT OF BILL—BILL AS EVIDENCE.

1. In an action between the holder of a bill of exchange and the acceptor, the bill is evidence, under the general money counts. So it is evidence between the holder and a remote indorser.

[See Benjamin v. Tillman, Case No. 1,304.]

2. There is a privity between the holder and the other parties to the bill, which enables him to sustain an action of indebitatus assumpsit against them.

3. In an action between the holder and the indorsers, the maker of the note, the defendants having released their costs, is a competent witness to prove that the note, after it was signed by him and passed out of his possession, was altered in a material part.

4. But he is not competent to impeach the note by any facts, within his knowledge, at the time the note was made.

5. His testimony must be limited to facts subsequent to his agency in the formation and negotiation of the note.

Mr. Frazer, for plaintiff.

Messrs. Buell & Witherell, for defendants.

OPINION OF THE COURT. This suit is brought by the plaintiff as the indorsee and holder of a note against the defendants [Carpenter, Palmer and Mack] as remote indorsers. To a count on the indorsement are added the common money counts. In the course of the trial a question was raised whether the note is admissible in evidence for the plaintiff as indorsee against the defendants, who are remote indorsers, under the general money counts. Where a bill of exchange was drawn by defendant and others, on the defendant alone, in favor of a fictitious person, and the defendant received the value of it from the second indorser, it was decided that a bona fide holder, for a valuable consideration, might recover the amount of it, in an action against the acceptor for money paid, or money had and received. Tatlock v. Harris, 3 Term R. 174; 1 East, 102; 3 Bos. & P. 560.

If a bill of exchange be drawn in favor of a fictitious payee, and that circumstance be known as well to the acceptor as to the drawer, and the name of such payee be indorsed on the bill, an innocent indorsee, for a valuable consideration, may recover on it against the acceptor, as on a bill payable to bearer. Minet v. Gibson, 3 Term R. 481; 1 East, 434; 1 H. Bl. 569. In the case of Mandeville v. Welch, 5 Wheat. [18 U. S.] 277, the court say—in all cases where the bill can be used as evidence, either against the parties, or against third persons, the same legal presumption arises of its having been given for value received, as exists in relation to a deed expressed to be given for a valuable consideration. And in the case of Page's Adm'r v. Bank of Alexandria, 7 Wheat. [20 U. S.] 35, the court remark—there are certainly cases in which a promissory note, or an indorsement of such note, may be offered in evidence, against the maker or indorser, under a count for money had and received, and if unconnected with other circumstances may be sufficient proof, in itself, to charge the defendant. An action of debt will lie by the payee or indorser of a bill of exchange, against the acceptor, where it is expressed to be for value received. Baborg v. Peyton, 2 Wheat. [15 U. S.] 385. The indorsee of the payee of a negotiable note can maintain an action for money had and received against the maker of the note, upon the proof of the note and indorsement. Penn v. Flack, 3 Gill. & J. 369; Young v. Adams, 6 Mass. 189; Wild v. Fisher, 4 Pick. 421. The indorsement of a cash note, of which the maker had notice and undertook to pay, establishes a privity of contract between indorsee and maker, and is legal proof of money held by the maker to the use of the holder. Ramsdell v. Soule, 12 Pick. 126; Cole v. Cushing, 8 Pick. 48. So money had and received lies by the holder of a note made payable to bearer. Pierce v. Crafts, 12 Johns. 90; Cruger v. Armstrong, 3 Johns. Cas. 5; Grant v. Vaughan, 3 Burrows, 1516.

To maintain assumpsit there must be a privity between the parties, but it may be a privity in fact or in law. Between each

[1] [Reported by Hon. John McLean, Circuit Justice.

party to a bill or negotiable note, and every other party, there is a sufficient privity in law; and each party liable to pay, is held responsible as for so much money had and received to the use of the party who is, for the time, the holder and entitled to recover. State Bank v. Hurd, 12 Mass. 172. Ellsworth v. Brewer, 11 Pick. 316. The holder of a negotiable note, whether by delivery or indorsement, is entitled to recover under the money counts. Olcott v. Rathbone, 5 Wend. 490; Ainslie v. Wilson, 7 Cow. 662; Butler v. Wright, 20 Johns. 367. A greater array of authorities might be brought to bear upon this point, but it is not deemed necessary. The above would not have been cited had not the late decisions in England established a different rule. We will now advert to some of those decisions.

In the case of Waynam v. Bend, 1 Camp. 175, Lord Ellenborough held, that a promissory note is evidence under the money counts only, as between the original parties to it. And the same rule has been followed by Lord Chief Justice Tenterden, in the case of Bentley v. Northouse, 1 Moody & M. 66; Exon v. Russell, 4 Maule & S. 507; Thompson v. Morgan, 3 Camp. 101. In the case of Eales v. Dicker, 1 Moody & M. 324, in an action by the indorsee against the acceptor of a bill of exchange, Mr. Justice Littledale said—I am decidedly of opinion that the bill is not evidence of money had and received by the acceptor to the use of the holder. And Mr. Chitty says, in his Treatise on Bills, (Ed. 1839) 595, it seems now to be settled, that the plaintiff can in no case recover under the count for money had and received, unless money has actually been received by the party sued, and for the use of the plaintiff. And he cites Barlow v. Bishop, 1 East, 434, 435, and Waynam v. Bend, 1 Camp. 175. The cases cited above, from 1 Camp. and 1 Moody & M., on which great reliance is placed, are both nisi prius cases. They are, undoubtedly, entitled to great respect, as having been decided by very learned and distinguished lord chief justices of the king's bench. But those decisions are not, as has been shown, conformable to previous decisions given by judges equally distinguished for their learning and ability. And, unless we labor under some misconception, these later decisions are not altogether consistent with some cases since decided in England.

In the case of Pownal v. Ferrand, 6 Barn. & C. 439, Lord Tenterden, and the other judges, held, that the indorser of a bill being sued by the holder, and having paid him part of the sum mentioned in the bill, might recover the same from the acceptor, in an action for money paid to his use. This recovery, it is true, was placed upon the peculiar circumstances of the case. The plaintiff having been forced to pay the money, in the language of the court, like a stranger, whose property, being on the premises, was distrained by the landlord for rent, is obliged to redeem his property, may recover on the money count. But suppose the plaintiff, on being applied to by the holder of the bill, had paid the full amount, for which, as indorser, he was liable; could he not, on the same principle, have recovered from the acceptor, on the money count? The payment of what he is legally bound to pay, without suit, could not, in any respect, weaken his right. Nor could it have been weakened by paying the whole amount of the bill instead of a part of it. And would not the indorser, in this view, stand in the same relation to the acceptor, as the holder of whom he received the bill. It was equally the duty of the acceptor to pay the bill to the holder as the assignee of it, as to the indorser who has taken it up. This change in the holder of the bill, could have no effect on the obligation of the acceptor. He was bound, and equally bound, to both parties. The assignee in purchasing the bill paid for it a valuable consideration, and the indorser in taking it up did the same thing. The indorser then, having taken up the bill is the holder, having the same rights and remedies as when the bill was first assigned to him. Now on what ground may he recover the amount of the bill from the acceptor? Whether as indorser or assignee of the bill he has paid for it the sum which the acceptor is bound to pay. And bound to pay it to him as the holder of the bill. Is not the consideration paid for the bill money paid on account of the acceptor, and for his use? And is not the bill evidence of this? In the above case Lord Tenterden remarks —"the law is, that a party, by voluntarily paying the debt of another, does not acquire any right of action against that other; but if I pay your debt because I am forced to do so, then I may recover the same; for the law raises a promise on the part of the person whose debt I pay to reimburse me." And the case of Exall v. Partridge, 8 Term R. 308, is referred to as sustaining this principle. The plaintiff, in that case, put his goods on the premises, knowing that he thereby placed himself in a situation to have his goods distrained for the rent; they were distrained, and, to redeem them, he had to pay the money sued for, and which the court held he might recover on the general money count.

A surety places himself in a situation in which he is compelled to pay the debt of his principal, and the sum thus paid he may recover from his principal on the general count. Now, in principle, does this case differ from the one in Term Reports? By placing his property on the premises it became subject to the demand of the landlord for rent, and the plaintiff thereby became the surety of the tenants. It was, in effect, the same as giving the property in pledge for the payment of the rent. Having paid the money to redeem his property, he might well re-

cover the amount from the defendants, as money paid to their use. Every indorser of a bill is a surety for the drawer or the acceptor, and may be compelled to pay it. Pownal et al., in the above case, became the sureties of Ferrand, the acceptor; and, having paid a part of the bill, it was properly considered as so much money paid for the use of the acceptor.

The right of the plaintiff, then to recover, depends not upon the peculiar circumstances of the case, but upon the fact, that being legally bound to pay, he has paid a sum of money which the defendant owed, and which he was bound to pay. And this principle applies to all cases of suretyship, where money has been paid by the surety, whether the plaintiff was bound as indorser or otherwise. The right of the owner of the property distrained, to recover, rested not alone upon the fact of his having paid the rent for the defendants, but upon that fact, coupled with the fact of the obligation he was under to pay it, to redeem his property. And this obligation arose from his voluntary act in placing his property on the premises. The right, then, of the plaintiffs to recover, in the cases of Exall v. Partridge [supra] and Pownal v. Ferrand [supra] rested upon a general principle. And this principle was directly in conflict with the decisions referred to, that a bill of exchange is not admissible in evidence, under the money counts, in behalf of the holder against the acceptor. And this upon the ground that there is no privity between the parties. In the case of Pownal v. Ferrand, Mr. Justice Littledale seems to have felt the pressure of this view, for he says that for some time he entertained considerable doubt whether the plaintiff, as indorser, in that form, could recover. Mr. Justice Holroyd took the broad, and, as we believe, the correct ground. The defendant, "he says, as acceptor of the bill, was liable in the first instance to pay it. If he had performed his duty, the plaintiff would not have been called upon by the holder; but, as an indorser, he was liable to be called upon to pay the whole or part; he was called upon, and was actually compelled to pay part." "It is said the plaintiff, by making this payment, was only remitted to his remedy upon the bill; but I am of opinion that the plaintiff is entitled to recover in this action, upon the same principle upon which a surety is entitled to recover money from his principal. I think that a party is not bound to resort to the original engagement, unless it be by deed, but that he may, at his election, found his action upon the original engagement, or bring indebitatus assumpsit for money paid." Except through the original engagement, where is the privity? A voluntary payment would not maintain the action. And if the privity is derived through the original engagement, it extends equally to the indorsee who has paid for the bill and become the holder, as to the indorser who has taken it up and become the holder. Each has paid the same sum for the bill. And as it regards the right to maintain the action for money paid, the bill being due, it can not be material whether it was purchased or taken up by the holder, before or after it became payable. Lord Tenterden having decided the action could not be maintained on the general counts, except as between the immediate parties to the bill, seems driven, of necessity, in the case of Pownal v. Ferrand [supra], to make a distinction between it and an ordinary case where the holder of the bill sues the acceptor. But the distinction he draws, is one of circumstances, and not of principle. In the case of Wilson v. Coupland, 5 Barn. & Ald. 228, these facts were proved: The defendants being indebted to Taillasson & Co., in the sum of £768, upon the balance of accounts, of money had and received; and Taillasson & Co. being indebted to the plaintiffs in a much larger amount, transferred this demand to the plaintiffs, and which the defendants agreed to pay them. On this state of facts the court held, Abbott, Chief Justice, afterwards Lord Tenterden, that the plaintiffs could recover the amount under the general count for money had and received. Now, here no money passed between the parties. The debt was due to Taillasson & Co., and the defendants agreed to pay it to the plaintiffs. There was no privity except through the promise of the defendants. And does not the acceptor of a bill promise every holder to pay it at maturity?

In the language of the supreme court, in the case of Raborg v. Peyton, 2 Wheat. [15 U. S.] 385, we think "it is very difficult to perceive how it can be correctly affirmed that there is no privity of contract between the payee and acceptor. There is, in the very nature of the engagement, a direct and immediate contract between them. The consideration may not always, although it frequently does, arise between them; but privity of contract may exist, if there be an express contract, although the consideration of the contract originated aliunde. Besides, if one person deliver money to another for the use of a third person, it has been settled that such a privity exists, that the latter may maintain an action of debt against the bailee. And it is clear that an acceptance is evidence of money had and received by the acceptor for the use of the holder. It is the evidence of money paid by the holder to the use of the acceptor. A privity of contract, and a duty to pay, would seem, in such case, to be completely established; and wherever the common law raises a duty, debt lies." If the contract thus establish the privity and a duty as between the holder of the bill and the acceptor, the same privity and duty must exist between the holder and any prior indorser of the bill whether immediate or remote. We, therefore, think

that, under the money counts, this bill is admissible in evidence.

The defendants then offered the maker of the note to prove that after its execution it had been altered in a material part without his consent or knowledge. To his competency, as a witness, the plaintiffs' counsel objected. The general rule is, says Chit. Bills, (Ed. 1839) 653, that it is no objection to the competency of a witness, that he is, also, a party to the same bill or note, unless he be directly interested in the event of the suit, and be called in support of such interest, or, unless the verdict, to obtain which his testimony is offered, would be admissible evidence in his favor in another suit. Bent v. Baker, 3 Term R. 27; Jordaine v. Lashbrooke, 7 Term R. 601; Smith v. Prager, Id. 62; Jones v. Brooke, 4 Taunt. 464.

So far as regards the amount of the note the witness seems to have no preponderance of interest for the one party over the other, to this action. But this does not hold in respect to the costs of this suit. Should the plaintiff fail in this action the witness would not be liable to him for the costs; but should he succeed he is liable to the defendants for the costs. On this ground, therefore, he is incompetent. But a release from the defendants being presented, this objection to the witness is removed. In the case of Walton v. Shelley, 1 Term R. 300, the court, after a full and most able and elaborate consideration of the question, held, that a person is not a competent witness to impeach a security which he has given, though he is not interested in the event of the suit. But this decision was afterwards overruled in the case of Jordaine v. Lashbrooke, above cited, and is not considered as law by the English courts. It has been adopted, however, by the supreme court. In the case of Bank of U. S. v. Dunn, 6 Pet. [31 U. S.] 55, the court held that no person, who is a party to a negotiable note, shall be permitted, by his own testimony, to invalidate it. And the same rule was sanctioned in the case of Metropolis Bank v. Jones, 8 Pet. [33 U. S.] 14. In many of the state courts this rule has been sanctioned. Haughton v. Page, 1 N. H. 60; Churchill v. Suter, 4 Mass. 156; Warren v. Merry, 3 Mass. 27; Jones v. Coolidge, 7 Mass. 199; Winton v. Saidler, 3 Johns. Cas. 185; Wilkie v. Roosevelt, Id. 206; Coleman v. Wise, 2 Johns. 165; Skilding v. Warren, 15 Johns. 270. Some doubt as to the rule was suggested by the judges in the case of Powell v. Waters, 8 Cow. 669, but no decision was given. Stille v. Lynch, 2 Dall. [2 U. S.] 194; Allen v. Holkins, 1 Day, 17; Baring v. Reeder, 1 Hen. & M. 175; 2 Bin. 154; 2 Desaus. Eq. 224; Bank of Montgomery Co. v. Walker, 9 Serg. & R. 236. The purpose for which the witness is called is not to show that the note was void in its creation, but that its validity has been destroyed by a subsequent alteration. An alteration after it had been signed by the witness. In the case of Baker v. Arnold, 1 Caines, 258, the court held that an indorser of a note was a competent witness to prove the indorsement was made after the note was due. Judges Thompson and Livingstone held the indorser was not a competent witness, under their decision, in the case of Winton v. Saidler [3 Johns. Cas. 185], cited in 1 Caines, 267, which adopted the rule of Walton v. Shelley. But Judge Kent, and two other judges, held otherwise. In his opinion, Judge Kent said—I do not think the decisions of this court go so far as to warrant a rejection of the indorser in the present instance. In those cases the maker of the note in the one, and the indorser in the other, were offered to prove the note to have been usurious. Those witnesses were, therefore, called to invalidate the paper they had signed. So in the case of Walton v. Shelley, the indorser, who was rejected, was called to prove the note void by reason of usury. And he further remarked, that he could wish to see the rule of witnesses being incompetent, on grounds of policy, rendered manageable by being reduced to limits susceptible of definition and certainty. To do this, he says—we must adhere strictly to the cases which produced the rule, and exclude only the witness who was called to impeach his own paper, by showing it to have been immoral, or illegal, when he put his name to it. The same rule is sanctioned in the following cases: Warren v. Merry, 3 Mass. 27; Barker v. Prentiss, 6 Mass. 430; Webb v. Danforth, 1 Day, 301; Hubbly v. Brown, 16 Johns. 70; Myers v. Palmer, 18 Johns. 167. The indorser is not a competent witness, in a suit against the maker of a promissory note, to prove that the note was originally drawn for the indorser's accommodation, and thereby enable the maker to set up a discharge by the holders' giving time to the indorser. For, though a party to negotiable paper may be received to prove subsequent facts to discharge it, yet he is not competent to show that the instrument was not, in truth, what it purported on its face to be. Bank of Montgomery Co. v. Walker, 9 Serg. & R. 236.

A party to a negotiable instrument may testify to facts which do not prove it to have been originally void. Wendell v. George, 1 R. M. Charlt. 51. The plaintiff declared as an indorsee of a promissory note, drawn by Foster Charlton, payable to the defendant; Lord Mansfield admitted the drawer to prove that the date had been altered. 2 Esp. 708. And in the case of Dickinson v. Prentice, 4 Esp. 32, Lord Kenyon admitted the drawer to prove, in an action by the holder against the acceptor, that the acceptance was a forgery. His lordship said the objection went to the credit of the witness, and not his competency. In an action on a note by the payee against the surety, the principal is a competent witness; and his testimony is admissible to prove facts happening after its execution, to discharge the surety. Free-

man's Bank v. Rollins, 1 Shepley [13 Me.] 202. The payee of a note, in a suit between the assignee and the maker, is a competent witness to prove upon what terms the assignment was made, if called by the maker; their interests being adverse. Stone v. Vance, 6 Hammond [Ohio] 248. The payee of a note, who has indorsed it with a saving of his own liability, is a competent witness to prove an alteration in the note since its execution. Parker v. Hanson, 7 Mass. 470. An indorser is a good witness in an action by an indorsee against the maker to prove that the note was, after the indorsement, fraudulently put into circulation. Woodhull v. Holmes, 10 Johns. 231. Where a note, before it became due, was paid to the payee by the maker, who took a receipt in full, and the note was afterwards, before it became due, indorsed by the payee and by the indorsee to the plaintiff, who was informed of the payment before receiving the note, it was held that the plaintiff took it subject to such payment, and that the first indorsee was a competent witness to prove the payment of the note. White v. Kibling, 11 Johns. 128. In the case of Sillding v. Warren, 15 Johns. 270, it was held that one of the makers of a note was competent to prove that the plaintiffs who sued the indorser were not bona fide holders, and thereby defeated their action. Such subsequent fact, however, must not involve the turpitude of the witness. Hubbly v. Brown, 16 Johns. 70. Under this rule it has been held that a second indorser is competent to prove that the third indorser had said that he had received and discounted the note on usurious interest. Powell v. Waters, 17 Johns. 176.

The great and governing principle in the case of Walton v. Shelley, and the other cases cited, is, that an individual, whose name appears upon a negotiable instrument, is not a competent witness to prove that it was not a bona fide instrument, at the time it was made. That he shall not be permitted to prove any fact which conduces to show that the bill or note was not what it purported to be when it received its signature. And this rule is founded upon public policy. It is deemed as incorrect in morals as in policy, that a person whose signature gives credit to a negotiable instrument should not only practice a fraud upon every holder of it, but be a witness to prove the fraud. That he should, by an exhibition of his own turpitude, destroy the value of the instrument in the hands of an innocent holder. But this rule is limited to the transaction in which the witness was a party. He may prove facts which subsequently transpired, though they should conduce to defeat the action of the plaintiff. But these must be facts in which he had no agency; and in reference to which, as regards the trial on hand, he can have no direct interest. Under this view the witness now offered, showing a release from the defendants, may be examined as to the alteration of the note after it was executed by him and passed out of his possession. The verdict in this case can not be given in evidence in any case either for or against the witness. He is responsible to the plaintiff as the maker of the note, whatever may be the result of this trial. That the maker of the note, as between the holder and the indorsers, is a competent witness, the defendants having released him from costs, all the authorities establish. And the only question is—what facts may he prove? These must be subsequent to his agency in the making and negotiation of the instrument, and it is not perceived that any other limit can be imposed.

The witness was examined, and other witnesses, but the jury not being able to agree upon their verdict, they were discharged, and the cause was continued.

FRAZER (DAGGS v.). See Case No. 3,538.

FRAZER (SMITH v.). See Case No. 13,048.

FRAZER (UNITED STATES v.). See Case No. 15,161.

Case No. 5,070.

In re FRAZIER.

Ex parte ANTHONY et al.

[2 Hughes, 293.] [1]

Circuit and District Courts, E. D. Virginia. May 6 and June 5, 1874.

JURISDICTION IN BANKRUPTCY—SETTLEMENT OF PARTNERSHIP ACCOUNTS.

It is too great a stretch of the jurisdiction of a bankruptcy court to take a fund from the estate of a decedent not in bankruptcy to pay the debt of a partnership firm not in bankruptcy, in which decedent was partner, on the single ground that the bankrupt himself was a partner of that firm; and the bankruptcy court will not entertain a petition praying such a thing, but will leave the petitioner to his remedies in the state courts.

In bankruptcy. W. G. R. Frazier and T. B. Starke entered into a written agreement, on the 3d of June, 1871, by which Starke agreed to lend him $2500 for three years as a fund with which Frazier was to purchase outfit and apparatus for a photographic establishment, and to secure upon this property by deed of trust the payment of the money advanced by Starke. Frazier was to go on with the business and to divide the profits with Starke, and was to make no debts, and draw no drafts, but was to buy for cash alone. On the 1st July following, Starke having advanced the money, Frazier executed a deed of trust on the photographic property to secure the $2500 loaned, but they substituted a different contract in one particular in this deed from the one which had been agreed upon a month before. The difference was this, that, instead of providing for a division of the profits of the business between Frazier and Starke, the deed stipulated that Frazier should pay to Starke 12

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

per cent. interest per annum upon the loan. Frazier thereupon went on with the business in his own name; and in buying fixtures, made a debt to E. & H. T. Anthony & Co. of $658.92, between 7th July and 23d December, 1871. These creditors did not know then, or for three years after, of any agreement having been made between Starke and Frazier to divide profits, and they gave credit individually to Frazier. The business was conducted from the beginning in Frazier's individual name. Two years after Frazier had commenced business, to wit, in March, 1873, Starke died, and of course is not capable of explaining how the contract of 3d June, to divide profits, became in July a contract by which he was to receive 12 per cent. on his loan. During all the period of Frazier's business, there was no pretence on his part, and no thought, on the part of the public, or of these creditors, Anthony, that there was a partnership. Frazier went on in his own name with his photographic business, until October 3d, 1873, when he was adjudicated a bankrupt on his own petition, having paid nothing to Starke or his estate either in the form of interest or profits. Sale of the property embraced in the trust deed was made in October, 1873, under the order of this court; $500 of the proceeds have been paid for rent, and two notes each for $1000 are on deposit in bank to the credit of this cause.

HUGHES, District Judge. The creditors, Anthony, now claim for themselves and other creditors the right to be paid their debts out of the two notes, on the ground that Starke was a partner of Frazier, and that this fund accruing to his estate, now in custody of this court, is chargeable with these debts. The counsel of Frazier were not authorized by the documents accompanying it to admit, in the statement of facts submitted to me, that the agreement of the 3d June, 1871, "was not abrogated before the death of said Starke in 1873;" and I do not accept that part of the agreed statement of facts as true. I conceive that the provision of the deed of trust giving Starke 12 per cent. as interest was a substitute agreed upon by both parties to the stipulation of 3d June, 1871, by which Starke was to take half the profits.

It is not proved that Starke's estate is insolvent. It is not denied that, if there has been such a firm as Starke & Frazier, the firm is solvent. Neither the estate of Starke himself nor the supposed firm of Starke & Frazier are in bankruptcy; and this court has therefore no jurisdiction over the estate of the one or the assets of the other. The property conveyed by Frazier to Starke's trustee is no part of the estate in bankruptcy, and but for the petition of Mary C. Starke, administratrix of T. B. Starke, improvidently preferred here, praying it to do so, this court would most probably not have assumed jurisdiction over the property conveyed by Frazier's trust deed. Now that a sale has proved that the bankrupt's estate had no interest in that property, this court declines longer to continue its jurisdiction over it.

It is unnecessary to decide whether a partnership existed between Starke and Frazier, or to decide, 1st. That a mere agreement, never carried into effect, to share profits, did not in this case constitute a partnership; and 2d. If it did create one, yet that the stipulation of the trust deed by which Starke was to receive 12 per cent. interest was an abandonment of the agreement to share profits. Starke's estate is not insolvent nor in bankruptcy. The estate of the alleged firm of Starke & Frazier, if such firm ever existed, is not in bankruptcy. Only Frazier himself is in bankruptcy; and as it is not pretended that the two notes, of $1000 each, are part of his estate in the custody of this court, the creditors of Frazier have no right to a decree for the payment of their claims out of those notes; certainly not on the agreed statement of facts signed by counsel, which by silence on the subject concedes that Starke's estate is solvent and that the hypothetical firm of Starke & Frazier is solvent.

It would be too great a stretch of the jurisdiction of this court to take a fund from the estate of a decedent not in bankruptcy to pay the debt of a partnership firm not in bankruptcy, on the single ground that the bankrupt himself was one of that firm.

If there was such a firm, and the creditors of this bankrupt have a claim against it, the local courts are open for the assertion of that claim, and the firm as well as the decedent's estate (for all that appears in the agreed statement of facts) are solvent and responsible for the debts of the firm. Starke being dead and unable to explain the terms on which the business of Frazier really went, it would have been proper to take the deed of trust, which is the last instrument executed between Frazier and himself, as indicating those terms, if there had been doubt on this point, which I have not. A decree may be taken for the delivery of the two notes of $1000 each to the administratrix of Starke.

This decree was affirmed, on appeal, on the 5th June, 1874.

BOND, Circuit Judge. This cause coming on to be heard upon the petition, agreed statements of facts, and answer, and having been argued by counsel, it is thereupon ordered that the petition be dismissed for the reasons well set forth in the opinion of the district judge, with costs.

Case No. 5,071.

FRAZIER v. BRACKENRIDGE.

[1 Cranch, C. C. 203.] [1]

Circuit Court, District of Columbia. Dec. Term, 1804.

EXECUTORS—RULE TO PLEAD.

An executor may be ruled to plead before the expiration of the year after letters granted.

[This was an action by Frazier against Brackenridge, the executor of White.]

Motion for rule to plead.

Mr. Key objects, that an executor is not obliged to pay money until twelve months after letters testamentary granted, and therefore is not obliged to plead. Cur. ad. vult.

Rule granted to plead by the 2d day of next term.

FRAZIER (IRVING v.). See Case No. 7,075.

Case No. 5,072.

FRAZIER v. LOMAX.

[1 Cranch, C. C. 328.] [1]

Circuit Court, District of Columbia. July Term, 1806.

WRIT OF INQUIRY UPON JUDGMENT BY DEFAULT.

Upon executing a writ of inquiry upon a judgment by default, the jury must find at least one mill in damages.

Upon the execution of a writ of inquiry.

Mr. Youngs, for plaintiff, said the practice was to find a cent, without any evidence, the default having admitted something to be due.

THE COURT instructed the jury that they might and ought to find the smallest possible sum due, which was one mill, being the smallest money of account known in the United States. Verdict accordingly.

Case No. 5,073.

FRAZIER et al. v. McDONALD.

[8 N. B. R. 237; [2] 20 Pittsb. Leg. J. 185; 7 West. Jur. 505; 10 Phila. 273; 30 Leg. Int. 232.]

District Court, W. D. Pennsylvania. July 11, 1873.

BANKRUPTCY—DEATH OF DEBTOR—ABATEMENT.

Where a debtor dies between the time of the serving of the rule to show cause and his adjudication as a bankrupt, the proceedings will be abated.

[Cited in Adams v. Terrell, 4 Fed. 801.]

In bankruptcy.

Messrs. Watson, Wood & Weir, for the rule.

Mr. Stoner and Mr. Swoope, Dist. Atty., contra.

McCANDLESS, District Judge. On the 4th of April, 1873, a creditors' petition was filed [by Frazier & Fry] against John V. McDonald, alleging several acts of bankruptcy. To this he filed a denial on the 12th of April, 1873, and demanded a trial by jury, which was ordered. On the 28th of May, 1873, and before a jury trial could be had, his executors, by counsel, came into court and suggested his death as having occurred on the 22d of that month. At their instance a rule was granted on the petitioning creditors to show cause why the petition and all the proceedings thereunder should not abate.

The question presented for our consideration is, does the death of McDonald terminate the proceedings in a court of bankruptcy?

Judicial legislation is a dangerous encroachment upon the constitutional rights of congress. Without its employment I cannot extend the provisions of the bankrupt law beyond the present status of this case. Realizing the justice of such an application to its existing features, I have tried to find authority for it in some one or more of its sections, but have not been able to do so. To apply the broad principles of equity practice to an act of legislation, comprehensive in its terms and designed to meet every possible contingency in the affairs of the debtor, is the exercise of a doubtful authority, and should be avoided by the judiciary.

Were this a voluntary proceeding the statute provides for it by declaring, in the twelfth section [Act 1867; 14 Stat. 522], that if the debtor dies after the issuing of the warrant, the proceeding may be continued and concluded in like manner as if he had lived. In such cases he had already been adjudicated a bankrupt, and complete jurisdiction over his person and property had been acquired by the bankrupt court, and there is no good reason why it should be transferred to another forum. In a proceeding by the creditors there is no such provision; the attitude of the party is wholly different; the process is simply inchoate; he has not been declared a bankrupt; he denies all the acts of bankruptcy charged in the petition, and demands that their truth or falsity may be determined by a jury. These are analogous to torts in an action at law, suits for which abate on the death of the party. Even if we thought that the twelfth section applied to cases of involuntary bankruptcy, it could not apply here, for no warrant has issued, and could not issue until after an adverse finding by the jury, and a decree of adjudication. Many of the clauses in the involuntary sections of the bankrupt law are penal in their nature. With what propriety can you visit these upon a representative man, upon the executor, who is the appointee, and, post mortem, the legitimate representative of the dead man, or upon the administrator, who obtains none of his powers from the decedent, but is ap-

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reprinted from 8 N. B. R. 237, by permission.]

pointed by, and derives all the authority from, the register of wills?

In construing this act of congress, I can give it no other interpretation, and as this is a question of the first impression, I suggest an early appeal, that it may be definitely settled in this circuit. The rule is made absolute.

Case No. 5,074.

In re FREAR.

[2 Ben. 467; 1 N. B. R. 660 (Quarto, 201); 35 How. Pr. 249; 1 Am. Law T. Rep. Bankr. 123.] [1]

District Court, S. D. New York. June 22, 1868.

BANKRUPTCY OF PARTNER — ADMINISTRATION OF INDIVIDUAL AND PARTNERSHIP ASSETS.

Copartnership debts may be proved in proceedings instituted by a single partner, on an individual petition, whether there are any assets of the copartnership or not.

[Cited in Re Abbe, Case No. 4; Re Wright, Id. 18,065; Re Stevens, Id. 13,393; Re Webb, Id. 17,317; Re Rice, Id. 11,750; Hudgins v. Lane, Id. 6,827; Re Jewett, Id. 7,306; Re Morrill, Id. 9,820; Re Lloyd, Id. 8,429.]

[Cited in West Phila. Bank v. Gerry, 106 N. Y. 471, 13 N. E. 453; Curtis v. Woodward, 58 Wis. 506, 17 N. W. 328.]

[In the matter of Alexander Frear, a bankrupt.]

[2] [I, John Fitch, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Brown, Hall & Vanderpoel, for the bankrupt; Martin & Smith, for Bauendahl & Co.; Matthews & Bretts, Chapman, Scott & Crowell, and S. T. Freeman for various creditors, also Richard J McCurdy, in person, and for Aldrich, McCurdy & Co. I deem it the duty of the register in deciding questions involving the construction of the bankrupt act, to examine the question presented in all its bearings; examine the authorities applicable to the case, and give an opinion in the matter upon the law of the case, which will enable the district judge to decide the case by revising or affirming the opinion of the register. This course lessens the arduous duties of the district judge, and relieves him of some of the most difficult and laborious part of his duties. On the 19th day of February, A. D. 1868, the above named petitioner filed his individual petition in the prescribed form (No. 1), praying that he might be adjudged by the court to be a bankrupt and have a discharge from all his debts provable under the bankrupt act. There is no reference in the petition to copartnership debts, but the schedules annexed show the petitioner was a member of the late copartnership firm of Alexander Frear & Co., which was dissolved more than six months prior to the filing of said petition, and a large number of debts contracted by said copartnership are set forth in said schedules, including the debt to Bauendahl & Co., and the other creditors who have proved their claims.

[The petitioner has been duly adjudged a bankrupt, and at the meeting of creditors, Bauendahl & Co. presented against the estate of said petitioner, proof of a debt which was contracted by the said firm of Alexander Frear & Co.; to this the attorney for the petitioner objected, upon the ground that copartnership debts could not be proved herein, and urged that the indebtedness sought to be proved was a debt of the said firm of Alexander Frear & Co., and not his (the petitioner's) debt within the meaning of the bankrupt act. The attorney for said Bauendahl & Co. insisted that the fact, that others were liable with the petitioner on this debt, made no difference, that the copartnership of Alexander Frear & Co., being dissolved, the debt was the joint and several debt of the persons who composed said copartnership, that the creditor could enforce its collection from the individual property of the petitioner, and that proof of it should be received, and that a creditor has a right to prove the same. The following question of law arises thereon: Where a person who was a member of a late copartnership, files his individual petition under the bankrupt act, praying for a certificate of discharge from all his debts, can all his creditors prove their claims against him, or are his individual creditors alone entitled to come in and prove their claims? Section 19 of the bankrupt act, approved March 2, 1867 [14 Stat. 525], allows a party to prove any debt he may have against a petitioner, but the proof of the claim or debt does not by any means conclude the petitioner, or any of the petitioner's creditors; he, or they, may contest the claim so proved upon any legal ground authorized by law. The act expressly allows the petitioner to object to all debts barred by the statute of limitations, yet such a claim, if proved, and not objected to by the petitioner or a creditor, must be allowed by the court, and the assignee must receive it as a claim entitled to its share of the dividend; the same rule applies to a debt which by a state law may have been discharged by a state insolvent law, which as between the citizens of the same state is binding and effectual in the state courts, and also United States courts, but not as between citizens of different states. 3 Seld. [N. Y.] 300; Kelley v. Drury, 9 Allen, 27; Baldwin v. Bank of Newburgh, 1 Wall. [68 U. S.] 234, 239; Worthington v. Jerome [Case No. 18,054].

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 123, contains only a partial report.]

[2] [From 1 N. B. R. 660 (Quarto, 201).]

[My view of the case is this, that any claim that the creditor could prosecute and recover as against the petitioner in a suit in the district court, can be proved and must be allowed in the proceedings in bankruptcy, as the law makes the proceedings a suit of the debtor against his creditors, merely reversing the manner of proceedings. This brings up the question: Could the creditor sue for and recover in the district, or circuit, court the debt or demand he now seeks to maintain against the objection of the petitioner? It must be allowed, as the same rule of law in regard to the debts that can be allowed in bankruptcy must govern at the circuit; as I conceive it to be plain, that, if the claimant could not obtain a judgment upon the claim, he cannot participate in the proceeds of the petitioner's estate. By the law of this state, a partner is liable personally for the debts of the copartnership to the entire indebtedness of the firm; the debt of the firm is as much the debt of the individual as of the firm, and after the property of the firm or corporation is exhausted, and there still remain claims or debts unsatisfied, the individual property of the members of the firm or copartnership can be taken in execution to pay the firm debts. Therefore, I hold that debts due by a firm are so far the debts of each member of the firm, that any creditor of the firm can prove their debts due them from the copartnership as against any member of the firm; whether he petition as an individual, or as a member of a firm, or of a late firm; the petitioner is liable both as an individual and as a copartner; is jointly as well as severally liable upon a contract, whether made as an individual or as a member of a firm.

[The discharge of the petitioner would not in any manner affect the claim of the creditor against the members of the copartnership; their claim against the others would remain the same, but should there be any money paid upon their claim, it would reduce the amount due upon the debt, by the amount so paid; the bankrupt would be discharged from the debt. It operates the same as the death of a bankrupt with no estate. The ground taken by Brown, Hall & Vanderpoel, for the bankrupt, would not only defeat the intent of the framers of the bankrupt law, but would render the discharge of the petitioner worthless, as he would remain indebted upon all the copartnership debts which constitute most of his indebtedness; also rendering most of the discharges in this district already granted, worthless, and laying the foundation for endless litigation. The bankrupt law is analogous to the insolvent law of this state, known as the two third act; by that act a discharge cuts off all debts, copartnership as well as individual. The supreme court, in the wording of the form of the petition, evidently intended that the petitioner should be discharged from all his debts, individual as well as otherwise. The provisions of the bankrupt law contemplate the entire discharge of the petitioner; no reservations are made, no partial discharge provided for; all claims of whatever nature are provable. Where an action at law, or in equity, could be maintained against a petitioner, the claim upon which said action could be maintained can also be proved subject to the same defence as in a court of law.

[By section 4 of the bankrupt act, the register is empowered to take proof of debts, "and all" depositions of persons and witnesses taken before said register shall be reduced to writing, be signed by him, and filed in the clerk's office of the district court, as part of the proceedings. Section 5, bankrupt act. By section 8 of the bankrupt act, "any creditor whose claim is wholly or in part rejected may appeal," &c. By section 11 of the bankrupt act, the petitioner in his petition must state his "willingness to surrender all his assets for the benefit of his creditors." His schedule must contain a full and true statement of all his creditors. Why require this to be done unless his creditors could prove their debts against his estate? The "sum due each creditor, also the nature of each debt or demand," must be stated. It is not probable that congress would have required the petitioner to set forth the name of each creditor, the amount and consideration of each debt, unless the holder and owner of the debt could prove the same, and share in the proceeds of the estate; "also to annex an inventory of all his assets, both real and personal." The estate of a petitioner may consist of every imaginable piece of property, held jointly with others, and his interest therein must be taken by the assignee. All debts due by the petitioner may be proved, and he will be discharged from them, be they individual or copartnership debts. By section 13 of the bankrupt act, a creditor who has proved his claim may request the judge to require the assignee to give bond, &c. Section 14 of the bankrupt act vests in the assignee all the bankrupt's property, including copartnership effects. By section 14 of the bankrupt act, the petitioner is compelled to make a transfer to the assignee of his assets; and any interest in any copartnership is an asset. If an attachment should have been issued against the property of the petitioner, and a levy made upon the property of the petitioner, and that property have been an interest in a copartnership, such attachment, if made within six months, would be set aside, and the assignee in bankruptcy would take the effects, be they copartnership or otherwise.

[For the reasons above given, and upon a careful review of the law applicable to this case, I held that the debt was provable, and allowed the claim to be proved as a debt against the estate of the bankrupt. Brown, Hall & Vanderpoel, attorneys for the petitioner, objected, and asked that the same

should be certified to his honor, the district judge.] [3]

BLATCHFORD, District Judge. The debt in question is provable, whether there are any assets of the copartnership or not. If there are any such assets, they must be administered according to the provisions of section 36 of the act, and so must the assets of the separate estate of the bankrupt.

Case No. 5,075.

In re FREDENBERG.

[2 Ben. 133;[1] 1 N. B. R. 268 (Quarto, 34).]

District Court, S. D. New York. Feb., 1868.

PARTY—EXAMINATION OF WITNESS—COUNSEL—CERTIFICATE OF REGISTER.

1. The only parties to bankrupt proceedings are the bankrupt and the creditors.

2. A witness in bankruptcy proceedings cannot take the opinion of the judge, on a certificate by a register, or be represented by counsel, except in a proceeding against him for contempt.

[Cited in Re Feinberg, Case No. 4,716.]

3. Where a witness, called for examination under the twenty-sixth section of the bankruptcy act [of 1867 (14 Stat. 529)], objected to being examined, on the ground that there was no authority to examine a witness under the act unless there was a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself, but, without insisting on the objection, submitted to an examination, and the register certified the question, involved in his objection, to the court: *Held*, that the objection was frivolous.

[Cited in Re Stuyvesant Bank, Case No. 13,582; Re Comstock, Id. 3,080.]

4. After the witness had waived his objection, there was no question to be certified, and the register should have refused to give a certificate.

[This was a proceeding in the matter of Michael W. Fredenberg, a bankrupt.]

[2] [I, James F. Dwight, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following questions arose, pertinent to the said proceedings, namely:

[Facts. On the 27th of January, one Henry Manheims, who had been regularly summoned as a witness herein by an order dated January 22d, made on the application of the assignee herein, was before the register for examination. The witness had appeared in obedience to said summons on the 23d inst., had been sworn, and his examination had commenced. By agreement between the assignee and witness, the examination had been continued and adjourned until the 27th inst. And at the commencement of the examination this day, the said witness objects to being examined, "because there is no authority to examine a witness in any matter unless there be a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself." Counsel for witness and the assignee being heard, the register overruled the objection, and decided that the witness may be examined as prayed for by the assignee. Whereupon the witness prays that the question may be certified to the judge for decision, under the provisions of section 6 of the act, whether he shall be examined. Without standing upon the objection, the witness submitted himself to examination, which was concluded. The bankrupt himself has not been examined. An assignee has been chosen and is duly qualified. The assignee has obtained an order for the examination of the bankrupt himself, but the bankrupt could not be found within the district, although he has received no permission to depart, from the register.

[In my opinion the objection of the witness is not a valid one. Section 26 of the law provides that "the court may, on the application of the assignee in bankruptcy, require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property," &c. "And the court may, in like manner, require the attendance of any other person as a witness," &c. There is no restriction in the statute as to the circumstances antecedent to the examination of a witness, and the provision of this section seems clear to me; otherwise, in the case of the death or absence of a bankrupt, the assignee or creditor would be unable to gain information sought for, concerning the bankrupt's property and disposition. I think the witness, Henry Manheims, was properly under examination.

[Which said facts and opinion of register are respectfully submitted, this 13th day of January, 1868, for the decision of the judge.] [2]

BLATCHFORD, District Judge. In answer to the question certified in this case, I reply:

1. The question is certified on the prayer of the witness, under section 6 of the act. The register might properly have refused to certify the question. It is only a party to the proceedings before the register, who can take the opinion of the district judge on a certificate of the register, on a matter arising in the course of such proceedings, or upon the result of them. The word "party" means the bankrupt or a creditor of his. It does not mean a witness who is not the bankrupt or a creditor of his.

2. I notice, from the certificate of the register, that the witness was represented be-

[3] [From 1 N. B. R. 660 (Quarto, 201).]

[1] [Reported by Robert D. Benedict, Esq. and here reprinted by permission.]

[2] [From 1 N. B. R. 268 (Quarto, 34).]

fore the register by counsel. The certificate speaks of the "counsel for witness." This is an anomaly. It can only lead to confusion and delay. It is only parties, the bankrupt or a creditor, who are entitled to be represented by counsel, either before a register or the court, unless where a witness is made a party to a new and collateral proceeding, by being cited to answer for an alleged contempt.

3. The register was correct in his decision, that the witness was properly under examination.

4. The register certifies that the witness, without standing on the objection, submitted himself to examination. Section 7 of the act provides, that, if any person examined before a register refuses or declines to answer, the judge shall have power to order such person to pay the costs thereby occasioned, if such person be compellable by law to answer, and such person shall also be liable to be punished for contempt. The objection made by the witness in this case was so entirely frivolous, that, if he had not submitted to an examination, the case would have been a clear one for the imposition of costs and for punishment for contempt. The objection made was, that there is no authority to examine a witness in any matter under the bankruptcy act, unless there be a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself. The twenty-sixth section of the act, under which section the witness in this case was summoned, requires him to submit to an examination on oath upon all matters relating to the disposal or condition of the bankrupt's property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. In addition to this, the court can compel the giving of testimony by witnesses, in the taking of evidence, under section 38 of the act. The objection made by the witness was wholly without foundation, and the fact, that he himself was unwilling to stand upon it, showed that he regarded it as untenable.

5. Although the objection was made, yet, by submitting to an examination, which the register states was concluded, the witness waived the objection, and after that there was no point or matter, within the meaning of section 6 of the act, to be certified by the register, and he ought on that ground to have refused to certify the question.

Case No. 5,076.

In re FREDERICK.

[The case reported under the above title in 21 Int. Rev. Rec. 310, is the same as Case No. 5,407.]

Case No. 5,077.

FREDERICK et al. v. The FANNY.

[Bee, 262.] [1]

District Court, D. South Carolina. 1808.

SEAMEN—PART OF CARGO MISSING—CONTRIBUTION.

If any part of the cargo be missing, all the seamen shall contribute to make it good, unless the guilt can be proved upon a particular person, or persons.

[Cited in Joy v. Allen, Case No. 7,552.]

[This was a libel by John Frederick and others against the brig Fanny (Ormond, captain).]

BEE, District Judge. The question in this case is, whether all the seamen shall be liable, proportionally, to make good the value of certain articles making part of the cargo, and missing. It was proved that William Harriott, one of the seamen, had been detected with part of the stolen goods, and that he alone was liable, no proof appearing against the others. It was admitted that all would have been chargeable, if none, in particular, could have been criminated. One hundred pieces of nankeen were missing, of which only three were found upon Harriott. The rest of the crew must necessarily have been privy to, or concerned in the loss of the remainder. I decree, therefore, that they all contribute, pro rata, to make up this loss.

Case No. 5,078.

The FREDERICK M. WILSON.
The GENERAL SHERIDAN.
The YORK RIVER.

[7 Ben. 367.] [2]

District Court, E. D. New York. June, 1874.

COLLISION IN EAST RIVER—TUG AND TOW — VESSELS MEETING—NAVIGATING MIDDLE OF RIVER.

1. The tug W. was towing an oil-scow by two hawsers astern, around the Battery, from the North river into the East river, when she saw coming down the East river, near the piers on the New York side, the two tugs S. and Y., with two barges, the S. being ahead and towing the barges on a hawser, and the Y. being alongside of the inshore barge. Off pier 7, East river, was a drilling machine at anchor, about 700 feet out from the piers. As the W. was coming round the Battery, she headed outside the drilling machine, but she determined to pass inside of it, and headed inside of it. The S. and the Y., with their tow, were inside of it. The tide was flood. The W. passed the other tow in safety, and the W. and the S. passed each other in safety, but the oil-scow and the port barge struck each other nearly head on, not far from the middle of the channel between the drilling machine and the piers. Both the W. and the S. gave one whistle and ported before the collision, and just before the blow all three tugs stopped. The owners of

[1] [Reported by Hon. Thomas Bee, District Judge.]

[2] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

the oil-scow filed a libel against all three tugs to recover the damages caused by the collision. The W. interposed a defence separate from the other two tugs: *Held*, that, although the tugs were none of them navigating in the middle of the East river, as required by statute, yet inasmuch as each of them saw the approaching tow in time to take the necessary steps to clear, the collision was not the result of their position in the river, but was the result of faulty navigation on the part of one or the other of the tugs, where they were.

[Cited in The Columbia, 29 Fed. 719; The Britannia, 34 Fed. 558; The Senator D. C. Chase, 46 Fed. 876.]

2. Under the single whistle blown by the W., the S. and Y. had the right to rely to the last moment upon her power to pass in accordance with that single whistle, and were not bound to have stopped sooner.

[Cited in The Maryland, 19 Fed. 556; The Susquehanna, 35 Fed. 324.]

3. The S. and the Y. and their tow were not at any time outside of the middle of the narrow channel between the drilling machine and the piers, and there was room enough for the oil-scow to have passed as the W. did, if she had been in line with the W. The W. was in fault, in that she did not, after she had determined to pass inside of the drilling machine, take measures to bring the oil-scow directly astern of her, so that the two tows might be parallel with each other; that she ported her helm too late, and was solely responsible for the collision.

In admiralty.

Henry R. Wing, for libellants.

Beebe, Wilcox & Hobbs, for the Wilson.

Benedict, Taft & Benedict, for the Sheridan and York River.

BENEDICT, District Judge. This action is brought by the owners of an oil-scow to recover the damages caused by a collision which occurred in the East river on the 20th day of August, 1873. The oil-scow was one of a class of vessels used in transporting petroleum oil in bulk about the harbor of New York. She was sixty feet long, twenty-two feet wide, and contained 23,630 gallons of oil in bulk, equally distributed in twelve tanks. This scow was being towed from the North to the East river by the steamtug Frederick M. Wilson, upon two hawsers some ninety feet long, the tide being strong flood and the weather clear. There was, at the time, moored in the East river, a drilling machine, at work upon a reef there situated, and occupying, with its anchors, chains and buoys, a considerable space in the river. The locality of the machine is admitted to have been opposite New York pier No. 7, and 640 feet distant from the end of the pier. As the Wilson, with the oil-scow astern, passed around the Battery, she took a course between this drilling machine and the New York piers, and, when about opposite to it, encountered the tugs General Sheridan and York River coming down the East river with two light barges in tow—the General Sheridan towing ahead by two hawsers of from twenty to twenty-five fathoms in length, and the York River towing alongside and inside of the barges. In passing, the tows came in contact, the oil-scow striking the port barge of the down tow nearly head on, whereby the oil-scow was cut into some six feet, and her cargo lost.

To recover the damages thus sustained, the owners of the oil-scow now bring this action against the three tugs above mentioned.

In support of the charges of fault, which the libel and the several answers of the tugs contain, a mass of evidence has been presented. An attentive perusal of it in the light of the careful arguments of the respective advocates, has rendered it clear to me that the Wilson is responsible for the accident in question.

Her fault consisted in attempting to pass between the drilling machine and the New York piers, and by the approaching tow, without getting the scow she was towing in such a position as would enable her to keep the scow upon the right side of the passage between the drilling machine and the New York piers.

When she passed pier 2, her course led across the course which the down tow was then pursuing; and when she determined to pass the drilling machine upon the inside, it was clearly incumbent upon her to maintain a position in the flood tide which would enable her to drag the scow through the passage upon the east side of it. Nothing is disclosed by the evidence calculated to prevent her from so doing, and yet she allowed her scow to get in contact with a tow which was not to the east of the middle of the passage. It is indeed shown that she ported her helm before the vessels struck, but she ported too late, and was then unable to haul the scow clear of the course of the down tow.

This opinion in respect to the navigation of the Wilson in her passage inside the drilling machine renders it unnecessary to consider the further charge against her that she should have kept outside the drilling machine, and was in fault for taking a course inside the machine.

Charges of fault are also made against the tugs Sheridan and York River, the principal of which is that they made a sheer out from the piers, and thus prevented the Wilson from passing them in safety. This charge, it should be noticed, is not to be found in the libel, and it is not sustained by the proofs. On the contrary, it satisfactorily appears that the down tow was at no time outside of the middle of the passage, and was expecting and endeavoring to pass to the right of the Wilson and her scow, which course was in accordance with all the signals given by the tugs.

Another charge made against the Sheridan and the York River, earnestly insisted on by the libellants and somewhat less earnestly by the Wilson, is a failure to stop when the Wilson approached, so as to give her time to haul the scow past the bows of the down tow. It is conceded that the tugs did stop,

and that the Sheridan sheered sharply to port before the two barges came in contact; but it is insisted that this should have been done sooner. I am unable to see how fault in this respect can be imputed to the tugs of the down tow. All the vessels were in plain sight of each other; there was abundant room for the Wilson to pass with her scow outside of the down tow. The whistles blown by each tug indicated an intention and ability to pass to the right. The down tow was moving very slowly, and the tugs in charge of it had, as it seems to me, the right up to the last moment to rely upon the power and ability of the Wilson to keep the scow behind her, and thus to pass them to port, as her whistle indicated her intention to do.

One other point, and that made by the scow against all the tugs, remains to be noticed. It is that of navigating in violation of the statutes of the state of New York, which require all steamboats passing up and down the East river to be navigated as near as possible in the centre of the river.

That none of these tugs were navigating in the centre of the river is clearly shown, but their course in that respect, if in violation of the statute, was not the cause of this collision. They all saw each other in time to pass in safety where they were. There was abundant room for them to pass in safety, and the accident is in no way attributable to the fact that they were not in the centre of the river, but because of faulty navigation where they were. The violation of the statute referred to, if any such existed, was not the cause of the accident.

Inasmuch as no fault is charged upon the scow, the libellants are entitled, of course, to recover of some one or of all the tugs proceeded against; the conclusions above stated require a determination that she is entitled to recover of the Wilson alone.

A decree will accordingly be entered in favor of the libellants as against the Wilson, with an order of reference to ascertain the amount, and the libel as against the Sheridan and York River will be dismissed with costs.

FREDERICKSON (BANK OF UNITED STATES v.). See Case No. 945.

FRED LORENTS, The (WHITAKER v.). See Case No. 17,527.

Case No. 5,078a.

FREEBORN et al. v. The FALCON.

[23 Betts, D. C. MS. 110.]

District Court, S. D. New York.[1]

SHIPPING—LIEN FOR SUPPLIES—CREDIT—DISCHARGE—DEPARTURE.

[1. Supplies were furnished a vessel in her home port on a credit of six months on condition that satisfactory paper be given to secure the price, and were charged against the vessel in libellant's original sales books. *Held*, that he had a lien therefor, and that the price became payable at once on the refusal of the owner, being insolvent, to give other than his own note therefor.]

[2. The departure of a vessel from port on Sunday on a trial trip, after which additional work is done, and again secretly Sunday night at half past 12 o'clock, will not discharge a material man's lien.]

[This was a libel in rem by William A. Freeborn and others against the steamship Falcon for materials for repairs furnished in the home port.]

BETTS, District Judge. The libellants set up a lien upon the ship for $3,355.05, the amount of a bill of sheathing metal sold by them to the owner and applied to the vessel in this port in the winter of 1857. She was a domestic vessel refitting in her home port for service as a tug and freighter in the coasting trade. The fact that the materials were furnished by order of the owner of the steamer at the place and times and at the prices charged by the libellants, and also that the balance demanded in this action is due and unpaid, is not denied by the answer. The defence is placed upon the denial that the term of credit has yet expired, and also that the libellants acquired a lien for the debt, and further that if one was primarily created, the claimants assert that it was lost to the libellants by the departure of the vessel from this state before service of process in this cause was made. The owner of the ship became avowedly insolvent after the contract with the libellants was entered into, and the evidence conduces strongly to prove that he was so when he purchased the materials supplied the ship. At all events, there is no reliable proof that he had credit in the market at that time upon which he could have made the purchase. The sheathing was sold on a credit of six months, to be secured by negotiable paper, and after the metal had been delivered the libellants applied twice at the owner's place of business for the paper, but, before the owner could be seen personally, he assigned the ship, with the residue of his property, to the claimants for the benefit of his creditors, and then refused to give other than his individual obligation for the debt, alleging that the libellants agreed to receive his promissory note payable in six months in satisfaction of the sale. He was examined as a witness in behalf of the claimants on the hearing, and testified that he never engaged to give any further security for the undertaking than his individual note. The clear weight of evidence is with the libellants on that point, and shows that the credit of six months agreed to in the sale was on condition that satisfactory paper to secure the debt should be furnished by the purchaser, and that when called for by the libellants the owner offered his own note alone and

[1] [The date is not given in the original manuscript. 23 Betts, D. C. MS. includes cases from January, 1857, to January, 1859.]

refused to give an endorser, or other security of a reasonably satisfactory character. The original sales books of the libellants were also produced, and proved the sheathing, as delivered by them, was charged to the steamship, and not to the owner alone. I have no doubt upon the proofs that the purchase price was originally a lien upon the vessel, and that the failure of the owner to fulfil the condition of his credit rendered the debt payable instanter, and that accordingly the action has not been instituted prematurely.

The other branch of the defence is equally unsustainable, which is that the lien was discharged by the departure of the steamer twice from this port before suit brought upon the lien. She first left the port at 9 a. m. on Sunday morning, and ran outside the Hook merely on a trial trip, to make proof of the sufficiency of her machinery, and ascertain whether she was in condition for the business of towage, to which she was destined. She required and received additional work upon her machinery on or after the trial excursion. The next time she went out of the port was secretly on Sunday night, at half past 12 o'clock. She took out no tow or passengers or cargo, and returned within a day or two, about the 9th of March, and was arrested in this action the 18th. The application of the libellants for the paper engaged to be furnished them had been made repeatedly at the owner's office, down to the time of her departure, and they had no notice she was intending or prepared to leave the port immediately. Neither of these acts of the ship can avail as a discharge of the lien. Each was done under circumstances preventing the libellants intercepting her departure, the first being on a day when no process for her arrest could be obtained or employed, and the second, if not so absolutely dies non juridicus, was secretly, and at dark of night, and palpably in fraud of the rights of the libellants, and therefore void as a defence to the action upon the lien. The Joseph E. Coffee [Case No. 7,536].

Decree for libellants for $3,355.05 and costs.

Case No. 5,079.

Ex parte FREEDLEY et al.

[Crabbe, 544.] [1]

District Court, E. D. Pennsylvania. July 6, 1844.

BANKRUPTCY — PETITION ENURES TO BENEFIT OF ALL CREDITORS — DISCONTINUANCE — RE-OPENING — REASONABLE TIME.

1. The application of a creditor to have his debtor decreed a bankrupt, in invitum, enures to the benefit of all the creditors, any of whom may come in, within a reasonable time, and prosecute the petition.

[Cited in Re Roberts, 71 Me. 393.]

2. Proceedings in bankruptcy were commenced, and subsequently discontinued on account of a voluntary assignment for the benefit of creditors. Seventeen months afterwards, certain creditors, who had claimed under the assignment, applied to have the discontinuance removed and the proceedings re-opened: this was not within a reasonable time.

This was an application by the Schuylkill Navigation Company to re-open the proceedings in bankruptcy against Freedley and Wood, which had been discontinued by leave of court.

It appeared that Freedley and Wood were citizens of Montgomery county, in Pennsylvania, and that on the 3d of June, 1842, certain of their creditors had commenced proceedings in this court to have them declared bankrupts, but, in consequence of an arrangement between the parties, a discontinuance thereof was entered, by leave of court, on the 15th July, 1842. In compliance with this arrangement, Freedley and Wood, on the 28th June, 1842, had made a general assignment, to S. L. Kirk and W. C. Ludwig, of all their individual and partnership property, to pay their individual and partnership debts "agreeably to the fourteenth section of the bankrupt law of the United States" [Act 1841; 5 Stat. 448]; it being therein provided, however, that no creditor or creditors should be entitled to snare under the assignment, unless, within three months from the execution thereof, he or they should furnish the assignees with a statement of his or their claim, and should covenant to execute a release on receiving the share or shares to which he or they should be entitled thereunder. Notice of this assignment was published in the newspapers in Montgomery county and in Philadelphia, at which city the Schuylkill Navigation Company had their principal place of business, and the assignees proceeded to sell the property and collect the debts. On the 21st July, 1843, the assignees filed their account in the court of common pleas of Montgomery county, and it was referred to an auditor to report distribution. In September, 1843, the auditor was attended by the parties interested, and, among others, by the solicitor for the navigation company, who presented a claim for $1066.66, which was allowed by the auditor; but, on exceptions filed to the report, this allowance was reversed, first by the common pleas of Montgomery county, and afterwards, on appeal, by the supreme court of Pennsylvania. On the 28th December, 1843, the navigation company obtained in this court a rule on Freedley and Wood and their assignees to show cause why the discontinuance should not be stricken off.

Tilghman and Sergeant, for the navigation company.

Mulvany and Mallery, for Freedley and Wood, and for assignees.

[1] [Reported by William H. Crabbe, Esq.]

Mr. Tilghman, for the navigation company.

The discontinuance should not have been entered without full notice to all parties in interest, instead of which many were wholly unaware of it until it was effected; but even under these circumstances, had the assignment been carried out really, as it professed to be, in the spirit of the fourteenth section of the bankrupt law, it would not have been complained of: this has not been the case. Under the decisions on the exceptions to the auditor's report, the navigation company have been deprived of their share, and are driven to this proceeding as their only means of relief. This court allowed the discontinuance on the faith of that assignment being executed; it has not been executed, and therefore the discontinuance was obtained by misrepresentation and technical fraud, which vitiates everything connected with it. Morris' Estate [Case No. 9,825].

Mr. Mulvany, for Freedley and Wood.

The navigation company were not parties to the original proceedings; they did not appear at the return of the process, they claimed under the assignment, which estops them from disputing its validity, and now, after some eighteen months have elapsed, they come in and ask to re-open the whole matter. Their application is entitled to no favor. Innocent third parties are interested that this application should be dismissed. On the faith of the discontinuance in this court, the real estate of Freedley and Wood has been sold, and if these proceedings are re-opened, the purchasers' titles are destroyed.

Mr. Sergeant, for the navigation company, in reply.

The discontinuance should only have been entered by consent of all parties interested. The petitioners alone, in an involuntary application, have no right to discontinue the proceedings; the ground of such an application is that the debtor has committed an act which gives every and any creditor the right to petition, but as only one petition can be pending at a time, every creditor is a party to it, whether named or not. Ex parte Calender [Case No. 2,307]. The discontinuance was conditioned that the assignment should be according to the terms of the bankrupt law, as contained in its fourteenth section, but the proviso in the assignment is contrary to that law, especially in requiring the account within three months. The application to strike off the discontinuance was made as soon as the decision of the supreme court was known, and the company discovered that they had no other remedy.

RANDALL, District Judge. On the 3d June, 1842, Eckel, Spangler, and Raiguel, Ludwick and Kneedler, and Frederick Liebrandt, filed their petition in this court, setting forth that they were creditors of Freedley and Wood, of Montgomery county, to an amount exceeding five hundred dollars, and praying the court, for the causes therein stated, to declare the said Freedley and Wood bankrupts. The court appointed Monday, the 11th July, 1842, to hear the application; and appointed a commissioner to take testimony in support of the allegations contained in the petition. On the 15th July, 1842, no answer to the petition having been filed, or any testimony returned, the petitioners applied for, and obtained, leave to discontinue the proceedings; the respondents having, on the 28th June, 1842, executed a voluntary assignment to S. L. Kirk and Wm. C. Ludwick, reciting the proceedings in bankruptcy, and "a desire to deliver up to trustees all their property, real and personal, to be distributed as provided for in the bankrupt law." The assignees were both bonâ fide creditors of Freedley and Wood, which firm was insolvent, though each of the partners, in his individual capacity, was entirely solvent.

The assignees, having accepted, proceeded to execute the trust, and made sales of valuable real estate of the individual members as well as the joint property of the firm. Their accounts were, in due time, filed in the court of common pleas of Montgomery county, and referred to an auditor for distribution. The Schuylkill Navigation Company appeared before the auditor, and claimed the sum of $1066.66, due to them by Freedley in his individual capacity, at the time of the assignment. It was objected before the auditor that the assignment contained a proviso that no creditor should be allowed any share of the assets or estate, thereby assigned and transferred, who did not hand in his claim to the assignees within three months from the execution of the assignment, and also execute an agreement covenanting to deliver a full and absolute release to the assignees, on receiving his share of the estate assigned, and that this had not been done by the navigation company. The auditor, for reasons stated in his report, allowed the claim of the company. To this allowance exceptions were filed by the assignees, and, on the 21st December, 1843, the court of common pleas sustained the exceptions, which decision was subsequently affirmed by the supreme court. On the 28th of December, 1843, the navigation company presented their petition to this court, setting forth the proceedings in bankruptcy and the assignment, and praying a rule upon the assignees, and upon Freedley and Wood, to show cause why the discontinuance should not be stricken off, and the proceedings re-opened.

In answer to the rule, it is, among other things, objected, that the Schuylkill Navigation Company were not parties to the original proceedings, and they cannot, therefore, compel a prosecution of that petition against the will of the petitioners; and, also, that

this application comes too late to be granted by the court. I think there is no weight in the first objection. The application of a creditor to have his debtor decreed a bankrupt, in invitum, enures to the benefit of all the creditors, any of whom may come in and prosecute the application, if he thinks proper. If it were not so, each creditor to the requisite amount might present a separate application, and each prosecute his own, if successful, at the expense of the estate, fearing that the first petitioner might compromise with the debtor, or, by collusion, neglect to prosecute his application. But a creditor seeking to come in and prosecute, must do so within a reasonable time, and not, as in the present instance, upwards of seventeen months after the proceedings have been discontinued, after the law under which they were commenced has been repealed; and after having claimed, in the state courts, under the very assignment which is now sought to be invalidated. This last fact alone, might perhaps be a bar to the present application. Ex parte Shaw, 1 Madd. 598.

It has been urged that the purchasers of the real estate are interested in the decision of this question, and that, as they have paid their money on the faith of the decision of this court discontinuing the proceedings, they should be protected. It is certain that it would be attended with much danger if the security of titles founded on judicial proceedings could be invaded by the exercise of an arbitrary and uncontrolled discretion of the courts over their own records. Catlin v. Robinson, 2 Watts. 380. But I apprehend that all acts performed under the judgment of a court of competent jurisdiction are, as to most third persons, perfectly valid. Thus a purchaser at a sheriff's sale under an execution, issued upon a judgment erroneously or fraudulently obtained, cannot be compelled to relinquish the property, even though the judgment be afterwards reversed. Sims v. Slacum, 3 Cranch [7 U. S.] 300.

The titles of the purchasers, however, do not, in my opinion, depend upon the decision of this motion. If the assignment is not in opposition to the provisions of the bankrupt law, then, according to Dudley's Case [Case No. 4,114], and the Anonymous Case [Case No. 467], the debtor had a right to make an assignment, without preference, to a bonâ fide creditor without notice, at any time before a decree of bankruptcy. If, however, the proviso in the assignment, requiring a presentation of claim within three months, and a covenant to release on receiving a share of the estate, gives a preference to any creditor or class of creditors, over the others, then it is an objection apparent on the face of the title, of which the purchaser was bound to take notice, and, under such circumstances the assignees could convey no title. Whether there be such a preference it is not necessary for me, at this time, to give an opinion. It may not, however, be improper to refer the parties to the Cases of Aspinwall [Case No. 592] and J. B. Bowen [unreported], decided by the circuit court of this district, an examination of which may lead to an amicable settlement of this controversy on just and equitable terms. Upon the ground that the application comes too late, the rule is discharged.

Case No. 5,080.

FREEDMAN v. SIGEL.

[10 Blatchf. 327;[1] 5 Chi. Leg. News, 196; 17 Int. Rev. Rec. 28; 4 Leg. Op. 506; 5 Leg. Gaz. 34.]

Circuit Court, S. D. New York. Jan. 2, 1873.

INCOME TAX—SALARY OF STATE JUDGE.

1. The United States cannot impose a tax on the salary of a judge of the superior court of the city of New York, by imposing a tax on such salary as the income of such judge.

2. It makes no difference that the salary of the judge is fixed by the board of supervisors of the county of New York, or that it is payable out of the treasury of the city of New York.

At law.

Edward Fitch, for plaintiff.

L. W. Emerson and Noah Davis, Dist. Atty., for defendant.

SHIPMAN, District Judge. This is an action brought by the Honorable John J. Freedman, one of the justices of the superior court of the city of New York, to recover back the sum of $162.37, exacted from him by the defendant [Francis Sigel], as collector of internal revenue for the ninth collection district of New York. This exaction was, in form, a tax on the income of the plaintiff, but that income consisted solely of his salary as a judge of one of the most important judicial tribunals of the state—a court of record, having a wide range of jurisdiction, and wielding an important part of the judicial authority of the commonwealth. The sum in question was nothing more or less than a tax upon the plaintiff's salary, as a judge of a state court. The amount was paid under protest, and it is conceded that the plaintiff is entitled to recover, if the tax in question was not warranted by law. The sole question now to be determined is, whether this assessment on the salary of the plaintiff was legal.

The plaintiff claims, that the illegality of this tax is conclusively settled by the case of The Collector v. Day, 11 Wall. [78 U. S.] 113. That case involved the validity of a tax upon the salary of the defendant, Day, as judge of the court of probate and insolvency for the county of Barnstable, in the state of Massachusetts. In that case, the salary was fixed by a statute of the state, and was payable directly out of the state treasury. The su-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

preme court held, that it was not competent for congress to impose the tax then in question upon the salary of a state judge. It is obvious, that that decision must control the question now presented for consideration, unless the latter can be distinguished, by some essential feature, from that determined by the supreme court in the case cited.

The defendant insists, that the present case is distinguishable from that of The Collector v. Day, in the following particulars: (1) In that case, the salary of the judge was fixed directly by a statute of the state, while, in the present one, the salary of the plaintiff was fixed by the board of supervisors of the county of New York. (2) The salary of Judge Day was payable directly out of the state treasury of Massachusetts, whereas, the salary of the plaintiff was payable out of the treasury of the city of New York. (3) The court of probate and insolvency for the county of Barnstable, Massachusetts, could not properly be termed a local court, and its judge a local officer; whereas, the superior court in question was purely a local court, belonging to a class of tribunals known only to the cities of New York and Buffalo, the justices of which are purely local officers. I will briefly consider these points raised by the defence, in the order above stated.

First. As to the body entrusted with the power of determining the amount of salary. In the one case, that body was the legislature of the state, and in the other, the board of supervisors of the county, acting under a statute of the state, expressly conferring that power upon them. For reasons, wise and salutary, no doubt, the legislature of New York, after creating the superior court, and conferring upon it extensive jurisdiction, saw fit to leave the amount of the salaries of the judges to be determined by the board of supervisors, and conferred upon the latter authority to that end. But, I apprehend that this circumstance does not, in any manner, affect the nature of the office of the judges of that court. They are still judicial officers of the state, wielding that part of the sovereign power of the state committed to their jurisdiction. Their salaries constitute their sole compensation, and, when once fixed, cannot be reduced during the terms for which they are respectively appointed. The same reasoning which led the supreme court, in the case of The Collector v. Day [supra], to hold the tax illegal, applies, with equal force, to the present case. In both cases, the judges exercise the judicial authority of the state, and represent its sovereignty in that behalf. Of what importance is it that amount of salary is fixed by the legislature itself, or by another body, acting under the authority conferred by the legislature? If a state were to create a commission for the purpose, and with the power, of fixing the salaries of all its judicial officers, would that circumstance change the nature of the judicial office, or materially affect its character, as one of the instrumentalities by which and through which the state exercised one of its sovereign powers? I apprehend there can be but one answer to these questions. The manner in which a state chooses to determine the salaries of its judicial officers, neither changes the character of the tribunals over which they preside, nor the relation of these officers or offices to the state, or to the federal, government. The agency which the state chooses to employ for the purposes of determining the amount of its judges' compensation is a purely incidental matter, wholly of its own concern, the exercise of which in no way changes or affects the relation which the two governments bear to each other. The line which marks and limits the constitutional power of each remains the same, unvaried by the incidental manner in which each, or either, may choose to exercise its acknowledged and unquestioned authority.

Second. As to the immediate source from which the salary is derived. In the case of The Collector v. Day [supra], the salary of the defendant was paid directly from the state treasury. But, suppose the legislature of Massachusetts had seen fit, after creating the courts of probate and insolvency for its respective counties, to make the salaries of each judge payable out of the treasury of the respective county over which his jurisdiction extended. Would that circumstance, purely a matter of legislative regulation and discretion, within the undoubted power of the state, have changed, in any essential particular, the nature or powers of the judicial office of the judge of those courts? To assert such a proposition would be to maintain that the sovereign power of a state depends upon the manner in which it exercises its discretion, in the details of its administration, and the distribution of its public burthens. The right of congress to tax the judicial offices of a state, certainly, cannot depend upon the mode by which the state may choose to raise the revenue applied to the support of such offices, or the sources from which it may choose to draw that revenue. These are mere incidents in the exercise of undoubted state power, in no way affecting the federal government, nor having any tendency to enlarge the power of the latter over subjects which are otherwise beyond its reach.

Third. As to the alleged local character of the office held by the plaintiff. On this point, the argument in behalf of the defendant signally fails. The courts of probate and insolvency of Massachusetts are courts of a more local character and limited jurisdiction than the superior courts organized by the state of New York. The latter are clothed with no inconsiderable part of the general judicial power of the state, with none or only partial limitations as to subject-matter of litigation, while the former are courts of limited and inferior jurisdiction, whose range of judicial authority is narrow, and touches only a very limited number of subjects. It is

obvious, therefore, that this alleged difference, by which the defendant seeks to withdraw the present case from that of The Collector v. Day, has no solid foundation.

Without pursuing the subject further, I am entirely satisfied that the present case is within the reason and authority of The Collector v. Day; and judgment must, therefore, be rendered for the plaintiff.

FREEDMEN'S SAV. & TRUST CO. (STATE NAT. BANK v.). See Case No. 13,324.

FREELAND (ROBBINS v.). See Case No. 11,883

Case No. 5,081.

FREELANDER et al. v. HOLLOMAN et al.

[9 N. B. R. 331.] [1]

District Court, S. D. Mississippi. 1873.

BANKRUPTCY — FRAUDULENT PREFERENCES—BILL BY ASSIGNEE TO RECOVER ASSETS — RIGHTS OF CREDITORS ON FAILURE OF ASSIGNEE TO ACT.

A confessed a judgment in favor of his wife, and executed a conveyance to B, of certain real estate, who afterwards re-conveyed it to A's wife, with the fraudulent purpose and intent, as it was alleged, to defraud A's creditors. He was subsequently adjudged a bankrupt, and one of his creditors filed a bill in equity alleging the above facts. The defendants interposed the statute limitation of two years, provided for in the second section of the bankrupt act [of 1867 (14 Stat. 518)] against the relief prayed for. *Held*, that if the charges made in the bill be true, and were known to the assignee, it was his duty to have filed the bill so as to subject the land, and other property which has been fraudulently covered up by the proceedings, to the payment of the debts and demands proven against the estate, and if he (the assignee) refused, any creditor who had proved his debt had a right to apply to the court for an order directing proceedings to be taken for that purpose; that when the proceedings are for the benefit of secured creditors mainly, they should defray the expenses of the suit; that the bill was filed too late, and must be dismissed at the cost of complainant.

[Cited in Norton v. Barker, Case No. 10,349; Andrews v. Dole, Id. 373; West Portland Homestead Assn. v. Lownsdale, 17 Fed. 208.]

[Cited in French v. Merrill, 132 Mass. 526.]

In bankruptcy.

Nugent & Yerger, for complainants.

F. Johnson and J. A. P. Campbell, for defendants.

HILL, District Judge. This bill is filed by complainants [Freelander & Gerson], who have proved their judgment as creditors of said Thos. R. Holloman, in bankruptcy, against M. C. Cheatman, his assignee in bankruptcy, and against said Holloman as executor of his late wife, Rebecca A. Holloman, her children, Mary A. and others, also against John B. Aikman, praying to have declared null and void a judgment confessed by said Thomas R. in favor of his wife, said Rebecca A., and deeds of conveyance, executed first by said Thomas R. to said Aikman, and from him to said Rebecca A., all in 1866, and done without consideration, and with the fraudulent purpose and intent to defraud the creditors of said Thomas R., and especially of complainants. The answers admit the transactions but deny the fraud. A large number of witnesses have been examined on both sides, and the proof submitted, a very large portion of which need not be considered in any point of view, and none of it under the conclusions to which, after a careful examination of the questions, I have arrived.

The grounds upon which the relief is sought by the bill are, that the judgment confessed by Thomas R. Holloman, in favor of his wife, was fraudulent and void; that complainants' judgment was soon thereafter rendered and enrolled, and thereby became a lien upon the property, real and personal, subject to execution; that the conveyance of the lands mentioned by him to Aikman, and from him to his wife, was without consideration, fraudulent and void, and that these lands were subject to the payment of his judgment; that in 1868 Thomas R. filed his voluntary petition in bankruptcy, and in his schedules falsely omitted to place these lands on his schedules; that he was in 1869 discharged from his debts; that Cheatman, the assignee, in ignorance of the facts, or from a disposition to aid Holloman, neglected to take proper proceedings to have this judgment and these conveyances declared void, and the property sold for the payment of the debts of said Thomas R., according to the priority of those holding liens and demands thereon.

To the relief prayed for in the bill, the defendants interpose the statute of two years limitation, provided in the second section of the bankrupt act of 1867 [14 Stat. 518]. This is the first time the application of this section of the bankrupt law has come before me, and is one of no inconsiderable importance in the collection and administration of bankrupt estates, and although the last question discussed by counsel will be first considered, as if held to apply to the relief prayed for, will dispose of the cause without further inquiry.

If the charges made in the bill be true, and had been known to the assignee, it was his duty to have filed the bill so as to subject the land and any other property which had been fraudulently covered up by the proceedings mentioned to the payment of the debts and demands proven against the estate; and if he refused to do so, any creditor who had proved his debt had a right to apply to the court for an order directing proceedings for that purpose to be instituted, which the court, if satisfied that such proceedings should be instituted, would, upon such terms as to costs, etc., as would have appeared right, have so ordered. Where pro-

[1] [Reprinted by permission.]

ceedings are mainly, if not entirely, for the benefit of secured creditors, they should defray the expense of the proceeding, and no more of the burthen be imposed upon general creditors than the ratable portion of interest in the assets sought to be recovered, as if they were for the general creditors the circumstances might be such as would require those applying to defray the expense in the first instance, to be refunded upon recovery out of the proceeds. The complainants in this case did not pursue this course, but made the assignee a party defendant. He was certainly a necessary party, and as it is a proceeding in equity the court will consider him as a co-complainant for the purpose of considering the question presented.

The fourteenth section of the act of 1867, in treating of the powers and duties of the assignee in bankruptcy, contains the following provisions: That upon the adjudication of bankruptcy and the appointment of the assignee the title to all the property, real and personal, rights and credits, and rights of action, owned or held by the bankrupt at the time of filing his petition to be declared a bankrupt, ("including all property conveyed by the bankrupt in fraud of his creditors,") "shall, in virtue of the adjudication of bankruptcy and the appointment of the assignee be at once vested in the assignee." Thus it will be seen that the assignee is not only vested with all the rights of property, credits and rights of action held or owned by the bankrupt at the time of filing his petition, but such rights to property as the bankrupt may have had before making any fraudulent disposition of the same, and which, by his fraud, he may have estopped himself from recovering. In other words, the assignee in all such cases is substituted as the agent and representative of the creditors, and may recover anything which they could have recovered had the bankrupt law never been in operation.

The policy of the bankrupt law is to make a speedy adjustment and settlement of every question connected with the bankrupt's estate. It is expected, and is the duty of all interested in the bankrupt's estate, immediately upon his being so declared, to examine into its condition, and to give all information and aid in its recovery and settlement. With this purpose, and to give quiet and repose to all concerned, and which is one of the prime objects of all statutes of limitation, the second section provides that "no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: provided, that nothing herein contained shall revive a right of action barred at the time such assignee is appointed."

The constitution of the United States conferred upon congress the power to establish a uniform system of bankruptcy throughout the United States; and when congress, in pursuance of this power, passed the bankrupt act, it at once superseded all laws in conflict with it. The bankrupt's estate, and every thing and right connected with it upon the bankruptcy at once passed under the control and operation of the bankrupt law. After that the rights of those in interest may be contracted or enlarged, as congress in its wisdom may provide. This provision in the second section provides that all rights of action barred upon the appointment of the assignee shall remain barred, whether in favor of or against the assignee, and give both to the assignee and those claiming an adverse interest to any property claimed by the assignee in the adverse possession of others, or claimed by others, to property in the hands or under the control of the assignee, two years in which to commence proceedings in equity or at law for its recovery. This is a separate and independent provision, and has no connection with any state statute on the subject; it may extend or may contract the time provided in the state statutes of limitations. Thus, if at the time of the appointment of the assignee but a few days remained of the time necessary to complete the bar, the time would be extended; or if the statute had just commenced running, and under the state law would have ten years to run, as in case of actions of ejectment to recover real estate, it would be complete within two years.

This act, unlike the state statutes, makes no exceptions in favor of married women, infants, absence, or for concealment of cause of action, and thus congress having complete power over the whole subject had the right to provide, and such provision is in accordance with the policy of the law, and is a rule which it is the duty, not only of this, but of all other courts, to apply when a case is presented to which it is applicable.

It will be observed that the statute of limitations, under the bankrupt law is limited to actions and suits respecting rights to property held adversely by or against the assignee. Applying this provision of the law to the facts in this case it will be found that the real estate intended to be recovered was held adversely to the rights of the assignee at the date of his appointment, and he must be considered as the complainant, which appointment was made on the 22d of September, 1868, consequently the law was complete on the 22d, or at least on the 23d of September, 1870; the complainant's bill not having been filed until the 8th of August, 1871. The result is that the bill must be dismissed, at the cost of the complainant.

I must acknowledge my obligation to the able counsel on both sides for the exhaustive

presentation of the question, now presented and considered for the first time, and one of so much interest to all parties concerned in bankrupts' estates. I am glad that it is a case in which, if I have come to a wrong conclusion, I may be corrected by appeal in the circuit and supreme courts of the United States.

Case No. 5,082.

In re FREEMAN.

[4 Ben. 245; [1] 4 N. B. R. 64 (Quarto, 17).]

District Court, S. D. New York. June, 1870.

FRAUDULENT CONVEYANCE—VAGUE SPECIFICATIONS—RECEIVER—DISCHARGE.

1. Where the discharge of a bankrupt was opposed on the ground, that he had omitted certain property from his schedules, such property having been conveyed by him, by a conveyance which was claimed to have been fraudulent, and it appeared, that, after such conveyance, and before the filing of the petition in bankruptcy, a receiver of the property of the bankrupt had been appointed by a state court: *Held*, that whatever title the bankrupt had in the property, after the conveyance, had vested in the receiver, and there was no false swearing, by reason of his not having inserted it in the schedule of assets.

2. A fraudulent conveyance, within the meaning of section 29 of the bankruptcy act [of 1867 (14 Stat. 531)], must be a conveyance made as required by section 35, within four or six months before the filing of the petition by or against the debtor.

[Cited in Re Cretiew, Case No. 3,390; Re Pierson, Id. 11,153; Re Hannahs, Id. 6,032; Re Wolfskill, Id. 17,930; Re Carrier, 47 Fed. 444.]

3. A specification of objection to the discharge stated that, since the passage of the act, the bankrupt had destroyed books, documents, papers and writings, with intent to defraud his creditors. Another stated that he had removed or caused to be removed, books, stationery and papers from this district, with intent to defraud his creditors. Another specification was, that he, or some person in his behalf, had procured the assent of certain creditors to his discharge, and influenced their action, by a pecuniary consideration: *Held*, that they were too vague to be triable.

[In the matter of Robert H. Freeman.]

This case came up on a hearing on specifications of opposition to the bankrupt's discharge.

Robert Jackson, for bankrupt.

Vernam & Wilcox and J. S. Ridgway, for creditors.

BLATCHFORD, District Judge. As to the first specification, whatever interest the bankrupt may have had in the property referred to, after the conveyance of it to E. Wolcott & Co., March 21st, 1868, was, at the time the petition in bankruptcy was filed, vested in the receiver appointed by the state court, and not in the bankrupt. There was, therefore, no false swearing, in not inserting such property in the schedule of assets. The fact of the transfer to Wolcott & Co. was set forth in the schedules with sufficient particularity, and there was certainly no wilful false swearing in respect to the property. Nor was there, within the second specification, any concealment of the property referred to.

The fourth specification is, that the bankrupt made a fraudulent conveyance of the said property, to Wolcott & Co., being the said conveyance of March 21st, 1868. The petition in bankruptcy was filed December 31st, 1868. The conveyance referred to in section 29, as a "fraudulent" conveyance, means a conveyance which is declared by the bankruptcy act to be a fraud against such act—a conveyance which the act declares to be void. This requires the conveyance to be one made, as required by section 35, either within four months, or within six months, before the filing of the petition by or against the debtor. As the conveyance in question was not made within six months before the petition in bankruptcy in this case was filed by the debtor, it is not a "fraudulent" conveyance, within the clause of section 29 which speaks of "any fraudulent payment, gift, transfer, conveyance or assignment." The fourth specification is founded on this clause and, therefore, fails.

It is not established, under the sixth specification, that the bankrupt, "in contemplation of bankruptcy," as the specification says, or "in contemplation of becoming bankrupt," as section 29 says, made the conveyance in question, for either of the purposes set forth in the clause of section 29 under which the specification is drawn. The meaning of the expression, "in contemplation of becoming bankrupt," as used in that clause, was defined by this court in the case of In re Goldschmidt [Case No. 5,520]. Within that definition, it is not established, in this case, that the debtor, when he made the conveyance in question, contemplated committing an act of bankruptcy, either by filing a voluntary petition, or by doing some one of the things which is declared by section 39 to be the commission of an act of bankruptcy. The specification is not sustained.

The third specification is, that, since the passage of the act, the bankrupt has destroyed books, documents, papers and writings with intent to defraud his creditors. The seventh specification is, that he removed, or caused to be removed books, stationery and papers from this district, with intent to defraud his creditors. The eighth specification is, that he, or some person in his behalf, has procured the assent of certain creditors to his discharge, and influenced their action, by a pecuniary consideration. These three specifications are too vague to be triable and are overruled.

A discharge will be granted when the register shall have certified conformity.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

Case No. 5,083.

In re FREEMAN.

[2 Curt. 491.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1855.

CONSTITUTIONAL LAW—PROSPECTIVE ADOPTION OF STATE STATUTES BY CONGRESS—IMPRISONMENT FOR DEBT.

1. Whether congress can adopt, prospectively, laws subsequently to be passed by a state upon a particular subject, quaere; but the act of January 14, 1841 (5 Stat. 410) does not adopt subsequent state laws imposing restrictions and conditions on imprisonment for debt.

[Cited in Campbell v. Hadley, Case No. 2,358; U. S. v. Walsh, Id. 16,635; U. S. v. Tetlow, Id. 16,456.]

[Cited in Howe v. Freeman, 80 Mass. (14 Gray) 578.]

2. The act of the legislature of Massachusetts, passed May 21, 1855, and entitled "An act to abolish imprisonment for debt and to punish fraudulent debtors," does not abolish imprisonment for debt, and is not adopted by any act of congress so as to affect process out of this court.

[Cited in Hanson v. Fowle, Case No. 6,041.]

[In the matter of Watson Freeman, marshal of the United States for the district of Massachusetts.]

CURTIS, Circuit Justice. The creditor in an execution which issued out of this court at the last term has obtained a rule on the marshal to show cause why he has not levied the same on the body of the debtor, pursuant to the exigency of the writ and the order of the creditor. The marshal has shown for cause, the act of congress of February 28, 1839 (5 Stat. 321), which enacts, "that no person shall be imprisoned for debt in any state on process issuing out of a court of the United States, where by the laws of such state imprisonment for debt has been abolished; and where by the laws of a state, imprisonment for debt shall be allowed under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein as are adopted in the courts of such state." Also the act of January 14, 1841 (5 Stat. 410), which requires the above act to "be so construed as to abolish imprisonment for debt, on process issuing out of any court of the United States, in all cases whatever, where by the laws of the state in which the court shall be held, imprisonment for debt has been or shall be abolished." Also a law of the state of Massachusetts, passed May 21, 1855 [Gen. Laws Mass. 1855, p. 90, c. 444], entitled "An act to abolish imprisonment for debt and to punish fraudulent debtors."

Assuming that congress can adopt, prospectively, future legislation of the several states abolishing imprisonment for debt, the first inquiry is whether imprisonment for debt has been abolished in the state of Massachusetts within the meaning of the act of congress quoted above. On examining this law of Massachusetts, we find, though it declares imprisonment for debt is abolished, it expressly allows a creditor to imprison his debtor upon complying with certain conditions prescribed by the act; and this, not by way of punishment of the debtor, but as a remedy to enforce payment of the debt. That this is a proceeding to be taken by a creditor at his election, to be prosecuted, or discontinued at his pleasure, in which he is treated as one party, and the debtor as the other party, and the sole object of which, if no charge of fraud is filed, is to enforce payment of the debt, is clear; and no charge of fraud need be filed. The debtor is liable to be arrested if the creditor make oath and prove to the satisfaction of a magistrate, that he has reason to believe and does believe that the defendant has property not exempt from execution, which he does not intend to apply to the payment of the plaintiff's claim. This does not even imply any fraud. It would be difficult to say that it implies any breach of any legal duty. For the debtor may intend to apply his property to pay another just debt, or to pay the two pro rata; or he may even have formed no intention on the subject, and yet be, within the act, liable to arrest. While, therefore, the act does in terms say, it abolishes imprisonment for debt, and punishes fraud, it does in equally clear terms, allow an execution to be levied on the body of a debtor, guilty of no fraud, to enforce payment of a debt. We are of opinion, therefore, that imprisonment for debt has not been abolished in the state of Massachusetts, within the meaning of the acts of congress. But it is true, that this law of Massachusetts does allow imprisonment, under certain restrictions and conditions, and this renders it necessary to inquire whether the act of congress has adopted those restrictions and conditions, and made them applicable to the process of this court. By the third section of the process act of 1828 (4 Stat. 278), which was applicable to all the states except Louisiana, it was provided that "writs of execution and other final process, issued on judgments and decrees and the proceedings thereupon, shall be the same in each state respectively, as are now used in the courts of such state." Under this act, as well as under the prior acts of 1789 (1 Stat. 93) and 1792 (1 Stat. 275), though they were held to include in general, all the regulations incident to process, yet it was also held that there were certain regulations made by state laws concerning their process, which were not intended to be adopted.

In Palmer v. Allen, 7 Cranch [11 U. S.] 550, it appeared that the law of Connecticut did not allow a debtor to be committed to jail on mesne process, without a mittimus granted by a magistrate. The marshal had com-

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

mitted a debtor to prison, under the authority of a writ of capias and attachment issuing out of a court of the United States held in Connecticut, without obtaining a mittimus from a magistrate. The supreme court said, "But it is equally clear to this court, that the law above alluded to, commonly called the process act, does not adopt the law of Connecticut, which requires the mittimus in civil cases. This is a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint on their state officers, in the execution of the process of their courts, and is altogether inoperative upon the officers of the United States in the execution of the mandates which issue to them." This decision related to a state law concerning mesne process. In Wayman v. Southard, 10 Wheat. [23 U. S.] 1, this decision is examined, and though some other reasons are suggested in support of it, the ground stated in the opinion of the court is not impugned. Bank of U. S. v. Tyler, 4 Pet. [29 U. S.] 366, brought under review the effect of the insolvent laws of the state of Kentucky upon a debtor committed on an execution issuing from a court of the United States; and a similar question arose in Duncan v. Darst, 1 How. [42 U. S.] 301. In these cases the court held that the discharge under the state laws was inoperative. In Boyle v. Zacharie, 6 Pet. [31 U. S.] 648, it was decided, that though in Maryland, an injunction operated as a supersedeas of an execution, this regulation did not apply to executions issuing out of the courts of the United States. And in McNutt v. Bland, 2 How. [43 U. S.] 9, it was held, that a state law, which authorized the sheriff to discharge a debtor from imprisonment, in default of payment of prison fees, did not justify his discharge by the sheriff from a jail to which he had been committed by the marshal, on an execution issuing out of a court of the United States. The results of these decisions and the principles on which they have been made, may be stated as follows: (1) That the adoption of state laws of proceeding, by congress, though general, does not include all state laws concerning process. (2) That among others not included, are those which are addressed to state courts and magistrates, accompanied with grants of power which enable them to execute such laws, which powers the courts of the United States do not possess and cannot exercise.

Another view must here be adverted to, which bears directly on the main question we are now considering. It is thus expressed by Mr. Justice Story, in U. S. v. Knight [Case No. 15,539]: "Hitherto the judicial construction of the acts of congress, which have adopted state laws, touching writs and processes, and the proceedings thereon, has uniformly been that they applied to the state laws then in force. To this effect are the decisions in Wayman v. Southard, 10 Wheat. [23 U. S.] 4; Bank of U. S. v. Halstead, Id. 51; and Beers v. Haughton, 9 Pet. [34 U. S.] 329. I must confess that I entertain very serious doubts whether congress does possess a constitutional authority to adopt, prospectively, state legislation on any given subject. For that, it seems to me, would amount to a delegation of its own legislative power. And I think my doubts strengthened by what fell from the supreme court in Wayman v. Southard [supra], and Bank of U. S. v. Halstead [supra]. At all events I should not be disposed to give such a construction to any act of congress, unless it was positively required by its words and its intent." See, also, Cooley v. Board of Wardens of Philadelphia, 12 How. [53 U. S.] 299. Whether the last clause of the act of February 28, 1839, by its language and its intent, does positively require such a construction as would amount to an adoption prospectively of the legislation of the states, modifying their laws concerning imprisonment for debt, but not abolishing it altogether, is the question to be here decided. Looking at the language of the act, it will be found that, construed grammatically, a part of it points to laws of the state thereafter to exist, whether passed before the act of congress or not, and a part of it points, solely, to the then existing proceedings under those state laws. For it first says, "When by the laws of a state, imprisonment for debt shall be allowed," &c.; that is, shall be after the passage of this act, whether by virtue of laws now existing or hereafter to be passed. This would apply to state laws in existence when the act passed, and might also include those subsequently passed. "And the same proceedings shall be had therein, as are adopted in the courts of such state." This points to then existing proceedings. The more grammatical construction of the language of the act does not enable us to pronounce with certainty, whether congress did or did not intend to adopt the future legislation of the states on this subject. The next congress had its attention called to the question of the construction of this act; and as already stated, by the act of January 14, 1841, they enacted that this act should be construed to abolish imprisonment for debt, where by the laws of the state "it has been, or shall hereafter be abolished." They are silent concerning the other part of the act, which provides for modifications of such imprisonment. We think this silence has a strong tendency to show, that it was not intended to adopt, prospectively, the state laws on this subject. Considering the doubts to which the language of the act in question was calculated to give rise,—considering, also, that such prospective adoption of state legislation, was a clear departure from the settled course of congress on this subject,—we can hardly doubt, that if it had been the intention of congress to apply this new principle of legislation, to the case of subsequent modifications of the state laws concerning imprison-

ment, having the subject directly before them, they would have so declared, with the same clearness, as they do in respect to future state laws for its abolition.

Nor should it be lost sight of, that it is, practically, a very different matter, to adopt prospectively, state legislation concerning the abolition, or concerning the modification of imprisonment for debt. It may be assumed, with some degree of safety, that if a state really and entirely abolishes imprisonment for debt, the process of the courts of the United States will be as effectual as the process of the courts of the states. Not so, if the right of the creditor is modified and restricted; for it may well be, and is so in this case, that those modifications and restrictions will be accompanied with sanctions and safeguards which the courts of the United States are incompetent to apply. This law of the state of Massachusetts, while it restricts the right of the creditor, and imposes on him new conditions, also provides, in the same connection, and as part of the same system, for highly penal proceedings against debtors, viewed merely as instruments for enforcing payment; these latter are of great practical importance, and if the conditions and limitations imposed on the creditor were adopted, while the penal proceedings against the debtor were rejected, it is clear that a system of law to compel the payment of debts differing very widely from that enacted by the state, would be brought into operation. These penal enactments are not only found in the same law, and make part of the same general system with the restrictions upon imprisonment, but the proceedings under them are part of the same course of proceeding taken to enforce the judgments of the courts. And if a judgment creditor in the courts of the United States were deprived of recourse to them, he would be placed upon a different and far less advantageous footing, than a judgment creditor in a state court. Yet it is certain that none of these parts of the law of Massachusetts can have been adopted by Congress. In Gwin v. Breedlove, 2 How. [43 U. S.] 29, it was held that the process act of 1828 had not adopted similar provisions of state laws, though in existence when that act was passed; because the courts of the United States cannot execute the criminal laws of the states. A fortiori, as to such laws, passed after an act of adoption. Whether the provisions of this law of Massachusetts, exclusive of those of a criminal nature, are necessarily addressed exclusively to state officers, and are not capable of being executed by the courts of the United States, we do not deem it necessary to decide. It is to be noted, that the law of Massachusetts does not make any change in the process of the state courts, but only in the proceedings of state officers in its execution. Nor is anything to be done by any court, as such, to vary the execution of process. There can, therefore, be no proceedings in any court of the United States in conformity with this law. Whether a judge of a court of the United States, or a commissioner appointed to take affidavits, &c., could be held to be in place of the state magistrates, and exercise the powers conferred by this law on the latter, are questions not unattended with difficulty, and which we do not find it needful to decide. Independent of this consideration, we are unable to declare that congress has adopted the law of the state of Massachusetts, now in question; and consequently, it is the duty of the marshal to levy this execution, without regard to that law.

We have considered this case as if it were an execution on a judgment at law. In point of fact it is upon a decree in admiralty. By the sixth section of the act of August 23, 1842 (5 Stat. 518), the supreme court are authorized to regulate and alter the forms of writs and other process used in the district and circuit courts. Under this authority they made and promulgated a rule for regulating proceedings in admiralty (December, 1850), which contains the following clause: "And imprisonment for debt, on process issuing out of the admiralty court, is abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been or shall be hereafter abolished, upon similar or analogous process issuing from a state court." This has no reference whatever to modifications and restrictions upon imprisonment. It is confined to its abolition. If this rule alone governs the case, it is decisive. If it does not, and upon that we give no opinion, it certainly has a strong tendency to show, that, in the opinion of the supreme court, no law was in existence adopting prospectively state laws, which should in any manner modify imprisonment for debt. If they had not so considered, it is very improbable that the rule would have stopped where it does. We have thought it proper, not to rest our opinion on this rule, but upon grounds applicable to all executions issuing out of this court, that suitors and officers may know what, in our judgment, the law requires of them, under all such executions.

Case No. 5,083a.

FREEMAN et al. v. The ALBANY.

[Betts, Scr. Bk. 554.]

District Court, S. D. New York. May, 1857.

ADMIRALTY—APPLICATION TO SET ASIDE SALE BY DEFAULT.

[An application will not lie to set aside a sale by default in admiralty, where it is not entitled in the same cause, and it does not appear that the promovents were parties or privies to that action.]

In admiralty.

Mr. Laforge, for the motion.

Beebe, Dean & Donohue, opposed.

Before BETTS, District Judge.

The propeller was libelled for wages by one Johnson, and her owners not appearing, she was ordered to be sold by default, and was accordingly sold by the marshal at auction for $2,000. Some time elapsed before the sale was completed, but after the money had been paid, and the bill of sale given, the present application was made to set aside the sale because of the irregularity in carrying the decree of sale into execution, and gross inadequacy of price accepted on the sale, and fraudulent and covinous acts and purposes in procuring the condemnation and sale of the vessel.

HELD BY THE COURT: That the allegations upon which the application is founded are strongly contradicted, and the court would not consider it consistent with a safe administration of justice to set aside the sale, upon the evidence, if this proceeding were otherwise unexceptionable. But the proceeding is wholly irregular. The proceeding is neither by nor against any party interested in the subject of it, or between whom any effective decree could be made, whatever may be the merits of the case. The motion is not entitled or made in the cause in which the decree was rendered and the sale made, nor does it appear that the promovents in the matter were parties or privies to that action. They have, therefore, no legal capacity to invoke these proceedings to review a judgment, by summary motion in another case. Motion denied, with costs.

Case No. 5,084.

FREEMAN et al. v. BAKER.

[Blatchf. & H. 372.] [1]

District Court, S. D. New York. May 14, 1833.

SEAMAN'S WAGES — ACT JULY 20, 1790 — SUIT IN PERSONAM — DISCHARGE BEFORE DELIVERY OF CARGO — LEAVING VESSEL FOR REASONABLE CAUSE — FORCIBLE RETURN — SUFFICIENCY OF ANSWER.

1. The sixth section of the act of congress of July 20, 1790 (1 Stat. 133, 134), prescribing the time and manner in which seamen may prosecute suits for wages, has reference to actions in rem only, and not to actions in personam.

2. The right of a seaman to sue in personam for his wages, is perfect as soon as the period of his service is completed.

3. If the seaman is discharged before the delivery of the cargo, his right to sue in personam for his wages is perfect from the time of his discharge.

4. A seaman who goes ashore, without the intention of deserting, to apply to an American consul for redress for alleged cruel treatment on board, leaves the vessel for reasonable cause, and does not incur a forfeiture of wages.

5. If a seaman who absents himself from his vessel is afterwards forcibly brought back, and returns to his duty, that is a condonation of his offence and a remission of the forfeiture of his wages; and a stipulation in the shipping articles that it shall not have such effect, will be *held* to be void.

6. An answer, averring, in general terms, that a vessel was supplied with a medicine-chest according to law, is not, of itself, sufficient evidence to discharge a master from his liability for a physician's bill for attendance upon a sick seaman.

7. An express promise by a sick seaman to pay the amount of such a bill, is without consideration and void.

[Cited in The Ben Flint, Case No. 1,299.]

This was a libel in personam for seamen's wages [by John Freeman and Nicholas Nelson], against [Hiram Baker] the master of a vessel. The vessel arrived at New-York, her port of final discharge, on the 18th of March, 1833. The libellants were discharged on the 19th, and commenced this suit on the 22d. The cargo was not unladen until the 26th. The answer set up a dilatory exception, that the suit was not authorized under the provisions of the 6th section of the act of congress of July 20, 1790 (1 Stat. 133, 134)—1st. That it was premature, because, by that act it is provided that, "as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and, if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful" to proceed in the manner directed by the act, provided that nothing therein contained "shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or for immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast;" 2dly. That the suit was irregular, because the act provides that, except where immediate process is allowed, "it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence shall be more than three miles from the place, or of his absence from the place of his residence, then for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackle, furniture and apparel, according to the course of admiralty courts, to answer for the said wages; and if the master shall neglect to appear, or, appearing, shall not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used." It was contended that these provisions of the act had a general application to suits in personam as well as to suits in rem; that such a construction was necessary to effect the object congress had in view, which was, to prescribe the time at which wages should be deemed payable, and the mode of their recovery; and that, therefore, every species of action by which wages might be recovered, fell within the regulation.

The answer contained, also, a defence upon the merits, and claimed to set off against the amount of wages due the libellants, sundry items, the only disputed one being the amount of a physician's bill at St. Jago de Cuba. It appeared that the libellants took the yellow fever, on ship board, at that port, and, at their request were attended by a physician from on shore, upon an express promise by them to pay his bills. After their recovery, his bills were paid by the master, and they subsequently admitted to a shipmate their indebtedness therefor to the master. The answer averred generally, that the vessel was provided with a medicine-chest and every thing else required by law for the health and healing of the crew on the voyage. No evidence was offered under this allegation. It was contended that the master was exonerated from any further charge on account of the sick seamen, by the provisions of the 8th section of the act of congress of July 20, 1790 (1 Stat. 134), and by those of the act of March 2, 1805 (2 Stat. 330), which enact that vessels of a certain description "shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine-chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine or attendance of physicians, as any of the crew shall stand in need of, in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner." The answer alleged, also, a tender to the libellants, before suit brought, of the amount due to them, deducting the physician's bill and some undisputed items, and claimed to be discharged from costs accordingly.

The answer further alleged, as to Freeman, one of the libellants, that he had forfeited his wages by desertion. An entry in the log-book was produced, made by the mate on the day on which Freeman absented himself, asserting that he left without leave, and absented himself for more than forty-eight hours at one time. The shipping articles, also, were put in evidence, containing a stipulation, "that if any of the said crew disobey the orders of the said master or other officer of the said vessel, or absent himself at any time without liberty, his wages due at the time of such disobedience or absence shall be forfeited; and in case such person or persons so forfeiting wages shall be reinstated or permitted to do further duty, it shall not do away such forfeiture." The evidence upon the other side contradicted in some respects the entry in the log, and showed that Freeman left the vessel at Messina, to lay before the American consul a complaint for his cruel treatment by the mate; that his lodgings on shore were but a short distance from the vessel, within sight of the master and crew, who knew the reason why he had left the vessel; that the master caused Freeman to be forcibly carried on board by the police; and that he afterwards went peaceably to work, and did full duty during the residue of the voyage.

Edwin Burr and Erastus C. Benedict, for libellants.

David D. Field, for respondent.

BETTS, District Judge. It is urged, on the part of the respondent, that the provisions of the 6th section of the act of congress of July 20, 1790 (1 Stat. 133), apply equally to suits in personam and to suits in rem; and it is argued that such a construction must be given to that section, in order to effectuate the general intent of congress. The statute has, in its terms, reference only to proceedings in rem; and, if its language be susceptible of a broader import, so as to be made applicable to all other forms of suit, there ought to be very manifest and urgent reasons for giving it such effect, to induce the court to depart from its letter and plain purpose. The act varies the maritime law under which seamen acquire a right to prosecute in admiralty, and, instead of enlarging and rendering more efficacious the remedies they before had by that law, modifies and restricts their remedies in a very important particular. Before the statute, a sailor could immediately attach the vessel for his wages, when the voyage was ended, or whenever he was entitled to an advance. The act, with a view to protect the interests of ship-owners and merchants, now requires that the seamen shall wait ten days after the voyage is ended and the ship is unladen, and that then he shall summon the master to show cause, before he is entitled to arrest the vessel by admiralty process. As the regulations of the statute are in restraint of the privileges of seamen, and do not create a right to sue in this court, (that right having been coeval with the institution of the court itself,) but abridge the right, in this par-

ticular, in favor of the merchant, the operation of the act should, by well-settled principles of interpretation, be limited by the courts to the identical case specified in it. The act has, accordingly, been accepted in this court as having regard to proceedings in rem alone; and that application of it is corroborated by the explicit reservation, in the statute, of the right of the seaman to an action at common law, where the right of action accrues as soon as the wages are due. When the remedy is pursued against the master or owner individually, no reason is disclosed by the act, indicating that congress intended to place seamen on a footing different from other suitors, or to provide their debtors with any further privileges in admiralty than are possessed by other parties defendants at common law. There would, however, be reasons of weight for preventing mariners from arresting a vessel so abruptly. They might thereby, often interrupt and put at hazard vital operations in navigation and commerce, or at least impose heavy expenditures and losses upon shipowners, which they would never be able to reimburse. It would, therefore, be a provident safeguard, to place under careful restrictions this method of procedure against a ship; and the act wisely provides, that before this advantage can be had, the sailors shall give the master or owner an opportunity to satisfy their wages, and that then they shall not be permitted to seize the vessel without showing, before a proper magistrate, probable cause for the proceeding. There seems to be no reason why the act should be carried further by construction than to ensure the fulfilment of that main object. It will, accordingly, not be held to apply to actions in personam prosecuted in admiralty. The arrest of the master or owner, and holding him to bail, when the voyage is ended, would interpose no impediment to the preparation of the ship for further employment, or to her pursuing the one then on hand, and would be a reasonable privilege to seamen against transient or non-resident masters or owners. The libellants, therefore, commenced their suit correctly in this case, without waiting ten days after the completion of the voyage, and without summoning the master to show cause, provided, however, the voyage was ended when the suit was instituted; because, a sailor acquires no right of action for his entire wages until the period of his service is completed.

The statute specifies some particulars which evince the termination of the voyage—as, that the vessel is at her last port of destination, and her cargo or ballast is fully discharged. But I think it is a mistake to suppose that congress contemplated making the full discharge of the cargo or ballast an absolute and inflexible requirement or pre-requisite to the completion of a voyage. The terms of the act are, that the wages shall be due as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery. It is obvious that a voyage may be ended, to all legal intents, without the arrival of the vessel at her last port of delivery. The misadventure or sale of the vessel, the abandonment of the voyage by the owner, the transshipment of the cargo at sea, the discharge of the seamen at an intermediate port, with or without their consent, as also acts of hostility or restraint by foreign powers, may terminate the voyage elsewhere than at the last port of delivery; and it cannot be supposed that congress meant to designate the arrival of the vessel at her last port of delivery as the only event which could end the voyage and entitle the seamen to their wages. So, with regard to the other provision of the act, respecting the full discharge of the cargo or ballast, it is not to be intended that congress has left it to the option of the owner when he will unlade his vessel, or whether, indeed, he will ever fully discharge the cargo or ballast. No time is limited by the act, within which he is required to do either. Instances undoubtedly occur, in long and unfortunate voyages, where the arrears of wages exceed the value of the vessel and her cargo, and it would be to the interest of the owner to suffer both to perish in port, if he could thereby excuse himself from the payment of wages. It follows, then, that neither the ending of the voyage at the port of discharge, nor the delivery of the cargo, should be regarded as conditions precedent to the right to sue for wages; and the courts ought not to interpret the act as expressing, with invariable certainty, the circumstance necessary to compose a mariner's right to sue for his wages. The statute should rather be understood as fixing a period beyond which wages cannot be withheld from a sailor, whatever stipulations to the contrary may be inserted in his contract. This motive alone would sufficiently call for the enactment of the law.

In the present case, the clause of the statute adverted to has been incorporated in the shipping articles. The seamen engage that they shall not be entitled to, and will not demand their wages until the arrival of the vessel at the last port of discharge, and her cargo delivered. But this covenant can have no further or other effect than the statute, the words of which it adopts. The contract must be expounded as if it rested upon the statute alone. The law benignly shields mariners from the effect of agreements into which they may be drawn, beyond what strictly appertains to a shipping contract; and the obligation of the statutory provision, as against them, cannot be enlarged by any stipulations into which they may be drawn, unless the purport of those stipulations is fully and fairly explained to them, and an additional compensation is allowed, entirely adequate to the new obligations imposed.

The Minerva, 1 Hagg. Adm. 347; The George Home, Id. 370; The Prince Frederick, 2 Hagg. Adm. 394. The right of action of the libellants was perfect when this suit was commenced, although the cargo was not fully unladen. The obligation to postpone their demand of wages until the delivery of the cargo, was correlative to their obligation to remain with the vessel until that time, the wages being the consideration for the bargain for the services. Having been separated from the vessel by the act of the master, and with their own consent, both their service and the time for which their wages are to be estimated, ceased. Their release or acquittance from the performance of their contract, imparts the same rights to them that they would have possessed had it then ended according to its terms, and by full performance on their part. The preliminary objections are, accordingly, overruled.

The defence of a forfeiture of wages applying to Freeman, one of the libellants, will be next considered. Admitting that the entry produced from the log-book is regular, it appears to me, that a forfeiture cannot be maintained in this case, because Freeman left the vessel, for a reasonable cause, not clandestinely or with the intention of deserting, and because there was a subsequent condonation of the offence and remission of the forfeiture, had any been incurred, by the act of the master in taking him back to service. Abb. Shipp. (Ed. 1829) 464, 468, 472, note. The stipulation in the shipping articles, which has been set up as working a forfeiture of wages, would, on the interpretation now claimed, extend as well to every act of disobedience, however harmless and trivial, and to every truant absence beyond the moment of leave granted, as to acts of insubordination and of flagrant desertion of the vessel; and it requires no comment to show, that if such a stipulation were enforced to the letter, no seaman would have a legal remedy for wages left him, but must depend upon the generosity of the owner and master, whether his services should be compensated or not. Had it not been notorious that the principles upon which courts of admiralty administer the law in respect to the engagements of seamen, would prevent any construction of the shipping articles, so destructive of their rights, the legislature would, without doubt, have interfered for their protection against their own contracts, as they have shielded them already in matters of less vital consequence to their interests, and would have left them under the security of judicial authority. Abb. Shipp. 464, 468, 472, and cases cited in notes. The courts, by interpreting and executing the stipulations of seamen, in consonance with the subject matter to which they relate and with the character of the parties entering into them, have effectuated an adequate guardianship over seamen, without depriving the owner and master of any just rights. Such stipulations are considered as nothing more than penalties held over the seaman in terrorem, and under which nothing more will be awarded to the owner or master, than an indemnity for injuries sustained by the misbehavior of the seaman, and nothing more imposed on the seaman than a punishment, by way of fine, for his misconduct. In that way, the courts are able to regulate the amounts chargeable against seamen by force of such covenants, conformably to the demerits of each individual case. The Mentor [Case No. 9,427]. The ground of defence taken upon this point is, accordingly, overruled.

The remaining inquiry is, as to an allowance against the libellants of the physician's bills at St. Jago de Cuba, which were paid by the master. By the maritime law, all charges for medicines, nurses, physicians, &c., furnished to or provided for a seaman, during the progress of a voyage, when his disability is not the immediate consequence of his misconduct, are imposed on the vessel. Jus Marit. Hans. (Ed. 1667, Hamb.) tit. 14, arts. 1, 2, pp. 72, 73; Laws of Oleron, arts. 6, 7; Laws of Wisbuy, art. 18; Harden v. Gordon [Case No. 6,047]. This principle of the maritime law has been eulogized by distinguished writers for its practical wisdom and its enlightened humanity; and eminent judges in this country have questioned the policy of the change made by statute on this subject, and have favored the limitation of the act of congress to the strictest reading of its letter. Walton v. The Neptune [Id. 17,135]; Swift v. The Happy Return [Id. 13,697]; 3 Kent, Comm. 184, 185; Abb. Shipp. 145, 146. The course of this court has not been to compare the act of congress with the law which it supersedes, in view of their relative adaptation to the interests of navigation or of seamen; but, receiving the statute as the only existing law on the subject, it has endeavored to carry the statute into effect according to its fair import and policy. In remitting the master to the responsibilities imposed by the maritime law, on his failure to obey the directions of the act, congress admit, by strong implication, that that law has full force, except in so far as the statute interferes with and modifies it. When, therefore, a master attempts to shield himself from the obligations of the maritime law with respect to sick seamen, it is incumbent on him to show, by very clear and satisfactory proofs, that he has complied with every requirement of the statute in that respect. The statute substitutes a new provision for sick seamen, under particular circumstances and conditions; and, before a master can claim its application, he must give satisfactory evidence that he has fulfilled those circumstances and conditions. Harden v. Gordon [supra]. If the answer could be received as evidence for the respondent in this respect, it is expressed in terms so loose and equivocal as to leave room to doubt whether

the requisitions of the statute have been complied with by the master. It gives the opinion of the master that he had done what was enjoined by the law, but does not set forth the facts so that the court may determine how far they correspond with and satisfy those requirements. An answer of this description is of no other avail than to admit the respondent to support its allegations by testimony aliunde. None such is offered; and, as the case is presented to the court, there is not only a want of proof that the vessel was furnished with a medicine-chest and directions in the mode pointed out by the statute, but there is an absence of all legal evidence that any medicine-chest was on board.

Nor can the engagements of the libellants to pay the physician's charges avail the respondent. The agreement was without consideration, and was made under the exigencies of a dangerous and alarming malady. Agreements of sailors with a master, on board of a vessel, in derogation of their rights and interests, are seldom regarded in courts of admiralty, especially when those engagements have relation to other matters than the terms and limits of their shipment. A higher objection still remains to promises of this character. The master would, by them, discharge himself of an obligation imposed upon him by positive law, and which the interests of humanity and commercial policy require should be fulfilled on his part with fidelity. This part of the claim of the master against the libellants is, accordingly, rejected. The residue of the accounts, which is undisputed, is allowed.

The offer made by the respondent, before suit brought, to pay the wages, deducting the physician's bills, cannot avail to excuse him from costs. Decree for libellants, with costs.

Case No. 5,085.

FREEMAN v. CARGO OF SALT.

[The case reported under the above title in 40 Hunt, Mer. Mag. 457, is the same as Case No. 2,406.]

FREEMAN (DUTTON v.). See Case No. 4,210.

Case No. 5,086.

FREEMAN v. The JANE.

[Crabbe, 178.] [1]

District Court, E. D. Pennsylvania. Sept. 8, 1837.

SEAMAN—SHIPPING FOR PART OF VOYAGE—SUIT FOR WAGES.

Where a seaman, shipped for a part of a voyage, is discharged, at the termination of his engagement, without payment of wages; if he makes every exertion to follow up the vessel, and, immediately he meets her, commences suit against her, his lien for wages is not destroyed though the vessel has made one or more voyages since his discharge.

This was a libel for wages. The libellant [Edmund Freeman] shipped on board the schooner Jane [William J. De Wolf, master], at New York, in December, 1836, for a voyage to Washington, North Carolina. On the 11th February, 1837, he was discharged at Washington, without payment of wages, and the schooner immediately sailed from that port. It was proved that the libellant followed the schooner to New York, and from there to Philadelphia, where he found her and immediately commenced suit. It was also proved that the schooner had made at least two voyages between New York and Philadelphia before she was attached in this suit, and since the libellant had been discharged. The respondent's counsel abandoned all other grounds of defence which had been taken, and relied on the fact that the vessel had made several voyages since the cause of libel accrued.

Mr. Grinnell, for libellant.

Mr. Shoemaker, for respondent.

HOPKINSON, District Judge, decreed for the libellant, for the whole amount of wages demanded.

[1] [Reported by William H. Crabbe, Esq.]

FREEMAN (KENDALL v.). See Case No. 7,692.

Case No. 5,087.

FREEMAN v. PEROT et al.

[2 Wash. C. C. 485.] [1]

Circuit Court, D. Pennsylvania. Jan., 1811.

BILLS AND NOTES—ACCEPTANCE AND PROTEST—PAYMENT—DISCHARGE.

The defendants accepted a bill of exchange, for the honour of the first endorser, the bill being under protest, agreed to pay any person authorized to receive the money, and to give a discharge; this acceptance did not bind the defendants to pay, without the holder putting his name on the bill, or giving, as required, an indemnity to the defendants.

This was an action upon a bill of exchange, drawn by G. on the defendants, at sixty days, in favour of Joseph and Samuel Darrell, which came by endorsement to the plaintiff [Joshua Freeman]. The bill was presented in due time for acceptance, and was noted; and when at maturity, the defendants accepted it for a part of the sum, and accordingly it was protested. The defendants then accepted for the balance, for the honour of the Darrells, the endorsers, and to pay to any person authorized to receive the money, and to give a discharge. It was proved that the plaintiff, before the presentation of the bill, left Philadelphia,

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

but gave to Mr. Worth an order on the defendants to pay him the amount of the bill, whose receipt, the order stated, would be a full discharge. The defendants, upon the production of this order, refused to pay, without an endorsement of the plaintiff's name on the bill; but agreed to dispense with that, upon receiving a bond of indemnity, which Worth refused to give.

Mr. Rawle, for defendants, objected, that without such indorsement, the defendants were not bound to pay; that the protest was not regular, as it stated that it was made at the request of Mr. Worth, who does not appear, on the face of the bill, to be authorized to make it; and of course, the drawer and endorser might, on that ground, resist the claim of the defendants, if they had paid. He objected, also, that there was no protest for non-acceptance. Cases cited: 3 Term R. 761; Beaw. Lex Merc. 459, 456; Chit. 116; 1 Esp. 112; [Gorgerat v. M'Carty] 2 Dall. [2 U. S.] 144.

Mr. Dallas, for plaintiff, cited Chit. 24, 25, 26; Kyd, 99; Marcus, 71.

WASHINGTON, Circuit Justice (charging jury). Before the defendants could be compelled to pay this bill, the plaintiff's agent should have shown himself authorized to place him in a situation to maintain all the rights to which he was entitled. This bill was accepted only in part, and was protested for the residue. The acceptance, supra protest, was for the honour of the payee; and although proof of payment might possibly be sufficient in an action against the person for whose honour the bill was partly accepted, upon a count for money paid to his use, yet, as the defendants, would have a right to sue all the endorsers above them, for whose honour it was accepted, as well as the drawer, such proof would not be sufficient, in an action against the drawer or such endorsers, if there had been any. As to them, at least, he must sue as endorsee. But in this case, the plaintiff was the last endorsee, and he has neither endorsed it in blank, nor to his agent. It was contended by the plaintiff, that the endorser who pays to a subsequent endorsee, may sue the drawer, or his endorser, upon proving payment. This may be so; but in that case, the endorser may strike out all the subsequent endorsements, and appear as the last endorser on the bill. In this case, the defendants could not have so appeared, without an endorsement by Freeman; and his name is not on the bill. It was further insisted, that Worth had an implied power, from the order, to make the endorsement. This may be questioned, but need not be decided; because, if he had, he ought to have offered to make it, when it was demanded by the defendants, and the want of it made the ground of their refusal to pay. The verdict, therefore, must be for the defendants.

Plaintiff suffered a nonsuit.

Case No. 5,088.

FREEMAN v. STEWART et al.

[5 Biss. 19.] [1]

Circuit Court, D. Wisconsin. Aug. Term, 1855.

HOMESTEAD EXEMPTION—PRACTICE IN EQUITY.

1. Homestead exemption must exist and be claimed at the time the writ comes to the officer's hands. A defendant, moving onto property thereafter cannot hold it exempt as a homestead.

2. A creditor's bill having been filed, and a receiver appointed the court will direct the assignment of such property to the receiver.

MILLER, District Judge. The judgment in this case was rendered against Norman Stewart on the 6th of July, 1854.

By the answer to the supplemental bill, it appears that lot 3 in block 4 in the town plat of Dell Creek was formerly owned by Francis M. Stewart, and it was given by him in the spring of 1854 to the said Norman Stewart, on condition that he would build a house thereon and improve the same. The title to the lot is now in Norman Stewart and was in him at the time of filing the supplemental bill.

The execution issued upon the judgment against Norman Stewart on the 18th of July, 1855, twelve days after the rendition of the judgment. If the marshal had levied upon this lot and the building then in process of erection, there is no question but the levy and sale would be good; for by the law (Rev. St. 1849, p. 542, § 65), lands, tenements and real estate holden by any one in trust or for the use of another, shall be liable to debts, judgments, decrees, executions and attachments, against the person to whose use they are holden. Defendants then had an equitable interest in the lot and building subject to sale, and also the subject of a bill in equity for the perfection of the title before a sale by the marshal. It could not have been then claimed under the exemption law, for the defendant was not in the actual occupancy of it as a homestead. He was not then a householder in the occupancy of the premises within the meaning of the exemption law. By the law the lien of this judgment attached to the defendants' interest in this lot, and it was also subject to levy and sale upon the execution, as I before stated, and it might have been levied under that execution, before the defendant had moved upon it. The question arises now, in regard to the remedy of the plaintiff and also the rights of the defendants under the exemption law. The defendant moved into the house in September, 1855, after the return of the execution nulla bona. The original bill was filed November 23, 1854. Subpoena was served November 29th. December 5th, injunction was allowed, and served on the 19th. A receiver was ap-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

pointed January 6, 1855. The supplemental bill was filed May 7, 1855.

In his answer the defendant says: "In my absence in the pinery, he (Francis) had deeded the lot to my wife. On my return, shortly after, I got a deed of it. I first saw it in the spring. I returned from the pinery in April last, the middle or latter part. My wife has since executed a deed to King and he to me, the last of April or first of May."

The use and object of the judgment creditor's bill is to discover assets and to render the equitable property or interests and the choses in action of the defendant subject to his debts. In other words, it is to compel a defendant to do that which he in honesty to his creditors should do fully and freely to the officer serving the execution. If the defendant had turned out his interest in this house and lot to the marshal, subject to his right of exemption, the question as to the right would have been raised upon a motion to set aside the levy; and it would have been raised just as effectually and as favorably to the interests of the parties as it is now by the defendant's refusal to assign it. The question then arises out of the occupancy by the defendant and his family, before the filing of this bill.

I have remarked that the judgment was a lien on the defendant's interest, which was subject to levy under the execution by the marshal. The defendant cannot conceal from the officer property which he was not occupying and then, in answer to the bill, say that "since the officer served me with the execution I have moved on the property, and I now claim it for my homestead exemption." To allow this, would be sanctioning a fraud upon the plaintiff. The homestead, by the law, must be claimed when the levy is made. When the levy might have been made, the defendant had not placed himself in a position to claim the exemption. The claim of exemption must have relation to the time when the execution was in the marshal's hands. No return of the property is made by the defendant to the marshal, or even in his answer to the original bill, and when a bill is filed expressly to have this lot and house appropriated by a decree of this court to the plaintiff's debt, it is too late for the defendant to interpose a claim of exemption.

Whether a defendant can dispose of his estate and property, reducing it to the exemption limit, and then successfully claim an exemption, I shall not now determine. The case of Brackett v. Watkins, 21 Wend. 68, is opposed to such a proceeding. The court will instruct the master that this house and lot is to be assigned to the receiver.

NOTE. See, further, as upholding the text, Upman v. Second Ward Bank, 15 Wis. 449. If the judgment debtor sells the land, held as a homestead, or ceases to use it, the lien attaches and it may be sold to satisfy the judgment. Hoyt v. Howe, 3 Wis. 752. Chattels levied upon are exempt if claimed early enough not to delay sale or necessitate new advertisements. Yost v. Heffner, 69 Pa. St. 68. Consult Pratt v. Burr [Case No. 11,372].

FREEMAN (UNITED STATES v.). See Cases Nos. 15,162 and 15,163.

Case No. 5,089.

FREEMAN'S NAT. BANK v. SMITH.

[13 Blatchf. 220.] [1]

Circuit Court, S. D. New York. Dec. 21, 1875.

CORPORATIONS — VOLUNTARY DISSOLUTION — NEW YORK STATUTES—INVOLUNTARY BANKRUPTCY —MEETINGS—DEATH OF STOCKHOLDER.

1. Under the statute of New York (2 Rev. St. pp. 467, 468, §§ 58–66), providing for the voluntary dissolution of corporations, it is necessary, on the presentation of the petition for dissolution, that an order should be entered calling on all persons interested, to show cause against the prayer of the petition at a time not less than three months from the date of the order. If this be not done, the proceedings are invalid.

2. Under section 5122 of the Revised Statutes of the United States, it is necessary that a petition by a corporation in voluntary bankruptcy should be authorized by a vote of a majority of the corporators at a legal meeting called for the purpose.

3. Where the owner of stock in a corporation dies before such meeting is held, leaving no will, and no administration on the estate is granted before the corporation is adjudged bankrupt, there is, as to such stock, no corporator.

4. Such meeting is not one of the meetings of stockholders, provided for in section 21 of the statute of New York, in regard to the formation of corporations (Act Feb. 17, 1848; Laws 1848, c. 40, § 21, p. 59), and it is not necessary it should be called in the manner prescribed by said section.

[This was a bill for an injunction by the Freeman's National Bank of Boston, against C. Edgar Smith, assignee in bankruptcy of the Pensacola Lumber Company. An application was made in the district court to have the order adjudicating the Pensacola Lumber Company a bankrupt vacated, on the ground that the corporation was dissolved at the time that it presented its petition in bankruptcy. This application was denied. Case No. 10,959.]

Thomas M. North, for plaintiff.

William R. Darling, for defendant.

JOHNSON, Circuit Judge. Upon the question of the jurisdiction of the supreme court of New York, to make the order dissolving the Pensacola Lumber Company, I agree with the learned district judge, and for the reasons which he has assigned. It is only after the notice required by the statute, that the proper judicial authority of the court to pronounce a judgment of dissolution arises. In the presentation of the petition, the statute does not merely permit, but absolutely

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

requires, an order to be entered calling upon all persons interested, to show cause against the prayer of the petition at some time and place not less than three months from the date of the order. So far, the only power, even of a discretionary character, to be exercised by the court, is the fixing of the time and place and person for the making of the proper inquiries. Upon the coming in of that report, the judicial power of the court is to be exercised. If it shall appear to the court that the corporation is insolvent, or that, for any reason, a dissolution thereof will be beneficial to the stockholders and not injurious to the public interests, a decree of dissolution is to be made. 2 Rev. St. N. Y. pp. 467, 468, §§ 58–66. The inquiry concerns not only the parties who are interested in the corporation, but also the public at large. For this reason, especially, is it necessary that a complete compliance should be exacted, with all the preliminary conditions upon which the power of the court to pronounce a dissolution is by the statute made to depend. The provisions in respect to notice stand in the place of the ordinary process or other proceeding for the commencement of a suit, and, until they are complied with, the authority of the court to act judicially on the subject-matter of the petition does not arise. In this case, it appears affirmatively, that, almost immediately upon the presentation of the petition, an order of dissolution was pronounced, instead of an order to show cause, as required by the statute. For this order there was no authority by law, and it was, in my judgment, invalid for all purposes.

Assuming this conclusion to be well founded, the next question is as to the validity of the adjudication in bankruptcy. The adjudication is assailed upon the alleged ground that the petition was presented without proper authority. The statute (Rev. St. § 5122) requires a petition of an officer of a corporation, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose. In this case, the corporation was such as the act includes, and the petition was made by an officer of the corporation, and was made in pursuance of a resolution adopted at a meeting of which all the living corporators had notice, and which was called for the purpose expressed in the notices, of acting on the subject of the bankruptcy, and which was attended, in person or by proxy, by all the living corporators, save the owner of one share, out of the 760 shares into which the capital stock was divided. The resolution, moreover, received the assent of all the corporators present and represented at the meeting. The owner of 190 shares of the stock, one J. D. Gardiner, had died on the 14th of February, twelve days before the meeting. He left no will, and administration had not been granted on his estate when the adjudication in bankruptcy took place. So far, therefore, as that part of the stock was concerned, there was no corporator, for, no one but the legally constituted representative of the deceased could make title to the shares, and no such representative then existed. It must, therefore, either be declared to be the law, that the death of a stockholder in a corporation suspends its power to take the necessary steps to go into bankruptcy, or that the language of the statute is satisfied when the word "corporator," as therein used, is taken in its primary and obvious sense, and as meaning the persons who are legally entitled to that character. It is, of course, plain, that neither Mrs. Gardiner, the widow, nor Mr. Gardiner, the son, of the deceased corporator, his next of kin, became corporators or stockholders upon his death; and, therefore, no action or assent on their part is of any weight in determining the question presented to the court, although neither of them, nor the absent stockholder, Knight, has raised any objection to the proceeding. It seems to me, that the sensible and just construction of the statute is the primary and obvious one, that only existing corporators are within the contemplation of the statute. Otherwise, this very important power of a corporation is made dependent upon the accident of the life or death of the owner of a single share of stock.

It is claimed, that the twenty-first section of the New York act authorizing the formation of manufacturing corporations (Act Feb. 17, 1848; Laws 1848, c. 40, § 21, p. 59), prescribes the mode of calling stockholders' meetings, and that its provisions were not complied with in respect to the meeting in question. But, the answer to this is, that the stockholders' meetings referred to in the section cited, are those held for one of the purposes specified in the section, which has no relation to stockholders' meetings in general. The named purposes are, to increase or diminish the amount of capital stock, to extend or change its business, or to avail itself of the privileges or provisions of the act. Neither of these purposes includes or is equivalent to the object or purpose of the meeting in question, and, of course, the provisions of the section have no application in the present case.

The grounds above stated cover substantially the argument on which the motion for an injunction was urged. I should have gone over them more at length, but that the interests of the parties on both sides require, and they have requested, a speedy decision. I have, therefore, considered the matter upon its merits, and have not inquired whether the bill is to be deemed to be founded upon the supervisory power of this court over proceedings in bankruptcy, under section 4986 of the Revised Statutes, or whether it is sustainable on the ordinary grounds of equitable jurisdiction, upon the facts alleged in this case. The injunction asked for must be denied, and the temporary injunction must be dissolved.

Case No. 5,090.

The FREE STATE.

[1 Brown, Adm. 251;[1] 6 Am. Law T. Rep. 401; 5 Chi. Leg. News, 373.]

Circuit Court, E. D. Michigan. April, 1873.[2]

COLLISION — STEAMER AND SAILING VESSEL—CONSTRUCTION OF ARTICLES 13 AND 16 — RISK OF COLLISION—OBLIGATION TO SLACKEN SPEED.

1. A propeller descending the Detroit river at her usual speed, made the green light of a scow very nearly dead ahead, and about the same time the red light of a steamer a little upon her port bow; the steamers exchanged single whistles and passed each other to the right; while passing the ascending steamer the propeller starboarded to avoid the scow; when very near the propeller, and about one and a half points on her starboard bow, the scow ported, and threw herself across the propeller's course, and thereby came into collision with her and was sunk. *Held*, the scow was in fault for changing her course, and that the propeller was not in fault for failing to slacken speed before the scow exhibited a red light. A propeller meeting a sailing vessel in a clear night with plenty of sea room, is under no obligation to slacken speed so long as the sailing vessel is apparently keeping her course, and no danger is apparent.

[Cited in The Sunnyside, Case No. 13,620; The Britannia, 34 Fed. 551; The Wilhelm, 47 Fed. 96.]

[See note at end of case.]

2. The words "risk of collision" are not used in the same sense in articles 13 and 16 of the collision act; in the latter they apply only to cases of manifest danger of collision, and the obligation to slacken speed under article 16 was not intended to be contemporaneous with the duty of porting under article 13.

3. The cases upon the subject of speed reviewed and criticised.

Libel for collision, by August F. Ludwig and others, against the propeller Free State, the Western Transportation Company, claimant. The collision occurred between three and four o'clock in the morning, on the 17th day of August, 1870, in the Detroit river, just above Amherstburg, in Canada, and between the main land and the head of Bois Blanc Island. The scow was bound up with a load of building stone. The propeller was bound down, also loaded. The weather was fair, and it was a good night to see lights. The scow had the wind free, and a little over her port quarter. The propeller struck the scow on the port side, a little forward of the main rigging, crushing her in and causing her to sink almost immediately. The specific faults with which the propeller was charged were five in number, and were as follows: 1. Want of proper lights. 2. No lookout. 3. Did not keep her course and pass on port side. 4. Did not slacken her speed. 5. Not fully equipped. The answer denied the faults charged, and that the collision was caused in any manner by fault or negligence on the part of the propeller, and claimed that the same was caused solely by fault and negligence on the part of the scow, and specified the following: 1. That the scow had no lookout. 2. She did not keep her course. 3. Officers and crew not at their proper posts, &c.

The following opinion was delivered by the district court (LONGYEAR, District Judge):

"There is no pretense that the first, second, and fifth charges of fault against the propeller, and the first and third against the scow, are sustained by the evidence. The case, therefore, stands for decision on the remaining charges only: The law governing the case is found in articles 15, 16, and 18 of the act of April 29, 1864 (13 Stat. 60, 61), as follows:

"'Article 15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such a direction as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

"'Article 16. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate speed.'

"'Article 18. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course,' etc.

"The mere fact of collision between a steam vessel and a sailing vessel is, as a general rule, prima facie evidence of fault and negligence on the part of the steam vessel, it being made her duty, by article 15, to keep out of the sailing vessel's way; provided always, however, that the sailing vessel is herself without fault. In such cases, therefore, unless it shall appear that the collision was in fact the result, in whole or in part, of fault on the part of the sailing vessel, the steam vessel must bear the loss. Hence it becomes important, in this case, in the first instance, to inquire into the charge of fault made against the scow. By article 18, it was the duty of the scow to keep her course, and the charge of fault made against her is that she did not do so. By the evidence adduced on behalf of the scow the following facts are established: After entering Detroit river, the scow kept up along nearer to the Canadian (her starboard) bank. Just after passing Amherstburg the steamer Jay Cooke passed the scow on her starboard side, or betwen her and the Canadian bank. As the Jay Cooke was passing her, the scow came up (starboarded) one point, or thereabouts, in order, as the witness said, to give the Jay Cooke more room. After the Jay Cooke had passed, the scow ported, in order to get into the wake of the steamer. It was while she was sailing under this port order that the propeller came down upon her. When the collision became inevitable, the scow's helm was put hard aport, and the collision occurred. Here, then, by her own showing, were at least two changes in the scow's course. Did these changes, or either of them, occur after it had become the duty

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

[2] [Affirmed in 91 U. S. 200.]

of the scow to keep her course? And, if so, did such changes cause, or contribute to, the collision? I think the proofs show that the propeller had been made from the scow before the Jay Cooke passed; at all events, she was made aware of the approach of the propeller when she and the Jay Cooke exchanged signal whistles, which occurred just as the Jay Cooke was passing the scow, and, of course, before the latter had ported to get into the Jay Cooke's wake. The proofs further show that when the two steamers blew their signal whistles, the propeller and scow were not to exceed a half a mile apart, and were probably considerably nearer than that; and that when the scow ported, the distance between them was only some 300 to 400 feet. From these facts, it is clear that the proximity of the two vessels was such that the duty of the scow to keep her course had attached before she had made either of the changes mentioned.

"Now let us see what effect these changes had in bringing about the collision. The proofs on the part of the propeller show that the scow was first made from the propeller at or about the time the Jay Cooke was passing the scow, and that then the scow showed to the propeller her green or starboard light. This must have been after the scow had starboarded to give the Jay Cooke more room; because, owing to a bend in the river between the two vessels, and their position in the river, the starboarding of the scow would have the effect to shut in her red and open her green light to the propeller. It also appears by the proof that the propeller's course was laid to avoid the scow, while the latter was under the starboard helm, and still showing her green light; and I think the conclusion irresistible that, but for the scow's porting as she did, the propeller would have gone entirely clear of her, and there would have been no collision. The propeller, of course, had the right to pass the scow on either side she chose, and, in laying her course, she had the right to presume the scow would keep her course.

"From the above premises two things are apparent: 1. That, if the scow had kept the course she was on when the Jay Cooke overtook her, and had not starboarded as she did (and there is nothing to show that such starboarding was at all necessary to avoid collision with the Jay Cooke), the propeller would not have been misled as to the scow's ultimate intentions, and would have had no excuse for attempting to pass her on her starboard side. 2. If, after the scow had starboarded, she had then kept her course, there would have been no collision, and hence that the immediate cause of the collision was the scow's porting as she did. In arriving at the above conclusions I have found it unnecessary to resort to that portion of the testimony on the part of the propeller in relation to the situation of the two vessels in the river, and relatively to each other, which was so ably and severely criticised by the learned advocate for the libellant. As to the movements of the scow I have drawn my conclusions solely from the libellant's own testimony, and have resorted to the testimony on the part of the propeller only for the purpose of ascertaining when the scow was first made from the propeller, what light of the scow was then seen, and what action on the part of the propeller was predicated thereon.

"Having found that the scow must be held responsible for the immediate cause of the collision, it remains to inquire into the conduct of the propeller, and see if she was guilty of any fault which contributed to the result. The speed of the propeller, as we have seen, was nine miles an hour. Confessedly she did not slacken that speed until the collision was inevitable, and then it did no good. Risk of collision was clearly involved from the time the propeller first made the scow, and therefore her failure to slacken speed was clearly a violation of article 16. As to when the duty to slacken speed begins in such case, see opinion in The Milwaukee [Case No. 9,626], recently decided in this court. Where a vessel thus violates a positive rule of law, and a collision ensues, it will be presumed that such violation of law contributed to the collision, unless the contrary be made clearly to appear. These rules were enacted to prevent the loss of life and destruction of property by collisions upon the water, and the only way to make them effectual is to insist on their rigid enforcement. There being nothing in the case to rebut the presumption above spoken of, the propeller must be held responsible for not slacking her speed as required by article 16. Considering that it was in the night, or, at best in the dim twilight of the morning, and in a narrow channel, through which lay the pathway of the entire commerce of the lakes, and consequently thronged with vessels passing and repassing most of the time, both night and day, as it actually was to a considerable extent at the time in question, the speed of the propeller was clearly too great for prudent and safe navigation, so much so as to constitute a fault on general principles, and for which she would be held liable independently of article 16. The St. Charles, 19 How. [60 U. S.] 108, 111; Union S. S. Co. v. New York & V. S. S. Co., 24 How. [65 U. S.] 307; The Despatch, Swab. 138; The Germania, 21 Law T. (N. S.) 44.

"Decree dividing damages."

From this decree an appeal was taken by the claimant to the circuit court.

H. B. Brown, for claimant and appellant.

The scow was clearly in fault for not keeping her course. Articles 15 and 18. If a sailing vessel keeps her course and a collision ensues, the steamer is, prima facie, in fault; but if she does not keep her course, she is in fault, unless she can bring herself within article 19. The Potomac, 8 Wall. [75 U.

S.] 590; Baker v. The City of New York [Case No. 765]; The R. B. Forbes [Id. 11,598]; The Wm. Young [Id. 17,760]; The New Jersey [Id. 10,161]; The Neptune [Id. 10,120]; New York & L. U. S. Mail S. S. Co. v. Rumball, 21 How. [62 U. S.] 372. The duty of keeping her course involves the incidental duty of beating out her tack. She must not embarrass the manoeuvres of the steamer by changing her course, unless there is an immediate necessity for so doing. The Argus [Case No. 521]; The Empire State [Id. 4,475]; The Bridgeport [Id. 1,860]; The Scotia [Id. 12,512]; The Potomac [supra]. Such fault being established, the scow was solely to blame unless she can prove the steamer guilty of a subsequent fault not produced by or in any way attributable to the first. Lown. Col. 88; Clapp v. Young [Case No. 2,786]; Martinez v. The Anglo Norman [Id. 9,174]; The Ariadne [Id. 524]; Foster v. The Miranda [Id. 4,977]. If the scow does not keep her course, she has no right to question the propriety of our order to starboard—the steamer has the right to adopt such measures as she may choose to get out of the way. The Great Eastern, Holt, Rule Road, 172; The Osprey [Case No. 10,606]; The Oregon, 18 How. [59 U. S.] 570; St. John v. Paine, 10 How. [51 U. S.] 557; Newton v. Stebbins, Id. 586; The City of New York [supra]; The Carroll [Case No. 2,451]; The R. B. Forbes [supra]; The Leopard [Case No. 8,264]; The Northern Indiana [Id. 10,320]. The propeller was under no obligation to slacken speed until danger was apparent. The Jesmond & The Earl of Elgin, L. R. 4 P. C. 1; The Scotia [Case No. 12,513]; The Queen [Id. 11,502]; Williamson v. Barrett, 13 How. [54 U. S.] 101; The Ariadne [supra].

There are but five exigencies in which the obligation to slacken speed arises, neither of which existed in this case: (1) When running in a fog, or in hazy or smoky weather. McCready v. Goldsmith, 18 How. [59 U. S.] 89; The Northern Indiana [supra]; The Colorado [Case No. 3,028]. (2) When meeting vessels in a narrow channel or river. Ward v. The Rossiter [Id. 17,147]; The Bay State [Id. 1,148]; The Milwaukee [supra]. (3) When entering a crowded harbor or thicket of vessels. The Indiana and Buffalo [Case No. 5,927]; The New York v. Rea, 18 How. [59 U. S.] 223; Rogers v. The St. Charles, 19 How. [60 U. S.] 108; The Louisiana [Case No. 8,537]; The Electra [Id. 4,337]; The City of Paris, 9 Wall. [76 U. S.] 634. (4) When approaching a vessel whose position or movements are uncertain. The Louisiana v. Fisher, 21 How. [62 U. S.] 1; The James Watt, 2 W. Rob. Adam. 271; The Birkenhead, 3 W. Rob. Adm. 75; Nelson v. Leland, 22 How. [63 U. S.] 48. (5) When the approaching vessel does something that indicates a departure from the rules of navigation, or a misunderstanding of the signals. All the cases holding vessels in fault for too great speed fall within one of the above classes. Not one can be found which holds a steamer in fault for maintaining her usual speed when no danger is apparent.

Geo. B. Hibbard, on the same side.

The district court erred in finding the propeller in fault for too great speed.

(1) There was no "risk of collision" until the scow committed her fault, and therefore no obligation to slacken speed. Certainly the propeller was not bound to anticipate an infraction of the statute by the scow.

(2) The burden is upon the scow to show that the collision was not owing to her fault in changing her course, and if she cannot establish this, she cannot recover for any injuries she may sustain. Clapp v. Young [supra]; The Bay State [Case No. 1,149]; Waring v. Clarke, 5 How. [46 U. S.] 441, 465.

(3) There was no obligation to slacken speed until danger of collision was apparent. "Risk of collision" is determined when one vessel changes her course sufficiently to pass clear of the other. The Jesmond & The Earl of Elgin, L. R. 4 P. C. 1; The Wenona [Case No. 17,411].

(4) The officer of a steamer has a right to assume that others will obey the rules of navigation, and is bound to assume that a sailing vessel will not change her course.

(5) There being no fleet of vessels, a speed of nine miles an hour, coming down the river, was not excessive—certainly it was not a fault as to the scow.

(6) The scow has no right to commit the fault she did, and then, upon a mere conjecture, call upon the propeller for contribution.

EMMONS, Circuit Judge. The grounds upon which the libellants demand an affirmance of the decree are that the Free State starboarded and ran into the Meisel after the latter had ported and showed her red light, and that the speed of the propeller was, under the circumstances, unlawful. In reference to the first, the district court found the facts against the libellant. We agree that the evidence shows the starboarding on the part of the propeller was before or nearly cotemporaneous with the porting of the Meisel, and that such movement on the part of the latter caused the collision. We shall not discuss the evidence upon this point. The facts will be stated only for the purpose of showing the reasons why we differ from the learned judge of the district court in reference to the application of the rule of law which requires a steamer in difficult navigation, or where, from any cause, there is "risk of collision," to slacken her speed.

The following facts, substantially stated in the opinion of the district court, are all which are necessary for the purposes of the present judgment. The Meisel was coming up the river between Malden and Bois Blanc Island, and near the Canadian shore. The propeller

Free State, well equipped, manned and lighted, with lookout, and officers well placed, was coming down somewhere near the center of said channel, at full speed. At the same time the steamer Cooke came up between the Meisel and the Canadian shore, and exchanging with the propeller the usual signals for so doing, they passed each other to the right. The Meisel, as the Cooke passed between her and the shore, starboarded, and then, if not before, displayed alone her green, and shut out from the Free State her red light. The wind was over the larboard quarter of the Meisel, and she had a clean run before her, in the course which the display of her green light indicated, of over half a mile. No other vessel was in the vicinity, and there was nothing to induce a suspicion on the part of the Free State that she would not run out the course upon which she had just entered, in circumstances rendering such duty imperative. As the Cooke passed the Free State, and while the Meisel was displaying her green light, indicating, as she was actually running, a course to the northwest, directly across that of the Free State, the latter, as was not only her right but her duty, starboarded, in order to pass the Meisel. While the ships were in this position, and in such close proximity as to make a collision inevitable from the movement, the Meisel ported, and displaying her red light to the propeller, ran across her bows, and was sunk so quickly as to result in loss of life. The instant the red light was opened to the Free State, every effort was made to arrest her progress. The morning had so far advanced that vessels could be seen a mile away. The atmosphere was clear, so that lights were in no way obscured. All the conditions of navigation were favorable for safety. It presents but the common case of a descending vessel meeting a ship without a circumstance to excite fear of collision. If the duty of slackening speed exists, it is only because the rule is universally applicable in all circumstances contemplated in article 13, even though the ships in fair weather meet in the open sea. Such a rule, counsel contend, the district court administered in this case, and more fully explained and illustrated in the case of The Milwaukee [supra]. It is insisted that both judgments, when taken in connection with the facts in this record, construe articles 13 and 16 of the act of 1864 [13 Stat. 60, 61] as imposing upon all steamships meeting end on, or nearly end on, the duty of both porting and slackening speed cotemporaneously. As a necessary result of such a rule, it is agreed a like duty is imposed upon all steamers meeting a sail vessel in circumstances demanding a change of course in order to avoid them. From this construction of the rules and all its consequences in practical navigation we are compelled to dissent. We can discover in the facts as we have stated them, no duty on the part of the Free State to slacken her speed, until the unfavorable presentation of the red light of the Meisel immediately under her bows suddenly prompted the attempt. As everything possible in the circumstances was then done, we hold her to be without fault.

So far as the practical administration of this principle is concerned in The Milwaukee [supra], we found no fault. In that case, from facts apparent to both masters, the courses were doubtful. It is with the argument, and some of the reasons of the judgment only, which we disagree. In the opinion of the district court, too, in this cause, we find it said the collision happened in the night, with the channel crowded with vessels. No such facts appear in the record before us, otherwise we should promptly affirm the decree. We think, in the application of this rule, there would be little difference between the district court and this. The necessity for the present discussion arises from the judicial argument in The Milwaukee, its citation in the present case in the opinion below, and its citation by counsel as a precedent here. It, by no means, follows that the learned district judge gave it any such extension.

Article 13 is as follows: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Article 16 provides that "every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse, and every steamship shall, when in a fog, go at a moderate speed." It is argued that the former provides the helm shall be put to port when vessels are meeting end on, so as to involve risk of collision; and, as article 16 uses like language in describing the cases when speed shall be slackened, both duties must be performed at the same time. Literally and irrespective of the former condition of the law, and of the exigencies of navigation, this is a logical conclusion. We think, however, this cannot be the meaning of these rules.

Upon principle we should have no doubt whatever in reference to their meaning. But in view of the history of their adoption by congress, we should deem the decision of the privy council, reversing the judgment of Sir R. Phillimore in The Jesmond and The Earl of Elgin, L. R. 4 P. C. 1, obligatory.

This act is but an adoption of the English rules sanctioned by act of parliament. They have sprung from much mutual consultation and political conference in both countries, and were intended to create a system common to the commerce of each. All the leading maritime powers of the world have adopted them. Were there much greater doubt than we apprehend exists as to their meaning, we have confidence the supreme court would follow for the sake of harmony the decision

of the privy council. It is at all events the duty of this court to do so. In that case the Jesmond and Elgin were meeting end on, and in the night, going at full speed. The former obeyed article 13, and ported. The Elgin, when so near that the movement inevitably produced the collision, starboarded, and was sunk so suddenly as to drown a large portion of her crew. Sir R. Phillimore held that article 16 imposed the duty of slackening speed at the same time, and in the same circumstances in which article 13 required the helm to be ported. He divided the damages therefore, upon the ground that the Jesmond was running at too great speed. His judgment was reversed upon appeal. There was full argument and consultation with the nautical advisors, and the rule clearly announced that where article 13 is obeyed, and there is nothing in the known conditions to lead either side to suspect a departure from it by the other, there is no duty to slacken speed, and article 16 has no application. It is said that article applies only where some known fact, or one which ordinary care might discover, indicates danger. It is with much emphasis said the risk of collision mentioned in it does not include those unexpected violations of law by an approaching ship which a good seaman would not anticipate, in the supposition that there was an experienced master in command.

The following decision, although not cited in The Elgin, is a full precedent for the judgment. The condition of the law, when it was decided, was substantially the same as after the statutory adoption of the rules in reference to porting and slackening speed. The Rob Roy, 3 W. Rob. Adm. 191. The Rob Roy ran down the Unicorn, going at full speed until she was in such close proximity that the attempt to stop was useless. The green light of the Unicorn being extinguished, and the red light hid on account of her course, she was mistaken for a sail craft. The Rob Roy ported as she should have done had the vessel been what the light indicated. Dr. Lushington excused the Rob Roy for not slowing her speed, because, he says, the lights which the Unicorn displayed indicated it was safe not to do so.

The following American decision, made since the adoption of the rules of 1864, is equally pointed,—The Scotia [Case No. 12,513]: A sail vessel, in the night, was sunk by a steamer proceeding at full speed. The collision was caused by illegal lights and faulty movements on the part of the sail vessel. About a half million was involved, and the case obtained an elaborate examination. Judge Blatchford, for reasons too extensive to reproduce, held that articles 16 and 13 prescribed the duties of the parties. He says, "The Scotia kept on at 13 knots an hour," and subsequently that he "can discover no fault on her part." He says, in different circumstances he would have found the Scotia in fault for not slowing or stopping when she first discovered the light of the Berkshire, but the improper light on the latter made it proper for the Scotia to port when she did. On appeal, Judge Woodruff, affirming the decision of the district court, although differing with some of its reasoning in other respects, approved fully the portions we have quoted. He says: "The law before the statute was that declared by it; and therefore the rule as to slowing would be the same under the one as the other." He inquires: "Ought she to have slackened her speed sooner than she did?" Proceeding to answer the query, he says: "Whether the light she saw was on a steamer or on a sailing vessel, no duty to slacken speed or change the course of the Scotia arose until there was reason to apprehend a collision." "The suggestion that it was her immediate duty to slacken speed when she saw the light, assumes what in the first instance is not to be assumed. If she saw the light and observed it diligently, without having reasonable ground for apprehending a collision, no duty to slacken speed, or even to change her course, was created." He illustrates at length the policy of the rule which authorized the Scotia to act with confidence upon apparent indications, without any assumption that there was, or would be, any violation of law on the part of the approaching ship.

To these literally applicable and pointed decisions many may be added which, by their necessary assumption of the rule, are equally efficient in its support. It was not intended to change the "rule of the road," so far as any duty in this case was concerned, by the adoption of these articles. The regulations they establish are as old as steam and the modern improvements in navigation. The introduction of colored lights wrought no difference in their principle. They, by a certain indication of courses, made their application more easy. For all time since the matter came under judicial discussion it has been law, when vessels were meeting end on, to port the helm and go ahead with confidence. It is law, equally familiar and equally old, that when vessels of any kind are approaching each other, under circumstances which in any degree indicate to an experienced seaman risk of collision, they must slacken their speed, and, if necessary, stop. This statute being but a reiteration of these principles, must by the most familiar rules of interpretation be read in reference to them. They will be held to modify them only so far as their plain and express provisions compel.

That the old so-called "Golden Rule" of porting and passing to the right was established before the act of 1864. See St. John v. Paine, 10 How. [51 U. S.] 582; The Nimrod, 15 Jur. 1201; Story, Bailm. 611; The Duke of Sussex, 1 W. Rob. Adm. 274. The Rose [2 W. Rob. Adm. 1] lays down the rule stringently,—1 Pars. Adm. 569, and note 4, —and fully affirming the rule, see New York

Co. v. Navigation Co., 22 How. [63 U. S.] 461, citing some of the leading English and American judgments. The supreme court says the rule is well established. That when approaching each other in circumstances indicating danger of collision, it was the duty of steamers to slow before the adoption of article 16, is abundantly shown by decisions which are immediately cited for a slightly different purpose. Save in the case of The Elgin and Jesmond, The Rob Roy, and The Scotia, before cited, and a few others, judges have seldom taken pains affirmatively to assert the truism that vessels passing each other, where there are no apparent circumstances to indicate danger, need not slacken their speed. But this has been so universally assumed, the law should be deemed at rest.

In order to establish old maxims it is by no means necessary, and is often difficult, to produce cases where the precise point has been raised and adjudicated. In Calton v. Bragg, 15 East, 223, Lord Ellenborough said: "It is not only upon decided cases, where the point has been passed upon but also from the continued practice of the court, without objection made, that we collect the rules of law." In Smith v. Doe, 2 Brod. & B. 598, Lord Eldon, with much spirit, replying to what had been said at the bar, answered: "That the most enlightened judges who ever sat in Westminster hall always gave the greatest weight to what had obtained in practice." And see 1 Bl. Comm. 68; Ram, Legal Judgm. 12; Bennet v. Watson, 3 Maule & S. 1; Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539; U. S. v. Hudson, 7 Cranch [11 U. S.] 32; Briscoe v. Bank of Kentucky, 11 Pet. [36 U. S.] 257. A long list of concurring judgments, therefore, which necessarily involve a proposition, are as efficacious for its support as if it were affirmatively ruled.

A very large majority of all the decisions in reference to collisions, both English and American, assumed as well as settled this principle, that actual perceived danger alone demands the duty of slackening speed. The Cognac, Holt, Rule Road, 133: Two vessels approached end on. The one followed the rule and ported, but the other suddenly starboarded, and brought about the collision. Dr. Lushington pronounced against the offending ship, although the other was proceeding under full steam; no criticism whatever was made upon the rate of speed. The Concordia, Holt, Rule Road, 142: So far as this question is concerned, the facts are substantially the same as those in The Cognac. For a faulty starboard movement, the Concordia was condemned for the whole damage, although the other vessel was proceeding with rapidity up to the moment of the collision. The Mary Sandford [Case No. 9,225]: The argument is full to sustain the rule. The Wenona [Id. 17,411]: Justice Woodruff reversed the judgment of the district court, where a schooner with misleading lights, and which made a faulty starboard movement immediately preceding the collision, was run down in the night by a steamer going at full speed. In a judgment admirable for its clearness he demonstrates the legal right of the master of the Wenona to proceed in the confident presumption, not only that the schooner's lights were properly placed, but that she would pursue the course they indicated. The facts are so strikingly like those before us, that the judgment in the one case would equally apply in the other. In Lown. Col. 59 et seq., is an intelligent analysis of most of the leading cases where ships have been condemned for too great speed. His citations and comments abundantly show that the duty of slackening speed is dependent alone upon the exigencies indicating danger. The America [Case No. 281] is another instance of the condemnation of a vessel for a faulty movement in the immediate presence of an approaching ship, when both were proceeding at the usual rate, without any intimation of a fault on that account. New York Trans. Co. v. Philadelphia Steam Co., 22 How. [63 U. S.] 461. A steamer was coming up the Delaware with unabated speed, and ported in order to pass a tug with a tow attached by a hawser. The latter improperly starboarded, and a collision ensued. The supreme court held the steamer did its whole duty if she slowed and endeavored to stop as soon as she discovered the improper movement.

These few judgments are referred to simply to illustrate a mode of argument which may be successfully pursued through nearly all the great mass of decisions where ships at full speed have come into collision, and one has been condemned in the entire damages for sudden faults which could not be anticipated by the other. That those which are most illustrative have been selected, is not supposed. In the brief time allowed for the purpose, it is accidental if they are so.

A long list of judgments illustrating the circumstances in which it is the duty of a steamer to slow, and demonstrating, we think, satisfactorily that they wholly exclude those contained in this record, has been analyzed in the instructive and thorough argument of the respondent's counsel. It has greatly aided the court. The length of our judgment prohibits what we had intended—its literal adoption. The perusal of these cases, with attention challenged to the argument that all of them with more or less force assume, that some affirmative evidence of danger must be present in order to impose the duty of decreasing speed, will result in a concession of the position: The Louisiana, 21 How. [62 U. S.] 1; The James Watt, 2 W. Rob. Adm. 271; The Birkenhead, 3 W. Rob. Adm. 75; Nelson v. Leland, 22 How. [63 U. S.] 48; Ward v. The A. Rossiter [Case No. 17,147]; Hall v. The Buffalo [Id. 5,927]; McCready v. Goldsmith, 18 How. [59 U. S.] 89; The New York, Id. 223; The

Bay State [Case No. 1,148]; The Northern Indiana [Id. 10,320]; The St. Charles, 19 How. [60 U. S.] 108; The Louisiana [Case No. 8,537]; The Electra [Id. 4,337]; The City of Paris, 9 Wall. [76 U. S.] 634. We have examined these judgments, and can say with conndence, they fully sustain the argument which tne learned counsel has deduced from them. They show that if we hold in this case it was the duty of the Free State to slow, where every condition before her promised perfect safety in full speed, the judgment will stand without a fellow, unless it finds one in those which have been overruled. Benedict, Conkling, Parsons, Abbot, Angell on Carriers, in laying down the general rule, treat the judgments sustaining it in the same mode. If there be one elementary principle better established than another, we should say it is that which authorizes a seaman, having complied with every rule of navigation, in the absence of all indications of danger, to proceed with unabated speed, in full confidence that others would also perform their duty.

The obligation on the part of the Meisel to keep her course is as imperative as that of the Free State to keep out of her way. The statutory rules themselves, and the judgments already referred to in reference to the speed of the steamer, clearly affirm it. We add, however, a few adjudications more particularly discussing the precise duty. They all deny the right of this sail craft to return to her former course, after having selected another, immediately in front of an approaching steamer. The Wenona, before cited, goes quite beyond the necessities of this case. The Scotia [Case No. 12,512]; The Argus [Id. 521]; Whitney v. The Empire State [Id. 17,586]; Wakefield v. The Governor [Id. 17,049]; The Bridgeport [Id. 1,860]; St. John v. Paine, 10 How. [51 U. S.] 557; The Oregon v. Rocca, 18 How. [59 U. S.] 570; The Scotia [Case No. 12,513]; The Queen [Id. 11,502].

The Potomac, 8 Wall. [75 U. S.] 590, held a steamer faultless which was running nine miles an hour with no abatement of speed until just before the collision, although a sail vessel was run down, which suddenly changed her course and crossed her bows. The case is much like the present. See New York & L. U. S. Mail S. S. Co. v. Rumball, 21 How. [62 U. S.] 372; Baker v. City of New York [supra]; The R. B. Forbes [Case No. 11,598]; Amoskeag Manuf'g Co. v. The John Adams [Id. 338]; Camp v. The Marcellus [Id. 2,347]. These judgments and numerous similar ones also establish what results necessarily from the rule itself, that if the sailing vessel must keep her course, and it is the duty of a steamer to avoid her, the mode in which this is to be done is not to be closely criticised. The selection is wholly for the latter.

Having fully approbated the construction which authorized unabated speed in the circumstances of this case, we desire to call special attention to the conditions in which alone such a rule will be administered. The utmost diligence will be demanded in order to discover the earliest indications of danger, and prompt precautions required to avoid their consequences when known.

As we understand article 13, it is a duty to port before any risk of collision has accrued. It would be a fault for which a steamer could be condemned if she waited until there was actual danger, such as is required in article 16. They, by no means, contemplate the same circumstances, or prescribe duties to be performed at the same time. The former is to be understood as if it read as follows: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, if their respective courses were continued, the helms of both shall be put to port, before any such risk is incurred, so that each may pass on the port side of the other." See The Nichols, 7 Wall. [74 U. S.] 656, which decides, the porting must be so early that no danger is incurred. If the rule had been so worded, it never would have occurred to Sir R. Phillimore that there was any analogy between it and article 16. The one would have commanded the duty of porting before any risk of collision arises; the latter that of slowing only where the risk has actually arisen. But the practical and judicial meaning of article 13 is precisely as if it so read, and it is therefore impossible that the two duties, that of porting and that of slowing, under the 16th article, can be contemporaneous. Such a result is deduced only by a mere literalism wholly overlooking the substantial mandate to port long before the exigencies arise which call for the duties demanded by article 16. This interpretation reconciles the rules and warns masters that they must port their helms at such safe distances, and accompanied by such watchfulness and care as would render wholly inapplicable the act of slowing their engines.

The Sunny Side [Case No. 13,620], just decided by this court, is an application of the same principle, for the justification of a sail vessel which, keeping her course under the rule, ran down and sank a tug. Both judgments are necessary for an understanding of the qualifications with which we would like to see the rule administered. A large number of experienced experts have been examined since the argument, and without exception old masters of sail vessels as well as steamers pronounce the suggestion of a duty to slow in such circumstances a novelty. It is one which is not performed on the one hand, or expected or desired on the other. All with great strength of preference declare in favor of holding both parties inexorably to the rules, and authorizing neither to anticipate a departure by the other until actual present

peril demonstrates that further adhesion is beyond all question dangerous. It is said a large majority of all collisions result from a too hasty decision that exigencies demand a deviation.

In the general principles of law we have announced, we have much confidence. Whether another tribunal in a disposition to divide a misfortune may not so criticise the conduct of the Free State as to impute some fault, we are less certain. But believing there is no greater discouragement to able officers, and no greater injustice to liberal owners who compensate them than those hypercritical judgments which demand a standard utterly impossible in practical navigation, and which are always announced in the interests of those but for whose wrongs the losses complained of would never occur, we have brought the steamer's conduct in this case to such a test only as we believe old and able mariners having a love for and a pride in their profession, would sustain. The ruling we make has the sanction of many such. Decree reversed and libel dismissed.

[NOTE. On appeal of libelants the decree of the circuit court was affirmed by the supreme court, Mr. Justice Hunt delivering the opinion. After reviewing the facts, it was held to be a rule of law that where two steamers are meeting each other end on, or nearly so, where there is plenty of sea room, and at a considerable distance from each other, it is not the duty of either to stop, reverse, or to slacken. The duty of each is to pass on the port side, and the rate of speed is not an element in the case. The Free State, 91 U. S. 200.]

FREESTONE, The (RUSK v.). See Case No. 12,143.

Case No. 5,091.

The FREE TRADER.

[1 Brown, Adm. 72.] [1]

District Court, N. D. Ohio. July, 1857.

PRACTICE—CUSTODIAN'S FEES.

The marshal is entitled only to his actual necessary expenses for ship-keeping, which must be established by vouchers or otherwise to the satisfaction of the court.

Motion to retax the marshal's charges for ship-keeper's fees. The Free Trader was seized upon attachment, remained in the custody of the marshal for 53 days, and was then sold by him. By the return of the marshal it appeared he had charged $106 custodian fees, being at the rate of $2 per day. No vouchers were filed showing payment of the amount, and no agreement by which the marshal was obligated to pay the same.

WILLSON, District Judge. The act of congress of 1853 [10 Stat. 161], in relation to the fees of the marshal for keeping vessels and other property, is perfectly clear. The marshal is, by this law, entitled to receive from the fund in court the actual necessary expenses he has paid, or obligated himself to pay, and no more. His claim is like any other claim or lien on the fund in court; it must be established by vouchers or otherwise to the satisfaction of the court, and cannot be paid except by order of the same. Let the claim for ship-keeper's fees be referred to the clerk to compute the amount paid by the marshal for keeping the schooner.

NOTE. See, also, The Phoebe [Case No. 11,065]; The Hibernia [Id. 6,455].

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

Case No. 5,092.

In re FREIDERICK.

[3 N. B. R. 465 (Quarto, 117); [1] 3 Am. Law T. 71; 2 Chi. Leg. News, 139; 1 Am. Law T. Rep. Bankr. 181; 2 Leg. Gaz. 133.]

District Court, D. Minnesota. Jan. 18, 1870.

VOLUNTARY BANKRUPTCY—APPRAISEMENT OF ASSETS IN EXCESS OF 50 PER CENT. OF CLAIMS.

1. Where a voluntary bankrupt, after January 1, 1869, applied to the court upon his petition and schedule, before the day of first meeting of creditors, to have his assets appraised and determined as being in excess of fifty per cent. of provable claims, etc., *held*, the application must be denied, no debts appearing to have been proved, and no present action of the kind asked could affect the question of the bankrupt's discharge.

[Followed in Re Vinton, Case No. 16,951. Cited in Re Waggoner, 5 Fed. 917.]

2. Section 33 [act of 1867 (14 Stat. 533)] should be construed, in relation to the word "assets," as if it read, "The proceeds of the bankrupt's property in the hands of the assignee, and subject to be divided among his creditors, must be equal to fifty per cent. of claims," etc.

[Cited in Re Graham, Case No. 5,661; Re Kahley, Id. 7,594; Re Van Riper, Id. 16,874.]

[In the matter of John Freiderick.]

Phelps & Taber, for bankrupt.

NELSON, District Judge. The solicitors for the bankrupt have presented a petition to this court claiming that the amount of the assets assignable under the bankrupt law are equal to fifty per centum of the provable claims against the estate of the bankrupt, and ask that appraisers be appointed by the court to ascertain the value of the assets of the bankrupt, for the due and just protection of his rights in the premises.

This application is based upon the petition and schedules of the debtor, on file, which give a list of his debts, and the value of his estate, in accordance with the provisions of the bankrupt act, and is made for the purpose, as is alleged, of showing the bank-

[1] [Reprinted from 3 N. B. R. 465 (Quarto, 117), by permission.]

rupt to be one of the class of persons entitled to a discharge when applied for, under the second clause of the 33d section of the bankrupt law. This section, as amended July 27, 1868, reads as follows: "In all proceedings in bankruptcy commenced after the 1st day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case, at or before the time of the hearing of the application for discharge."

It is impossible, at the present stage of the proceedings in this case, to ascertain what are the assets of the bankrupt, and whether they are equal to the amount required, so as to bring him within the 33d section. There is no evidence before us that any claims whatever have been proved against the estate. The earliest period designated in the warrant issued upon the adjudication of bankruptcy, at which time creditors are summoned to prove their debts, has not yet transpired. No assignee has been appointed whose duty it will be to possess himself of all the bankrupt's estate; and the bankrupt, under the 19th section, cannot, as yet, apply for a discharge. It would seem, therefore, that there was no necessity for the court, at present, to make any inquiry as to the assets of the estate.

The solicitors for the bankrupt, however, claim that the estate can now be readily appraised, or at least that portion of it which is stated in the schedules, and which, under the bankrupt's surrender, is in possession of the register. They believe a fair appraisement will show this portion of the estate fully equal to fifty per centum of all provable debts. Even if such was the case, we do not see how it could influence the question of granting a discharge to the bankrupt.

The 33d section, before the amendment referred to above, declared that in bankruptcy proceedings commenced after one year from the time the act went into operation, "no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless," etc. The plain and obvious meaning of "assets" in this section, was the proceeds of the debtor's property which are applicable to the payment of his debts. The subject-matter of this section points to this signification of the word. Nothing else could pay debts. It may be true that in other portions of the act the word "assets" has been used in a more enlarged sense, but, in this section, it clearly is not synonymous with "estate." The amendment of July, 1868, although more favorable to the bankrupt, has not changed the meaning of "assets," and, according to our view, the section as it now stands, is to be construed as if it read: "The proceeds of the bankrupt's property in the hands of the assignee, and subject to be divided among his creditors, must be equal," etc. In bankruptcy proceedings commenced before January 1, 1869, discharges are granted without reference to the assets of the bankrupt. If no debts have been proven, or if no assets have come to the hands of the assignee, the discharge can be granted upon application made after the expiration of sixty days from the adjudication of bankruptcy.

The supreme court of the United States declare a bankrupt to have "no assets" when the assignee makes oath that he has "not received or paid out any moneys on account of the estate." See Form 85. The adverse proposition must also be true, and a bankrupt has assets, when the assignee has received or paid out moneys on account of the estate; if the moneys received or paid out equal fifty per centum of the claims proved against the estate, upon which the bankrupt is liable as principal debtor, a discharge will be granted upon the proper application. We do not think that any relief can be given now, and deny the prayer of the petition.

FREIDMAN v. SIGEL. See Case No. 5,080.

Case No. 5,092a.

FRELIGH v. CARROLL et al.

Circuit Court, E. D. New York. 1871.

COPYRIGHT OF PLAY—MECHANICAL CONTRIVANCES USED IN ITS PRODUCTION.

[Cited in 2 Morgan, Lit. 222, to the point that a mechanical contrivance used upon the stage to represent the incident of a drawbridge surreptitiously opened to precipitate an approaching train into a stream below, etc., being patentable, cannot be protected by a copyright of the play in which the incident is contained.]

[NOTE. There is no opinion on file in this case. The motion for preliminary injunction was denied on default of the complainant. A demurrer was interposed by Carroll and McCloskey, and an answer put in by Thompson. The cause was discontinued by consent as to Carroll and McCloskey. The records do not show any hearing upon the answer.]

Case No. 5,093.

The FREMONT.

[3 Chi. Leg. News, 233; 10 Am. Law Reg. (N. S.) 340; 13 Int. Rev. Rec. 149.]

District Court, E. D. Wisconsin. March, 1871.

SEAMAN—VERBAL AGREEMENT AS TO WAGES—EFFECT.

A vessel employed on the Lakes, between Chicago and the port of Sarnia, in Canada, having shipped a seaman on verbal promise of certain wages, and no shipping articles having been signed, the seaman may leave the vessel at any time; and having drawn the full wages promised, and not demanding more before leaving, the seaman cannot recover a larger amount.

In admiralty.

Emmons & Hamilton, for libellant.
James MacAllister, for claimant.

MILLER, District Judge. This vessel was employed in trade between the port of Sarnia, in Canada, and the city of Chicago, in connection with the Grand Trunk Railroad. On the twenty-fourth day of May, 1870, at Chicago, the libellant shipped on board as first mate on verbal contract with the master, at seventy dolars per month, no shipping articles being signed. Libellant continued in service on board, drawing his wages from time to time as he wanted money, until the thirty-first day of October following, when he left the vessel at Milwaukee, having drawn his full wages at the rate of seventy dollars per month, and not making demand for any larger sum. The vessel was on a trip from Sarnia to Chicago, when libellant left, having notice to return on board as the vessel was ready to put out; he declined or neglected to appear, and the vessel had to be navigated to Chicago without a first mate, where the master was obliged to procure another in his place. It is contended on behalf of the libellant that not having signed shipping articles in a printed or written contract, he was at liberty under the law to leave the vessel at pleasure, and demand the highest rate of wages.

By the act for the government and regulation of seamen in the merchant service, approved July 20, 1790 (1 Stat. 131), every master of "any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print with every seaman or mariner on board such ship or vessel," etc. By the tenth article of the act, in addition to the several acts regulating the shipment and discharge of seamen, approved July 20, 1840 (5 Stat. 394), "all shipments of seamen made contrary to the provisions of this and other acts of congress shall be void, and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment." The general scope of this act relates to vessels bound on a foreign voyage, but the tenth article above quoted extends to and includes all shipments of seamen. Even if these statutory provisions did not embrace seamen shipped on vessels employed in the lake trade, they should be enforced by the courts as correct principles of maritime law. This vessel at the time of the shipment and service of the libellant, was employed in trade with a foreign port. Libellant had drawn his full wages promised him at the time of his shipment, and left at his pleasure. He took advantage of the right extended to him under the act of 1840. Before leaving the service he had not demanded or given notice that he claimed a larger amount. Libellant had a lawful right to leave the service at Milwaukee, and having received the full wages up to that time as promised him at his shipment, he could not maintain this libel for a larger amount, if he had proven himself entitled to it, which he did not. If the master was put to inconvenience by libellant's leaving the service, it was his own fault in not complying with the law. It is the duty of every master navigating the Lakes to have his seamen sign shipping articles, specifying the ports or places to which his vessel trades, and the trip or season for which they are shipped, and the wages to be paid. In cases of such neglect every legal intendment will be taken against the master and owners. It is not the fault of the seaman that shipping articles are not signed, but of the master. It does not appear that libellant is legally entitled to any larger amount of wages than he received before leaving the service; and this libel must be dismissed.

Case No. 5,094.

The FREMONT.

[3 Sawy. 571.] [1]

District Court, D. California. March 26, 1876.

COLLISION—BURDEN OF PROOF—ANCHOR WATCH.

Where a vessel breaks from her moorings, and comes into collision with another vessel also at anchor, the burden of proof is on the former to show vis major, or inevitable accident. The injured vessel *held* not to be in fault for omitting to set an anchor watch.

[Cited in The Chickasaw, 38 Fed. 363.]

In admiralty.

Daniel T. Sullivan, for libellants.
Milton Andros, for claimants.

HOFFMAN, District Judge. On the twenty-fourth of January, about midnight, the barquentine Fremont, then lying at anchor in the harbor of Port Townsend, broke from her moorings and was driven by the wind against the schooner Alice, inflicting upon her considerable damage. The vessels remained in contact until late in the afternoon of the succeeding day, when they were separated by the aid of a steamer.

Both vessels were in a proper and usual place of anchorage. Their distance from each other on the evening before the accident was from one-quarter to one-half a mile. The harbor is not a dangerous one, though severe gales are sometimes experienced. The holding ground is good. Under these circumstances, the burden of proof is on the Fremont to show that the collision occurred without fault on her part.

On this point a single authority will be sufficient. In the case of The Louisiana [3 Wall. (70 U. S.) 164], the supreme court says: "The

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

collision being caused by the Louisiana drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis major, which human skill and precaution and a proper display of nautical skill could not have prevented." I have been unable to discern in the evidence produced on the part of the claimants any satisfactory grounds for considering that the collision was caused by either a vis major or inevitable accident. Undoubtedly the wind blew with some violence. But it is equally beyond doubt that the ground tackle on board the Fremont would have been abundantly sufficient to hold her if used seasonably and with proper skill.

She had but one, and that probably an insufficient, anchor down. The scope of chain paid out would seem to have been sufficient if the witnesses of the claimant are to be relied on. It appears, however, that she came to anchor on the evening of the 24th, with the intention of getting under way about midnight, when the tide would serve. There were no indications of an approaching storm. It may be presumed that the master, aware that he would have to weigh anchor in a few hours, did not pay out more chain than he thought absolutely indispensable. He was first aroused about ten minutes before the vessels came together by hearing the noise of the chain passing through the hawse pipes. He came on deck and continued to pay out chain for some minutes, but it was not until within a very short distance of the Alice and too late to prevent the collision that he succeeded in letting go his best anchor. From some expressions of the master of the Fremont subsequently to the collision it would seem that he attributed the accident to the insufficiency of his smaller anchor, of which he was previously aware. As to the admissibility of such declarations, see The Potomac, 8 Wall. [75 U. S.] 584; The Enterprise [Case No. 4,497].

On this evidence I do not, however, lay much stress. But it is plain that in the absence of any vis major, or irresistible violence of the elements, the accident must have been occasioned by the want of due care, caution and skill on the part of the Fremont. Whether that consisted in not having out an anchor of sufficient size, or in not paying out enough chain originally, in not giving her more chain when she began to drag, or in not having her best bower ready to let go at a moment's notice, it is immaterial to inquire—for it is evident that by the skilful and timely use of the appliances at his command, the master of the Fremont could have avoided the accident.

It is contended that the Alice was also in fault in not having an anchor watch set. That it would have been practicable for a seaman keeping an anchor watch on deck to have done any thing to avert or modify the effects of the collision, is by no means shown. The only expedients suggested as proper to have been adopted are hoisting the jib and sheering the vessel by shifting her helm. But the first operation, even with all hands on deck, would probably have required more time than the suddenness of the danger allowed. And whether the second would have had any beneficial effect depended upon whether the tide was running with sufficient strength to act upon the rudder—a point which the evidence leaves extremely doubtful. I am not, however, disposed to deny that if the Alice neglected any usual and proper precaution, and omitted anything which either positive law or maritime usage requires, it will be for her to show that the neglect in no degree contributed to the accident. But the proofs fail to establish any general custom or rule of navigation which requires an anchor watch to be set on small vessels when lying in a harbor. The practice of the masters seems to be various. If the weather is threatening, or the anchorage dangerous, the watch is usually set. But if there be no reason to apprehend danger, and when the crew being in port have been working all day, it is not uncommonly dispensed with. Under circumstances closely analogous, the learned judge of the Southern district of New York came to the conclusion that a schooner was not in fault in not having an anchor watch. The Clara [Case No. 2,788].

I see nothing in the case at bar to distinguish it from the numerous cases in the books where a vessel insufficiently moored drags her anchors, and collides with another vessel securely anchored and in a proper place. Unless under very exceptional circumstances the colliding vessel is in such cases uniformly held liable.

A decree in favor of libellants must be entered.

Case No. 5,095.

FREMONT v. MERCED MIN. CO.

[1 McAll. 267.] [1]

Circuit Court, N. D. California. Jan. Term, 1858.

COURTS—JURISDICTION—PLEA—INJUNCTION—AVERMENTS IN BILL.

1. Where no want of jurisdiction is patent on the record, the proper mode of availing of such defect is by plea.

2. Where a plea to the jurisdiction is interposed, the court will direct an argument of the plea to be made forthwith, and intermediately direct a temporary injunction to issue to keep the parties in statu quo until the plea is disposed of.

3. Where proper averments are made in the bill to give jurisdiction, they give prima facie jurisdiction to the court, and enable them to do justice between the parties in cases of irremediable mischief by the issue of a temporary injunction until the plea to the jurisdiction has been disposed of.

[1] [Reported by Cutler McAllister, Esq.]

The bill in this case was filed [by John C. Fremont] to enjoin the working of a gold mine. A plea to the jurisdiction was filed, and motion for injunction was met by the objection that the court had no jurisdiction. Argument of plea ordered forthwith, and the issue of fact given to the jury.

Hall McAllister, for complainant.
Cook & Fenner, for defendants.

McALLISTER, Circuit Judge. The bill in this case was filed to enjoin the excavation of gold from land alleged to be the property of the complainant. The bill was met by defendants with a plea to the jurisdiction of the court, on the ground that the complainant was not a citizen of the state of New York, as alleged in the bill, but was a citizen of California at the time; and that therefore the complainant could not sue the defendant, who is also a citizen of this state, in this court. A motion was then made on behalf of the complainant, for the issue of an injunction; which was resisted upon the ground that pending the plea to the jurisdiction, the court could take no further proceeding in the cause. To enjoin an alleged irreparable mischief is the object of the present proceeding. No defect of jurisdiction appearing on the record, the proper mode to avail of it is by plea. It is contended, however, that the filing of the plea has the effect of arresting all further proceedings in this court, and that it can make no order in regard to the injunction until the plea is disposed of. That the court cannot grant a perpetual injunction or hear an argument upon it, is evident. It will direct an immediate argument of the plea; and in a case of irreparable mischief alleged and not denied, it can issue a temporary injunction to stay the mischief until the obstacle interposed by the defendant's plea shall be removed. It cannot be that, assuming the fact averred in the plea may be true, the court must remain passive and permit the mischief to be wrought, because its jurisdiction has been questioned.

The case is simply this: The complainant in his bill has made the proper averments of citizenship to give jurisdiction to the court. So far, then, as the record is concerned, the jurisdiction of the court is perfect. The effect of such averments is to impart, prima facie, jurisdiction; and it is incumbent on the defendant who would impeach that jurisdiction for causes dehors the record, to do so not only by allegation but proof. Until this be done, the prima-facie jurisdiction derived from the record authorizes the court to retain the suit in such position as to enable it to preserve the rights of the respective parties in statu quo until the intervening obstacle to a decision on the merits is disposed of. An immediate opportunity will be afforded to the parties, the one to sustain, the other to falsify it. The issue, arising as it does in an equity suit, might be tried by the court. Such seems to have been the course pursued in the case of Shelton v. Tiffin, 6 How. [47 U. S.] 163. But as it is within the power of the court to inform its conscience by the verdict of a jury, the facts establishing the citizenship of plaintiff either in New York or this state, will be referred to a jury. Various cases have been cited; all, however, were common injunctions in which pleas or demurrers were filed. Even in such, the court have always speeded the trial of the issue raised by the demurrer or plea, in order to promptly reach the injunction. In an anonymous case (2 Atk. 113) it is said, "Where defendant has put in his plea to plaintiff's bill, the plaintiff cannot move for an injunction to stay defendant from proceeding at law till the plea, by some means or other, is removed out of the way; all that the plaintiff can do is, to move that the plea may be accelerated; which the court did." In Cousins v. Smith, 13 Ves. 166, Lord Erskine plainly indicates, he would have removed a demurrer, under similar circumstances, by ordering it to be argued immediately. In Humphreys v. Humphreys, 3 P. Wms. 395, the court said, upon motion of an injunction to stay, &c., after a plea put in, there can be no motion for an injunction; but, at the instance of the plaintiff, it was ordered that the plea should come on for argument the next day, and if overruled the plaintiff might move at the same time for an injunction.

If, therefore, a motion shall be made by the plaintiff to accelerate the removal of the plea, the court will direct the immediate trial of the issue raised by it. If no immediate disposition of it can be made, it will issue such order as will maintain the parties in statu quo until such is made.

The issue of citizenship was submitted to a jury; who having returned a verdict in favor of the plaintiff, the following order was placed upon the minutes of the court:—

Whereas, heretofore, a trial was had in above action in this court, on the law side thereof, before a jury impaneled for said trial, on the 14th, 15th, 16th and 17th days of June, 1858, upon the following issue: Whether John Charles Fremont was at the commencement of this action, viz., on the 8th day of May, 1858, a citizen of the state of California. And, whereas, the plaintiff and defendants appeared by their respective counsel, and evidence was adduced by both parties in reference to said issue at said trial; and, whereas, the said issue was duly submitted to the jury so impaneled as aforesaid, and thereafter said jury did render a verdict in the words and figures following, namely: "The jury in this case unanimously agree that John Charles Fremont was not, at the commencement of this suit, on the 8th May, 1858, a citizen of the state of California. San Francisco, June 17, 1858."

Now, I do hereby certify that said verdict

was found as aforesaid; and I further certify it is satisfactory to me.

M. HALL McALLISTER,

Circuit Judge, Circuit Court, U. S., for Dist. Calif.

San Francisco, June 18, 1858.

FREMONT, The (SCHENCK v.). See Case No. 12,448.

FREMONT (UNITED STATES v.). See Case No. 15,164.

FRENCH (BAKER v.). See Case No. 767.

FRENCH (BANK OF COLUMBIA v.). See Case No. 867.

FRENCH (BOWMAN v.). See Case No. 1,739.

Case No. 5,096.

FRENCH v. BREWER.

[3 Wall. Jr. 346;[1] 18 Leg. Int. 324; 9 Pittsb. Leg. J. 153.]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1861.

OIL-MINING RIGHTS — BILL FOR PRELIMINARY INJUNCTION.

1. Deeds, however apparently formal, must be interpreted upon a view of the whole paper, and in subservience to what appears to be the scope of them, especially when it appears, as it often does in the United States, that the instrument is the production of an ignorant scrivener who has used legal terms without exact knowledge of their legal import. The technical rules of the old English books must be applied with intelligence; and only after an examination of the whole deed.

2. In cases of obscure instruments, especially on motions for a preliminary injunction, a court may inquire into the actual state of the knowledge which the parties to it had upon the subject of it; and where it involves questions of science, may refer to the state of public knowledge or that of learning at the time the deed was made.

3. Where the meaning of a deed is not absolutely clear, and the rights of the party claiming under it are disputed, a preliminary injunction will not be granted to restrain a person acting in violation of alleged rights, unless it is plain that irreparable injury is likely to be suffered. And where the defendant is laying out his own money in such a way that the complainant, if his construction of his deed be true, can ultimately get the benefit of it all, and where the defendant has not received from his outlay any return as large as the outlay itself, the injury will not be regarded as irreparable.

Bill for injunction, the case being thus: In the beginning of the present century, a stream was discovered not far from Meadville, in Crawford county, Pennsylvania, upon the surface of which, as of the smaller rivulets running into it, a species of oil frequently flowed; and to such an extent in some places, that when a candle was applied to the surface, the oil would ignite and blaze in a lambent flame on the creek itself. The people in the neighborhood of the stream, which was now called "Oil Creek," were aware of this peculiarity of the water; but the population thereabouts, was sparse in those days, and no great deal of mineralogical science was applied to the subject. The schoolmaster called it a "phenomenon," and this was regarded by the learned as a full and lucid explanation of the matter. The Indians, it is said had known this peculiarity of the stream, and applied the oil to surgical purposes, in the cure of external injuries or sores. The early white settlers used it in the same way, and also for different domestic or farm purposes. It flowed along with the water—on its surface—but the descent of the water being rapid, and the stream itself shallow, the only mode in which the people could get the oil separated from the water was by making little ditches or pits along side of the creek, and drawing off a certain amount of water of the stream into them. This being left in a state of stagnation, the oil would soon collect in a coagulated form on the surface; when the women would go out, and inserting blankets under the water, raise them and secure the oil; the blankets being porous enough to let the water flow through them, but sufficiently close to retain, till they could empty it, the thicker substance of the oil. Enough oil was obtained in this way, to make it worth while for the farmers and others in the neighborhood occasionally to go through this somewhat laborious process of getting it; but the oil never became in those days a subject of much value or of any commerce. Sometime, however, in the spring of 1858—the date is important—a person named Edwin Drake, residing at Titusville, a town on this creek, conceived that the oil must be a mineral substance, some way connected with coal formations; and that it probably came from a great depth below the creek, and through some fissures in the rocky formation, from coal strata on the adjoining lands, and therefore that it could be far better got by boring on the lands themselves. His conjecture proved to be right, and led the way to a branch of industry which in five years has, in western Pennsylvania, become an immense one, covering whole regions from Lake Erie to the Ohio, with operations in what is now called "petroleum" or "rock oil."

[In the case here reported,—which was a bill in equity to restrain certain persons from boring on some lands for this oil,—Drake was examined as a witness, and his account may deserve perpetuation. It was in these words: "That some time in the forepart of 1858 the deponent entered upon the lands which are the subject of this bill, for the purpose of gathering oil, and developing the same; that he, at great expense, during that and the following year, sunk, by boring, the first well that was known for obtaining oil in that region of the country; that this method was wholly

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

unknown previous thereto; that in consequence of this, and the want of proper implements to operate with, and the necessity of obtaining new patterns for these, and especially for iron pipe for driving to the rock, a very great expense was incurred, amounting at least to $4,500, in establishing the first well; that this proved successful in obtaining large quantities of oil."] [2]

In November, 1855—that is to say, two years or more before the discovery and labors of Drake, as thus recorded, the defendants, being then owners in fee of 160 acres of land on Oil creek, including a certain island particularly well situated for gathering oil in the old way—while the complainants owned 105 acres on the same creek, adjoining this tract of 160 acres, but lower down on the creek than the defendants', made to the complainants a deed, somewhat peculiar in its expression. It ran thus: "The said parties of the first part," (the now defendants) "do hereby lease and by this indenture have leased to the said parties of the second part," (the now complainants) "their heirs and assigns, for the full term of ninety-nine years, all the oil or paint on or being on any of the lands," &c. (of the defendants), "with the privilege of"—the deed went on rather oddly to say—"of going on to and of taking away all or so much of the oil or paint at any time and at all times, as is consistent with the pleasure or interest of the said parties of the second part, on the following described lands only, viz.:" (Here followed a description of certain lands of the defendants.) "Reserving to the said parties of the first part" (that is to say, to the now defendants, who had large mill works near this land), "their heirs and assigns, the right and privilege at all times to pass over and repass with teams, wagons, sleighs, carts, sleds, or any other vehicle, to and from their mills, over said ground or lands, together with all ground or land necessary for yard and mill privileges and mechanical purposes: And the said parties of the second part, their heirs and assigns," the deed proceeded, "are not in any case to approach with their work or excavations so as to endanger or obstruct in any manner their mills, races, dams and ponds, or to impair or obstruct their lumbering and mechanical business as they do now or may hereafter exist."

It was made plain enough in behalf of the complainants, that between the date of the deed just mentioned and the time of Mr. Drake's discovery, the defendants never attempted to claim any oil on or about this tract of 105 acres—the tract on the upper part of the creek—but that in May, 1860, finding that Mr. Drake had discovered a new mode of getting at the oil, and of making a great subject of commerce out of it, they too, by numerous workmen and under-tenants had been sinking wells and carrying away the oil also; although, as yet, all the oil that they had got had not paid off the cost of sinking the wells. The complainants—citizens of Connecticut, who were largely engaged in boring for oil—finding that the defendants were interfering with the monopoly of the substance which they had got through Mr. Drake's discovery, now filed a bill, praying an account for the oil that the defendants had already got from the 160 acres, and an injunction against taking any more, in any way, and especially by the process of boring wells. The bill alleged that the complainants had expended large sums of money in the development of the oil on the 160 acres, and of the means and methods of obtaining it from the land, by reason of which the premises aforesaid, and the right and title thereto, and interests therein of the complainants, had been greatly increased in value; so that they were now believed to be worth $100,000 more than before such expenditure and development; that the rights and claims of the complainants were acknowledged until the expenditure was made, and the development had resulted in increasing the value. It complained in substance, further, that respondents occupied the 160 acres to the exclusion of complainants, and had excavated and bored numerous wells thereon, and taken the oil therefrom, "thereby" preventing complainants from taking and using it, and preventing the same from oozing and flowing down the creek from the tract of 160 acres to that of the 105 acres below it and belonging to complainants. The testimony showed that the respondents had bored wells, and had a large number of hands employed in boring others. But there was no evidence that they have meddled with or sensibly affected the flow of the oil down the creek, or the collection of it by complainants, either on their own land or on the island. Nor was there any proof that the oil raised from the upper works, flowed in any way, either above or below the surface, to the lands below, of the complainants, or to the island where they were permitted to enter and make pits: whatever might be the inference which a geologist, on looking at the soil, would draw if the wells were very numerous, and near to the stream.

Mr. Church, for complainants, rested strongly on the general expressions of the deed, and on the old and technical rules as given in Coke, Shepherd's Touchstone and other books, about interpreting them; citing authorities very fully. This he said was a deed of indenture, leasing for ninety-nine years "all the oil and paint lying on or being on any of the lands," &c. It was therefore an original conveyance, absolute in character during the time limited therein. The grant of the oil is complete and explicit. It conveys a corporeal right; and, by the terms of the deed, is assignable. The language of

[2] [From 18 Leg. Int. 324.]

the deed in Caldwell v. Fulton, 7 Casey [31 Pa. St.] 475, is, "the right and privilege of digging and taking away stone coal, to any extent, the grantee may think proper to do, or cause to be done, under any of the land now owned and occupied by the said grantor, provided, nevertheless, the entrance thereto, and the discharge therefrom, be on the foregoing described premises;" that is, on a certain 16 acres granted in fee by the same deed. The supreme court of Pennsylvania held that this was a grant of the coal corporeal, and not of a mere privilege incorporeal, and was exclusive of the grantor. The grant here is of "all the oil on any of the lands of the grantors, in," &c. The instrument is that of the grantors, and is to be taken most strongly against them. The restriction, if a restriction is meant in the words—"With the privilege of going on and taking away all or so much of the oil or paint, &c., on the following described lands only"—is repugnant to the preceding grant, and void. The first expression is plain in its meaning; the later words are ambiguous. Under those circumstances the latter, even if they were apparently restrictive, would be inoperative; for certainty previously expressed, is never to be restrained by subsequent ambiguity. But, by a slight straining, we can reconcile these different parts, and are bound to do so, if we can in any way. "An exception in a deed," says Shepherd's Touchstone, 75, "must be of something separable from that which is before expressed." And hence the words subsequent to the lease or grant, of "all the oil on any of the lands," should be made to apply—as they can be made to apply—to gathering it on that part whereon the right to the use for lumbering business is reserved to the grantors. In fact, this later clause being new, means something new; something by way of addition to that already granted. "With," in this connection, means "in company with"—"as an appendage." The later words are in fact disjointed from the earlier and complete grant: and they refer to the later part of the subject spoken of; that is to say, to the rights reserved about lumbering. This mode of construction will harmonize the apparently conflicting parts of the instrument. The fact that the plan of raising oil by wells had not been discovered in November, 1855, when the deed was made, is unimportant. The deed is to be interpreted by its plain words; according to what it says; and who shall declare that it was not in view of the very purpose of trying the experiment, which Drake did try, that the grant was obtained? The discovery was made soon after the deed. The conjecture made by Mr. Drake, as to the source of this oil, was one natural to be made; and certain to be made by some one, as the region along this stream became, as it was rapidly becoming, populous, rich and enlightened. It does violence to the words to restrict them to the old way of getting oil by blankets. How was a right to get oil from the creek, in a blanket, a grant of "all the oil and paint lying or being on any of the lands," &c.? Whatever the deed does or does not mean, it is impossible to say that it means nothing more than that the complainants might practice the old fashioned and half savage operation of the blanket. It is a dangerous rule—one, certainly, having no place among Blackstone's—by which to construe deeds, to speculate upon the supposed state of the scientific knowledge of a purchasing party. It would be a pre-eminently dangerous one in regard to the purchase of mining rights, where science is constantly advancing from conjectures to certainties, and enterprise is continually based upon speculation—upon "inklings"—which the purchaser carefully conceals. The present plaintiffs are citizens of Connecticut, and probably made the purchase under scientific counsel, and with a strong suspicion of what has turned out to be a fact. Assuming that this part of his case had been made out, Mr. Church argued without difficulty in favor of an injunction.

McCalmont & Kerr, for respondents, contended that the deed was too obscure for a court to interpret it in this form of proceeding, and in a way which would be so injurious to the defendants; as the grant of an injunction would plainly be.

GRIER, Circuit Justice. The instrument on which this controversy arises is anomalous in character. It is the work of a conveyancer ignorant of legal forms, and wholly unlearned in the law. It does not profess to sell or convey absolutely all the mines of paint or petroleum lying in or under the 160 acres. If it had done so, the title to the minerals would necessarily include a right to enter on the land of the grantor to take them away. A lease for years is a contract for the use of lands or tenements; and although it may be for a full consideration paid down, and reserve no rent to be paid in future, yet it contemplates a temporary use of the thing leased, whether it be a farm or a mine, and a return of the possession thereof to the owner or reversioner. Suppose it was a lease for one year to "take at all times so much of the oil as is consistent with his pleasure or interest," would this confer an absolute title to all the oil, whether taken within the year or not? The great and governing rule in the construction of all contracts or deeds is to ascertain the intention of the parties, and this must be by a careful examination of the whole instrument. This is more especially necessary in a country where every man is his own scrivener, and freely uses legal terms without a knowledge of their true or precise legal import. It is no doubt a just rule of construction, that restrictive words, repugnant to an absolute grant or

sale of a thing, may be construed to be inoperative, because they contradict the clearly expressed terms of the deed, as to the nature and extent of the estate granted, and render it ineffectual for the purpose clearly intended by the parties. But we must first examine the whole instrument, all its parts, and each provision or covenant contained in it, to ascertain the intention of the parties, before this rule can apply. We should ascertain the nature of the thing which is the subject of the grant, and the state of knowledge of the parties. The rules of construction adopted with regard to leases or conveyances of coal mines or other solid mineral substances, may have little application to this newly discovered mineral liquid. There would be no necessary contradiction in the terms of a lease of coal mines, that the lessee might take all the coal, or so much as he pleased, under a tract of 100 acres, while it prohibited his entry on all but 10 acres for the purpose of sinking the shafts for his mines. It may be true that wells sunk on the 105 acres or on the island, might or might not drain the oil from the whole 160 acres. As to this fact, the parties have furnished no evidence whatever, and it is probably a fact not yet ascertained or known. We must have reference, in interpreting this obscure paper, to the state of knowledge of the parties, and of the whole country, with regard to the subject matter of this contract, and the mode in which this mineral oil was obtained. When the instrument was executed, the only method known by which the oil could be obtained, was by digging trenches, and raising the oil by blankets from the water. The natural flow of the creek would carry the oil on its surface from the lands of the respondents to those of the complainants, which were lower down; unless the oil was arrested above. That part of the 160 acres called the island was conveniently situated for making the trenches to gather the oil as it came down. Recalling, as the reporter's statement gives it to us, and as the affidavits disclosed it, the knowledge of the parties and the people on the subject of this contract, and the fact that till the time of Drake's discovery the oil had found its way to the surface through chance fissures in the strata under the stream, and that it was not till 1858 that boring to find the source of the oil was practised—much of the difficulty in the construction of this instrument, by reason of apparent contradiction in its covenants, vanishes.

It is not necessary, however, nor perhaps proper to express any conclusive opinion as to the construction and effect of this instrument before the final hearing. It is sufficient, for the purpose of the present motion, to say:

1. That it is, at least, doubtful whether the complainant's deed conveys in absolute estate all the oil under the respondent's lands, or only a license for a term of years to collect what flowed on the surface of Oil creek; or whether parties could be said to contract about a subject matter of which both were wholly ignorant. Caldwell v. Fulton, 7 Casey [31 Pa. St.] 479, cited by Mr. Church, has no similarity to the present. It is no doubt true, that minerals beneath the surface may be conveyed as corporeal hereditaments, and thus severed in title from the surface soil; and there is no doubt that livery of seizin is unnecessary either here or in England since the statute of uses and the introduction of deeds of bargain and sale. But it might nevertheless be a sufficient reason for construing an instrument to take effect as a grant of an incorporeal hereditament, which requires no livery of seizin, that it contains no apt technical words to grant, bargain, or sell absolutely a corporeal hereditament, or an unsevered portion of the grantor's land.

Since that decision, a court, administering the law of Pennsylvania, might be justified in construing a grant of "the full right, title and privilege of digging and taking away stone coal to any extent" from the land of the grantor, as an absolute bargain and sale of the coal to the grantee. But we must construe the deed before us ex visceribus suis; having reference to the peculiar nature of the subject matter and the knowledge of the parties with regard to it. With these facts in view it is at least doubtful whether the parties intended by this anomalous instrument to grant anything more than a license for a term of years to take all of the oil floating down the creek, and to use the island for that purpose, in consideration of the grantee's license to them to have a mill race over their land. A final decision of this question must be reserved till a final hearing of the case.

2. There is no evidence to support the charge of the bill, that wells bored by the respondents prevent the oil from flowing down the creek, or that they have interfered in any way to arrest such flow or hinder the enjoyment of any of the complainants' right on the island. We do not know, and are not informed by the pleadings or evidence, that the oil taken from the rocks above would ever have flowed (above or below the surface) down to the island, or to the one hundred and five acres below.

3. The oil taken by defendants thus far has not compensated the expense and trouble of boring the wells. An injunction now would compel the respondents to cease their business and discharge a large number of hands. It would inflict a certain injury on the respondents, while the benefit to the complainants, like their title, is uncertain. If they recover on final hearing, the new wells will be a benefit to them, and not an irreparable injury. Injunction refused.

FRENCH (BRIGGS v.). See Cases Nos. 1,870 and 1,871.

Case No. 5,097.

FRENCH v. EDWARDS et al.

[4 Sawy. 125.] [1]

Circuit Court, D. California. Nov. 27, 1876.

CONVEYANCE PENDENTE LITE—JUDGMENT—ESTOPPEL—SUPPLEMENTAL ANSWERS—CALIFORNIA CODE CIVIL PROCEDURE.

1. Where in an action to recover land, the plaintiff conveys to a stranger the premises in controversy, pendente lite, under the Code of Procedure of the state of California, the action may be prosecuted to judgment in the name of the original party; and such conveyance cannot be set up by way of supplemental answer to defeat a recovery of the possession.

[Cited in Elliot v. Teal, Case No. 4,389.]

2. F. sued E. to recover land, and there was a trial and judgment for defendant. Afterward F. conveyed the same land to V., who sued E. to recover the same. E. set up as a defense by way of estoppel the prior judgment against F. and the subsequent conveyance to V., and the court found the matter of estoppel, and gave judgment for defendant on that ground. Afterward the said first judgment in F. v. E. was reversed on writ of error, and the case remanded for a new trial. V. in the meantime conveyed to R. When the case of F. v. E. was again called for trial, E. moved for leave to file a supplemental answer, setting up the conveyance to V. and his subsequent conveyance to R.; that the action was then prosecuted for the sole benefit of R., and by way of estoppel against any recovery for the benefit of R., the said judgment in V. v. E. *Held*, That the vacation of the judgment in F. v. E. after the judgment in V. v. E., which was based upon the first judgment, removed the matter of estoppel, and that the judgment in V. v. E., constituted no defense to the action.

3. Supplemental answers are in the nature of pleas puis darrein continuance under the former practice, and like such pleas, should be interposed at the first opportunity after coming to the knowledge of the parties.

4. Where pending an action matter has arisen constituting a good technical, though an inequitable defense, which, the defendant having notice, has for several years neglected to plead, one trial having intervened, the court after such delay, in the exercise of its discretion, will, on the ground of laches, refuse leave to file a supplemental answer setting up such matter as a defense.

5. Code Civ. Proc. Cal. § 367, construed.

Action to recover land. The complaint in the action was filed November 8, 1866. A trial by jury having been had, and a verdict found for defendants [Thomas Edwards and others], judgment on said verdict was entered April 26, 1867. Afterward on September 26, 1867, the plaintiff, [Ira G.] French, conveyed the premises in controversy to one Robert H. Vance, who soon after, on November 4, 1867, commenced in his own name, an action in the state court of the Sixth judicial district, against the defendants in this action and other parties, to recover possession of the premises. The defendants herein, in their answer to Vance's complaint, set up as a defense the said former adjudication in their favor in this action of April 26, 1867; the said subsequent conveyance to Vance; that said conveyance was Vance's only title, and that said matters ought not to be again litigated. The case was tried, and the issue on this defense was found by the court for the defendants. As a conclusion of law, the court found that the "plaintiff is estopped from maintaining this action by the verdict and judgment entered in said circuit court in said action of French v. Edwards [unreported], and that said verdict and judgment are a bar to said action herein." Judgment for defendants was accordingly entered upon said finding April 18, 1868. Vance, however, established his title, and recovered as to those defendants who were not parties to this action, or did not plead the matter of estoppel. Afterward on April 12, 1870, French, by writ of error, removed said judgment of April 26, 1867, to the supreme court for review, and thereupon said court, at the October term, 1871, reversed said judgment and remanded the cause for a new trial (13 Wall. [80 U. S.] 516), the judgment reversed being the same set up and established as a bar to said action in said case of Vance v. Edwards [unreported]. Upon the return of the case to this court, the defendants, on August 20, 1872, by leave of the court, filed a supplemental answer, setting up a conveyance of the title to them, by deed executed since the last trial, upon a sheriff's sale, in pursuance of a judgment rendered for taxes levied on said premises. At the September term of this court, 1872, the case was again tried, and some of the issues found upon which judgment was again rendered for defendants, on October 30, 1872. This judgment was also reversed on writ of error at the October term, 1874, and the case again remanded with directions to proceed in conformity with the opinion of the court (21 Wall. [88 U. S.] 150), which was afterward construed as requiring the court to proceed and try the other issues, and in other respects to proceed in such manner as according to its judgment justice may require. [Ex parte French, 91 U. S. 425, 426.] The case having been returned to this court, and subsequently set for trial, when the case was called on February 8, 1876, the defendants, in pursuance of notice previously given to plaintiff's counsel, on January 26, 1876, moved the court for leave to file supplemental answers: (1) That since the commencement of this action, to wit: on September 27, 1867, plaintiff conveyed the premises in controversy to R. H. Vance, hereinbefore mentioned, and that his estate has consequently terminated, and he has now no right to a judgment for the possession; (2) that since the commencement of this action the plaintiff conveyed the premises in controversy to said Vance, as aforesaid; that Vance afterward brought his action against these defendants, the action hereinbefore set out, and the matters between said Vance and defend-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

ants were adjudicated in said action between said Vance and these defendants; that Vance afterward conveyed to one Reynolds, with knowledge of said prior adjudication, who is now the party in interest for whose benefit this action is being prosecuted, and that he is estopped by said judgment in Vance v. Edwards [supra], from further litigating the matter. The plaintiff opposed the motion for leave to file said supplemental answers on the grounds: (1) That the matters sought to be set up came to the knowledge of defendants so long ago, at least, as April 18, 1868, when said judgment in their favor, now sought to be set up, was rendered in the said case of Vance v. Edwards, and during all the intervening time of some eight years they have neglected to set up these defenses, although there has since been one trial and appeal to the supreme court; (2) that the matters alleged in said several proposed supplemental answers do not in either case, constitute a defense to said action, and are, therefore, irrelevant and immaterial.

John H. McKune and J. W. Armstrong, for the motion.

Houghton & Reynolds, contra.

SAWYER, Circuit Judge. As to the matter set up in the first supplemental answer—the conveyance to Vance since the commencement of this action—it is settled by the decisions of the supreme court of California that this is no defense to the action under the statutes of California. Section 34 of the act concerning conveyances authorizes the owner of land in the adverse possession of another to convey it "with the same effect as if he was in the actual possession thereof." And section 16 of the practice act, in force at the time of the conveyance to Vance, provided that "an action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death or other disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." Under these provisions of the statute, the supreme court of California has settled the construction that in an action to recover the possession of land, the action may proceed in the name of the original party, after a conveyance to a stranger pendente lite, and that such conveyance is no defense against a recovery of possession. Moss v. Shear, 30 Cal. 474, 475. The change in the common law, by which a party out of possession is authorized to convey his lands, rendered this change in the practice necessary, otherwise it would often happen, as was the case in Moss v. Shear, and, as is the case in this action, the statute of limitations would bar an action by the grantee before he could have an opportunity to bring his action, or even before the conveyance to him. If the pending action could not be continued in the name of the original party, or the grantee be substituted, the title might be cut off by the statute even while the litigation is going on. Without such a provision in the Code of Procedure, the owner of lands in the possession of another, would lose much of the advantage of the provision of the statute allowing him to convey while out of possession.

This is a very important consideration in this state, where the statutory period is extremely short. According to my judicial experience and observation, the only cases in which attempts have been made to set up a conveyance to strangers to the suit pendente lite, to defeat a recovery, have been cases where the defendants have been in a position to avail themselves of the statute of limitations, in case they could defeat the pending action in the name of the grantor, and compel the grantee to bring a new action. Be this as it may, the questions now under consideration depend upon the provisions of the state statute referred to, and that construction is settled by the highest court of the state, and is controlling in this court. Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. [87 U. S.] 137.

The change of the language in section 4 of the old practice act, when carried into the new Code, does not in my judgment affect the question. The case is governed by the other provisions cited. But if it did, the change cannot be construed to apply to cases already pending, wherein a party would be liable to lose his right of action altogether under the statute of limitations if his right to recover in the pending action be cut off, and he be compelled to bring a new suit. Besides, section 4 doubtless refers to the commencement of a suit, not to its continuance after it has been properly commenced.

As to the said judgment in the case of Vance v. Lincoln [38 Cal. 586], sought to be set up as an estoppel in the second proposed supplemental answer. It will not be necessary, under the view I take, to consider how far that judgment could under any circumstances affect this action. It is enough to say that the first judgment in this present action, which was adjudged in that case to estop Vance from relitigating the title, has since the entry of that judgment been itself vacated on appeal, and if it ever could be an obstacle, it no longer stands in the way of an inquiry into the merits of his title. The judgment in Vance v. Lincoln [supra], cannot stand in the way, for it is only evidence that at the time of its entry there was a judgment in existence which estopped the parties from further litigation. It does not touch or affect subsequent changes in the condition of things. Since that time there has been a change, and the judgment upon which the

judgment in Vance v. Lincoln proceeded has been vacated. The reversal of that judgment is not merely a destruction of the evidence upon which the case of Vance v. Lincoln was tried, but a change in the state of the facts themselves. The record in Vance v. Lincoln shows that the judgment proceeded alone on the estoppel of the prior judgment in this case, which has since been set aside, and we are now proceeding to try the case again in pursuance of the mandate of the supreme court.

The record in the case of Vance v. Lincoln is conclusive evidence that, at the time of its entry, Vance was estopped from further litigating the title to the land in controversy, while the record in this case now in progress is also conclusive evidence that, since the judgment in that action, the estoppel therein adjudged has been annulled and removed, and that there is nothing to preclude an examination into the title of Vance and his grantees, and especially nothing to preclude such examination in this particular action.

But these matters now sought to be set up in supplemental answers necessarily came to the knowledge of the defendants some eight years before they offered to set them up, for the judgment in Vance v. Lincoln, in which they were determined in their favor, bears date April 18, 1868. More than four years after that time, this case was tried again, and has since been to the supreme court and returned for another trial; yet no effort was made to set up these defenses till the present motion, notice of which was given in the latter part of January, 1876. A supplemental answer is in the nature of a plea puis darrein continuance under the old practice, which it was necessary to plead at the first opportunity, and before the next continuance, and could only be pleaded at a later date by leave granted by the court in its discretion, upon showing a satisfactory excuse for the negligence. The ends of justice, I think, require the same rule to be applied in the case of supplemental answers, and this very case affords a striking illustration of the propriety, not to say the necessity, of such a rule. Both of the defenses sought to be set up, if they could, under any circumstances, be regarded as valid defenses, are purely technical and without substantial merit; and upon the hypothesis that the plaintiff or his grantee really has the title, it would work a transfer of the property of the plaintiff or his grantee to the trespasser upon his rights, and therefore be grossly inequitable if they should prevail. Upon the first defense, if this action should be defeated, the right of action of Vance, the grantee of French, and Reynolds, his grantee, is barred by the statute of limitations, and Vance, as shown by the said judgment in Vance v. Lincoln, never was in a position to maintain an action in his own name till his action was barred or might have been barred. If the second defense should prevail, then the plaintiff and his grantors will lose their land, no matter how good their title may be, without ever having had an opportunity to have their title in fact finally adjudicated. Thus, in either event, the defendants, by wrongfully taking possession of plaintiff's property and skillful and adroit management of pretended defenses, would, after putting the plaintiff to the trouble and expense of years of litigation, in process of time not only defeat his action, but actually, by this iniquitous process, acquire the title to his property. That defenses which are liable to work such results are entitled to no favorable consideration at the hands of a court of justice, needs no argument to demonstrate, and such are the proposed defenses in this case. That plaintiff has some ground, at least, to prosecute this action, may, for the purposes of this motion, be inferred from the fact that Vance actually established his title and recovered, in said case of Vance v. Lincoln, against those defendants who were not in a position to avail themselves, or did not avail themselves, of the estoppel of the first judgment entered in this case, and, so far as the record shows, was only defeated as to the defendants in this action by being precluded by the said judgment in this action from any investigation of their title. In the first trial, which took place before I had the honor to preside in this court, the plaintiff was defeated by a tax deed which the supreme court held to be void. On the second trial he was defeated by a purely technical defense, which this court reluctantly sustained. The supreme court reversed the judgment upon a point which, doubtless, fairly arose on the record, but which did not occur to counsel in this court, was not suggested at the trial, and, consequently, was never passed upon or considered by this court, while the only point decided by this court, and intended by the court and counsel who tried this case to be presented by the record to the supreme court, was not considered at all by the appellate court. The same point, however, was decided in another case by the supreme court at the same term in the same way as by this court in this case. Schulenberg v. Harriman, 21 Wall. [88 U. S.] 63. I do not regret, however, that the counsel on appeal and the supreme court found a point upon which the judgment could be reversed as to this technical defense, and the case remanded for retrial upon its real merits. I think, however, after so many years' neglect on the part of the defendants to set up their proposed technical and inequitable defenses, in view of all the circumstances of this case, that, even conceding them to be good defenses, if they had been set up in time, which I do not in fact admit, the court in the exercise of a sound discretion, is fully justified in denying leave to file these supplemental answers at this late date on the ground of laches.

The motion for leave is therefore denied, both on the ground of laches and the ground

that the matters sought to be set up do not constitute defenses to the action.

[NOTE. Subsequently, judgment was rendered for the plaintiff. Case No. 5,098.]

Case No. 5,098.

FRENCH v. EDWARDS et al.

[5 Sawy. 266; 7 Reporter, 68.] [1]

Circuit Court, D. California. Oct. 7, 1878.

CONFESSION OF JUDGMENT—SALE UNDER SATISFIED JUDGMENT VOID—JUDGMENT—ESTOPPEL—TRUST ESTATE—EXECUTION SALE — RECOVERY OF ENTIRE LAND BY CO-TENANT — AMENDING RETURN —TAX SALE—PRESUMPTION—TRUST.

1. Under the statute of California of 1850 (St. 1850, p. 454, § 293), authorizing an entry of judgment upon confession without action, the statement required must be signed by the party in person; and a judgment entered upon a statement signed by the defendant's attorney in the case, is void.

2. Where the judgment under said act was entered upon a statement signed by two of the defendants in person, and by the attorney of the third, *held*, that the consent of those signing was only that judgment might be entered against all; and as there was no authority to enter judgment as to the third party, the judgment was unauthorized and void as to all.

3. Where an execution is issued upon a judgment and returned satisfied, and the judgment creditor afterwards assigns the judgment to one of the principal judgment debtors, a sale of the co-defendants' property upon a second execution, issued at the instance of the assignee of the judgment, is void.

4. French sued Edwards to recover land, and there was a trial, and judgment for defendant. Afterwards, French conveyed the land to Vance, who sued Edwards to recover the same land. Edwards set up as a defense, by way of estoppel, the prior judgment against French, and subsequent conveyance to Vance, and the court found the matter of estoppel, and gave judgment for defendant solely on that ground. Afterwards, said first judgment in French v. Edwards, was reversed on writ of error, and the cause remanded for a new trial; whereupon French, having amended his complaint, Edwards, in his answer thereto, alleged a conveyance from Vance to Reynolds with notice of Vance's judgment; that Reynolds is now prosecuting this action for his own benefit, and in turn set up, by way of estoppel, the said conveyance to Vance, and judgment in Vance v. Edwards [unreported]. *Held*, that the vacation of the judgment in French v. Edwards, after the judgment in Vance v. Edwards, which was based solely on the first judgment, removed the matter of estoppel, and that the judgment in Vance v. Edwards constituted no defense to the action.

5. A tract of land was conveyed to Vance, Sneath, and Melvin, "Trustees of the Sutter Land Company," an unincorporated association of more than thirty persons, Vance and Sneath being members. A judgment for a debt of the association having been recovered in an action to which all the members individually, including Vance and Sneath, were parties defendant, all of whom appeared, an execution was issued thereon, and the said land sold. *Held*, that Vance and Sneath had an undivided interest in both the legal and beneficial estate in the land, and that their interest at least passed by the sale.

6. The holder of an undivided interest in land under the laws of California may recover the entire land, as against all parties, except his cotenants.

7. Under a decree for taxes, the sheriff sold a large tract of land, and made a return that he sold to the "highest bidder," where the law required a sale of the smallest quantity that any party would take and pay the taxes and costs. Six months were allowed by law for redemption, at the expiration of which time the sheriff executed a deed, which recited a sale to the highest bidder. In an action by the grantee on the tax deed to recover the land, it having been held that the sale appeared upon the face of the return and deed to be void, the ex-sheriff, six years after the sale, by direction of the court, amended his return showing a valid sale, and afterwards executed a new deed corresponding with the amended return. *Held*, (1) That the original return was made in the regular course of the sheriff's duty, and was the proper and only record evidence of the mode of sale, and that it showed a void sale from which there was no necessity to redeem. (2) That the owner of the property was not bound to ascertain the mode of sale from any other source, and had a right to rely upon the truth of the record thus made. (3) That the ex-sheriff could not, years after the expiration of the time for redemption, amend his return so as to show the sale to be valid, which before appeared upon the record to be void, and thereby and by his reliance upon a false record cut the owner off from his right of redemption.

8. The presumption of a reconveyance of lands conveyed in trust, after it becomes impossible to execute the trust, arising under the conditions of this case as stated in French v. Edwards, 21 Wall [88 U. S.] 147, is a conclusive presumption.

[This was an action at law by Ira G. French against Thomas Edwards and others for the recovery of certain land.]

John Reynolds, for plaintiff.

J. H. McKune and J. W. Armstrong, for defendants.

SAWYER, Circuit Judge. The plaintiff has title unless it has been cut off in some one of the several modes suggested by defendants. None of the defendants claim title except Lincoln, who claims through a sale and sheriff's deed under a judgment for taxes. He has no other title. If this fails, then he, as well as the other defendants, claims that the title is outstanding in other parties.

1. The Milliken title relied on by defendants is manifestly void. The judgment by confession entered in 1850, under which Milliken purchased at sheriff's sale, conceding the proceeding to be in due form in other particulars, was not entered upon a statement made by the defendants as required by the statute. St. 1850, p. 454, § 293. The statute evidently contemplates a statement signed by the party in person against whom judgment is authorized to be entered without action. In this case one of the defendants did not sign the statement, but it was signed by a person purporting to sign as his attorney. Those who did sign consented to a judgment against all, not against themselves alone. This point has been decided

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 7 Reporter, 68, contains only a partial report.]

by the supreme court of the state in a case arising under the same statute. Chapin v. Thompson, 20 Cal. 687. But if valid, an execution was issued and returned satisfied. That satisfied the judgment. Some six months afterwards the plaintiff assigned the satisfied judgment to one of the principal defendants, who thereupon had another execution issued, and sold thereunder the interest of his co-defendant in the premises in controversy to Milliken. Such a sale under a satisfied judgment could not affect the title. It does not appear that the holders of the Milliken title themselves even claim any interest in the land.

2. As to the matter set up as res adjudicata. The defendants in this case had judgment in 1867. Afterwards the plaintiff, French, conveyed to Vance, who brought suit to recover the premises against the same defendants. They set up as one defense by way of estoppel the said judgment recovered in this case in 1867, and the court held the plaintiff to be estopped by said judgment. Afterwards French sued out a writ of error upon the said judgment in this case of 1867, and it was thereupon reversed at the December term 1871. 13 Wall. [80 U. S.] 506. The case having been remanded to this court for new trial numerous other proceedings were had, and the plaintiff, having in 1877 amended his complaint, the defendants in their answer thereto alleged that Vance, since the said judgment in Vance v. Edwards [supra], had conveyed to Reynolds, who took with notice of said judgment; that the action is now being prosecuted for the benefit of said Reynolds, and then set up in turn as one defense the said judgment in Vance against these defendants by way of estoppel against further litigation herein, which judgment rested solely on the former judgment in this case which had in the meantime been reversed as stated; and this is the matter adjudged now relied on. The question on this point is precisely the same as when presented to this court on motion for leave to file a supplemental answer setting up the Vance judgment. I am entirely satisfied with the view I took on that motion, and content myself with referring to the decision then rendered. French v. Edwards, [Case No. 5,097.]

As to the Martin and Lynch trust. I regard the decision in this case, reported in 21 Wall. [88 U. S.] 150, where the facts are fully stated, as indicating the opinion of the supreme court to be that the presumption arising upon the facts stated is an indisputable or conclusive presumption. It must have been evident to the court that there had in fact been no reconveyance, and the court would scarcely have sent the case back on that point under these circumstances, if it had not deemed the presumption conclusive. The presumption in this class of cases is either conclusive or useless; and if useless, it might as well not be indulged. The ends of justice in such cases, doubtless require the presumption; but if so, they require it to be indisputable. I shall therefore act upon that view. I have, however, at the request of the defendant, and upon testimony admitted against the objection and exception of the plaintiff, found the fact upon the evidence that no reconveyance was actually executed. It is a fact in the case, and the defendants are entitled to have it found in this special verdict, so that they may have the benefit of it, if I have misapprehended the views of the supreme court as to the character of the presumption arising in the case.

4. As to the alleged Sutter Land Company trust. The Sutter Land Company was an unincorporated company, consisting of more than thirty members. A conveyance of the larger portion of the premises in controversy had been made to Vance, Sneath and Melvin, as trustees for the Sutter Land Company. In 1858, one Pettitt brought an action against the members of the Sutter Land Company for a debt due from the association, making all the members individually parties, and all answered. Vance and Sneath were two of the trustees, and were also parties defendant to the suit as members of the company. A judgment was obtained and a large portion of the property standing in the names of Vance, Sneath and Melvin, sold under an execution issued upon the judgment. All the title acquired under these proceedings became vested in the plaintiff before the commencement of this suit. Two of the three parties vested with the legal title, Vance and Sneath, and all the beneficiaries were parties to the suit. There being no corporation, Vance and Sneath had undivided interests in both the legal and equitable title to the land which was sold, as well as in the part unsold, and, at least, their interest in the part sold, passed by the judgment and sale, and this is sufficient in this state to enable the successor to their interest to recover against all the world except their co-tenants. I think, also, under such a state of facts the entire legal title which was vested in Vance and Sneath, and the entire beneficial interest in the whole, passed. Vance's interest, also, in the part not sold under the execution, passed to plaintiff by subsequent conveyance.

The evidence shows that the enterprise of the Sutter Land Company was long since abandoned, and, although Sneath and Melvin and the secretary of the company were examined as witnesses by defendants, it does not appear, nor am I aware, that any of the association now claim title for themselves, or that they ever have since the sale under said judgment, claimed any interest in said premises; and none of the defendants connect themselves with that title.

5. As to the tax title. After the reversal of the judgment by the decision reported in

13 Wall. [80 U. S.] 506, on the ground that the tax deed originally executed is void upon its face, the defendant, Lincoln, on June 11, 1872—more than six years after the sale and return—procured an ex parte order of the state district court directing the ex-sheriff to amend his return to the order of sale in the tax sale, so as to show that the sheriff sold the least quantity of land that any party would take and pay the taxes and costs, instead of showing a sale to the highest bidder, as the return was originally made; and the ex-sheriff thereupon amended his return in accordance with said order.

On the same day he executed and delivered to Lincoln another deed in which he recited the facts as stated in the amended return.

The defendants thereupon filed supplemental answers setting up the title thus acquired by defendant, Lincoln, through the corrected return and new deed, since the former trial. Plaintiff claims on the one hand, that when the sheriff made his return, executed and delivered his deed in accordance therewith, and went out of office, his power was exhausted; and that even if he could amend his return by stating omitted acts, and make a new deed supplying corresponding defects, he could not amend by falsifying facts before returned, and make a new deed reciting facts inconsistent with his recitals in his first deed. On the other hand it is insisted that the return can be amended so as to correct errors in any particulars, and new deeds be made correct in fact in their recitals at any distance of time; and many authorities are cited to sustain this view.

The current of authorities undoubtedly sustains the general proposition maintained by defendants where no new rights will be gained or lost by the amendment. But there are facts in this case that do not appear to have been considered in any of the cases brought to my attention by defendants' counsel. Under the statute of California affecting the question, the owner of real estate sold under a judgment for taxes, had a right of redemption; but the time within which he was called upon to exercise it was extremely short—it being only six months. In this case, as in most others of the kind, the owner did not appear in the tax suit in any part of the case; and the whole proceedings from beginning to the end, including the sale and making of the first return and the deed and the amendment of the return and execution of the new deed, were without the presence of the owner. The return by the officer of his proceedings at the tax sale was made in the proper and ordinary course of his duty.

The act of 1851, concerning sheriffs, in force when the tax sale in question was made, provides that: "A sheriff to whom any process, writ, order or paper shall be delivered, shall execute it with diligence," etc., "and shall return it without delay to the proper court or officer with his certificate indorsed thereon of the manner of its service or execution." St. 1851, p. 191, § 6. The act of 1864, relating to sales under judgments for taxes, provides, that a copy of the decree, "duly certified by the clerk, shall authorize the sheriff to sell the property therein described, and such copy, when executed and returned by the sheriff, shall be filed with the other papers as a part of the judgment roll." St. 1863-64, p. 400, § 1. See, also, practice act then in force, section 212.

Thus, it was a part of the official duty of the sheriff to make a certificate, and indorse it on the process, of the manner of its execution; and the process in this case by express provision of the statute was a certified copy of the decree, which when returned with the certificate of the mode of execution was under the express provision of the statute to be "filed with the other papers as a part of the judgment roll." It was intended by the statute to become a part of the authentic public record of the proceedings for the information and security of all interested in them. This record was necessary not only for the purpose of informing the owner of the fact of sale, but of its terms, in order that he might know whether it was necessary to redeem under the law to preserve his property; and if so, what amount it would be necessary to pay to effect a redemption. This record, with the certificate of sale, are the authentic, official, and only means provided by law to furnish this information, and the facts stated in this record the owner of the land was entitled to rely upon as true.. It may be, if the sheriff had omitted to make any return other than to make the certificate of sale, and in due time the deed, that the want of a return would not have been fatal, the certificate and deed being correct and in due form. If this is so —but it is not necessary to decide the point now—having made a return, he was bound to speak the truth. The return being made became a part of the record of the case of which parties interested were bound to take notice, and upon which they were entitled to rely. If all the proceedings were regular, the owner was, perhaps, bound to know that a sale would be made, but he was not required to be present in person, and was not bound to know the terms upon which the sheriff actually sold otherwise than from the record made of it by the officer in his return as required by law, and for the purpose of giving this information.

In this case the sheriff made a return, which, as we have seen, formed a part of the public judgment record; and that record, the proper and only place to go for information, informed the world and the owner of the property sold, that the sheriff had sold a tract of land one mile long by half a mile wide which was in fact laid out into a city, and in part occupied as such, to the highest bidder for the sum of one hundred and seventy-five and forty-two one hundredths dollars. The owner consulting that record, and

this is the only notice he is presumed to have had, was informed that the sale was an absolute nullity on its face; and that there was nothing from which he was called upon to redeem. If he examined this record, and so concluded, he judged rightly, for the supreme court so held in this very case on a former writ of error. If years afterwards, and after the expiration of six months from the sale, the ex-sheriff can amend his return, and his deed made in pursuance thereof, showing a valid instead of a void sale, the owner relying on the false record by this act loses the right of redemption. The purchaser, it is true, loses the benefit of his purchase; but he is necessarily present at the sale at which he himself buys, and knows the actual terms of sale. He also has notice by the record of the false return, and he can call upon the sheriff to correct it in time. If it be not corrected, and the record is permitted to speak a falsehood till the six months expires, it operates as a fraud—though doubtless, unintentionally—upon the owner by which he loses his property; and the purchaser by having notice by the record of its falsity without requiring its seasonable correction, is in some sense a party to the fraud.

If, under such circumstances either must suffer, it should be the purchaser, rather than the owner, whose loss by the error is usually vastly the greater. If either must be remitted to the responsibility of the sheriff in an action for a false return, it should be the party who knows, or is bound to know, the record to be false, rather than the one who does not. That a return can not be amended to the injury of any party was held in Newhall v. Provost, 6 Cal. 86. Freeman v. Paul, 3 Greenl. 263, 264, is in point. For the very reason that it would cut off a redemption, the court refused to permit the amendment of a return by showing, in accordance with the facts, the execution of a process three days earlier than appeared by the return. So, in Thatcher v. Miller, 13 Mass. 273, the court refused to allow a return to be amended where an injury would have resulted. See, also, 45 Mo. 116; 29 Vt. 332. In Thatcher v. Miller the court observes: "For an officer to undertake, six years after a defective return, to know with certainty the performance of a particular duty, when he is daily and hourly performing similar duties upon different persons, is more than can be expected, however strong his memory. In the cases cited, where amendments have been permitted, there was something in the record by which the correction could be made." And this language was quoted by the court with approbation in Means v. Osgood, 7 Me. 148, cited by defendants' counsel. In the case now under consideration, McClatchy, the ex-sheriff, was examined. He could not remember this particular sale, and only testified as to what was done at the sale from his recollection of what his custom was at tax sales. He did not even state that he was personally present at the sale, and the first return was made by a deputy, who would seem from the return to have made the sale; and he was not examined.

Even defendants' authorities recognize the principle stated as in Gilman v. Stetson, 16 Me. 124; Means v. Osgood, 7 Me. 147. The cases cited by defendants, are generally cases, such as where a summons, for instance, has been regularly served, but the return is defective. In such case the party has had his notice by the actual service of the process upon him, not by the return. The return is to enable the court, and others interested, to see that jurisdiction has been acquired. The party is bound to act upon the service made, and not upon the evidence furnished to the court. He has had the legal notice, and no injury is done him by correcting the record, so as to show the fact. He has had his opportunity to appear and defend. But in this case the owner was not bound to attend the sale in person, or to know the mode or form of the sale, except as he got it from the record, which the law requires the officer to make of his acts at the sale. The acts at the sale are not matters of record, except as they are made so by the return, and the owner gets his notice from that return, and not from a service on, or notice to, him personally At least, he is not bound to get it elsewhere; and there is no presumption that he gets it from any other source. If, relying on the official record, which is the only notice he is presumed to have, he is misled by a falsehood in the record, and thereby fails to redeem because the record shows nothing to redeem from, he is injured by the amendment of the record after the time of redemption is past, when it is too late to protect himself. In the other case where the service of the process is duly made, the party served has the proper legal notice, and he is not injured by the amendment showing the fact. This is the plain distinction between the two classes of cases. It does not matter that the party injured is a party generally to the action. The court has no more right to arbitrarily injure him than a stranger. The term, "not a party to the action," in some of the cases cited by defendants' counsel is loosely used. The question is, or should be, will anybody be injured by the amendment. In the case of a party, the amendment is allowed, not because he is a party, but because being a party, and duly notified, he has all the opportunity to which he is entitled, and he is not in fact injured by making a correct record of matters already within his knowledge. Returns are only allowed to be amended by courts in furtherance of justice. The amendment of a return, after a right of redemption is lost, by a party relying upon the false return, would certainly not be in furtherance of justice. It is true, that it is the duty of the owner by statute

to make reasonable efforts to ascertain if there is any tax against him, and if so, to pay it, and thus avoid a sale of his property; but we are looking at the question in its legal aspect, and every citizen is entitled to stand upon his strict legal rights. No one familiar with the operation of the tax laws and sales, in this state at least, I apprehend, can doubt that it is for the interest of the citizen—and such interest is the interest of the public upon the whole, as well as of the individual citizen and the interest of justice—that in one-sided proceedings, without actual notice to the owner to divest his title to real estate for non-payment of taxes, the officer should be held to a rigid compliance in all important particulars with the statute upon the subject, and so the authorities in this state all hold; and that the official records of these proceedings, of which the public is bound to take notice, should be required to speak the truth, so that those interested shall not be misled to their injury. Our tax laws are complicated, and different taxes, and parts of taxes, are payable at different times. The taxpayer is required to hunt up his taxes, and seek the tax gatherer, instead of the tax gatherer seeking the taxpayer, or even notifying him individually of the tax against him.

These circumstances, together with careless assessments, especially of real estate—sometimes to wrong parties, to unknown owners, to different persons, and the like—render it difficult, if not next to impossible, for the citizen of average intelligence even, to know when he is through paying taxes for any given year. Under all these difficulties, and where officers charged with the execution of the law, and whose special duty it is to thoroughly familiarize themselves with their provisions, often themselves commit errors, it is not remarkable that honest citizens, absentees, women, and children, inheritors of estates of deceased persons often absent, who would willingly pay their taxes, and who endeavor to do so, sometimes make slips, and receive the first notice of an unpaid tax from the dealer in tax titles, when, with deed in hand, he demands possession of their property already sold, and the time of redemption expired. Where the period allowed for redemption from a tax sale is only six months, the time of redemption is so short as to make the right itself little less than a delusion—a right in name rather than in substance. One who has failed to find and pay the tax in time to prevent a sale would scarcely be likely to learn of the sale within six months afterwards, unless he should chance to require an examination of the title for the purpose of a mortgage or sale. Even then, professional searchers of records and experts sometimes fail to make the discovery. One can hardly have occupied a seat upon the bench, or have been a practicing attorney long in this state, without having cases of tax sales and deeds brought to his attention, wherein the taking of the property by the purchaser would be little short of downright plunder, effected under the forms of law.

Parties are not likely, willfully, or knowingly, to allow property of large value to be thus sacrificed without redemption. There is usually positive ignorance, or misapprehension, which, to a great extent, takes away actual culpability.

While no sympathy is due to the man who knowingly or willfully evades the payment of his share of the public burdens, or from culpable negligence fails to pay his taxes levied for the support of the government which protects him, it is, perhaps, upon the whole, fortunate, that the carelessness or ignorance of those charged with the execution of the tax laws, so often leaves an avenue of escape to the really honest, though unfortunate delinquent. At all events the interests of justice manifestly require the proceedings in tax cases to be in the strictest conformity to law in all essential particulars. I know nothing of the character of the delinquency in this particular case; but one rule must be established for all falling within the same legal principles. I think the amendment of the return and execution of the second deed under the conditions of this case so as to cut off the right of redemption not made in furtherance of justice, and that it was unauthorized by law. It may well be questioned whether a tax levied in solido, upon a whole tract of large extent laid out into city lots, and in part actually occupied as such, like this, and owned by a large number of different persons, as appears from the findings was the case here, is valid. And the character of the levy appears upon the face of the judgment roll. But under the view I take upon the points discussed, it will be unnecessary to consider the points made upon the invalidity of the proceedings prior to the sale.

The original complaint was filed in this case soon after the cause of action accrued, November 8, 1866, twelve years ago. Special findings have been prepared presenting fully all the facts upon which the rights of the parties depend. Should there be any error in the conclusions of law drawn from the facts, the appellate court will be able to reverse or modify the judgment, and render such final judgment as the rights of the parties may require without any further trial in this court, thereby ending a long, tedious, expensive, and troublesome litigation.

Under the view I take, there is no title in any of the defendants, and no outstanding title to any portion of the premises which are specifically stated in the findings of fact to be in the possession of the several defendants therein named, other than the lots excepted in the judgment ordered, and the plaintiff is entitled to judgment. There must be a judgment for plaintiff in accordance with the order appended to the findings.

FRENCH (FARRELL v.). See Case No. 4,-683.

Case No. 5,099.

FRENCH v. FIRST NAT. BANK.

[7 Ben. 488; [1] 11 N. B. R. 189.]

District Court, S. D. New York. Nov., 1874.

PLEADING IN EQUITY—INTERROGATORIES AND ANSWERS—CORPORATION.

1. A bill in equity was filed against a corporation praying for a discovery, and praying that the corporation might, "upon the several and respective corporal oaths of its proper officers, agents and servants, &c.," answer such interrogatories "as by the note hereunder written they are respectively required to answer." The corporation answered under its corporate seal, declining to answer the interrogatories, and the plaintiff excepted to the answer: *Held*, that a corporation must answer a bill in equity under its common seal, and not on oath.

2. As the note in this case did not require the corporation, but its president, cashier and agent, to answer, the corporation was not bound to answer.

3. Under this bill, the officers of the corporation could not be compelled to answer the interrogatories, because they were not parties; but they could be made parties, in order to obtain a discovery from them.

[Cited in Kelley v. Mississippi Cent. R. Co., 1 Fed. 567.]

4. The plaintiff might apply to amend his bill accordingly.

[This was a bill in equity by Stephen B. French, assignee in bankruptcy of William Adams, against the First National Bank of the city of New York.]

S. L. Gardner, for plaintiff.

Peabody & Baker, for defendant.

BLATCHFORD, District Judge. The defendant is a corporation, and is the sole defendant. The bill prays for relief, and avers facts which lay a foundation for a discovery, and prays a discovery. A corporation must answer a bill under its common seal, and not on oath. This is well settled. Bronson v. La Crosse R. Co., 2 Wall. [69 U. S.] 283, 302. The bill in this case prays that the corporation "may, upon the several and respective corporal oaths of its proper officers, agents and servants, according to the best and utmost of their several and respective knowledge, remembrance, information and belief," answer "such of the several interrogatories hereinafter mentioned and set forth, as by the note hereunder written they are respectively required to answer." The note appended to the bill does not require the defendant to answer any of the interrogatories, but says: "The president and cashier of the defendant, and its agent, surnamed Brown, are severally required to answer the interrogatories." The corporation has answered under its corporate seal. In its answer it states that it declines to answer the interrogatories. The plaintiff now excepts to the answer, "for that the said defendant hath not, to the best of its knowledge, and to the best of the knowledge, remembrance, information and belief of its officers and agents, answered and set forth, whether," &c.

Under the rules of equity practice established by the supreme court, a defendant is not bound to answer any interrogatories except such as, by the note at the foot of the bill, he is required to answer. In the present case, the note does not require the defendant to answer any of the interrogatories, but only requires its president and cashier, and its agent, Brown, to answer them. But the bill could be amended so as to require the defendant to answer them. Yet this would probably be of no use, for, as corporations answer under seal, and without oath, a discovery on oath could not be compelled from the corporation, except through the medium of such a discovery from its agents and officers, and by making such agents and officers parties defendant. Fulton Bank v. New York & Sharon Canal Co., 1 Paige, 311; Brumly v. Westchester Co. Manuf'g Soc., 1 Johns. Ch. 366.

Under this bill the officers and agents of the defendant cannot be compelled to answer the interrogatories under oath, because they are not defendants. The equity rules (41 to 44) clearly import that no one but a defendant can be compelled to answer the interrogatories in a bill. Officers of a corporation may be made parties defendant to a bill against the corporation, in order to obtain a discovery from such officers. Angell & A. Corp. §§ 674, 675; Story, Eq. Pl. § 235; 2 Story, Eq. Jur. § 1501.

There is nothing in Kittredge v. Claremont Bank [Cases Nos. 7,858 and 7,859], which conflicts with these views. The plaintiff can, if he desires, so amend his bill as to require the defendant corporation to answer the interrogatories. It may then answer them under its seal, and without oath. But its answer must be stated therein to be made according to the knowledge and information and belief of its officers, ascertained from all proper sources of information.

The exceptions are overruled, with costs, with leave to the plaintiff to apply on notice for permission to amend the bill by adding new parties and otherwise.

[NOTE. See French v. First Nat. Bank, Case No. 5,100.]

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

Case No. 5,100.

FRENCH v. FIRST NAT. BANK.

[8 Ben. 248.] [1]

District Court, S. D. New York. Oct. 1875.

TRANSFER OF PROPERTY IN VIOLATION OF THE BANKRUPTCY ACT—COURSE OF BUSINESS.

A., living in Sag Harbor, was doing business with a bank in New York, depositing with and drawing drafts on the bank. On January 6, 1871, there was a debit balance against him on the books of the bank. The bank wrote him a letter on that day, telling him that his account was overdrawn, and that, if he could not send them money to meet this overdraft and drafts which they had refused to pay, he must send them securities on which they could make him a loan to keep his credit good. This letter the bank sent by a special messenger, and, on the 7th of January, A., having received the letter, gave the messenger securities amounting to $1,527.39, which he delivered to the bank on the 11th. Previous to the receipt of the securities by the messenger, other remittances had been received by the bank from A., and items were also in their hands, which were afterwards credited to A., so that, including all such items, at that time, the balance of his account at the bank was in his favor. The bank subsequently responded to him for that balance and for the $1,527.39. Bankruptcy proceedings were commenced against A. on January 21, 1871, and an assignee having been appointed, he brought suit against the bank to recover back the $1,527.39. *Held*, that the transaction was not in violation of the bankruptcy act, and that the bill must be dismissed, but without costs.

This was a bill in equity filed by the complainant [Stephen B. French], as assignee in bankruptcy of William Adams, of Sag Harbor [against the First National Bank of the City of New York], to set aside a transfer to the defendant by Adams of certain bills, checks, &c., which the complainant alleged to have been made within four months before the filing of the petition in bankruptcy on January 21, 1871, contrary to the provisions of the bankruptcy act [of 1867 (14 Stat. 517)]. The facts sufficiently appear in the opinion of the court.

S. L. Gardner, for complainant.
Peabody & Baker, for defendant.

BLATCHFORD, District Judge. The evidence shows that, at the close of business on the 5th of January, 1871, the bankrupt had a debit balance against him on the books of the defendant, of $1,868.35. On the 6th of January the defendants paid drafts drawn on them by the bankrupt, to the amount of $119.65. This made a debit balance against him on such books, of $1,988, at the close of business on the 6th of January. The defendants then wrote to him the letter of the 6th of January, which was sent to him by the special messenger, saying: "Your account with us is overdrawn about $2,000 and we have refused payment of about $3,000 more of your drafts. It requires full $5,000 to make you good. If you are short of money, so that you cannot send that amount by the bearer, you must send by him some bonds, notes, &c., that we can make you a loan on and save you from further discredit." The special messenger, with this letter, left New York on the 6th and arrived at Sag Harbor the same evening. Meantime, on the 7th, after the messenger had left, a remittance of $1,115.94, which had been sent by the bankrupt to the defendants on the 5th, arrived, and was credited by the defendants to the bankrupt, in account, on the 7th. They also credited him on the same day with $589.52, as the proceeds of $533.50 gold. On the same day they paid drafts drawn on them by him to the amount of $150.32. This left a debit balance against him, on their books, at the close of business on the 7th, of $433.86. But, the testimony of the cashier of the defendants shows that they had in their custody on the 7th the item of $140, coupons, afterwards credited in account on the 11th, and the item of $533.41, Hunt, afterwards credited in account on the 14th. The bankrupt was, therefore, not really indebted to them at all at the close of business on the 7th. As the result of their sending the special messenger, he obtained at Sag Harbor, on the 7th, the package containing the items which he delivered to the defendants on the 11th, and which they credited in account on that day, at $1,527.39. Whatever might have been the proper conclusion, as to this $1,527.39, if the bankrupt had not remitted the $1,115.94, which he did remit on the 5th, in the regular course of business, and which, on the evidence, must be regarded as having come to the hands of the defendants before the $1,527.39 was placed in the hands of the messenger, it is apparent that the $1,527.39 came to the hands of the messenger at a time when the bankrupt was not indebted to the defendants, but when they were liable to respond to him for the sum of $239.55. They subsequently responded to him for the $1,527.39 and the $239.55, and for a further item of $35 collected for his account on the 18th, being a total of $1,801.94.

I see, therefore, nothing in the transaction as to the $1,527.39 which the plaintiff can impeach as in violation of the provisions of the bankruptcy act. All the other remittances made by the bankrupt to the defendants appear to have been made in the ordinary course of business dealings between the parties, and there is no evidence of any intent on the part of the bankrupt, in respect to them, to give any preference to the defendants, even though at times his account may have been overdrawn, because he was constantly drawing on them and they were constantly paying drafts of his and receiving remittances from him, and they paid ten drafts of his after the 7th of January, namely, five on the 9th, two on the 14th, two on the 17th and one on the 18th. The bill must be

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

dismissed, but, under the circumstances, without costs.

[NOTE. See French v. First Nat. Bank, Case No. 5,099.]

FRENCH (GREEN v.). See Case No. 5,757.

FRENCH (KING v.). See Case No. 7,793.

Case No. 5,101.

FRENCH v. KINGSLAND.

[The case reported under above title in 9 Pittsb. Leg. J. 153, is the same as Case No. 5,096.]

Case No. 5,102.

FRENCH et al. v. LAFAYETTE INS. CO.

[5 McLean, 461.] [1]

Circuit Court, D. Indiana. May Term, 1853.[2]

FOREIGN INSURANCE COMPANIES — REGULATION — SERVICE OF PROCESS ON AGENT—VARYING PROVISIONS OF STATUTE BY CONTRACT — JURISDICTION.

1. By a law of Ohio, all foreign insurance companies which, through an agency, do business in the state, are held amenable to the process of the state.

[See note at end of case.]

2. All such companies are liable to be sued, and a service on their agents shall bind the companies which they represent.

3. It would be unjust and impolitic, to require the injured insured to sue the companies in the state or country where they are located. There is one agency, if not more, in Cincinnati, from a London (England) office.

[Cited in Runkle v. Lamar Ins. Co., 2 Fed. 12.]

4. Parties can not, by a contract, agree upon a limitation different from the statute, within which suit shall be brought, or the right to sue be barred.

[Cited in Riddlesbarger v. Hartford Fire Ins. Co., 7 Wall. (74 U. S.) 392.]

[Cited in Amesbury v. Bowditch Mut. Fire Ins. Co., 72 Mass (6 Gray) 605; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 448.]

5. This would be in conflict with the law and its policy. Jurisdiction of corporations attaches, in the courts of the United States, from the place where their business is done.

[Cited in Stillwell v. Empire Fire Ins. Co., Case No. 13,449.]

6. Where a suit is founded on the record of a judgment, in which the court has jurisdiction, no error in the proceeding can be considered. Nor in such a case can nil debit be pleaded.

At law.

Smith, Fox & French, for plaintiffs.

Gregory & Orth, for defendant.

OPINION OF THE COURT. This is an action of debt, on a judgment rendered in the commercial court of the city of Cincinnati; there are also counts in the declaration, on a policy of insurance. The policy of insurance was entered into in the city of Cincinnati, on certain property of the plaintiffs [French, Strong & Fine], by the defendant, to the amount of $2,500, which was lost by fire. A judgment was obtained, before the commercial court, in Cincinnati, for the amount of the policy. The defendants pleaded nil debit to the 2d, 3d, and 6th counts. And further to the 1st, 2d, and 3d counts, that they are founded on the same contract or policy of insurance. And that it was and is, a parcel of said contract, that no suit or action of any kind, should be brought against said defendant for the recovery of any claim on the policy, in a court of law or chancery, unless brought in six months after the loss. To the 4th and 5th counts, the defendant pleads nul tiel record. And further, to the 4th and 5th counts, defendant says, it is a corporation under the laws of Indiana, the principal place of business being at Lafayette, in said state. That the officers and directors are citizens of Indiana, and were, &c. That defendant was not served with process. That its agent living in Cincinnati for the purpose of making contracts of insurance, was not otherwise served, than by leaving a copy of the summons at his residence, by which the suit in Ohio was commenced. To the plea of nul tiel record the plaintiffs joined issue. And they demur to the pleas to the 1st, 2d, and 3d counts. And as cause of demurrer they say, that the matters pleaded in bar are in conflict with the law of the state, which is the law of the forum. Defendant joins in demurrer.

Among other conditions there is annexed to the policy the following: "It is further hereby provided, that no suit or action of any kind against the company, for the recovery of any claim upon, under or by virtue of the policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and if any such suit or action shall be commenced against the company after the expiration of six months, next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, thereby so attempted to be enforced." The plea in bar is founded on the above limitation of six months. This is not a condition on which liability is to attach. It does not affect the contract, but the remedy. A condition subsequent, for the payment of money, after the liability is fixed, by which the payment is barred, is a singular condition. It is nothing less than an act of limitation, of six months. A statute of limitation is founded upon public policy. A contract is void if made against the policy of the law. But this limitation in the policy is not only opposed to the policy of the law, but in fixing a different time from the statute, is in conflict with it. Can parties, in all contracts, make a statute of limitations for

[1] [Reported by Hon. John McLean, Circuit Justice.]

[2] [Affirmed in 18 How. (59 U. S.) 404.]

themselves, which shall bind the courts? There is no more reason why this should be done, in a policy of insurance, than in any other contract. Such a contract might well require notice of a loss, within a limited time, in order that the underwriters may inquire into it; but such is not the nature of the above limitation. The diligence required is, after the loss or damage shall have occurred, not to fix the liability, but to recover the money. By another clause the insurers are not liable to pay, until sixty days after proof of the loss—but the limitation of six months runs from the time of the loss. It may not be within the power of the party to prove the loss within six months, but if suit be not brought within that time, the agreement bars a recovery.

This is an attempt to discharge or bar a right of action, before the right occurs. It is a well settled principle, that a release can only operate upon an existing claim—a present right. Co. Litt. 265; 4 Mass. 688; 7 Mass. 155; 15 Mass. 110; 4 Pick. 368. Why has a condition or an agreement in a policy, providing that all disputes arising under it shall be referred to arbitration, been held to be void? Because it is an attempt to oust the jurisdiction of the courts. 2 Arn. Ins. 1245; 1 Phil. Ins. 23, 587; 5 State Rep. 134; 1 Wils. 129; 4 Watts 41; 6 Har. & J. 413. In 15 Mass. 110, the court say: "No cause can be found to show, that a party may be restrained by way of estoppel from maintaining an action, although it be in violation of an executory contract." An agreement for a valuable consideration or under seal, not to sue for a limited time upon a cause of action accrued or to accrue, can not be pleaded in bar to a suit, if brought before the period expires. 5 Blackf. 126; 6 Blackf. 283; 19 Johns. 133; 11 Pick. 159. Is there any difference as to the legal effect, between such an agreement, and one that suit shall not be brought, after the time limited? What is the nature of the contract of insurance? The underwriter takes the risk on his own terms, and agrees to pay the damage should a loss occur. Annexed to the policy, though not constituting an essential part of it, is an agreement, in the event of a loss the assured shall bring suit in six months or be barred. What is the consideration of this agreement? It is without consideration, unless it be considered as a part of the contract, under which the liability arises. Where a policy provided that the insured should not abandon, until six months after notice of capture to the underwriters, it was held the right to abandon accrued on the condemnation. 10 Johns. 273. If a mortgagor stipulate that his mortgage shall be irredeemable, he may still be let in to redeem. 1 Vern. 192. And if he agreed not to redeem after six months, would he be estopped? The time specified in the statute of limitations is as much a part of the policy of the law as the act itself. It is a matter of law, and cannot be changed by the contract of parties. If they may shorten the time expressed in the act, they may extend it; or they may, by their agreement, annul it. This, it appears to me, they cannot do. It would be a dangerous power. The law was not made for particular cases, but it is founded in a general policy, and applies equally to all contracts, as specified in the act.

Several other questions are made in the case. It is insisted that the corporation is not amenable to process in Ohio. This, as a general principle, can not be controverted, but the question is, is not the insurance company, though established in Indiana, under a law of that state, amenable to the process issued in this case, under the circumstances? By the Ohio act of 1847 [Laws Ohio 1847, p. 17], it is provided that "where the principal office of such insurer is located out of this state, in all suits instituted by virtue of this act, the service of process upon the agent of such insurer for the time being, in the county in which such contract shall be made, shall be as effectual, as though the same were made upon the principal. By the general statute, leaving a copy at the residence of the party, is service. Under the act of 1851, it is provided that the summons may be served, on the president or other chief officer, or any clerk, secretary, treasurer, director, or agent, of such foreign corporation or body politic, by the sheriff, and when so served, the said corporation shall be considered in court for judgment or decree against it. Under the above acts, the suit was brought in the commercial court of Cincinnati, against "the president and directors of the Lafayette Insurance Company," the corporate name being "The Lafayette Insurance Company." And this misnomer is now made an objection. It is too late to take advantage of this variance—it should have been pleaded in the commercial court. The description of the judgment, in the declaration, is substantially good. The insurance company, by establishing an agency at Cincinnati, came into the state, not by virtue of its original act of incorporation, but under the law of Ohio. It could come in under no other conditions. The agency was established with a view to profit, and having realized the contemplated advantages, it can not claim exemption from the liabilities imposed. The agent opened an office in the city—made insurance upon property binding the corporation. In fact he discharged, so far as regards insurances, the corporate functions of the company; and this the act of Ohio permitted, on the conditions that the company should be amenable, through its agent, to the courts of Ohio, on any contract of insurance. For this purpose the Ohio act substantially sanctioned the exercise of the corporate powers within the state. The condition imposed was just, and it was accepted by the corpora-

tion, and the suit in the commercial court was brought on a policy issued by the agent. There are several corporations of other states doing business, under similar circumstances, in Cincinnati. And there is one agency from a corporation of London, making insurances in the city. Would it be politic in the state of Ohio to permit these agencies to do business within it, and leave its citizens to seek redress by suit against the company in any other state or country, wherever it may be located? This would be unjust as well as impolitic. We have no doubt that the state of Ohio had a right to prescribe the conditions on which the defendant might do business in the state, and in coming into the state for that purpose, the conditions attach.

We think the judgment of the commercial court is conclusive as to the rights of the plaintiffs, as well to the service of process as to the amount of damages. The judgment comes before us as evidence, and the court having jurisdiction, no errors in the proceeding can be objected to collaterally. In regard to the question of jurisdiction made in the pleading, that some of the stockholders are citizens of Ohio, it is only necessary to remark that the law is now settled that the state which granted the charter, and within which the corporation does its business, determines its right to sue in this court, and not the citizenship of the stockholders, as was formerly held. And we think the late decisions on this subject have established the true principles on which jurisdiction, in cases of a corporation, should be sustained. The former rule to take jurisdiction from the citizenship of the stockholders, defeated, in many cases, the object of the law, in authorizing suits to be brought between citizens of different states in the courts of the United States. The corporators having united to accomplish certain purposes, appoint their agents to manage the concern and bind the stockholders, without regard to their citizenship. Formerly the stockholders were required to be citizens of the same state, or at least that no one of them should be a citizen of the same state as the other party, as that would defeat the jurisdiction of the court. On this ground, suits by or against corporations were frequently defeated for want of jurisdiction, while the fact of citizenship had no influence upon the merits of the case or the powers of the corporation. It was an objection—a technicality, without substance, and very often defeated an important right. This action being mainly founded on the judgment of the commercial court, which we think was conclusive, the other points made in the case have been considered, as they were earnestly discussed. Judgment on the record.

[NOTE. On writ of error, the judgment of the circuit court was affirmed by the supreme court. Mr. Justice Curtis delivering the opinion, in which it was held that the state of Ohio may properly require a corporation created in another state to submit to proper conditions before doing business in that state; and these conditions must be deemed valid and effectual by other states, and by the supreme court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure jurisdiction and authority of each state from encroachment by all others. In this case the condition provided that the agent of the foreign corporation should also be deemed its agent to receive service of process in suits founded on its contracts. Lafayette Ins. Co. v. French, 18 How. (59 U. S.) 404.]

FRENCH (PIGOU v.). See Case No. 11,161.

Case No. 5,103.

FRENCH et al. v. ROGERS et al.

[1 Fish. Pat. Cas. 133;[1] 4 Am. Law J. (N. S.) 150; 8 Leg. Int. 158.]

Circuit Court, E. D. Pennsylvania. Nov. 3, 1851.

PATENTS — DATE OF GRANT — DATE OF FOREIGN PATENT—REISSUE — EFFECT OF COMMISSIONER'S ACTION—DESCRIPTION AND CLAIM— SURRENDER AND REISSUE—ART—PROCESS.

1. The provisions of section 8 of the act of 1836 [5 Stat. 120], and of section 6 of the act of 1839 [5 Stat. 354], as to when a home patent shall bear the date of a foreign patent, relate only to such patents as are applied for here, after the issue of the foreign patent. Where, therefore, an application for a patent was made in this country in April, 1838, and acted on in that month, but a patent was not actually issued until June 20, 1840, at which time the patent was dated, and a foreign patent was obtained in August, 1838. *Held*, as the application here was before the foreign patent, that the grant of the patent here was under the general enactments of the act of 1836, and its term was properly from its date.

[Cited in Gold & Stock Tel. Co. v. Commercial Telegram Co., 23 Fed. 343.]

2. In cases of reissue, the action of the commissioner has more than prima facie influence in finally deciding the question of identity of invention.

[Cited in Hussey v. Bradley, Case No. 6,946.]

3. The patentee need not describe and claim, in the specification of a reissue, either in words or idea just what he described and claimed in his original.

4. There may be more than one reissue of the same patent; and it is for the public interest that the surrender and reissue should be allowed to follow each other as often as the inventor is content to be more specific or more modest in his claims.

5. The surrender and reissue, no matter how often they recur, are reciprocal—each in consideration of the other—and form together but a single act. If a reissue is invalid for want of authority to make it, the surrender is ineffective for want of authority to accept it.

6. The specification of the reissued patent must describe the same invention, and the claim can not embrace a different subject-matter than that which he sought to patent originally; but, unless the correction contemplated by the statute is narrowed down to a mere disclaimer, the

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

corrected specification must be broader than the original one.

[Cited in Sickles v. Evans, Case No. 12,839; Crompton v. Belknap Mills, Id. 3,406.]

7. An art is entitled to protection, as well as the machinery or processes which the art teaches, employs, and makes useful.

8. The duplicate drawings, required by section 6 of the act of 1837 [5 Stat. 193], are unnecessary until the patent issues, and need not accompany the application.

9. There is no act that requires the jurat to an application for a patent to be dated.

This was a bill in equity filed [by Benjamin B. French, Adam J. Glossbrenner, and John M. Broadhead] to restrain the defendants [Henry J. Rogers, Josiah Lee, Zenas Barnum, and others] from infringing letters patent [No. 1,647] granted to Samuel F. B. Morse, June 20, 1840, reissued January 25, 1846, and again June 13, 1848 [No. 117]; also letters patent [No. 4,453] granted to him April 11, 1846, and reissued June 13, 1848 [No. 118]; and also letters patent [No. 6,420] granted to him May 1, 1849—all for inventions relating to electro-magnetic telegraphs.

Amos Kendall, George Gifford, St. George T. Campbell, and George Harding, for complainants.

Wm. M. Meredith, R. H. Gillett, Wm. Schley, and Peter McCall, for defendants.

KANE, District Judge. This case is before us on final hearing upon the pleadings and proofs. Professor Morse, under whom the complainants hold, has three patents: the first dated June 20, 1840, reissued after surrender on January 25, 1846, and again reissued after a second surrender, on June 13, 1848, which has been referred to in the argument as the "magnetic telegraph patent"; the second, dated April 11, 1846, also reissued on June 13, 1848, referred to as the "local circuit patent"; the third, dated May 1, 1849, referred to as the "chemical patent." The bill charges that the respondents have infringed all three of these patents; the answer denies the infringements, and controverts the validity of the patents.

I. The objections to the validity of the first patent, that for the magnetic telegraph, are stated in the defendants' brief as follows:

"1. That it does not run from the date of Morse's French patent.

"2. That the commissioner of patents had no authority in law to reissue a second time.

"3. That the claims set out in the first reissue are broader than the claims in the original patent; and the claims in the second reissue are broader than those of either of its predecessors; and are not for the same invention."

1. The first of these objections founds itself upon the fact, that Mr. Morse had obtained a patent in France for this same invention twenty-two months before his patent issued here; and it asserts that under the second proviso of the sixth section of the act of 1839, his American patent should in consequence have been limited to the term of fourteen years from the date of the French patent; and that not having been so limited, it is void.

This objection was fully met in the argument of the complainants. Mr Morse's application for a patent in this country was made in April, 1838, and was filed and acted on in the patent office before the 10th of that month; his French patent bears date the 18th of August following. There is, therefore, no room for the questions which were argued so elaborately, of the proper interpretation of this proviso in the sixth section of the act of 1839, and the eighth section, second clause of the act of 1836, which was also invoked, in any possible bearing upon the case of Mr. Morse. The proviso of 1839 must be interpreted by reference to the enacting words of the section which it limits; and the provisions of both the sections relate only to such patents as are applied for here, after the issue of a foreign patent. But Mr. Morse's application here was before his patent abroad—in nowise after it—and his American patent was granted, therefore, under the general enactments of the act of 1836, not under any special proviso or exception whatever, and its term runs properly from its date.

We do not see the justice of the criticisms upon his application, that the jurat affixed to it is without date of day or month; and that the drawings which accompanied it were not in duplicate. There is no act that requires the jurat to be dated at all; and the supplementary provision of the sixth section of the act of 1837, that "the applicant shall be held to furnish duplicate drawings," though directory in its terms, is not a condition; and it has obvious reference, in point of time, to the issuing of the patent, and not to the filing of the petition for it. Such has heretofore been the interpretation of the patent office, announced in the official circulars for the instruction and guidance of inventors; the practice founded on it is both reasonable and convenient; and no act of congress appears to conflict with it. If Mr. Morse's patent is invalidated on this ground, more than half the modern patents for mechanical inventions must probably fall with it.

2. The second objection to the patent is that the act of congress makes no provision for a second surrender and reissue. The thirteenth section of the act of 1836, which provides, in certain cases, for the surrender of a defective patent, and its reissue in an amended form, regards the new patent as substituted for the old one, with just the "same effect and operation in law" as if the specification had been filed first in the form which it takes in the reissue. It is difficult to see why, if the original patent could be amended, its substitute, having all the legal

attributes of the original, can not be amended, also.

There is nothing in the words of the act, or in the policy which it proclaims, that limits the correction of errors to such as may have been the first discovered. On the contrary, if it be true, as we have supposed in determining the recent case of Batten v. Taggart [Case No. 1,107], that the patent is granted to the inventor in consideration of some benefit to be derived by the public from his disclosures, and that the reissue is in consideration of some more full or more accurate disclosure than that which he had made in his original specification, or some renunciation on his part of an apparently secured right—it is for the public interest that the surrender and reissue should be allowed to follow each other, just as often as the patentee is content to be more specific or more modest in his claims.

Besides, it might not be safe to assume too readily, that the act was intended to withdraw altogether, from the officers of the executive department, the power to accept a surrender and grant a reissue, which they had before, and which would sanction a second reissue quite as readily as a first. The act might, perhaps, be regarded more justly as affirming the propriety of the usage which had obtained under the former laws, and had been repeatedly recognized by the courts (Morris v. Huntington [Case No. 9,831]; Grant v. Raymond, 6 Pet. [31 U. S.] 220; Shaw v. Cooper, 7 Pet. [32 U. S.] 315), and as prescribing in addition the conditions and incidents which should attach to it thereafter in certain cases. It is hardly to be supposed that the merely clerical error of an engrossing subordinate, or the accidental inadvertence of the commissioner himself, is not capable of being rectified or supplied now, just as it was before the passage of the act. And yet, the construction, which regards this section as superseding the implied power of the commissioner, might lead to this; since the act makes no provision for correcting such mistakes on the part of the patent officers.

Still further: it must, as we think, be conceded, that if the commissioner's power to reissue is so restricted by the act as to be exhausted by a single exercise, his power to accept the surrender must be equally restricted, and equally transitory. And the argument then resolves itself only into another form of the question, whether the patent was for any purpose a valid one as it stood after the first reissue; because, if the second reissue was invalid for want of authority to make it, the second surrender was ineffective for want of authority to accept it—and so the patent stands as if it had not been surrendered the second time. The surrender and the reissue, no matter how often they recur, are reciprocal—each in consideration of the other—and forming together but a single act between the parties. It would be unconscientious to retain the consideration, while denying the validity of the grant. See Woodworth v. Hall [Case No. 18,017].

3. We pass to the third objection, the supposed variance in the reissues. From the course of some parts of the argument on this point, it might be inferred that the objects as well as the import of the thirteenth section of the act of 1836, had been misapprehended by the learned counsel for the respondents. It is not the meaning of the law that the patentee who applies for a reissue must, at his peril, describe and claim in his new specification, either in words or idea, just what was described and claimed in his old one. His new specification must be of the same invention, and his claim can not embrace a different subject-matter from that which he sought to patent originally. But, unless we narrow down the correction which the statute contemplates till it becomes a mere disclaimer, it is not possible, in any case, to frame a correct specification, which shall not be broader than the one originally filed. To supply a defect, to repair an insufficiency, is to add—either directly, or by modifying or striking out a limitation; in either form, the effect is to amplify the proposition; in the case of a specification under the patent laws, it is to amplify the description and enlarge the claim.

There are few things more difficult, even for well educated and practiced lawyers, than to describe a new invention clearly, and point out the principle which distinguishes the subject of it from all things known before. And as inventors are rarely experts either in philology or law, it has long been established as a rule, that their writings are to be scanned with a good degree of charity. But it is easy to abuse this liberality to the purposes of fraud. The public has rights to be guarded also; and these exact, that the patentee's specification shall set forth his invention so fully and definitely that it can not be readily misunderstood.

It is the purpose of the statute to reconcile this seeming conflict; and it effects it by allowing the inventor to amend the mistakes he has honestly fallen into in his description and claim of title, as soon and as often as he discovers them. And there is the more reason for this indulgence, since under the act of 1836, § 7, the specification is reviewed by the commissioner before the patent issues, and is very often modified in accordance with his suggestions, or to obviate objections made by him to its original form. He may be supposed to know, therefore, better than any one else but the patentee himself, what the invention was for which the patent was sought at first; and he may also know whose inadvertence, accident or mistake it was, that made the first specification inoperative or invalid. It is not absolutely impossible that it may have been his own, as certainly it had his implied concurrence.

And this consideration furnishes a strong

argument for the rule, that the commissioner's action, in ordinary cases of reissue, shall have more than a prima facie influence in finally deciding the question of identity of invention. Whatever be the extent of the rule; whether it leaves nothing open for discussion before the court, but the issue of fraud —as appears to have been the undivided opinion of the supreme court, in the Case of Stimpson, 4 How. [45 U. S.] 404—or whether we permit ourselves to except from it as we did in Batten v. Taggart [supra], in cases in which the invention claimed in the reissued patent is obviously different from that claimed in the original; or whether, with Judge Story, in Allen v. Blunt [Case No. 216], and in Woodworth v. Stone [Id. 18,021], we hold the grant of the amended patent to be "conclusive as to the existence of all the facts, which by law are necessary to entitle the commissioner to issue it; at least, unless it is apparent, on the face of the instrument itself, without any auxiliary evidence, that he was guilty of an excess of authority; or that the patent was procured by a fraud between him and the patentee." Whatever be the rule, or its limitations, the propriety of the reissue in the case before us can hardly claim a judicial review. There is no want of jurisdiction, either apparent on the face of the proceedings, or asserted by the evidence; and there is no fraud imputed, or justly imputable.

Nor is there any flagrant diversity of claim. After a repeated and careful examination of the three specifications, with their respective claims, fully aided by the acumen of highly ingenious counsel, we have not found a material difference of import between any of them. The order in which the subjects of claim are marshalled is not the same throughout; a phrase is more concise in one, in another more popular; in one, a scientific term, or a general expression, takes the place of the descriptive or defining language, or the detailed particulars of another; in a word, they are unequal as specimens of artistic writing, and a close examination may detect defects in the two first, which are repaired in the last. But they all describe the same thing essentially; and we should find it easier to argue that neither the first nor the second specification could be rightfully regarded as "inoperative or invalid," for want of precision and clearness, than that there was an important variance in the second from the first, or in the third from either. These observations form the answer to the third objection.

Mr. Morse's patent of 1840, in all its changes, asserts his title to two distinct patentable subjects; the first, founded on the discovery of a new art; the second, on the invention of the means of practicing it.

1. That he was the first to devise and practice the art of recorded language, at telegraphic distances, by the dynamic force of the electro-magnet, or, indeed, by any agency whatever, is to our minds plain, upon all the evidence. It is unnecessary to review the testimony for the purpose of showing this. His application for a patent in April, 1838, was preceded by a series of experiments, results, illustrations, and proofs of final success, which leave no doubt whatever, but that his great invention was consummated before the early spring of 1837. There is no one person, whose invention has been spoken of by any witness, or referred to in any book, as involving the principle of Mr. Morse's discovery, but must yield precedence of date to this. Neither Steinheil, nor Cooke and Wheatstone, nor Davy, nor Dyer, nor Henry, had at that time made a recording telegraph of any sort. The devices of the first three were merely semaphores, that spoke to the eye for the moment—bearing about the same relation to the great discovery now before us, as the Abbé Sicard's invention of a visual alphabet for the purpose of conversation bore to the art of printing with movable types. Mr. Dyer's had no recording apparatus, as he expressly tells us; and Professor Henry had contented himself with the abundant honors of his laboratory and lecture-room.

When, therefore, Mr. Morse claimed, in his first specification, "the application of electro-magnets" "for transmitting, by signs and sounds, intelligence between distant points;" and "the mode and process of recording or marking permanently signs of intelligence transmitted between distant points;" and when in his second specification he claimed "the making use of the motive power of magnetism, when developed by the action of currents of electricity as a means of operating and giving motion to machinery, which may be used to imprint signals upon paper or other suitable material," "for the purpose of telegraphic communication;" characterizing his invention as "the first recording or printing telegraph by means of electro-magnetism;" and when in his third—after again describing his machinery and process, he once more characterized it in the same terms, and claimed "as the essence of his invention, the use of the motive power of the electric or galvanic current (electro-galvanism, as he now terms it), however developed, for making or printing intelligible characters, signs or letters, at any distance;" through these several forms of specification claiming and renewing his claim of property in the same invention, as it seems to us; and claiming in each and all of them no more, as it also seems to us, than he was justly entitled to claim; he declared the existence of a new art, asserted his right in it as its inventor and owner, and announcing fully its nature and merits, invoked in return the continued protection of the laws.

From this time his title was vested as patentee of the art, and other men became competitors with him only in the work of diversifying and perfecting its details. He himself

used the stylus, to impress paper or parchment, or wax-coated tablets, it may be: though he sometimes made a colored record by the friction of a pencil; another substitutes a liquid pigment, or stains his paper with a chemical ink; the next perhaps stains his paper beforehand, and writes on it by decomposing the coloring matter; and another yet, more studious of originality than the rest, writes in a cyclovolute, instead of a straight line, and manufactures his ink as he goes along, by decomposing the tip of his stylus on a chemically moistened paper. They are, no doubt, all of them inventors; as was the man who first cast type in a mold, or first bent metal in the practical semblance of a grey goose-quill, or first devised sympathetic ink, that the curious in letter writing might vail their secrets from the profane. All these toiled ingeniously and well, to advance or embellish a pre-existing art. But they had no share in the discovery of the art itself, and can no more claim to share the property, which its discovery may have conferred on another, than he who has devised some appropriate setting for a gem can assert an interest in the gem itself.

Yet, admitting, for the sake of argument, that Mr. Morse's leading invention is correctly designated as a new art; and that he has sought to patent it accordingly, by a compliance with all the requisitions of the statute—it is still contended, and with much of elegant research into the radical meaning of the term, that an art, as such, can not be made the subject of a patent. But interpreting language as men use it around us, and as it reflects ideas, the question can hardly be regarded as doubtful. The constitutional provision under which our patent laws are framed, looks to the promotion of "useful arts." The act of congress places "a new and useful art" among the discoveries it proposes to protect, and assigns to it the first place on the list. The statute of 21 James I, c. 3, from which the patent system of England has grown up, speaks only of "new manufactures." Yet the judges of that kingdom find a warrant, in this limited expression, for sustaining patents for an art, and even for the renewed discovery of an art that had been lost. See the Hot-Blast Case [Household C. & I. Co. v. Neilson], Webst. Pat. Cas. 683, 717, and Mr. Webster's note at page 718, and the case Wright's Patent, Id. 736, and the cases grouped in Hind. Pat. 77, 102.

Indeed, the author whose treatise we have cited last, asserts with much emphasis that it is the art, and nothing else, which is the characteristic subject of every privilege granted by a patent under the statute, page 92. And it may be noted, as not without interest, that in just accordance with the spirit of the English law cases, the English patents of Cooke and Wheatstone, Davy and Bain, claim property in the arts, for which their mechanical devices are respectively adapted; not indeed in so many words, but in language as unequivocal as that employed by Mr. Morse.

Nor can we see that there is any reason of policy, which should deny protection to an art, while extending it to the machinery, or processes, which the art teaches, employs, and makes useful. Why should the type, or the ink, or the press itself, be dignified beyond the art, to which they minister in such humble subordination, and without which they are rubbish? Will you patent the new product, and the new elemental means, and the new process by which they act, and then debate whether you may patent the art? You have patented it already.

We are aware, of course, that it has been held in some cases under the English patent law, that the art to be patented must have some reference to a manufacture. See Hind. Pat. ut supra. But while such a deduction might be legitimate from the words of the statute of James, it would be obviously otherwise under the more liberal phraseology of our act of congress. And even in England, it must be apparent to every one who has watched the progress of their patent system, that this limitation is practically disregarded already, and that it is to be repudiated so soon as it shall interfere with the protection of an important invention.

Yet in truth, there are few discoveries of practical moment to the daily concerns of man, even in the lapse of many years, that are not more or less directly connected with some department of manufacturing industry and skill. The convex lens, the steamboat, the iron road on which cars are propelled by the friction of driving-wheels—some of these may be so indirectly connected with manufactures—or, rather, they are associated so intimately with the leading pursuits and interests and enjoyments of all of us—as to make it difficult to refer them to the category of a particular manufacture. Would it not be strange, if, on this account, they were excluded from the benefits of the patent system? If we go back to the early story of our race, and mark the stages of its long and difficult advances, from language, the first exponent of thought, to letters, its first record, and from letters to printing, which first diffused letters, widely, though slowly, among men; and from printing to the telegraph, the electric register of thought, spreading its fibers of sympathy over the intelligent world, and making it throb simultaneously everywhere, as with the pulsations of one heart; who will say that the transition between these epochs, that signalize the moral and intellectual progress of mankind, should not be marked by a memorial as stately as the first clipping of a cut-nail, or the compounding of a new variety of liquid blacking; or that the men, to whom we owe them, should not be dealt with as liberally, or at least as justly by the state?

2. The second general subject of Mr. Morse's patent of 1840 includes many particulars; all of them interesting and valuable in connection with the claim we have just been considering. Taken together, they give a practical form to his leading invention, and guard it from the imputation of being a mere abstract notion—a principle resting in idea. Taken singly, some of them appear to us to be new; as his alphabet (claim 5), his combined series (claim 4), by which the electric current from one battery, before entirely expending itself in its lengthened circuit, is made to set another battery in action, from which another circuit traverses to a battery still beyond—and so onward; his adaptation of clock-work to the recording cylinder (claim 2), and others, are only new, as they are elements of a novel combination. There is no proof before us, that any of the devices, which Mr. Morse has claimed in this patent, whether as independent inventions or parts of a combination, are not really his as far as he has claimed them. It is unnecessary to discuss them in detail, for they are all substantially protected, as appliances of the art which is the great subject of his patent.

II. The second patent of Mr. Morse is for what has been termed his "local circuit." To understand the questions which arise upon this, it is necessary to refer back to the apparatus which he had patented before, and to explain in general terms its principle and modes of operation. I shall attempt to do this in popular language, without stopping to consider very carefully the varying niceties of scientific nomenclature.

It is well known that a current of galvanic electricity, while passing along a wire that has been wound spirally around a bar of soft iron, communicates to the iron a certain degree of magnetic virtue, and that the iron loses this magnetic character again as soon as the electricity ceases to pass along the wire that surrounds it. It is also well known that the electric fluid may be passed along a wire of great length, and yet retain, when at the farthest extremity of the wire, a sufficient degree of energy to impart this occasional magnetism to the iron, and to make it capable, for the time, of attracting any small body of iron that may be near it. If such a small body of iron be made to form the extremity of a nicely-balanced lever, it is plain that while the one extremity of the lever is attracted toward the temporary magnet, the other extremity will be moved in the opposite direction; and if to this other extremity we affix a pencil, or stylus, this will press upon whatever surface may be interposed in the way of its motion, and may either mark the surface, or, if it be of a yielding nature, indent it. It is plain, also, that when the bar of soft iron ceases to be magnetic, in consequence of the electric fluid ceasing to pass around it, the lever will take its original position, and the stylus cease to press upon the resisting surface.

If, now, we suppose that surface to be moved uniformly below the stylus, it is obvious that the surface will be marked with a straight line, and that this marked line will be interrupted during any intermission of the electric current, so as to form a broken series of straight lines, or if the electric current passes and intermits, in rapid alternation, a series of dots or points. These broken traces of the stylus, the lines and dots, constitute the alphabet of Mr. Morse—a certain succession of either or a certain combination of the two being arbitrarily chosen to indicate a particular letter.

The galvanic battery generates the electric fluid continuously, whenever the two extremes or poles of the battery are connected with a suitable conducting medium—such as a metallic wire, water, or with the earth itself—along which conductor, as it is called, the electric fluid may pass between one pole of the battery and the other, thus performing what is termed an "electric circuit."

Let us now extend a continuous wire from one of the poles of the galvanic battery to a distant point, taking care that it shall not be intermediately in contact with the earth, or with any other good conductor of electricity; and let us, at a distant point, pass a wire in a spiral coil around a bar of soft iron, and thence lead it back again into the other pole of the battery, or avail ourselves of the earth itself as a part of the circuit. It is obvious from what we have said before, that the electric fluid passing from the battery, along the wire, around the occasional magnet, and back to the battery—and then at appropriate intervals of time interrupted in its circuit—will cause the stylus to make its trace of lines or dots, or in other words, its alphabetical record, at the distant station.

It only remains then, to devise a mode of interrupting and renewing at pleasure, the flow of the electricity; "breaking and closing the circuit," in the language of the experts. This is done by dividing the wire near the battery, and then arranging a simple finger-key, which, when struck or pressed upon by the finger, brings a short metallic conductor into intimate contact with the two ends of the divided wire, and thus restores the continuity of the circuit while the pressure continues on the key. This may serve as a rude explanation of Mr. Morse's electro-magnetic telegraph, in its simplest form.

It was found, however, during an early period, that though the electric current was still appreciable after it had passed over a great length of wire, yet in traversing the very long circuits that were required to include distant telegraphic stations, it ceased to impart a sufficient degree of energy to the temporary magnet to work the stylus effectively. To meet this difficulty, Mr. Morse resorted to the simple device of employing a series of batteries, distributed over his line of telegraphic communications, with as many shorter circuits, each operating, by means

of a magnet at its extremity, to control the movements of a small lever, that opened or closed the circuit of the battery beyond. The last battery gave efficiency to the recording apparatus at the distant station. This formed the combined series of Mr. Morse's first patent.

It is easy to see that the intermediate magnets of the combined series, besides opening and closing the circuits, might be also made to act as recording magnets, by merely adapting to them the stylus with its appendages; and that there would thus be as many stations of telegraphic communication as there were batteries and minor circuits. But there still remained this objection to the combined series, that it could only be worked in one direction, and that it was necessary, therefore, to have two complete lines of wires, with their batteries and magnets, in order to establish a reciprocating communication.

To dispense with this duplication of machinery and expense was the object of Mr. Morse in the invention which is the subject of his second patent. It had been found that the magnetism excited by the electric coil was capable, at the end of an almost indefinitely extended circuit, of giving motion to a delicately adjusted lever, but that this was the apparent limit of its dynamic power. A single wire might be employed then, without intervening magnets, by connecting it at the extremities with electro-magnets, of great sensibility of mechanism, and employing the force of those magnets merely to open short local circuits, from which local circuits the degree of magnetic energy adequate to the purposes of the recording apparatus could be derived.

But the electric current, after passing over a long wire, does not exert a uniform dynamic energy. However carefully insulated at first, the wire becomes, after a time, more or less exposed to atmospheric action, and the fluid is more or less dissipated in consequence. The posts on which it is supported become conductors during storms of rain, and carry off the fluid to the earth. Under other circumstances the electro-magnetic phenomena are exaggerated at the receiving station by atmospheric electricity from the regions through which the conducting wire has passed. The batteries, too, do not always generate the fluid with the same rapidity. In a word, the current at the extremity of the circuit is irregular.

And besides all this, it is found that the magnetism induced in soft iron by the electric current, though truly occasional, does not absolutely cease at the instant of breaking the circuit; but seems to linger in the iron for an appreciable interval of time afterward, with an intensity which, though slight, bears an apparent relation to the intensity of the current that produced it. This of itself would interfere greatly with the very rapid operation of the telegraph, if the lever were left to withdraw itself from the magnet, to which it serves as an armature, by the force of gravity alone. A small spring is therefore connected with the machine, of sufficient strength to overcome the attraction of this lingering or continuous magnetic force, but not sufficient to resist the attraction of the magnet when the circuit is closed.

Now it is apparent that under the varying circumstances that influence the magnetic energy at the further extremity of the circuit, the adjustment of this spring must not be uniform. If its tension were just that which would neutralize or barely overcome the continuous magnetism induced by an electric current of small intensity, it would not draw back the armature when the inducing current had been in greater force; and on the other hand, a stronger spring, adapted to the case of a powerful current, would oppose a controlling resistance to the magnetism induced by a feeble one. The "adjustable receiving magnet," described in Mr. Morse's second patent, meets perfectly the conditions of this difficulty, and enables the operator, by the mere touch of a finger on an adjusting screw, to regulate the tension of the spring, and adapt his apparatus to the circumstances of the moment.

The main line, thus arranged, with its delicate receiving magnet, and its short recording circuit at each extremity, made no provision for intermediate or collateral stations. But, as it had been found desirable in practice to distribute the batteries, in which the electric fluid was generated, over different parts of the line, so as to reinforce the energies of the current in its progress, it was almost an obvious suggestion to connect at these several points a receiving magnet of adjustable character, either with the main line or with the battery, forming part of it, and to attach to this receiving magnet a local registering circuit, or a branch circuit, leading to one or more collateral stations.

Such I understand to be Mr. Morse's local or independent circuit. His patent of 1840, as reissued in 1848, claims it in these words: "The employment in a certain telegraphic circuit, of a device or contrivance called the 'receiving magnet,' in combination with a short local independent circuit or circuits, each having a register and registering magnet, or other magnetic contrivances for registering, and sustaining such relation to the registering magnet, or other contrivances for registering, and to the length of circuit of telegraphic line, as will enable me to obtain, with the aid of a main galvanic battery and circuit, and the intervention of a local battery and circuit, such motion or power for registering as could not be obtained otherwise without the use of a much larger galvanic battery, if at all."

That the local or independent circuit, as we have described it, and as it is more ac-

curately and, perhaps, more intelligibly set out by Mr. Morse, in his specification, was original with him, can not be seriously questioned. The devices referred to in the patents of Cooke and Wheatstone, and Davy, are at best imperfect modifications of the combined series of Mr. Morse's first patent; one of them not improbably borrowed from it. The adjustable receiving magnet, the indispensable and characteristic element of the local circuit patent, no one has claimed but himself.

It is only to make the first approach to a controversy on this point, to prove to us that Professor Henry had, as early as 1828, made the "intensity magnet," with which the scientific world is now familiar—or that he afterward, and before Mr. Morse's first application for a patent, had illustrated, before his class at Princeton, the manner in which one circuit could operate to hold another closed or to break it at pleasure—or that he had foreseen the applicability of his discoveries to the purposes of a telegraph. The question is not one of scientific precedence; and if it were, this is not a forum that could add to or detract from the eminent fame of Mr. Henry. It is purely a question of invention applied in a practical form to a specific use; and so regarded, it admits of but a single answer.

In passing from the questions of originality and identity of invention that have been raised in the cause, without a more detailed review of all the testimony, there is occasion, perhaps, for an explanatory remark. It is this: the decree of a judge finds its appropriate and only justification in the facts proved before him, not in theories, however ingenious, or the less speculative inferences of other minds; and where the essential facts of a case are as clearly established as they are here, it would be unprofitable as well as painful to discuss the particulars of variance between the witnesses. There is no place in which the evidence of scientific men, upon topics within their own departments of knowledge, is more to be desired than in this court, when sitting for the trial of patent causes; and the opinions also of such men, when duly supported by reasonings founded on ascertained fact, must of course be valued highly. But it is a mistake to suppose that, even on a question of science, opinion can be dignified here or elsewhere with the mantle of authority. Still less can we allow it to avail us here, when it assumes contested facts, or volunteers to aid us in determining the most important written instruments.

These remarks are not dictated by a spirit of unkind or uncourteous commentary on the depositions before us. We know that when opinion is active, it is not always easy to limit its range. There is, besides, very much of accurate scientific history, and of just and well-guarded deduction from it, in these two volumes of exhibit. But it must be confessed also, that there is to be found here and there not a little of imperfectly considered dogma, as well as something of doubtfully regulated memory—and it has seemed to us, in this case, as well as in some others, that the toil and expense and excitement of litigation might have been moderated perhaps, if the appropriate tone and province of testimony had been more exactly understood by some of the witnesses.

The objections which have been taken to the terms of the reissue of Mr. Morse's patent of 1846, may be answered by a simple reference to that part of our opinion in which we have considered the arguments of the same character that were urged under the patent of 1840.

It is beyond controversy, that the local circuit patent has been infringed upon at some of the stations of the respondents' line; and it is the opinion of the court, that it is also violated whenever the branch circuit of Mr. Rogers is employed. We have not been able to see the asserted difference in principle between the two devices. Both are equally well described as branch or as local circuits. They have the same purpose; they effect it by the same instrumentality, even in appearance to a great degree, and they seem to vary only in this: that the one derives its electric fluid from a battery placed within the line of the main circuit; the other from a battery placed without it. The change may be for the better; or it may not—if it be, it is patentable as an improvement; but it can not be used without Mr. Morse's license, until after his patent has expired.

III. The third patent is for the chemical telegraph. We do not propose to enter on the discussion of this. The subject of it is clearly within the original patent of Mr. Morse, if we have correctly apprehended the legal interpretation and effect of that instrument. We will only say, that we do not hold it to have been invalidated by the decision of the learned chief justice of the District of Columbia, on the question of interference. The form of the two machines before him was not the same; and the leading principle of both having been already appropriated and secured by the magnetic telegraph patent of 1840, nothing remained but form to be the subject of interference.

The counsel for the complainants will be pleased to prepare for the consideration of the court, the draught of a decree in accordance with the prayer of their bill.

Decree accordingly.

[NOTE. For other cases involving this patent, see note to Smith v. Ely, Case No. 13,043.]

FRENCH (SHOEMAKER v.). See Case No. 12,800.

FRENCH (SOMMERVILLE v.). See Case No. 13,173.

FRENCH (STEWART v.). See Case No. 13,427.

Case No. 5,103a.

FRENCH et al. v. The SUPERB.

[19 Betts, D. C. MS. 1.]

District Court, S. D. New York. April 28, 1851.

ADMIRALTY—DISTRIBUTION OF PROCEEDS OF SALE OF VESSEL—PRIORITY.

[1. Where demands against a vessel are of like character, without intrinsic priority of privilege, as for advances, repairs, materials, labor, etc., the parties are to be classed in payment out of the proceeds in the order of bringing their suits, while creditors holding the higher privilege, as seamen, pilots, and bottomry lenders, are to have priority without regard to time of bringing their suits, where the validity of their claims is conceded or decreed.]

[2. To impound a fund in admiralty until a decision can be had upon the validity of a contested claim, the creditor must have sued out attachment or pleaded his lien to an antecedent action. The presentation of a bottomry bond and petition under it is not sufficient.]

[3. Questions as to the validity of bottomry claims will not be entertained on motion and notice.]

[4. Creditors having obtained decrees against the proceeds of a vessel, where bottomry creditors come in and arrest the fund, may make themselves parties and contest the bottomry claims.]

[These were libels in rem by Charles F. French and others against the bark Superb.]

BETTS, District Judge. Various libels have been filed by different parties against the vessel, and she has been sold under decrees obtained thereon, and the proceeds are now in court. Application is made for the direction of the court as to the order of priority to be observed in distributing those proceeds. It is only necessary that the court shall lay down the general principle which is to govern the clerk and parties in drawing the funds from the registry and apportioning them on the respective decrees; and I shall not, therefore, go over the pleadings to determine in what class the several demands are to be ranged.

When the demands are of like character, without intrinsic privilege, the parties are to be classed in the order of bringing their suits. Accordingly, creditors for advances, repairs, materials, labor, etc., supplied the vessel, are to be paid each in full in the order of commencing their suits. Creditors holding the higher privilege, as seamen for wages, pilots, and bottomry lenders, are to have a priority of payment out of the fund, without regard to the time their suits were instituted, provided the validity of their claims is conceded by the other parties or is decreed by the court. But if demands of that character are in contestation, then they are not to be regarded if presented only by way of petition. To impound the fund until a decision can be had upon the validity of the claim, the creditor must have sued out his attachment and placed the fund under its control, or at least have pleaded his lien to the antecedent action. If the fund stands attached on any demand of that character, no distribution can be had until the attachment is regularly discharged, on the hearing upon the merits in the suits which may be in contestation, or on motion because of the invalidity upon its face of the alleged lien, or because of some irregularity in enforcing it. A creditor holding a bottomry bond cannot stay the distribution to the creditors of an inferior degree, merely by presenting his bond and petitioning under it. He should at least have come in by answer to their suits, or, which is the regular course, have arrested the vessel or her proceeds, so that the other creditors could have the opportunity to take issue upon his claim and have its validity determined by the court. Such questions wi l not be entertained on notice and motions merely. If, after decrees rendered in favor of any of those parties, bottomry creditors come in and arrest the fund, it is competent for those having obtained decrees to make themselves parties and contest the validity of the bottomry demand. These principles will determine whether the fund is now in a situation which allows of an immediate distribution to any of the parties having obtained their decrees. It is sufficiently indicated already that the prosecuting creditors are not to take pro rata upon their debts, but have a right to full payment in the order of their respective actions, subject only to the stay by any bottomry demands which have actually attached the fund.

Case No. 5,104.

FRENCH v. TUMLIN.

[10 Am. Law Reg. (N. S.) 641; 14 Int. Rev. Rec. 140; 6 Am. Law Rev. 367.] [1]

Circuit Court, N. D. Georgia. 1871.

JUDGMENTS — COURTS OF STATES IN REBELLION—DEBT FOR SLAVES—CONSTITUTIONAL LAW —OBLIGATION OF CONTRACTS.

[1. A judgment of a state court of Georgia, rendered in a civil suit between citizens of the state during the war of the Rebellion, is valid as between the parties.]

[2. The provision of the Georgia constitution of 1868 (article 5, § 17), that the courts shall have no jurisdiction to enforce a debt, the consideration of which was a slave or slaves, or the hire thereof, is void, as impairing the obligation of contracts, so far as it relates to contracts made before the emancipation proclamation.]

This was an action of debt [by Jefferson C. French against Lewis Tumlin] on a bond

[1] [6 Am. Law Rev. 367, contains only a partial report.]

conditioned for the payment of a judgment obtained by one Chisolm (whose assignee plaintiff was) in the inferior court of Cass (now Bartow) county, November 25th, 1861, but stipulating that "if the state convention, to be held in December, 1867, or any state legislature, shall pass any resolution, ordinance, act, or law that shall relieve defendant from his constitutional and legal liability to pay said judgment, or any part thereof, then defendant is to be relieved and discharged from complying with said obligation in the same way and manner, and to the same extent, that he is relieved and discharged from the payment of the judgment," &c. Defendant pleaded among other things that there was no consideration for the bond, because the judgment therein mentioned was utterly void, being rendered while the sovereign authority of the state was displaced and its constitutional government overthrown, and whilst its functions were usurped by a spurious and revolutionary government; and that said judgment was rendered by and under said spurious and revolutionary government, and was for the price and purchase-money of slaves, and for no other cause; that plaintiff took said bond with notice of these facts, and that he paid no value for the same, &c. To this plea there was a replication and to the replication a special demurrer, but these are not necessary to notice in the view taken by the court.

Akin, Hammond & Son and Mr. Dougherty, for plaintiff.

Mr. Bleckley, for defendant.

ERSKINE, District Judge. The obvious intention of the plea is to show that there was no consideration for the making of the bond; and, under the Code, want of consideration is a good defence. The object and design of the other matters stated in the plea are, that the judgment is a nullity, because it was rendered in this state whilst the rightful government was overthrown, and its place usurped by a spurious authority; but if not void for that reason, then it was void because it was rendered upon an undertaking which cannot be recognised or enforced in this court, the price and purchase-money of slaves. The other branches of the plea may be passed over for the present. It is to the substantial elements alone of the plea that the court must look in giving judgment.

There is nothing indicated in the plea going to show that the defendants, or either of them, in the action brought by Chisolm in the inferior court of Cass (Bartow) county, had no notice of the action, or that they questioned the jurisdiction and had their plea overruled, and had no further remedy, or that for good reasons they did not appear and defend. And I find nothing in the record before me which states, or from which it can be inferred, that defendants in that suit were not citizens of Georgia, and one or both of them resident of Cass county, when the proceedings were instituted.

Had the inferior court, pending the action in 1861, jurisdiction of the parties and subject-matter of the suit brought by Chisolm against Fields and Tumlin, and if so, was the judgment for the purchase-money of slaves valid? and if valid, then can this court recognise it now, and if necessary enforce it? Neither of these inquiries is free from embarrassment. I learn that these or similar questions now stand for argument on error or appeal before the supreme court of the United States. And had they not risen here, during the progress of a trial at bar, I would have deferred judgment and awaited the decision of the supreme court. But as they are directly presented by the pleadings, I will pass upon them—not with hesitancy in the performance of a duty, yet not without diffidence in my ability to perform it well. I shall be as brief as possible in my remarks.

Looking to the first specific clause in the plea, that the judgment rendered on the 26th of November, 1861, was void, for the reason that it was pronounced during the Rebellion, I refer to the case Cuyler v. Ferrill [Case No. 3,523]. A suit had been instituted in 1862 or 1863, by certain heirs, through guardians, in the so-called superior court of Chatham county, in this state, to partition land. One of these heirs was a citizen of Alabama, the other of Georgia; but Dr. Cuyler, another heir, was a citizen of Pennsylvania, and, at the time the suit was pending, a surgeon in the national army. He was notified, in accordance with the statutory laws of Georgia, by publication, to appear and defend. He did neither. The court ordered the property, as it could not be equitably divided, to be sold, and Cuyler's share of the proceeds invested in Confederate bonds, which was done. The other heirs received their moiety in Confederate treasury notes. After the war, Cuyler filed his bill against Ferrill, who had purchased the property, and the other heirs, to set aside the proceedings. And I decreed them to be, so far as they concerned Dr. Cuyler, utterly null and void, because that tribunal had no jurisdiction of him or his estate. But as to the position of those heirs who had voluntarily sought the aid of that court, I declined to express any opinion. Had it been a point absolutely necessary for decision, I apprehend that I would have been warranted in holding that they or their guardians (as the case might be) were by their own voluntary act estopped from denying the validity of the proceedings in the so-called superior court. In 1868 the supreme court of the United States, in Texas v. White, 7 Wall. [74 U. S.] 700, said: "It is not necessary to attempt any exact definition within which the acts of said state (Texas) government must be treat-

ed as valid or invalid. It may be said, perhaps, with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts * * * providing remedies for injuries to person and estate, and other similar acts which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government." I think that the court meant to employ the term "remedies" in the ordinary legal and judicial sense, and did not intend to confine it to the redress of torts and injuries alone, but that it should also apply to the enforcement of contracts. I do not think that the judgment is void for the first special cause alleged in the plea.

The next fact stated in the plea is, that the judgment was for the price and purchase-money of slaves and for no other cause whatsoever. Is the judgment invalid for this reason? The opinions which I have always entertained on the subject of slavery—the buying and selling of human beings like sheep in the shambles—must be here laid out of view; for it is the duty of the judge to declare the law of the case before the court, and to forget, while discharging his official duties, his own private opinions. Time will not permit me to give a full exposition of my views on this question. Therefore, in brief, if the contract was for the price and purchase-money of slaves, and that contract was the immediate subject of the action upon which the judgment of the 25th of November, 1861, was founded, the judgment, when rendered, was, in the opinion of this court, valid. But it is said that even if valid then it is not so now, or if valid now it cannot be recognised, or (if necessary) enforced by this court; and the first paragraph of section 17, art. 5, of the state constitution of 1868 is referred to. It is as follows: "No court or officer shall have, nor shall the general assembly give, jurisdiction or authority to try or give judgment on or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof." The word "judgment" is not in this paragraph, but it is necessarily included in the term "debt," a judgment being but a debt of record—a chose in action—and in this state negotiable by endorsement or written assignment like bills or promissory notes; but the transferee takes it "subject to the same equities and defences as the original plaintiff in judgment was." This provision of the constitution has been before the supreme court of the state on more than one occasion. The leading case, however, is Cobb v. Shorter, 39 Ga. 285. The opinion of the court (Warner, J., dissenting) was delivered by Chief Justice Brown. Shorter, as bearer, sued Cobb upon a promissory note made in 1861, and payable twelve months thereafter; the note was given for slaves, and the court below dismissed the action for want of jurisdiction, and the supreme court of Georgia affirmed the judgment.

I here remark that it was in accordance with certain acts of congress that the state convention was called. A constitution was framed and submitted to congress, and certain portions of it were stricken out by congress. But the provision which I have just read was allowed to remain. On this matter the chief justice in his opinion says: "But it is the constitution as amended and approved by the congress of the United States, by virtue of their authority as the conquering power, to dictate a form of government to the conquered, which is accepted by the people of the state as an act of obedience to the conqueror, and not as a matter of will or sanction." He afterwards says, "that congress is presumed to have sanctioned every word and line of it which, upon examination, congress did not, while amending it, require to be stricken out or changed." From these propositions the chief justice draws the following corollary: "The state has not pretended to destroy the obligation of this class of contracts. She has simply said, with the sanction of congress in forming her new government, that her (the state's) courts shall have no jurisdiction to enforce them." In Luther v. Borden, 7 How. [48 U. S.] 42, the court said that "it rests with congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, congress must necessarily decide what government is established in a state, before it can decide whether it is republican or not." This question is wholly political, its determination belongs exclusively to congress, and, therefore, it is in no wise judicial in its nature. And it must not be forgotten that the executive, judicial, and legislative departments of the United States, though co-ordinate branches of the government of the nation, are, in their powers and functions, separate and distinct. In rejecting certain provisions in the constitution of the state, or in allowing that relating to the inhibition placed upon the courts to take jurisdiction of debts, the consideration of which was a slave or the hire thereof, congress did not, I apprehend, in any wise mean to interfere with the constitutional powers and functions of the judiciary department of the government, any more than the judiciary would assume to control the admission to congress of senators or representatives. I cannot think otherwise than that congress intended to leave the interpretation and construction of that provision in the state constitution exclusively and absolutely with the courts. This provision does not declare that contracts for the purchase of slaves shall be void, but that the courts shall not have jurisdiction or authority to enforce them. Does it, then, contravene any portion of the 10th section of the 1st article of the constitution of the

United States, which declares that "no state shall pass any bill of attainder or ex post facto law, or law impairing the obligation of contracts?" In the case of Cohen v. Virginia, 6 Wheat. [19 U. S.] 414, the court said, that "the constitution and laws of a state, so far as they are repugnant to the constitution of the United States, are absolutely void." And in Cummings v. Missouri, 4 Wall. [71 U. S.] 277, the court, Mr. Justice Field delivering the opinion, declared certain parts of the constitution of the state of Missouri null and void, because they were in contravention of the 1st and 2d clauses of this section.

I will now endeavor to ascertain and determine whether this provision in the state constitution impairs the obligation of contracts. For this purpose the case of Von Hoffman v. City of Quincy, 4 Wall. [71 U. S.] 535, may be relied upon, containing, as it does, a clear and exact exposition of this most important subject. Mr. Justice Swayne, in delivering the opinion of the court, said: "It is also settled that the laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. Without the remedy, the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the constitution against invasion. It is competent for the states to change the form of the remedy or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired." Applying these citations to the provision in the state constitution now under consideration, it will become obvious that it is in direct conflict with the 10th section of the 1st article of the constitution of the United States; indeed, it is not only an impairment of the obligation of the contract, but a denial of all remedies. And, in the language of Mr. Justice Swayne, "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist." Von Hoffman v. City of Quincy, 4 Wall. [71 U. S.] 554. If contracts, entered into previously to the promulgation of the president's proclamation of emancipation, the consideration of which was the price and purchase-money of slaves, were then valid under the laws of the United States and of the state of Georgia, the aid of the courts must be given, if demanded, to enforce them. But if such contracts were invalid, the provision in the state constitution is mere surplusage. There must be judgment quod recuperet on this plea.

Case No. 5,104a.

FRENCH v. TUNSTALL.

[Hempst. 204.] [1]

Superior Court, Territory of Arkansas. July, 1832.

PLEADINGS — GENERAL DEMURRER — JUDGMENT — DEBT OR COVENANT.

1. On a general demurrer, unless for misjoinder of actions, judgment must be given for the plaintiff, if there is one good count in the declaration.

2. Debt or covenant is the appropriate remedy on a writing obligatory.

Appeal from Chicot circuit court.

[This was an action at law by Robert W. French, assignee of Joseph Henderson, against Thomas T. Tunstall.]

Before JOHNSON and CROSS, Judges.

OPINION OF THE COURT. The declaration contains two counts. The first is the common count in an action of assumpsit for money lent and advanced by the plaintiff to the defendant. The second is also in the form of a count in assumpsit, upon a promissory note under seal. The defendant filed a general demurrer to the declaration, which was sustained by the court, and judgment rendered in his favor, from which the plaintiff has appealed to this court.

If the declaration contains one good count, a demurrer to the whole declaration will not be sustained, unless there is a misjoinder of actions. The first count is in assumpsit, and is clearly a good and valid count. It is equally clear that the second count is also in the form of a count in the action of assumpsit. It is true that the cause of action set out in the second count will not support an action of assumpsit; debt or covenant being the appropriate action upon a writing obligatory. But because the second count is faulty and defective, and might have been reached by a general demurrer, it does not follow that it is a count in debt, although it states a cause of action for which debt is the appropriate remedy. We are of opinion, then, that there is no misjoinder of actions, notwithstanding the second count is palpably defective, and sets out no cause of action for which assumpsit will lie. The first count being good, the demurrer to the declaration should have been overruled. The case of Judin v. Samuel, 1 Bos. & P. (N. R.) 43, is, in principle, analogous to the present case. The declaration contained three counts. The first was in trover for bills of exchange, and the second and third counts, after stating the delivery of the bills to the defendant, in order that he might get them discounted for a certain commission, and his having got them discounted, stated that he converted and disposed of the money to his own use. The defendant demurred generally, on the ground of a misjoinder of tort and contract;

[1] [Reported by Samuel H. Hempstead, Esq.]

the subject of the two last counts being matter of contract; but the court held, that, on a general demurrer, as all the counts were in the form of tort, judgment must be for the plaintiff if any one count was good. We think the principle decided in the above case is decisive of the case now before the court. Judgment reversed.

FRENCH (UNITED STATES v.). See Case No. 15,165.

Case No. 5,105.

FRENCH v. VENABLE.

[2 Cranch, C. C. 509.] [1]

Circuit Court, District of Columbia. Jan. 6, 1825.

ACTIONS—DISCONTINUANCE—REINSTATEMENT—ENTERING APPEARANCE ON DOCKET OUT OF COURT.

1. The court will not reinstate an action of replevin which has been discontinued, at a preceding term, for want of the appearance of the defendant, unless the omission to enter the appearance was by neglect of the clerk.

[Cited in Reiling v. Bolier, Case No. 11,671.]

2. An appearance cannot be entered upon the docket, out of court.

Mr. Hall, for defendant, moved to reinstate this action of replevin, it having been discontinued at the last term by the non-appearance of the defendant. The defendant's affidavit stated that Mr. Caldwell, ever since the death of Mr. Bates, had acted as the counsel of his executors. That the writ, in this cause, was returnable to the last term. That Mr. Caldwell was specially employed to defend it, and that the defendant was, until otherwise informed by Mr. Wallach, under a firm impression that Mr. Caldwell had entered his appearance for him. That just before the court, upon hearing that his impression was erroneous, he desired Mr. Hall to enter his appearance, and was assured that he had done so. Mr. Hall made affidavit, that after the adjournment of the court, in June, and before the expiration of the term, he called at the clerk's office, and, upon finding that no appearance had been entered for the defendant, "he ordered his appearance," "and supposed, until the beginning of this term, that it had been done."

Mr. Key, for plaintiff.

Mr. Hall, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent) refused to reinstate the cause, saying that an appearance could not be entered in the office; and the clerk was not bound, upon such a verbal order, to make the entry in court, at the adjourned session of the court, although it was, in law, the same term. The court has uniformly refused to reinstate such cases unless the omission to enter the appearance was by neglect of the clerk, and referred to the case of Williamson v. Bryan, at April term, 1823 [Case No. 17,751], and several other cases in this court.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 5,106.

FRENCH v. The VICTORIA.

[31 Leg. Int. 293; [1] 10 Phila. 292.]

District Court, D. New Jersey. Aug. 7, 1874.

COLLISION BETWEEN SAILING VESSELS — SAILING RULES—DIVISION OF DAMAGES.

1. The Hazel Dell and Victoria—two sailing vessels close hauled and having the wind on different sides—were beating up a narrow inlet against a head wind, when a collision took place. *Held*, that by the 12th and 17th articles of the rules and regulations for preventing collisions (13 Stat. 58) it was the duty of the Hazel Dell—the wind on her port side and being the overtaking vessel—to give way and to keep out of the way of the Victoria.

2. Whilst by the 18th article the Victoria, under ordinary circumstances, was entitled to hold her course, she was bound by the 19th article, from the special circumstances of the particular case, to depart from the rule in order to avoid the immediate danger.

3. The evidence brought the case within the principles of The Maria Martin, 12 Wall. [79 U. S.] 31, and the damages caused by the collision should be divided equally between the libellant and respondent.

In admiralty.

A. Flanders, for the Hazel Dell.

Elias L. Boudinot, for the Victoria.

NIXON, District Judge. This is a libel in rem by Hiram E. French, master of the schooner Hazel Dell, for himself and owners, against the schooner Victoria, to recover damages for a collision. The libel sets forth that on the 6th of September, 1873, at about 8 o'clock in the morning, the schooner Hazel Dell, in proceeding from the port of New York, in ballast, to the port of Tuckerton, New Jersey, entered the inlet of Little Egg Harbor; that the captain and all the crew were on deck and observed the Victoria with all her sails set sailing up the said inlet towards the Hazel Dell, and thereupon the captain and others of the crew called several times loudly to the crew of the Victoria and desired them to keep clear of the Hazel Dell; that although there was sufficient room for the Victoria to pass she kept on her course with the wind and tide, and with violence ran foul of and on board the Hazel Dell, breaking her boom, tearing her mainsail, and damaging her yawl boat; that at the time of the said collision it was impossible for the Hazel Dell to get out of the way of the Victoria, because she was properly on her way and on her starboard tack; had just gone about to avoid collision and had not gathered way; that there was room enough for the Victoria to steer clear of and

[1] [Reprinted from 31 Leg. Int. 293, by permission.]

pass by the Hazel Dell, and that the damage was caused by the captain of the Victoria not heeding their calls and making proper efforts to avoid the collision. John Rose intervenes as owner, and answers, acknowledging the collision at the time and place stated in the libel, but alleges that it occurred without fault of those in charge of the Victoria, and entirely from the negligence and unskilfulness of those in charge of the Hazel Dell. He states the collision to have occurred as follows: The schooner Victoria was beating up Little Egg Harbor inlet, at or about 8 o'clock in the forenoon of the 6th day of September, 1873, and having both the wind and tide ahead or adverse. The schooner Hazel Dell entered the inlet after the Victoria, and sailed up the said inlet astern of her. The Victoria having reached a very narrow place in said inlet known "as the Point of Sods," where the channel is about two hundred feet wide, was sailing across the same, having her port tacks aboard (that is to say, heading towards the right hand side of the channel on her way up the same,) and was close hauled to the wind when the Hazel Dell sailed close up to her under her port quarter, and thereby forced the Victoria to go almost aground before changing her tack in order to avoid a collision with the Hazel Dell head on; that the Hazel Dell, after thus driving the Victoria almost ashore, and when it became necessary for the Victoria to go about to avoid going on the breakers, which were at that time right under her bows, did not change her course as it was her duty to do, but kept on the same and came nearly abreast of the Victoria on her port side, and so close to her as to leave no room for the Victoria to turn without coming foul of the Hazel Dell. Those in charge of the Victoria being in this perilous condition in which they were placed entirely by the fault of those navigating the Hazel Dell as aforesaid, took all the precaution possible to avoid a collision consistent with safety to their vessel, and went about, put the helm hard to starboard, and endeavored to avoid a collision by letting the Victoria pay off before the wind and go clear of the Hazel Dell and astern of her, but the Hazel Dell having placed herself in the position above described it was impossible for those in charge of the Victoria to avoid a collision of the jib-boom of the Victoria and the after lash of the mainsail of the Hazel Dell.

I have carefully examined the testimony taken and am of the opinion that if the captain of the Victoria when he first became aware of the danger of a collision had put his helm a starboard, slackened his peak and raised his centre board, he would probably have passed to the stern of the Hazel Dell; and that the collision occurred because he kept his course too long before he tried that method to avoid it. I am further of the opinion that if he had put his helm hard a lee and brought the Victoria into the wind no damage would have been done. The case, therefore, turns upon the single question whether the Victoria was entitled under the circumstances to hold her course. And this question is determined by the provisions of an act, entitled "An act fixing certain rules and regulations for preventing collisions on the water," approved April 29, 1864 (13 Stat. 58), and which was only the adoption by congress of the "Rules and Regulations" promulgated by order in council, January 9, 1863, issued under and by virtue of the British "Merchant Shipping Amendment Act" of 1832. The articles applicable to this case are the 12th, 17th, 18th and 19th; the first and second named referring to the duties of the Hazel Dell; the third to the Victoria, and the last, under special circumstances, to both. The 12th article prescribes, that "when two sailing ships are crossing so as to involve risk of collision, then if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard, except in the case in which the ship with the wind on the port side is close hauled and the other ship free, in which case the latter ship shall keep out of the way." I find no evidence to bring the case before me within the exception. Both vessels were close hauled, beating against the wind, in a narrow channel, were crossing so as to involve risk of collision, having the wind on different sides, and the Hazel Dell having it on her port side. By the 17th article "every vessel overtaking any other vessel shall keep out of the way of said last mentioned vessel." Both parties admit that the Hazel Dell was the overtaking vessel; that she entered the inlet some time after the Victoria, and was about passing her when they came in contact. By the express terms of both of the above articles, it was undoubtedly the duty of the Hazel Dell to give way, and to keep out of the way of the Victoria. It was not for her to assume that the Victoria would change her course, for the 18th article says, "that where one of two ships is to keep out of the way the other shall keep her course, subject to the qualifications contained in the 19th article." The rule of the road did not oblige, or even allow her to change, unless it became necessary in order to avoid immediate danger. The Hazel Dell, therefore, is not entitled to any compensation for the damages which resulted from the collision, unless it can be made to appear that there was something in the relative situation of the vessels, and wilfulness or want of skill in the management of the Victoria, which contributed to the accident, and which takes the case out of the general rules and brings it within the provisions of the 19th article. That article is in the nature of a proviso to save special cases, and prescribes that "in obeying and construing these rules due regard must be had to all dangers of navigation, and due regard must also be

had to any special circumstances which may exist in any particular case, rendering a departure from the above rule necessary in order to avoid immediate danger."

What is the correct interpretation of this article? Does it mean that when any special circumstances exist rendering a departure from the rules necessary in order to avoid danger, the parties may or must depart from them? If it were an open question in this court I should be inclined to say that it was a privilege accorded and not a command to be obeyed; that it allows either one or the other of the parties, in those emergencies, where adherence to the rules must result in collision, to depart from them, and to adopt such methods as good seamanship would suggest, to escape the imminent peril, but that even in such cases no obligation rests upon the party not in fault to depart from the rules in order to avoid what seemed at the moment to be the certainty of a collision. And I find on examination that I am sustained in this view by Dr. Lushington, in the case of The Eliza v. The Orinoco, reported in Holt, Rule of Road, 98. In his address to the elder brethren, after quoting the 19th article, he said: "Now, according to my view of that section, it is an exemption of persons who would otherwise be under obligations to obey the previous sections. In omitting so to do, viz., the effect of it would be this, that though they were directed to keep their course, yet if there was imminent danger, they would be justified in not keeping their course, provided they had a chance thereby of avoiding the certainty of a collision. But it does not appear to me this is a directory section at all, that tells parties they are to do this or that, or anything else; but they are released from the severe obligation of complying with all the terms of the previous sections, and they are released from that obligation by circumstances which would render obedience to them conducive to peril, while by deviation, they might escape from that peril."

But this does not seem to be the construction given to the article by the supreme court. It was held in the case of The Maria Martin, 12 Wall. [79 U. S.] 31, that even flagrant fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from adopting every precaution required by the special circumstances of the case to prevent a collision. Mr. Justice Clifford delivered the opinion of the court affirming the decree of the circuit court, which had divided the damage equally between the libellant and respondent on the ground that both parties were in fault, and as illustrating his view of the meaning of the 19th article he said: "Errors committed by one of two vessels approaching each other from opposite directions does not excuse the other from adopting every proper precaution required by the special circumstances to prevent a collision, as the act of congress prescribes that in obeying and construing the prescribed rules of navigation due regard must be had to the special circumstances rendering a departure from them necessary in order to avoid immediate danger."

Accepting this as the meaning, the only remaining inquiry is, whether the Victoria, although entitled to keep her course by the 18th article, was nevertheless inexcusable because she did not depart from it under the pressure of impending peril? She did depart from it at the last moment, but procrastinated too long to keep from coming in collision. When at the distance of about thirty or forty feet, and when, as the captains of both vessels agree, there was a certainty, without a change of course, of striking the Hazel Dell about midships, the helm of the Victoria was put to the starboard, whereby she bore away aft of the hull, but came in contact with her yawl boat and the end of her main boom, breaking the latter and tearing the mainsail. If this action had been taken sooner it is probable that she would have passed to the stern of the Hazel Dell and avoided her altogether. But that was not the departure from the rule which it seems to me good seamanship demanded. Why was not the Victoria put in stays? That was the most obvious movement which the circumstances of the vessel suggested. The case really appears to be this: that the captain of the Victoria knew enough of the rules of the road to know that he was entitled to his course, and that it was the duty of the Hazel Dell to keep out of the way. He had the slower craft, which is always an irritating fact to an ambitious captain, and he resolved in his own mind not to yield an iota of his strict legal rights to his more fortunate rival. This resolution was adhered to in the face of immediate danger, and until the collision was inevitable. According to the principle of The Maria Martin, supra, he ought "to have adopted every proper precaution required by the special circumstances to prevent a collision," without reference to the ordinary rules of navigation, and I think he came short in this respect in not porting his helm and bringing his vessel into the wind.

I have not overlooked the reasons which the captain of the Victoria has given for not doing so, viz., that he was so near the shore that there was danger of his getting on the breakers. The weight of the testimony was against this view of their situation. He acknowledged that he had gone about and had run at least two or three lengths of his vessel before the collision took place. Other evidence located them nearer the middle of the channel. But considering the daylight, the calm weather, the state of the wind and of the tide, there appears from his own admissions, room enough to have brought the Victoria in stays without peril. It hence results that the owner of the Victoria should

equally divide the damage caused by the collision with the Hazel Dell, which was also in fault. This view of the case renders it unnecessary for me to consider whether the claim of the respondent for damages for the detention of his vessel should be allowed. That question will properly arise when the defence prevails, and when the judgment of the court fixes no blame on the management of the defendant's vessel.

FRENCH, The D. M. See Case No. 3,938.

Case No. 5,107.

FRERE v. MUDD.

[2 Cranch, C. C. 407.] [1]

Circuit Court, District of Columbia. April Term, 1823.

BANKRUPTCY—ARREST ON DEBT DUE BEFORE DISCHARGE.

An insolvent debtor, arrested for a debt due before his discharge, can only be relieved by the court, or a judge of the court, before whom the process is returnable.

A writ of habeas corpus was issued to bring up the body of Mudd, who was arrested on a ca. sa. issued by a justice of the peace for a debt under $50. It was suggested, upon the return, that all the debt except $8 was due before his discharge under the insolvent act, and the court was now moved, under the tenth section of the act, to discharge him upon his paying the $8 and interest and costs. The execution was, under the act of congress of the last session (1st March, 1823), returnable before the justice. 3 Stat. 743.

THE COURT (nem. con.) refused to discharge him, because, by that section of the act, the power to discharge, in such cases, is given only to the court, or a judge of the court, to whom the execution is returnable.

Case No. 5,108.

FREREZ v. The GENESEE.

[This was a case of collision between two sailing vessels; the circumstances are set forth in 19 Hunt, Mer. Mag. 186, but the decision of the court is nowhere reported.]

FRERICHS (UNITED STATES v.). See Case No. 15,166.

Case No. 5,108a.

FRERICKS v. COSTER.

[17 Reporter, 168.] [2]

Circuit Court, S. D. New York. Jan. 19, 1884.

DEMURRER—TO SUPPLEMENTAL COMPLAINT—NEW YORK CODE—ADDITIONAL DAMAGES CLAIMED.

1. The Code of Civil Procedure of New York does not authorize a demurrer unless it is to the whole complaint or to a separate cause of action alleged in the complaint.

2. Where a supplemental complaint has been served alleging matters arising since the complaint which increase the plaintiff's damages but do not change the cause of action, a demurrer to such supplemental complaint will be stricken out.

On motion to strike out a demurrer. Defendant [Charles R. Coster] was collector of internal revenue and seized a still and other property of the plaintiff [Frederick Frericks] for alleged violations of the internal revenue law. The information was dismissed by the district court and a certificate of probable ["reasonable"] cause was refused, and this action was brought to recover damages for the wrongful seizure. Plaintiff by permission of the court filed a supplemental complaint alleging that the judgment and order of the district court were taken up by defendant for review [Case No. 15,166], and affirmed by the supreme court [106 U. S. 160, 1 Sup. Ct. 169], and that defendant had been put to additional expense thereby. The defendant demurred to the supplemental complaint on the ground that it did not state facts sufficient to constitute a cause of action.

Edward Salomon, for the motion.

Elihu Root, Dist. Atty., and H. E. Davies, contra.

WALLACE, Circuit Judge. The demurrer interposed by the defendant is not to the whole complaint or to any separate cause of action alleged in the complaint, and is, therefore, an unauthorized pleading. Code, § 492. The supplemental pleading of the plaintiff which is thus demurred to does not take the place of the original complaint; it avers facts arising since the original complaint which increase the plaintiff's damages but do not change his cause of action. It is a pleading in addition to the original complaint but not one in place of it, and is authorized by section 544 of the Code of Procedure. Motion granted.

[NOTE. Subsequently, the defendant moved this court for a certificate of probable cause of seizure, which was refused. Frericks v. Coster, 22 Fed. 637. A petition was filed in the court of claims by Frericks against the United States. Judgment was given for the plaintiff (21 Ct. Cl. 16), which was affirmed by the supreme court (U. S. v. Frericks, 124 U. S. 315, 8 Sup. Ct. 514).]

Case No. 5,109.

FRESE et al. v. BACHOF.

[13 Blatchf. 234; [1] Cox, Manual Trade-Mark Cas. 273.]

Circuit Court, S. D. New York. Jan. 10, 1876.

TRADE-MARKS—INFRINGEMENT—INJUNCTION.

1. The plaintiffs had a right to use, as a trade-mark, in connection with packages of a

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reprinted by permission.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

medical preparation put up and sold by them, and known as "Hamburg tea," the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," in an oval. The defendant had, at one time, sold his article of Hamburg tea in packages, with a label containing the name of "J. C. Frese & Co." Although he claimed to have discontinued the use of such label, *held*, that he had rendered himself liable to an injunction in that respect.

2. The plaintiffs also made a claim to the color of the wrappers and notices and directions tied up with the wrappers, and also to the general size and appearance of the packages in which they had been accustomed to sell their Hamburg tea, independently of such trade-mark or label. The defendant's packages were of the same size and general shape as those of the plaintiffs, and the color of the envelopes and of the printed notices and directions for use, tied up with the envelopes, was nearly the same; but the labels on the plaintiffs' packages contained, in a plain round label, the words "J. C. Frese & Co.," and, embossed in an oval, on an oblong white label, the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," while the defendant's labels contained, in a round white label, the name "Ed. Bachof & Co.," and, on an oblong white label, embossed in an oval, "Ed. Bachof & Co., No. 39, Hamburg." *Held* that, on this branch of the case, a preliminary injunction must be refused.

In equity.

Arthur v. Briesen, for plaintiffs.

Edwin M. Wight, for defendant.

JOHNSON, Circuit Judge. The plaintiffs have been, for a long time, accustomed to put up and sell a medical preparation known as "Hamburg tea," and have used, in connection with it, as a trade-mark, the words "J. C. Frese & Co., Hopfensack, 6, Hamburg," in an oval, applying it more commonly on a white label, in raised characters. I consider that their right to the use of this trade-mark, to distinguish the Hamburg tea sold by them, is established. It is shown that the defendant did, at one time, sell his article of Hamburg tea in packages, with a label containing the name of "J. C. Frese & Co.," and also with another white label bearing a strong general resemblance to the white label of the plaintiffs. Although he claims to have discontinued the use of these labels, he has, nevertheless, rendered himself liable to an injunction in that respect.

The plaintiffs, however, present a larger claim. This is to the color of the wrappers and notices and directions tied up with the wrappers, and also to the general size and appearance of the packages in which they have been accustomed to sell their Hamburg tea, independent of the trade-mark or label which has been already spoken of. The defendant's packets are of the same size as those of the plaintiffs; but this is because the quantity is what a purchaser usually desires. The general shape is the same; but this arises from the physical properties of the compound, which would most readily take that shape in being tied up for sale. The color of the envelopes, and of the printed notices and directions for use, tied up with the envelopes, is nearly the same, and might mislead, but for the printed or stamped label. Those on the plaintiffs' packets contain, in a plain round label, the words "J. C. Frese & Co.," and, embossed in an oval, on an oblong white label, the words "J. C. Frese & Co., Hopfensack, 6, Hamburg." The defendant's labels with equal distinctness, contain, in a round white label, the name "Ed. Bachof & Co.," and on an oblong white label, embossed in an oval, "Ed. Bachof & Co., No. 39, Hamburg." I am by no means clear, that, as the case stands, the plaintiffs have made out any appropriation to their own exclusive use of the colored wrappers and form of packages employed. On the contrary, in these particulars, I am inclined, upon the proofs, to the conclusion that both plaintiffs and defendant have employed the common method used in Germany for putting up medicinal teas. Nor do I find, nor have I been referred to, any case, in which, on such resemblances alone, apart from names or labels containing imitative matter, it has been held that an injunction would lie. These questions, however, it is not necessary, in this stage of the cause, to decide. To a preliminary injunction the plaintiffs are not, on this branch of the case, entitled. Neither party has any exclusive right in the article known as Hamburg tea, which appears to be a compound known in the German books of medicine; nor do the plaintiffs at present appear to have any special right in respect to the form, size and color of the packages, the labels upon which are sufficient to distinguish, even to a careless observer, the one from the other.

A preliminary injunction must issue against the defendant, restraining him from the use of the name of "J. C. Frese & Co.," and from that of the trade-mark, or label, "J. C. Frese & Co., Hopfensack, 6, Hamburg," on packages of Hamburg tea, and the residue of the injunction asked for is denied.

[NOTE. Subsequently, this injunction was made perpetual, and a further injunction granted in accordance with the prayer of the bill. See Case No. 5,110.]

Case No. 5,110.

FRESE et al. v. BACHOF.

[14 Blatchf. 432;[1] 13 O. G. 635; Cox, Manual Trade-Mark Cas. 346.]

Circuit Court, S. D. New York. March 22, 1878.

TRADE-MARKS—HAMBURG TEA—FORM AND STYLE OF PACKAGE—COLORED LABELS—INFRINGEMENT.

1. Where a bill was brought in the name and right of a firm, by a person claiming to be its sole member, to enforce its right to a method of identifying its wares, and it appeared that the right belonged to the firm, and that there was another member of it, who was not a party plaintiff, and the case was a meritorious

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

one, opportunity was allowed to bring in such other member.

2. The plaintiffs' firm had long been accustomed to pack a compound called "Hamburg Tea," in long cylindrical packages with pink wrappers, and to have a crimson paper of directions, and yellow ones of warning, tied in with each package, and their firm name printed across a white label within a circle pasted across the ends of the string, and the same embossed with the words "Hamburg, Hopfensack, 6," on another white label pasted on the package, so that the package, by its form and colors, would be at once known by its general appearance, without taking time to read anything on it; and their wares had come to be well known as theirs by the appearance of the packages. B. openly used such style of package and firm name to put up Hamburg tea. He then discontinued the use of the firm name, but continued to use the exact form and style of package, substituting his own name merely for that of the firm on the labels: *Held*, that, with the proper parties before the court, B. ought to be restrained by injunction from such use of the plaintiffs' symbols.

[Cited in Hostetter v. Adams, 10 Fed. 843; Coats v. Merrick Thread Co., 36 Fed. 327.]

In equity.

Arthur v. Briesen, for orator.
Edwin M. Wight, for defendant.

WHEELER, District Judge. This cause has been heard on bill, answer, replication, proofs and argument. The bill is brought by Christel F. H. Frese alone, claiming to stand upon rights acquired by a firm to methods of identifying their wares, of which he alleges himself to be now the sole member. The defendant does not admit any right to the orator, but leaves him to his proof. The proof shows Edward George Schroeder to be a member of the firm equally with the orator, and, whatever right it does show in respect to the matter of the bill, it shows to belong to the firm. As the case stands, the orator has no right to be protected in this form, and, if it should proceed to a decree, the bill would have to be dismissed. But, the bill is brought in the firm name and right, and has been litigated in that right, and the want of the other member is a defect that can be cured by amendment. Lewis v. Locke, 41 Vt. 11. Under such circumstances, where a case appears to be meritorious, it is not usual to proceed to a decree without affording an opportunity to amend upon some terms. Story, Eq. Pl. § 236. This consideration makes it necessary to inquire into the merits of this case.

The orator's firm have not any patent on the compound called "Hamburg Tea." The manufacture and sale of that article are open to all persons. Nor is it in the bill directly alleged, nor does the bill appear to proceed on the ground, that this name was appropriated and used by them to identify their production. So, for aught that appears, all persons are at liberty to apply that name to their own manufactures. The proof shows clearly that the name of the orator's firm has long been used in this business, and that the wares of the firm, of this sort, came to be known by it. It also shows, that this firm is a successor of the former one. Whether it is or not is a question of fact, and this fact could be and has been established by parol proof. The trade-marks of the firm were partnership property, and would pass to the successors. Colly. Partn. (6th Ed.) § 117, note. The defendant does not claim the right to use the firm name of the orator's firm, nor their registered trademark, and there is no question made about those. But the orator claims that his firm and their predecessors have long been accustomed to pack this article in long cylindrical packages, with pink wrappers, and to have a crimson paper of directions, and yellow ones of warning, tied in with each package, and their firm name printed across a white label within a circle pasted across the ends of the string, and the same embossed with the words "Hamburg, Hopfensack, 6," on another white label pasted on the package, so that the package, by its form and colors, would be at once known by its general appearance, without taking time to read anything on it; and that their wares have come to be well known as theirs by the appearance of the packages. They have the exclusive right to sell their wares as their own, and no other person has any right, by any means, to palm off any other wares than theirs as theirs. And, if any person does utter any other wares than theirs as theirs, an action at law would lie. And, whenever there is danger that this would be done so often as to occasion multiplicity of suits, or so as to work irreparable injury, a court of equity would interfere by injunction. The orator's proof shows that the firm has long used this style of package. It also appears, that the defendant at first openly used the style of package and firm name; that, in obedience to warning, he discontinued the use of the name on the outside of the package; and that, under the pressure of legal proceedings, he has stopped the use of that altogether, and that of the words "Hopfensack, 6," but that he still continues the exact form and style of package, substituting his own name merely for that of the firm, on the labels. The exact question is, whether this is a simulation of his wares for those of the orator's firm, calculated to have them pass for the orator's firm's wares. Probably, no mere form of a package would ever alone amount to a representation, capable of deceiving, that the wares contained in it were those of any particular make. But, when the form of these packages, the color of the wrappers and papers done up with them, and the form and color of the labels, are considered all together, it is quite apparent, that, when they had been so long used by the orator's firm for holding this particular compound when offered for sale, the mere appearance of the packages would amount to a representation, that they contained that article, of that manufacture. It is equally

obvious, that the very slight changes made by the defendant in the general appearance of his packages used by him now, would not put the general public purchasing such articles on their guard; and that the use of such packages for a similar article would amount to a forcible representation, that it was the same article that the orator's firm had been accustomed to pack in that way. And, when the mode in which the defendant commenced using such packages, and the various steps by which he has been brought to his present method, are considered, there does not seem to be any fair question, but that his use of them now is for the purpose of passing off his wares for those of the orator's firm. Upon this view of the case, it seems, that, with the proper parties before the court, the defendant should be restrained by injunction from making the use he does of these symbols.

Let the cause stand, with leave to the orator to move for an amendment, if he shall see cause, within thirty days; otherwise, let a decree be entered, dismissing the bill of complaint, with costs, but without prejudice.

[2] [Motion to amend bill. This cause has been further heard on the motion of the orator for leave to amend the affidavit of A. v. Briesen, solicitor, in support thereof and briefs of counsel. From the whole case it appears that the firm of J. C. Frese & Co. consisted of two members. This cause was brought by one member, in the name of the firm, without joining the other member. The whole litigation has been carried on with reference to a right of the firm to protection and relief against the defendant; and it has been carried on in precisely the same manner that it would have been if the other member had joined in the bill as an orator, so far as has been made to appear or is claimed. The cause of action that has been litigated is exactly the same that the bill will cover if the amendment is allowed and made. It is urged in opposition that the court has no power to permit an amendment to be made that will change the cause of action. This is considered to be true when the amendment would bring in a cause of action not before involved; and that is the sense in which the remark of the supreme court of Vermont, in Lewis v. Locke, 41 Vt. 11, quoted in the defendant's brief, was used. A necessary amendment always changes a cause of action in another sense, as when it changes what would be no cause of action to a good one, or one that the proof will not support to one that it will, or one imperfectly described to one well described. In this case the cause of action in the name of the firm is well set forth, but the firm itself is not properly described and represented. The amendment will cure that imperfection, which is precisely what was done in the case cited. And it may be done at this stage of the cause. Tremaine v. Hitchcock, 23 Wall. [90 U. S.] 518. It is also argued that the orator should not be favored because he seeks to restrain dealing in the well-known compound involved called "Hamburg Tea." But that is not the relief sought, nor that to which the firm is thought to be entitled; but it is that the defendant shall not pass off tea of this sort, of his own or others' manufacture, for that of the orator's firm. This is not claiming any monopoly, nor fostering one, but is merely claiming and protecting a right of that firm that is common to all persons. On the whole, it is considered that the amendment should be allowed, but that the orator should recover no costs of the proceedings in the cause while it was so situated that it could not proceed to a final decree in his favor; and the defect was one of which he must have had knowledge, although probably he had no knowledge of its effect. Let an order be entered granting leave to amend the bill of complaint by permitting said Johann Siegmund Schroeder to appear as a party complainant therein in his right as a member of the firm of J. C. Frese & Co. at any time before the 15th day of May, 1878; and, upon such appearance, let a decree be entered for the orators according to the opinion hereinbefore filed, with costs to the orators after the appearance; and if he does not so appear, let a decree be entered dismissing the bill of complaint with costs, but without prejudice.

[Decree: This cause having come on to be heard upon the bill of complaint herein, the answer of the defendant, E. Bachof, the replication of the complainants to such answer, the amendment to the bill of complaint duly entered in the order-book, and the proofs—oral, documentary, and written—taken and filed in said cause, and the same having been argued by counsel for the respective parties, and it appearing that the firm of J. C. Frese & Co. is exclusively entitled to the style and arrangement of packages mentioned in the bill of complaint for containing the medical compound known as "Hamburg Tea," manufactured and sold by said firm, and also to the exclusive use of its registered trade-mark, mentioned in said bill of complaint, and that the defendant has infringed the rights of the complainants by manufacturing, using, and selling what purports to be "Hamburg Tea," in packages of substantially the same style and arrangement as those to which the complainants' firm, of J. C. Frese & Co., is exclusively entitled, and also by applying to said packages the complainants' said registered trade-mark: Now, therefore, in consideration thereof, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree as follows, viz.: (1) That the said complainants do recover of the defendant those costs and charges and disbursements in this suit—to be taxed—which accrued after Johann Siegmund Schroeder has

[2] [From 13 O. G. 635.]

been made a party complainant herein in his right, as a member of the complainants' firm of J. C. Frese & Co. (2) That the said complainants do recover of the defendant the damages which the complainants have sustained by, and compensation for, the manufacture, use, and sale by said defendant of medical or other goods contained in packages made in imitation of the style and arrangement of complainants' packages, set forth in the bill of complaint, or resembling the same so nearly as to be calculated to deceive. (3) That the said complainants do recover of the defendant the damages which the complainants have sustained by, and compensation for, the manufacture, use, and sale by the defendant of medicinal or other goods contained in packages to which the complainants' registered trade-mark No. 1,946, or substantially the same, or so nearly resembling it as to be calculated to deceive, was affixed. (4) That Joseph M. Deuel, of the city of New York, N. Y., be appointed master to ascertain and take and state and report to the court the number of packages containing medical or other goods manufactured or put up, and the number sold, by the defendant, or on his behalf, in infringement of the style and arrangement of the complainants' package, and the number of such packages now on hand; and also the number of packages manufactured or put up, and the number sold by the defendant, or on his behalf, having the complainants' registered trade-mark No. 1,946, or substantially the same, or so nearly resembling the same as to be calculated to deceive, affixed thereto, and the number of such packages on hand; and also the gains, profits, and advantages which the said defendant has received, or which have arisen or accrued to him by reason of such infringements, and the damages suffered by the complainants, and the compensation due the complainants by virtue thereof. (5) That the said master, on such accounting, shall have the right to cause an examination of said defendant, and of other witnesses, to be had ore tenus or otherwise, and shall have the right to order the production of the books, vouchers, and documents, and other memoranda of said defendant, his agents, servants, and attorneys; and that the said defendant and other necessary witnesses attend for such purpose before said master from time to time, as such master shall direct. (6) That a perpetual injunction be issued in this suit forthwith against the said defendant, restraining him, his clerks, agents, servants, attorneys, and workmen, and all claiming or holding under or through him, according to the prayer of the bill of complaint for such injunction, but in accordance with the opinion filed in this cause.][2]

[NOTE. See Frese v. Bachof, Case No. 5,109.]

[2] [From 13 O. G. 635.]

Case No. 5,111.

FRESE et al. v. BIEDENFELD.

[14 Blatchf. 402; 3 Ban. & A. 205.][1]

District Court, S. D. New York. Jan. 31, 1878.

EQUITY PRACTICE—EXAMINER'S FEES—ATTACHMENT.

In a suit in equity the proofs taken on the part of the defendant were not filed, because the examiner's fees had not been paid. The plaintiff moved for an order that such proofs be filed, and that an attachment issue against the defendant to compel payment of such fees. *Held*, that the motion must be denied.

[Cited in J. L. Mott Iron Works v. Standard Manuf'g Co., 48 Fed. 347.]

[This was a bill in equity by J. C. Frese & Co. against Shalberg Biedenfeld.]

Arthur v. Briesen, for plaintiffs.

James L. Onderdonk, for defendant.

WHEELER, District Judge. This cause has been heard on the motion of the complainant to have the defendant's proofs ordered to be filed, and for an attachment to compel payment of the examiner's fees. Equity rule 82 requires a master to file his report whether his fees are paid or not, and provides for an attachment to compel payment. There is no rule requiring an examiner to file testimony taken by him, without payment of his fees. Doubtless he has a lien as against the party for whom testimony is taken, upon the testimony, for his fees; and, in addition to that remedy, he may proceed by application to the court for an attachment to compel payment. Caldwell v. Jackson, 7 Cranch [11 U. S.] 276. The other party can have no greater, if as great, right to the testimony. In this case, the other party claims that the testimony shall be put on file, not for the purpose of establishing his case, but that it may be overruled as showing a defence. It is doubtful whether he has any right to the testimony for that purpose, but, if he has, it must be subordinate to the right of the examiner to have his fees first paid. To order the testimony filed without payment to the examiner would cut off one of his remedies, and it may be a very useful one. If the party who has caused the testimony to be taken is willing or prefers to have his cause heard without it, the opposite party does not seem to have any just cause for complaint. If, however, he deems the testimony of sufficient value to him to be paid for by him, he may be entitled to have it filed on making the payment. But that is not his position on this motion. Here he asks to have it ordered on file without making payment, that it may be overruled as constituting a defence. That he does not appear to be entitled to. Motion denied.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 205; and here republished by permission.]

Case No. 5,112.

FRESH v. GILSON.

[5 Cranch, C. C. 533.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.[2]

INDEBITATUS ASSUMPSIT — CONTRACT UNDER SEAL — ACTION AGAINST DEFENDANTS NOT PARTY TO THE CONTRACT.

The plaintiff cannot recover in an action of indebitatus assumpsit, for work and labor done under a contract under seal, unless the whole work has been done according to the contract; nor in an action against three defendants, upon a contract under the seal of one defendant only; unless the contract was made for the benefit of all the defendants, and the work performed according to the contract.

[See note at end of case.]

The defendants [Riah Gilson and others] had a contract with the Chesapeake and Ohio Canal Company for making culvert No. 116, in section No. 150; and the plaintiff [W. H. Fresh], by a written contract under his seal and that of Gilson, one of the defendants, undertook to do the work, by the 4th of July, 1833, at a less price as to part of the work, and at the contract price as to the residue. This contract was given in evidence by the plaintiff. The defendants gave evidence tending to show that, according to a stipulation in that contract, Midler, one of the defendants, (not Gilson, who had signed and sealed the contract,) not being satisfied with the progress of the work, some time in July, 1833, came and declared the plaintiff's contract to be abandoned, and proceeded to finish the work before the 21st of December, 1833. The defendants attempted to prove the amount which they had been obliged to pay to complete the contract; the vouchers produced were disputed at every step, and the plaintiff took four bills of exception to the admission of evidence.

Brent & Brent, for plaintiff.

Mr. Bradley, for defendants.

THE COURT, at the motion of Mr. Bradley, the defendants' counsel, instructed the jury, that if they should find from the evidence that there was an agreement under seal between the plaintiff and the defendants for the execution of the work and labor for which this action is brought, the plaintiff is not entitled to recover.

CRANCH, Chief Judge, would have added, "unless they should also be satisfied by the evidence that the plaintiff had performed the work according to his agreement."

THE COURT also instructed the jury, at the instance of the defendants' counsel, that if they should find from the evidence, that the plaintiff performed the work and labor for which this action is brought, under a sealed agreement between the plaintiff and Riah Gilson, the plaintiff is not entitled to recover in this action.

CRANCH, Chief Judge, would have added, "unless they should be satisfied by the evidence, that the plaintiff had done the work according to the written contract; and that the contract was made by Gilson for the benefit of all the defendants and with their consent, and that they recognized it."

To these instructions the plaintiff also excepted, and took his bills of exception. Verdict and judgment for defendants.

[NOTE. This judgment was reversed by the supreme court, Mr. Justice Daniel delivering the opinion, in which it was held:

[1. Liability for the acts of others may be created either by a direct authority given for their performance, or it may flow from their adoption, in some instances from acquiescence in those acts. But presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them, and must still more give place when in conflict with clear, distinct, and convincing proof.

[2. Wherever the rights of a party, founded upon a deed, are dependent on the terms and conditions of that deed, the instrument thus creating and defining those rights must be resorted to, and must regulate, moreover, the modes by which they are to be enforced at law. These identical rights cannot be claimed as being derived from a different and inferior source. If the deed be in force, all who claim by its provisions must resort to it.

[3. When the contract contained in a deed has been varied or substituted by the subsequent acts or agreements of the parties, thereby giving rise to new relations between them, the remedies originally arising out of the deed may be varied in conformity with them. An action upon the deed would not be insisted upon or permitted, because the rights and obligations of the parties to the suit would depend on a state of things by which the deed had been put aside. 16 Pet. (41 U. S.) 327.]

FRETTER, The JOHN. See Case No. 7,342.

Case No. 5,112a.

In re FREUDENFELS.[1]

District Court, S. D. New York. Aug. 25, 1879.

BANKRUPTCY—AMENDING PETITION—LACHES.

[It was the design of the bankrupt law that proceedings in bankruptcy should be summary, —that they should go on without delay; and, where an order to show cause was denied on the day the petition was filed because it appeared on the face thereof that the bankrupt resided out of the jurisdiction, the petitioners cannot, after a delay, without sufficient excuse, of nearly a year, have the petition amended so as to show that the bankrupt did in fact reside within the jurisdiction, especially when the bankrupt law was repealed in the meantime.]

In bankruptcy.

Thos. J. McKee (A. J. Dittenhoefer, of counsel), for petitioners.

A. H. Hitchcock, for another creditor.

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reversed in 16 Pet. (41 U. S.) 327.]

[1] [Not previously reported.]

CHOATE, District Judge. The petition in this case was filed Aug. 31, 1878. Two creditors joined in the petition. The petition averred that for a period of six months next preceding the date of the filing of the petition the alleged bankrupt resided in East Orange, New Jersey. The order to show cause was refused because it appeared on the petition itself that the court had no jurisdiction. A memorandum to this effect was endorsed on the petition on the same day on which it was filed. Nothing more was done in the matter till Aug. 21, 1879, when the two petitioning creditors presented another petition to the court, showing that the alleged bankrupt in fact resided in the city of New York during the necessary period of time to have given this court jurisdiction of the case, if it had been so averred in the petition, and praying to be allowed to amend their petition. This petition is supported by an affidavit of the bankrupt tending to prove the fact now alleged as to his residence. The bankrupt apparently favors the action of the petitioning creditors in attempting to revive these proceedings. Upon this petition, notice was ordered to be given to all the creditors of the alleged bankrupt to show cause why the amendment should not be allowed. Upon the return of the order to show cause, a creditor appeared and objected to the amendment, and the petition was dismissed for laches in making the application, but with leave to renew. The motion is now renewed on the affidavits intended to excuse the delay on the ground that both of the petitioners have been sick a large part of the time since Aug. 31, 1878, and one of them out of the country a part of the time, and their attorney had been so pressed with business that he was unable to attend to the matter earlier. The excuses are wholly insufficient, and do not account for the delay. The only proper inference to draw from the papers is that the petitioning creditors really abandoned the proceeding, and that for some reason that has recently become operative with them they desire now, with the approval of the debtor, to revive it.

It is still urged that, as no particular injury is shown to have resulted from the delay to any other creditor, the general principle which favors amendments to conform pleadings to the facts should be applied in this case. I think not. It was the obvious design of the bankrupt law that proceedings in bankruptcy should be summary; that upon the filing of the petition the case should go on without delay, by the appointed series of meetings, hearing, and other steps to the end of distributing the estate among the creditors, and the discharge, or refusal of discharge, of the debtor. It never was intended that petitions should be filed and the commencement of proceedings here used for other purposes merely to obstruct creditors in pursuing their remedies elsewhere, without giving them, with reasonable promptness, that relief which they have in bankruptcy. While there might be shown peculiar circumstances which had prevented and would excuse the diligent prosecution of a petition by creditors, yet to permit an abandonment of it for eleven months, and then its revival after the repeal of the bankrupt law, would virtually be entertaining an application now to put a debtor into bankruptcy. This is what is really asked in this case under the form of amending the petition. Any creditor who examined this record would have a right to assume long before the eleven months had expired that the proceeding was abandoned, and to act on that assumption in his treatment of the debtor. The relief asked would not be a proper exercise of the discretionary power to allow an amendment, because the creditors have most unreasonably failed to proceed according to the obvious intent and purpose of the bankrupt law, and especially since the law has been repealed, because to grant the amendment would in effect be to entertain jurisdiction of a case not in reality commenced while the law was in force. Petition dismissed.

Case No. 5,113.

FREVALL v. BACHE.

[5 Cranch, C. C. 463.] [1]

Circuit Court, District of Columbia. March Term, 1838.

DEPOSITION—FILING INTERROGATORIES AND CROSS INTERROGATORIES—NOTICE.

A commission to take a deposition in a foreign country may issue for the plaintiff ex parte by order of the court, or of a judge in vacation, if the opposite party does not file his cross interrogatories, provided his interrogatories shall have been filed ten days before the rule day; and it is not necessary to give notice to the opposite party of the filing of the interrogatories; nor is it necessary that the party or the commissioner should give notice to the opposite party of the time and place of taking the deposition in a foreign country. But it must appear that the commissioner took the oath annexed to the commission.

Mr. Key, for defendant [Franklin Bache, administrator of J. Dabadie], objected to a deposition of one Fournier, taken under a commission to D. C. Croxall, the United States consul at Marseilles, in France, because (1) the commission was issued ex parte without notice to the defendant of an application for the commission, or of the filing the plaintiff's interrogatories; (2) because it was enclosed in an envelope directed to the chief judge of the court, when, by the commission the commissioner was required to "send the same to the judges;" and (3) because it does not appear that the commissioner took the oath annexed to the commission as he was required by the commission to do. On the 17th of May, 1837, the plaintiff [Peter E. Frevall] filed his interroga-

[1] [Reported by Hon. William Cranch, Chief Judge.]

tories, more than ten days before the rule day, which was the first Monday in June. On the 23d of June, more than five days after the rule day, the plaintiff filed a petition for a commission, which was ordered, and on the 8th of July was issued to Daniel C. Croxall, Esq., United States consul at Marseilles. On the 16th of November, the commission was returned with the deposition in an envelope, directed "To the Hon. William Cranch, Chief Judge of the Circuit Court for the County of Washington, District of Columbia." By the Maryland act of 1785, c. 72, § 14, the parties have a right to be present at the execution of all commissions for taking evidence, &c. For this purpose, the opposite party must have notice. It is also required by the dictates of natural justice.

R. S. Coxe, contra. The 26th rule of equity practice for the circuit courts of the United States, says, "All testimony taken under a commission, shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office ten days previous to a rule-day; after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right." The act of Maryland is applicable only to commissions executed in that state. In the case of Grant v. Nailor, 4 Cranch [8 U. S.] 224, 231, one of the objections overruled by the court was, that there was no notice of the time and place of executing the commission; and no cross-interrogatories were filed.

Mr. Smith, the deputy clerk of this court, stated that the practice, ever since the rule of the supreme court, had been to file the interrogatories ten days before a rule day; and if the opposite party does not file cross-interrogatories within five days thereafter, the commission issues upon the order of the court, or of a judge in vacation, without notice of the motion.

MORSELL, Circuit Judge, stated that such also was the practice in Maryland.

THE COURT (THRUSTON, Circuit Judge, absent) overruled Mr. Key's two first objections, but rejected the deposition because it did not appear that the commissioner had taken the oath annexed to the commission.

[See Frevall v. Bache, 14 Pet. (39 U. S.) 95.]

Case No. 5,114.

In re FREY et al.

[9 Ben. 185.] [1]

District Court, S. D. New York. July, 1877.

PRACTICE IN BANKRUPTCY—STENOGRAPHIC REPORT OF TESTIMONY.

A bankrupt, on examination before a register under section 26 of the act [14 Stat. 517], cannot require the register to have his testimony taken down in common writing, when the assignee furnishes a stenographer to take it down and desires to have it so taken.

In this case the bankrupts [Daniel Frey and others] appeared before the register for examination under section 26 of the act, and the counsel for the assignee proceeded to have the examination taken down by a stenographer, whereupon the attorney for the bankrupts objected, stating that if the counsel for the assignee would afterwards supply him gratis with a copy of the testimony he would withdraw the objection, but otherwise he would not. He insisted that the register must have the testimony taken down in common writing, so that the questions and answers might be plainly seen, to enable him to cross-examine the bankrupts. The register over-ruled the objection, and the question was certified to the court. The register, in his certificate, said: "The question substantially is, whether any party may, at his will, forbid stenography upon the trial and compel common writing. I think not. The art of swift writing is too valuable, too prevalent and too well recognized by law and by the courts, for this."

BLATCHFORD, District Judge. I concur with the register.

[NOTE. For a final hearing on specifications and proofs in opposition to the bankrupts' discharge, see In re Frey, 9 Fed. 376.]

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

Case No. 5,115.

In re FREYVOGEL.

[25 Pittsb. Leg. J. 109.]

District Court, W. D. Pennsylvania. 1878.

NATIONAL BANKS—MORTGAGE TO SECURE FUTURE ADVANCES—PAYMENT OR DISCHARGE—INTENTION OF PARTIES.

1. A mortgage of $11,000, taken by a national bank to secure an indebtedness for firm notes and renewals thereof previous to the date of said mortgage, is not rendered illegal or void by the act of congress as being taken for future advances, by reason of the bank delivering the notes secured by the mortgage, shortly after its execution, to the bankrupt to prove in a copartnership settlement in a state court.

2. The acceptance of memorandum notes, with the minor son of the bankrupt as endorser, by said bank, in place of said notes delivered to the bankrupt, for the purpose specified, and renewal by said bank of said memorandum notes, for several months, for said bankrupt, leaving the original $11,000 of the indebtedness due on said renewal notes, is not payment or discharge of the mortgage taken to secure the original indebtedness of same amount.

3. The act of the party at the time of giving the new notes and renewals, and not his intention or understanding, is to prevail in a legal controversy wherein substitutions, renewals, or extensions are claimed as payments of the original discounts or indebtedness secured by the mortgage.

[In bankruptcy. In the matter of Henry A. Freyvogel.]

By SAMUEL HARPER, Register:

The assignee having sold encumbered property divested of encumbrances, the matter has been referred to me to ascertain liens and report distribution. The claimant upon the fund is Dominick Ihmsen, trustee for the City National Bank of Pittsburgh, who seeks to be paid the amount of four promissory notes made by the bankrupt to the order of, and endorsed by, John M. Freyvogel, the first dated March 30, 1875, for $4,000, the second dated April 8, 1875, for $2,600, the third dated May 11, 1875, for $2,443.33, and the fourth dated June 23, 1875, for $1,900; and all at four months, the aggregate amount being $10,933.33. It is claimed that these notes are secured by a mortgage given by the bankrupt, on the real estate sold by the assignee, dated February 2, 1875, for the payment of $11,000 in one year, "which amount is as collateral security for certain promissory notes held by the City National Bank which were discounted and renewed before date hereof for said H. A. Freyvogel, as will appear more fully on reference being had to said in part recited obligation."

The bond and mortgage are dated February 2, 1875, nearly two months prior to the date of the first note claimed on, and consequently the notes there described are not the notes now outstanding. The notes described in the bond are as follows: One dated October 19, 1874, for $2,000; one November 27, 1874, for $4,000; one December 5, 1874, for $2,600; and one January 8, 1875, for $2,433.33,—and all having four months to run. At the date of the mortgage the City National Bank held the four notes just described, which were made by the firm of W. J. Anderson & Co., of which the bankrupt was a partner, and endorsed by the bankrupt. The firm was then dissolved and proceedings were pending in the state courts for the settlement of its accounts. An arrangement was effected between the bank and Freyvogel, by which the latter executed the mortgage referred to and gave his individual notes, endorsed by his minor son, of even date, amount and time to run of the notes then held by the bank—which latter notes were to be surrendered to him. A large mass of testimony was offered, which I have labored in vain to put to some practical use. The question presented and urged with great zeal by the assignee's solicitor is, that the circumstances surrounding the mortgage constitute a new loan and that the new mortgage upon the faith of which the loan was contracted, is void under the provisions of the act of congress approved June 3, 1864, known as the "National Bank Act" [13 Stat. 107]. The 28th section (now section 5137 of the Revised Statutes) limits the real estate that may be held by a national bank, as follows: "First. Such as shall be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by such association, or shall purchase to secure debts due to said association. Such association shall not purchase or hold real estate in any other case or for any other purpose than as specified in this section; nor shall it hold the possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years."

If the first position of the counsel be correct, the second must as a matter of course follow. If the facts show the transaction to be a new loan, they must also show that the debt, then existing, was paid; but the very first step in the transaction negatives such an idea. The preceding negotiation had for its object the securing of the debt for which the bankrupt was liable, and the testimony does not disclose a syllable as to an intent on the part of either the bank or Freyvogel to negotiate for the payment of that debt. It is true that Freyvogel testifies that it was his understanding that when he gave the mortgage and the new notes that the old ones were paid, but that it is only his understanding. He desired to use the old notes in his equity case against his partner, Anderson. The bank desired to have them paid, but Freyvogel was unable to pay them, and the mortgage security was agreed upon, and when given, the old notes were given up to him for the purpose for which they were desired. The mortgage itself negatives the idea of a new loan, and shows the fact of a subsisting debt. It reads "which amount is as collateral security for payment of certain promissory notes held by the City National Bank which were discounted and renewed before date hereof for said H. A. Freyvogel." And to the same effect is the bond: "which amount is payable to said trustee as collateral security for the payment of the following promissory notes, being renewals and discounts before the date hereof and on the respective dates of the same in favor of said Henry A. Freyvogel, the original endorser on said notes."

The mortgage speaks of notes "discounted and renewed," and the bond of "renewals and discounts," and both that such renewals and discounts were before the date of the bond and mortgage. It is true, that in neither the bond or mortgage are the notes described as those of W. J. Anderson & Co., as should have been the case, but the mortgage describes them as having been discounted and renewed "for said H. A. Freyvogel, the original endorser on said notes." It is very evident, however, that the bond and mortgage refer to, and describe the old notes, and not the new notes substituted for them. The old notes were made by the

firm of W. J. Anderson & Co., to the order of H. A. Freyvogel, and by him endorsed, and it was perfectly proper for the mortgage to say that the notes had been discounted for the bankrupt, as the presumption is that the last endorser is the person for whom such obligations are discounted, and it was undoubtedly correct for the bond to say that the notes were "in favor of H. A. Freyvogel, the original endorser." Neither of these expressions could apply as well to the new notes, as they were made to the order of John M. Freyvogel. The conclusion is irresistible that the mortgage was given to secure the old notes, and not for the purpose of securing a new loan made at the time. The bankrupt, however, testifies very positively that it was his understanding that the transaction paid the old notes, and that he gave his bond and mortgage under those conditions. A personal knowledge of many years of Mr. Freyvogel, satisfies me that he was thoroughly conscientious in his testimony, but on some points he is flatly contradicted by the witnesses for the bank, some of whom —Ihmsen, Callery and Maginn, notably—I have intimately known equally long, and whom I am convinced testified fully as conscientiously. The bankrupt does not, however, detail any facts to sustain the idea of payment; nothing but his understanding and intention. Evidence of the intention of the parties at the time of the discounts, to consider the new notes as renewals of former notes preceding them in the series, is not admissible; for the question was one of fact, whether or not, they were renewals, and not what the parties intended or considered. Appeal of Bank of Commerce, 8 Wright [44 Pa. St.] 423. Hence the intention of the parties is not to govern the controversy, but the facts occurring at the time the transaction occurred. As already shown, the mortgage was taken to secure the old notes, an existing indebtedness. The bankrupt himself admitted the mortgage to be but security. That it paid the debt is not even pretended. Then, did the new notes pay the debt? Certainly there was no agreement expressed that they should have that effect. The existing debt having been secured by the mortgage, the old notes were surrendered by the bank to Freyvogel, that he might have the use of them in his equity suit against his partner, and the new notes were given as a mere matter of form; they were called "memorandum notes"; they were numbered and marked by the bank to correspond with the numbering and marking of the old notes. It is not pretended by the bankrupt that these notes paid the old ones. He merely alleges that when he gave the mortgage and new notes, he understood it to be payment. Both mortgage and notes entered into the payment, yet, as we have seen, the mortgage was unquestionably given as security for the old notes. There is nothing in the fact as detailed in the testimony, to warrant the understanding of the bankrupt as to the effect of the transaction.

Proof has been given of the various transactions with the bank when the memorandum notes fell due, and it is strongly urged that the facts show payment. When a note fell due, another was offered to the bank, discounted, and the proceeds placed to the credit of the bankrupt, who then lifted the matured note by his check. And this is claimed to be payment. But such a claim is not supported by authority. On the contrary, all the authorities show it to be renewal. In Hartly v. Kirlin, 9 Wright [45 Pa. St.] 54, affirming the court below, the judge used this language: "It is difficult to define exactly what a renewal is; so far as our opinion goes, we consider it an extension of credit—a new loan of the same credit formerly given—an agreement not to require to pay the due note by other funds, but for a consideration to extend the time of payment of the old debt, by fixing a new period, through a new note, for its payment. The old debt, not being paid except in form, no new fund passing into or out of the bank, lives again in the new, because by an actual payment it has never been ended." This language is appropriate to this case. There was only the form of payment by applying the proceeds of the new to the lifting of the old note—the debt all the time remaining unpaid. The substance of payment was never realized. When the mortgage was given, Freyvogel was indebted to the bank about $11,000, and that indebtedness has never been satisfied, and it is perfectly clear that nothing in the national bank act forbids the bank taking a mortgage securing for such a debt. The mortgage is clearly within the second clause of the 28th section of that act. The debt to secure which it was given was certainly "previously contracted," and the property was as certainly mortgaged to the bank "in good faith," thus fulfilling all the conditions of the law. Nothing, therefore, but the payment of the debt would discharge the security. There is no pretense that the debt was ever paid in substance, and nothing short of a positive agreement between the parties that the new notes should operate as payment, can discharge the debt. No such agreement is alleged.

Some testimony has been offered on the subject of usury, but as the fund in the assignee's hands is not sufficient to pay the debt when reduced by deducting the usurious interest, it is not necessary for me now to make any calculation to determine the actual amount of the debt. Should the bank seek to prove for the defect, the testimony will control the liquidation. I find that the bank is entitled to the whole fund.

John Bartou, for assignee.

Chas. F. McKenna and M. W. Acheson, for City Nat. Bank.

FRICK (ALBERS v.). See Case No. 136.

FRICK (KARTHAUS v.). See Case No. 7,615.

FRICK (RIGGS v.). See Case No. 11,825.

Case No. 5,115a.

FRICKE v. HUM.

[See 22 Fed. 302.]

FRICTION MATCH MACHINERY (UNITED STATES v.). See Case No. 15,167.

FRIDENBERG (SEDGWICK v.). See Case No. 12,611.

FRIDENBERG (UNITED STATES v.). See Cases Nos. 15,168 and 15,169.

FRIDGE (RAVERTY v.). See Cases Nos. 11,586 and 11,587.

Case No. 5,116.

In re FRIEDBERG.

[19 N. B. R. 302.] [1]

District Court, S. D. New York. Dec. 5, 1879.

BANKRUPTCY—DISCHARGE OF DEBTOR—FAILURE TO KEEP BOOKS OF ACCOUNT.

1. The fact that the bankrupt failed to keep proper books of account in a business which has been entirely closed out, there being no debts due to nor owing by him, arising out of such business, will not prevent a discharge.

2. Nor will a discharge be prevented by the fact that he failed to keep proper books of account in his business prior to the passage of the bankrupt act.

[In bankruptcy. In the matter of Isaac Friedberg.]

Carpenter & Hays, for bankrupt.

C. Blandy, for opposing creditors.

CHOATE, District Judge. This is an application for the discharge of the bankrupt. The only specification of which any proof is offered that requires any consideration, is that the bankrupt, since March 2, 1867, being a merchant or tradesman, kept no books of account. It appears that prior to April, 1874, for a short time, the bankrupt was engaged in the business of buying and selling tobacco and cigars, and that in that business he kept no books of account. But it further appears that that entire business is closed out, there being neither debts due to him nor owing by him which arose out of that business. The case is therefore exactly like the case of In re Keach [Case No. 7,629], in which Judge Lowell held that the failure to keep books in such a case did not prevent the granting of a discharge. I entirely concur in the reasoning on which that decision was rendered. It further appears that very many years before the bankruptcy, the bankrupt was engaged in some business from which there may be some uncollected claims still due to him, but the evidence does not show the business was continued after the 2d of March, 1867. Discharge granted.

[1] [Reprinted by permission.]

Case No. 5,117.

FRIEDLANDER et al. v. JOHNSON et al.

[2 Woods, 675.] [1]

Circuit Court, S. D. Mississippi. May Term, 1875.

HUSBAND AND WIFE — CONVEYANCES BETWEEN—RIGHTS OF CREDITORS—TRUSTS.

1. If a husband borrow or use his wife's money or estate for his individual purposes, he becomes equitably indebted to her, and may secure her by payment, pledge, or in any other proper way.

2. A statute of Mississippi declares that "if the husband shall purchase property in his own name with the money of his wife, he shall hold the same only as trustee for her use; but such trust shall be void as against creditors of the husband, who contracted or gave credit in consequence of his possession of such property, without notice of the trust." *Held*, that this statute could not avail a creditor of the husband when the wife's property had once stood in the husband's name, but had been conveyed by him to a third person, who purchased in good faith and who had made a bona fide conveyance to the wife for a valuable consideration.

3. A creditor of the husband, in order to have the trust raised by the statute declared void in his favor, must show that credit was given by him to the husband in special and specific reliance on that particular trust property.

[Cited in McClung v. Steen, 32 Fed. 376.]

4. When either the money or any other assets of one person are used by another to purchase property in his own name, a resulting trust arises in favor of the party with whose means the purchase is made.

In equity. This was a creditor's bill brought to subject a certain plantation, of which the legal title stood in the name of Elizabeth Johnson, to the payment of a judgment recovered by the complainants [Friedlander & Gerson] against her husband, Robert G. Johnson. The defendants, Johnson and wife, were married in 1853, having previously entered into a marriage settlement by deed inter partes, whereby all the property of the wife was conveyed to a trustee for her separate use, leaving her free as if she were unmarried, and sole and perfect owner, to lease, alien, encumber, devise or bequeath the same, or any part thereof, according to her own will and pleasure. The defendant Robert G. Johnson, at the time of his marriage with his wife Elizabeth, had no property, while she was the owner of a plantation, a number of negroes, and a considerable estate, valued altogether at from twenty-five to forty thousand dollars. After the marriage, the husband took charge of the property and conducted its business in his own name. A few years after the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

marriage, when it became evident that his wife would bear him no children, the husband conceived the design of getting his wife's property in his own name, so that it should not go to her relations at her death. In pursuance of this design, he purchased in 1856 the plantation now in question, from one George W. Hogan, for ten thousand dollars, and took the title in his own name and paid for it out of the proceeds of his wife's separate estate. In February, 1866, Mrs. Johnson entered into partnership with one Howard, an inmate and protégé of the family. The evidence was conflicting whether he had any means, but its weight tended to show that he had considerable at that time. It was clear that the business of the concern was quite large in amount. At the time of the formation of the partnership, Johnson conveyed to Howard the plantation in question for twelve thousand dollars, secured by the two notes of Howard for six thousand dollars each. One of them was paid by advances to Johnson, the other still remained outstanding in 1868, when the partnership business was closed, and the plantation was conveyed to Mrs. Johnson by Howard, and his remaining note for the purchase money given up to him. The note thus surrendered to Howard had been appropriated to Mrs. Johnson by her husband, in consideration of the large amount of her property which he had converted to his own use. The note was surrendered to Howard contemporaneously with the delivery of the deed by him to Mrs. Johnson for the plantation in question, and was the consideration therefor.

James Z. George and A. M. Harlow, for complainants, cited Code Miss. 1857, p. 336; Sheldon v. Harding, 44 Ill. 68; Macq. Husb. & W. 332; Reeve, Dom. Rel. 262, 263.

W. L. Nugent and D. & S. W. Jones, for defendants, cited Walker v. Brungard, 13 Smedes & M. 764; 2 Story, Eq. Jur. §§ 1201, 1211a; 4 Kent, Comm. 310; Adams, Eq. 165; Ratliffe v. Collins, 6 George [35 Miss.] 581; Butterfield v. Stanton, 44 Miss. 26.

BRADLEY, Circuit Justice. A clearer equity of a wife has rarely been shown in a court of justice. Unless prevented by some technical rule from having her rights, so far as the property in question is concerned, she must prevail in this suit.

Technical law is cited to show that a resulting trust could not arise in favor of Mrs. Johnson, when her husband originally purchased the property from Hogan. But she does not stand on a resulting trust. She has the legal estate, and does not seek the benefit of any such trust. The complainants have come into the court to press an equity which they claim to have against Mrs. Johnson. They come subject to the rule that he who asks equity must do equity. Whether Mrs. Johnson had or had not a resulting trust, which she could have enforced, is not material. Her money or her property went to the purchase of this plantation. She was equitably entitled to be repaid or secured out of her husband's estate. He placed Howard's note in her hands for this purpose; with this note she acquired the legal estate in the land. Surely her equity to keep it is greater than the complainants' equity to take it from her.

It is well settled that if a husband borrow or use his wife's money or estate for his individual purposes, he becomes equitably indebted to her, and may secure her by payment or pledge, or in any other proper way. See 2 Story, Eq. Jur. §§ 1404–1415, and Sykes v. Chadwick, 18 Wall. [85 U. S.] 141. This is all that was done in this case.

We are met, however, by the statute of Mississippi, which declares that "if the husband shall purchase property in his own name with the money of his wife, he shall hold the same only as trustee for her use; but such trust shall be void as against creditors of the husband, who contracted or gave credit in consequence of the possession of such property, without notice of the trust." Code, § 376. The complainants claim the benefit of this law. They allege that the property in question, though purchased with the wife's money in 1856, stood in the husband's name until 1866, and that they gave him credit on the faith of his ownership thereof, without notice of the trust. This plea cannot avail the complainants unless they can prove that the conveyance to Howard was a fraudulent one, intended to cheat them. For, if the conveyance to Howard was valid, then the title of Mrs. Johnson is unimpeachable, if she was equitably entitled to the note of Howard, which her husband transferred to her. From the evidence in the case, it would have been difficult for the complainants to attack the title of Howard. Johnson may have sold the property to him because he was largely in debt, and in order to have its proceeds in more manageable shape in case of being pressed by his creditors. But there is no evidence that it was not sold for its full value, or that Howard did not purchase it in good faith. If this was the case, there was no law to prevent its sale. The bankrupt law, if it would have affected the transaction, had not then been passed. At all events, the complainants never did attack it, although they recovered judgment against Johnson in November, 1866, and failed to collect anything thereon.

But, aside from this consideration, it is questionable whether the statute referred to can fairly be quoted by the complainants in their favor. By the decisions of the supreme court of Mississippi, it would seem that a reliance on property thus situated, namely, purchased with the wife's money, in order to give the husband's creditors a priority over the wife, must be a special and specific reliance, giving actual credit to that particular property. Thus, in Butterfield v. Stanton, 44

Miss. 26, it is laid down with regard to the statute in question as follows:

1. "That it is exceptional and almost penal, as to the wife, in declaring a trust to her use void, in the contingency stated. This statute ought therefore to be strictly construed.

2. "Though the statute declares the trust void as to a class of creditors, it creates no lien on the property. The property thus subjected to their debts is bound only as other property, there being no lien until one is obtained by judgment, mortgage or otherwise. There is none per se.

3. "The trust provided for in this statute is available to the wife except as to those creditors giving credit on account of this particular property. To benefit creditors, the contract of credit ought, therefore, to be based upon it, and it ought in some way, to be defined or distinguished by the parties at the time of the credit. It should be definitely made to appear that the particular property was the occasion of the credit."

Now, in the present case, Johnson, at the time the complainants gave him credit for their present claims against him, was in possession of other property to a large amount, and was producing large annual crops which were disposed of through the agency of the complainants as his commission merchants. It cannot be pretended that they gave any such special credit to the particular property in question, as is mentioned and required in the foregoing abstract of the decision referred to. On the contrary, in March, 1861, when the complainants were taking security from Johnson for his then indebtedness to them, amounting to over $12,000, they took from him a trust deed on other property standing in his name, together with certain slaves, and did not take any lien on the property in question. It is true, they say that they supposed that the latter property was included in that trust deed; but this is denied by Johnson, and no evidence is offered to sustain the statement.

As to the position that a resulting trust only arises when actual money of another is used in the purchase of property, and not when other assets are so used, it has no foundation in reason or authority.

The plea that the wife gave her consent to the use of her slaves and other property, in purchasing property in her husband's name, cannot avail in this case, because, even if she did give such consent, and if she was bound by it (which under her peculiar circumstances may be doubted), she, at any rate, became a creditor of her husband to the amount thus appropriated, and this was a good consideration for the note of Howard, which she received, and with which she obtained the deed for the property which she now holds.

In any point of view in which the case may be considered, we are always met by the wife's equity standing out in bold relief, and dominating every claim which the complainants may assert in their favor.

Bill dismissed.

Case No. 5,118.

In re FRIEDLOB.

[19 N. B. R. 122;[1] 11 Chi. Leg. News, 189.]

District Court, W. D. Tennessee. 1879.

BANKRUPTCY—DISCHARGE OF DEBTOR—NOTICE OF APPLICATION—LOST RECORDS.

1. The loss of proofs of debt which have been filed is the misfortune of the bankrupt, and he cannot be legally discharged until they are supplied.

2. A creditor who has proved his debt is entitled to notice by mail of an application for a discharge, and he cannot be prejudiced by the loss of his proof from the files.

3. Where proof of debts have been lost a general notice of the meeting under the petition for discharge to all creditors named in the schedule, stating that if they have theretofore filed proof of debt, it will be necessary for them to supply it as it has been lost, is not sufficient. Such lost records must be supplied under sections 899, 900, Rev. St.

In bankruptcy.

Before T. J. Lathan, Register:

On the 22d day of May, 1878, the creditors elected an assignee in said matter, to whom was delivered the proof of debts on file at that date. These, together with such as have come to his hands since his appointment, are so mislaid that he cannot find them, nor his book in which the same are entered. The only record to be had of the proven debts is that of those in hands of the undersigned, which is only partial. I may add that the number of debts proved is small, and the assignee reports no assets whatever. The bankrupt has filed his petition for discharge. Under section 5109, Rev. St., no creditors are required to be notified of the day to show cause, except such as have proved their debts; but in the case now certified, not having a perfect list, I am unable to know whom to notify. This difficulty, however, could be only obviated by giving notice to all the creditors in the schedule. But this would not remove another serious defect in the proceedings; the creditors who had previously filed their debts, on receiving the notice unless they desired to oppose the discharge for cause, would conclude it unnecessary to give the matter further attention.

It is useless to point out the inconsistent result that would follow. I respectfully recommend the following course: At the bottom of the usual notice of the meeting under the petition for discharge to let the following note be added: "If you have heretofore filed your proof of debt in this case, it will be necessary for you to supply it, as the same has been lost." And let these notices be sent to all the creditors named in the schedule.

I would further suggest that the time un-

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der these notices be five days longer than usual, viz.: fifteen days.

HAMMOND, District Judge. The course suggested by the register will not answer the purpose. It goes on the assumption that all the creditors of the bankrupt are, as a matter of fact, mentioned in his schedules, and notice to them will be notice by mail to all "who have proved their debts," as the statute requires. Rev. St. § 5109. Now it is possible that the bankrupt may have left off his schedules the name of some one or more of his creditors by misadventure, or it may be, designedly in the case of some creditor known to be hostile; and as some creditors of this kind may have proved their debts, under the plan above suggested, they would receive no notice by mail. The statute (section 5109) provides for a publication of a notice of any application for discharge, which seems designed to protect the creditors against a discharge without notice; but this kind of notice will not bind a creditor who has proved his debt, nor can he be prejudiced by the loss of his proof from the files. Having proved his debt, he is entitled to notice by mail. The loss of these papers is the bankrupt's misfortune, and until they are supplied he can no more be legally discharged than he could be if other material points, or the whole of the record, were lost. Lost records are supplied in this court under the provisions of the Rev. St. §§ 899, 900. That the proofs of debt are a part of the record there can be no doubt. In re Emison [Case No. 4,459]; Anon. [Id. 460]. The clerk will certify this opinion to the register.

Case No. 5,119.

FRIEDMAN v. GOODWIN et al.

[1 McAll. 142.] [1]

Circuit Court, D. California. July Term, 1856.

LAND GRANT—LEGISLATIVE ENACTMENT—NAME OF GRANTEE — ADMISSION OF CALIFORNIA AS A STATE—VOID ACT VALIDATED BY SOVEREIGN.

1. The title to the premises in dispute was in the United States, until the admission of California into the Union.

2. Intermediate the treaty of Guadalupe Hidalgo and the admission of California into the Union, no military officer of the United States could make any alienation of the public land.

3. On the admission of California into the Union, she became the proprietor of the land in dispute.

4. The sovereign may, although an individual can not, render valid a void act.

5. The name of a grantee is not essential to the validity of a deed. A grant may be made to classes of persons, if sufficiently designated by descriptio personarum.

[Cited in Durham v. Fire & Marine Ins. Co., 22 Fed. 471; Salem Capital Flour Mills Co. v. Stayton Water-Ditch & Canal Co., 33 Fed. 153.]

6. The act of the legislature of this state, approved May 18, 1853 [Laws Cal. p. 219, c. 160], was a legislative grant.

7. Where a grant made by government refers in general terms to a certainty, it is the same as if the certainty had been expressed in the grant, though it be not matter of record, but lie in averment by matter in pais.

This cause came on to be heard on complaint and general answer, upon an agreed statement of facts in the nature of a special verdict by consent of parties. It is in haec verba:

1st. That the premises sued for are situated upon the navigable tide-waters of the Bay of San Francisco, in the state of California, which bay is an arm of the sea, in which the tide regularly ebbs and flows; that the said premises are within the limits of the water-line front of the city of San Francisco, as defined in and by a certain act of the legislature of the state of California, entitled "An act to provide for the disposition of certain property of the state of California," passed March 26, 1851 [Comp. Laws Cal. 767], and were below usual high-water mark at the time California was admitted into the Union, and so continued below high-water mark, and covered by water, at the date of the passage of the said act of the California legislature.

2d. That by virtue of a sale, made in accordance with an act of the legislature of the state of California, passed May 18, 1853 [supra], entitled, "An act to provide for the sale of the interest of the state of California in the property within the water-line front of the city of San Francisco," as defined in and by the act entitled, "An act to provide for the disposition of certain property of the state of California," passed March 26, 1851, and certain mesne conveyances, the plaintiff became seized of all the right, title, and interest in the premises, on the 18th February, 1854, which the state of California had on the 20th October, 1853, the date of the commissioners' sale, in and to the premises sued for, and still continues so seized. The said acts of March 26, 1851, and March 18, 1853, are contained in the published statutes of California, and are hereby made a part of this special verdict, with the same effect as if said acts were herein set forth. That the defendants have been in the adverse possession of the premises since the —— day of December, 1855, and now hold the same.

On the 27th day of September, 1849, a lease by deed was made by Captain E. D. Keyes, of the 3d regiment of artillery of the U. S. army, and then commanding officer of the post at San Francisco, Upper California, to Theodore Shillaber, of certain lands then and ever since known as the "Government Reserve," of which the premises sued for in this action are a part. The lease is then set out in totidem verbis. (It is only necessary to understand that the lease was made by the officer above named to the said Theodore Shillaber, for the term of ten years.) On the —— day of Decem-

[1] [Reported by Cutler McAllister, Esq.]

ber, 1849, the said lease was by a writing thereon, approved and ratified by Brevet Brigadier General Bennett Riley, governor of California; and afterwards, Alexander H. H. Stuart, secretary of the interior, under the seal of his department, made the following indorsement, to wit, "I hereby ratify and confirm the within lease, on the part of the United States." The said Shillaber afterwards, by deed bearing date on the 11th day of April, 1851, assigned the said lease, and conveyed all his right under the same to the leased premises, to Joseph C. Palmer, Charles W. Cook, George W. Wright, and Edward Jones, who constitute the firm of Palmer, Cook & Co. On the 26th day of March, 1851, the legislature of California passed an act entitled, "An act to provide for the disposition of certain property of the state of California" [Comp. Laws Cal. 764]; which said act is hereby incorporated in this special verdict, with the same effect as if fully set forth. The lands sued for in this action are above the value of two thousand dollars, and are part of the lands mentioned in the second section of said act as "the property known as the 'Government Reservation';" and, by a series of intermediate conveyances, the defendants are invested with and seized of all the title which Palmer, Cook & Co. derived from the said lease to Shillaber and the assignment thereof to them, and the said act of the legislature of California, passed March 26, 1851, for an unexpired term, beginning on the —— day of December, ——, and ending on the —— day of December, 1847.

It is hereby stipulated that the foregoing statement shall be taken and accepted as the special verdict of a jury in this action, and shall be entered on the record as such. And the court shall determine the law arising thereupon, and enter judgment for plaintiff or defendants, as it may determine the law.

Crittenden & Inge, for plaintiff.

Lockwood & Wallace and C. H. S. Williams, for defendants.

McALLISTER, Circuit Judge. The plaintiff sues in ejectment for certain premises described in his complaint, and rests his title upon the rights acquired under a sale made of the premises sued for, under and by virtue of an act of the legislature of the state of California, passed on the 18th day of May, 1853, entitled "An act to provide for the sale of the interest of the state of California in the property within the water-line front of the city of San Francisco, as defined in and by the act entitled 'An act to provide for the disposition of certain property of the state of California,' passed March 26, 1851" (Comp. Laws Cal. 767). The defendants rely for the defense of their title, on an act of the same legislature, passed previously, on the 26th March 1851 (Comp. Laws Cal. 764). The superiority of title depends upon the solution of two questions: 1. In whom was the title to the disputed premises on the 26th day of March, 1851, at which time the elder title of the defendants accrued? 2. What was the legal effect of that upon their title?

On the ratification of the treaty of Guadalupe Hidalgo, the title to the premises passed from Mexico to the government of the United States. In the latter it remained during the territorial existence of California. The lease executed by Captain Keyes during that existence, approved by General Riley, and subsequently ratified by A. H. H. Stuart, secretary of the interior, could divest no title from the United States, and consequently could transfer none to Theodore Shillaber, under whom defendants claim. The lease, for all purposes of conveying any title, was still-born at its birth. The title remained in the United States; and on the admission of California into the confederacy on an equal footing with the original states, the title passed, under the operation of that admission and of the constitution of the United States, to the state of California, where it remained until the 26th day of March, 1851, at which date the act under which the defendants claim was passed.

What is the legal effect of that act? It is well to remark, in limine, that all objections urged against the title of defendants on account of non-payment of rent, or by reason of the failure of the lessees to comply with any other condition of the lease from Captain Keyes, are disposed of by the fact that they are not claiming title under it. They claim title from the state under the legislative grant of March 26, 1851. To that, then, we are to look for the source of it. If the state of California, as the court believes, had the title to the premises in dispute vested in her, and if she transferred it to the defendants, or to those under whom defendants claim, then the purchase under the sale by virtue of the subsequent act of the legislature of this state on the 18th day of May, 1853, by the plaintiffs, gives their title no standing against that of the defendants. The act of the legislature to be considered, is entitled "An act to provide for the disposition of certain property of the state of California," passed March 26, 1851 (Comp. Laws Cal. 764). The first section describes the boundaries of the lots in relation to which it is intended to legislate. The second section grants the use and occupancy of all the land described in the first section, to the city of San Francisco for the term of ninety-nine years; save as therein afterwards excepted, being those lands which have been sold by the authority of the ayuntamiento, or town or city council, or by any alcalde of the said town or city, at public auction, in accordance with the terms of the grant known as Kearney's grant to the city of San Francisco; or which have been sold or granted by any alcalde of the said city of San Francisco, and confirmed by the ayuntamiento, or town

or city council, thereof, &c. There are certain terms annexed to the grant, to which it is unnecessary to refer. This second section closes with the following words: "The property known as the 'Government Reserve' is exempt from the operation of this act; except that any estate held by virtue of any lease or leases, executed or confirmed by any officer of the United States on behalf of the same, shall be and the same are hereby granted and confirmed to the lessees thereof; and the written instrument whereby such lease or leases was made shall, in all actions brought by the lessees for the recovery of the lands so demised, be sufficient evidence of title and possession to enable the plaintiff to recover." It is upon this last clause that defendants rely. The construction contended for by plaintiff is, that the confirmation by the act is limited to "any estate held;" and that no estate was held under the lease, it being void; that nothing in fact was confirmed, and therefore the lessee took nothing by the legislative grant. It is true, that an estate in land means, in strict legal parlance, such interest as the tenant hath therein; but the word "estate," when used in a statute, or instrument other than a deed, and calling for such meaning, is to be deemed as passing the land itself. The statute, speaking of the estate (referring to the lands described), declared that they are hereby granted; evidently referring to those lands. But, turning from this logomachy, or war of words, there are other and less verbal arguments which suggest the unsoundness of the construction urged by the plaintiff's counsel. It would impute gross ignorance to the legislature, not to award to them the knowledge of the utter impotency of any attempt by an officer of the government to alien any portion of the land the property of the United States, without the authority of an act of congress. That the president with the heads of departments combined could not so have done, must have been known to them; and it is reasonable to consider that the legislature had a full knowledge that no interest by any unauthorized act of the officer could have been conveyed, and that large and extensive improvements had been made in good faith by individuals, and therefore they determined, in the distribution of the property, to save the rights of the occupants by a confirmation without which they would have had no legal existence. It is to be observed that the act does not stop at the point where the estate is confirmed, but proceeds to declare that the "written instrument" by which such "lease or leases were made shall, in all actions brought by the lessees for the recovery of the lands so demised, be sufficient evidence of title and possession to enable the plaintiff to recover." Now, although a private individual may not, the sovereign may confirm that which was originally void; and in this case the legislature has given vitality to the written instrument, so far as to constitute it, by their creative faculty, sufficient evidence of both title and possession, with the avowed purpose that he may recover the lands. This would seem to show clearly their intention to do what was attempted to be done, and to grant the lands at least for the terms mentioned in the leases. If this written instrument is made by the legislature a muniment of title sufficient to enable the party to recover the land, such legislative action is equivalent to a grant. The grantees who were to take, were those who held by virtue of any lease or leases executed or confirmed by any officer of the United States on behalf of the same. The defendants bring themselves strictly within this class, and answer to the descriptio personarum. They hold by virtue of a lease executed in behalf of the United States, executed by one of the officers thereof, ratified by another, and confirmed by a third.

It is true that no grantee is named in this law; and it is equally true that a grant is void for uncertainty, where the grantee is not sufficiently designated to distinguish him from all others; and when such designation cannot be gathered from the grant, it cannot be supplied by parol testimony. Thus a grant to the heirs of A., in being, is void; for non-constat who are the heirs of a living person. If the word "heirs" is to be construed "children," then, what children? Are those in esse at the time of the grant only to take; or were after-born to be included? Was the grant to take effect immediately, or after the death of grantor? If no children survived A., would his brothers and sisters take? There are no means of ascertaining from the face of the grant the intention of the grantor. In such case, therefore, the grant is void for uncertainty in the designation of the grantee.

Admitting this rule in its fullest extent, it by no means results that a grantee must be named. "The names of persons at this day are only sounds for distinction's sake, though it is probable they originally imported something more; as some natural qualities, features, or relations; but now there is no other use of them but to mark out the individuals we speak of, and to distinguish them from all others; and therefore in grants, which are to receive the most benign interpretation, and most against the grantor, if there be sufficient shown to ascertain the grantor and grantee, and to distinguish them from all others, the grant will be good." Bac. Abr. tit. "Grant C." If they (the grantees) are so designated as to distinguish them from all others, the grant would be good without a name at all; and the mistake of a name in such a case would not vitiate. Hall v. Leonard, 1 Pick. 27. Again, parol evidence, though inadmissible to vary or contradict the terms of a deed, is competent to show the situation of a party in relation to things and parties around him; thus, if the language

of a written instrument is applicable to several persons, parol evidence is admissible of any intrinsic circumstance to show what person or persons were intended. 1 Greenl. Ev. § 288. In the interpretation of a grant, another rule prevails. Where a grant made by government in general terms refers to a certainty, it is the same as if such certainty had been expressed in the grant, though it be not matter of record, but lie in averment, by matter in pais or in fact.

There is no doubt that the grant in this case comes within the principles of the foregoing authorities. In the grant there is a descriptio personarum who are to take. The defendants have brought themselves within that description, and are entitled to a verdict. Upon consideration whereof, after hearing counsel for the respective parties, we adjudge that defendants are not guilty.

Ca e No. 5,119a.

FRIEMANSDORF v. WATERTOWN INS. CO.

[See 1 Fed. 68.]

Case No. 5,120.

In re FRIEND.

[3 Woods, 388.] [1]

Circuit Court, S. D. Georgia. April Term, 1877.

BANKRUPTCY—EXEMPTION UNDER STATE LAW—SETTING APART SPECIFIC GOODS.

1. Where no property is claimed by a bankrupt under the specific exemptions of the bankrupt act [of 1867 (14 Stat. 517)], his claim for an allowance must stand upon the exemption granted by the laws of the state.

2. Under the law of Georgia which exempts personal property of the value of one thousand dollars in specie, the bankrupt is not entitled to money the proceeds of articles sold by the assignee.

3. In this case the bankrupt set apart and claimed certain specific goods as exempt. The assignee took no notice of the claim, but mixed the goods claimed with others and sold all indiscriminately, and afterwards allotted to the bankrupt out of the proceeds one thousand dollars. *Held*, that the assignee mistook the law. All the bankrupt was entitled to was the proceeds of the specific goods claimed and set apart by him.

[In bankruptcy. In the matter of Joseph Friend.]

This was a petition to review the decree of the bankrupt court on exceptions to the assignee's allowance of exemptions.

Clifford Anderson, for petitioner.
R. E. Lester, contra.

BRADLEY, Circuit Justice. On examination of this case, I am of opinion that the assignee erred in setting apart to the bankrupt one thousand dollars on a specie basis (or eleven hundred and twenty-five dollars currency) in money, which accrued from the sale of his goods.

As no property was claimed by the bankrupt under the specific exemptions of the bankrupt act, his claim for an allowance must stand upon the exemption granted by the laws of the state. This, as to personal property (which is the only kind of property here in question), is "personal property to the value of one thousand dollars in specie." Const. Ga. art. 7. But the articles must be specifically claimed (Code, 2003); and if money is claimed, it is to be invested under the direction of the ordinary, in such articles as the applicant may desire—and in no case will the allowance of cash, without such investment, be a valid exemption (Code Ga. § 2016a; Smith v. Turnley, 44 Ga. 243). It is probable that the bankrupt court would not feel bound to superintend such investment, but, without it, would allow an exemption of money on hand. But this was not on hand. The money set apart is the proceeds of sales made by the assignee. The bankrupt should have specifically claimed the articles he desired before their conversion, unless deprived of an opportunity of doing so.

In this case the bankrupt did specifically claim certain goods which he set apart and separated from his other goods. The assignee took no notice of this separation, but mixed the goods together and sold them indiscriminately. The assignee then allotted to the bankrupt, out of the proceeds of sale, one thousand dollars in cash on a specie basis, as before stated. In doing thus he mistook the law. The bankrupt was entitled to the specific goods set apart and claimed by himself, if they did not exceed in value the amount of one thousand dollars in specie, and to those goods alone. The assignee having sold the entire stock, the bankrupt is only entitled to the proceeds of the specific goods set apart by himself. He cannot claim any advantage from the fact that the assignee improperly mixed the goods together. That would be unjust to the creditors. They have as much right to complain of the mixture as the bankrupt has. The assignee was the common agent of both parties; or rather, he was the agent of the law, and neither party ought to be prejudiced or advantaged by his act. I do not find any sufficient proof of fraud to deprive the bankrupt of his right to have property exempted under the law.

The decree of the district court [case unreported], and the decision of the register affirmed thereby, are reversed, and the matter is referred back to the assignee to ascertain (as near as can be done) the actual proceeds of the property claimed and set apart by the bankrupt (not to exceed one thousand dollars in specie), and to pay the same to him, and amend his schedule accordingly. The costs of this petition for review to be paid out of the general assets of the bankrupt estate.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

FRIEND (CANA v.). See Case No. 2,375.

Case No. 5,121.

FRIEND v. WASHINGTON.

[2 Cranch, C. C. 19.] [1]

Circuit Court, District of Columbia. Dec. Term, 1810.

ASSIZE OF BREAD.

This was an appeal from the judgment of a justice of the peace for a penalty incurred under the 5th section of the by-law of the 17th of April, 1806 [Wash. Corp. Laws, 30], for offering for sale bread of insufficient weight. By the 4th section, it was the duty of the mayor, or register, to ascertain and publish in the last week of every month the cash price of superfine flour; and the price so published was to be the standard by which the weight of bread was to be regulated for the month succeeding, according to the rule prescribed in the 3d section. This price not having been ascertained and published in the last week of the month preceding the supposed offence, THE COURT reversed the judgment.

Case No. 5,122.

The FRIENDSHIP.

[Cited in The Henry Ewbank, Case No. 6,376. Nowhere reported; opinion not now accessible.]

Case No. 5,123.

The FRIENDSHIP.

[2 Curt. 426.] [2]

Circuit Court, D. Maine. Sept. Term, 1855.

JURISDICTION IN ADMIRALTY—PETITORY SUITS—SUIT BY PART OWNER.

1. The admiralty has jurisdiction over petitory suits.

[Cited in The Comet, Case No. 3,050; Grigg v. The Clarissa Ann, Id. 5,826.]

2. A part owner may sustain such a suit against a merely fraudulent possessor, without joining the other part owners; and if they do not appear, or object, and the libellant establishes his title, the court will decree the possession to him.

[Appeal from the district court of the United States for the district of Maine.

[In admiralty.]

CURTIS, Circuit Justice. This is a petitory action to try the title of the libellant to one half the schooner Friendship. It is objected that the court has not jurisdiction. But I consider that question settled for this circuit by the case of The Tilton [Case No. 14,054]. It is also insisted that it is admitted by the libel, that one Peter Hardy is the lawful owner of one half of the schooner, and that he is not before the court. But he might have appeared, if he had chosen to do so, and the utmost effect of his non-appearance is, that the court might conclude that he has no desire to have the claimant Haskell deprived of the possession of the vessel. The Valiant, 1 W. Rob. Adm. 64.

Upon the proofs, it appears, in substance, that Haskell, the claimant, obtained his apparent paper title to one half the vessel through a forged bill of sale; and that the libellant is the true and lawful owner thereof. And the question is, whether the other part owner, by failing to appear, can prevent his co-owner from trying his title as against a mere wrongdoer, and having established it, whether the court will not, as against that wrongdoer, decree the possession to the libellant. I am of opinion that it will try the title, and dispossess the fraudulent possessor, even in the absence of the other tenant in common. He has no interest in this dispute, and there is no reason for requiring him to be made a party to it. He may have no wish to have the possession changed; for he may be willing that whichever of these parties may be the true owner of a moiety should possess and manage the vessel. But I cannot presume from his mere silence, that he desires a fraudulent possession to continue, and if he did, I am not prepared to admit that it ought to affect the action of the court. If this were a cause of possession, he, owning a moiety, would have an equal right to the possession if he chose to assert it. But it is a petitory action. The decree divests only the fraudulent and unlawful possession of the claimant. The real part owners will stand wholly unaffected thereby, as respects the employment of the vessel. This objection is overruled.

The decree of the district court [case unreported], establishing the title of the libellant to one moiety of the schooner, and decreeing the possession to him, is affirmed.

Case No. 5,124.

The FRIENDSHIP.

[1 Gall. 45.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

FORFEITURE—COASTING ACT OF FEBRUARY 18, 1793—PROCEEDING ON A FOREIGN VOYAGE.

Under the 8th section of the coasting act, 18th February, 1793, c. 8 [1 Stat. 305], a coasting vessel is not forfeited for proceeding on a foreign voyage, if such vessel has not actually left the port, from which she intended to proceed on a foreign voyage. The forfeiture does not attach, until the vessel has quitted such port, with an intent to proceed on such foreign voyage.

[Cited in U. S. v. 129 Packages, Case No. 15,941; Dobson v. Campbell, Id. 3,945; The Ocean Spray, Id. 10,412.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by Hon. B. R. Curtis, Circuit Justice.]

[1] [Reported by John Gallison, Esq.]

[Appeal from the district court of the United States for the district of Massachusetts.]

This vessel being an enrolled vessel, licensed for the fisheries, at the custom-house at Ipswich, was, on Saturday, the 8th of October, 1808, sold by her former owners, John Dexter, and James Andrews, to the claimant [Samuel Plummer]. The bill of sale was made out by the collector of the port of Ipswich, and the enrolment and license of the vessel, were, on the same day, surrendered to him, but no new papers were, at that time, taken out. On the same day, the vessel was removed from a place, called "Chebacco River," in said Ipswich, by Plummer, to a place within the limits of the same town, called "Plumb Island River," into which Ipswich river empties; and in the latter river, vessels belonging to the port usually lie. On the afternoon and evening of the same day, the schooner was loaded with a full cargo, by means of gondolas, which brought the same from a place in Newbury, called "Old Town Bridge." About twelve or one o'clock of the same night, the schooner was discovered by a revenue boat belonging to the custom-house at Newburyport, and was immediately hailed twice or thrice, and no answer, or an unsatisfactory one, was returned. At this time, the schooner had her foresail up, and was in motion. There was some contrariety of evidence, as to the point, whether her anchor was weighed, or not; but the weight of evidence was, that it was weighed. Eight persons were found on board. The vessel was fully loaded, and appeared equipped for a voyage. On going on board, the revenue officers receiving no satisfactory information respecting the destination of the vessel, and finding no papers on board, seized her, and on the next day carried her to Newburyport. At the time of the seizure, it appeared that there was very little wind, and that it was about half ebb tide; and in order to go to sea, it was necessary that the vessel should pass Ipswich bar, where, at high water, there is ten feet of water; and at half tide, about five feet. The schooner, it was said, when loaded, would draw eight feet. On the Monday following (the 10th of October) the claimant, accompanied by one Joscelyn Hildrupp, (who, on the night of the 8th of October, appeared on board as master,) went to the collector, at Ipswich, and by deceptive representations, and concealment of the seizure of the schooner, obtained a temporary enrolment and license in the claimant's name, for the coasting trade, and also obtained a permit for Newburyport, on the manifest presented by them, which was sworn to before the collector, and signed by Hildrupp with the name of Joseph Hildrupp, instead of Joscelyn. It seemed conceded on the whole evidence, that at the time of the seizure, the schooner was actually within the limits of the port of Ipswich.

The libel, or information, contained several allegations of forfeiture. 1. For a departure from the port of Ipswich without a permit, or clearance, founded on the 3d section of the act of 9th of January, 1808, c. 8 [2 Stat. 453]. 2. For taking on board sundry goods and merchandize, without a permit from the collector of the port, founded on the 2d section of the act of April 25, 1808, c. 66 [2 Stat. 499]. And 3. For proceeding on a foreign voyage from the port of Ipswich, without first giving up her enrolment and license, and without being registered by said collector for said voyage, founded on the 8th section of the act for enrolling and licensing vessels in the coasting trade and fisheries [Act Feb. 18, 1793, c. 8 (1 Stat. 305)].

G. Blake, for the United States.
Wm. Prescott, for claimant.

STORY, Circuit Justice (after stating the facts and the allegations). Upon the argument, the two first allegations are abandoned, and the attorney for the United States rests the cause altogether upon the third, and with great propriety, as the supreme court have already settled the only questions which could arise on the two former allegations against the construction, on account of which they were originally introduced into the libel.

It has been contended, on the part of the claimant, that the 8th section of the act alluded to, does not work a forfeiture, unless the vessel has actually performed a foreign voyage, and returned to the United States; and that part of the section which alludes to the forfeiture of goods imported in such vessel, is supposed to fortify this construction. It is certainly true, that by returning with a cargo to the United States, a vessel which contravenes the provision of this section, subjects the imported cargo to forfeiture. And so it has been adjudged by the supreme court, at February term, 1812. But this increase of forfeiture in a certain event, by no means proves that no forfeiture could accrue, without the return to the United States from a foreign voyage. The reason of affecting the return cargo was, without doubt, to take away the strongest temptation to an illicit employment of the vessel, by subjecting every thing to forfeiture which was connected with the voyage. The language of the statute is clear and explicit, and cannot, without manifest violence, be brought to the construction contended for.

I rely as little upon the suggestion, that the vessel was not subjected to forfeiture, because her enrolment and license were surrendered; although no register was taken out. The counsel for the claimant has assumed, that the words "and being duly registered," are used as mere idle words, and in no distinct connexion, and therefore are to be rejected as surplusage. It is true, that I can perceive no sufficient reason, why a register should in such case be required, when it is very certain, that in no other case

a register is absolutely necessary. Without a register, a vessel in foreign trade is not entitled to the privileges and benefits of a ship of the United States; but in other respects she is recognised by law. She may sail with a sea letter, or certificate of ownership. But it is sufficient for me, that the words of the statute are so; and when the legislature have expressly enacted a provision, the court have no other duty but to interpret it according to its genuine sense. Vessels engaging in the coasting trade and fisheries, engage upon the terms and conditions of the law, and are bound to comply with them.

But the main difficulty remains, did the Friendship "proceed on a foreign voyage?" It is contended by the attorney for the United States, that she did so proceed, although the vessel was not without the limits of the port of Ipswich; that "to proceed on a voyage," does not imply leaving a port; but may be satisfied with breaking ground, and sailing in a port, with intent to pursue such a voyage. And he relies upon the analogous case of an insurance from one port to another port, where the voyage commences on the breaking ground with intent to sail. Perhaps it may be answered, that in cases of insurance, an intent to deviate is not a deviation, and that sailing on a voyage with such an intent does not constitute the fact, until the vessel has actually passed the dividing or deviating line. But another answer is, that the cited case is of contract, where the intent of the parties is to prevail; and the law construes the risk, as commencing with the first inception of the voyage; in order more fully to effectuate the manifest intention of the parties. Policies of insurance are always liberally expounded for the benefit of trade. But the case is otherwise as to penal statutes. It is a maxim long since settled, that the construction of such statutes is to be strict; and a maxim so sanctioned by ages, and by the reason of things, I do not feel at liberty to disturb, upon supposed inconveniences. Sitting here to dispense justice, I am not at liberty to narrow the law, to suit any class of prosecutions. When the legislature speak directly, we must expound their acts according to their natural meaning, and obey their injunctions.

It does not, indeed, appear distinctly in evidence, which way the vessel was sailing, when seized; and if it be true (which has not been contradicted) that she could not pass the bar at the ebb tide; or if it be true, (which has been strongly sworn, even on the part of witnesses introduced by the government), that the sole object of moving the vessel was to prevent her grounding, and to get her into deeper water in the channel, it might be doubted, if there was a commencement of any voyage. But I confess, that the other facts in the case powerfully impress my mind with the belief, that the whole transaction was fraudulent, and that the intention was to violate the laws. The time, the place, the manner, and the conduct, of the business, equally show, that it was not fit to meet the day; and if the vessel had been seized without the port, it would not have been easy to remove the presumption of a foreign voyage.

But let us return to the construction of the act. The point is, not what the legislature might, but what they have, provided. At the time of the passing of this act, there was no prohibition of trade, and there was no necessity of jealously watching vessels while lying in port. The object of the act was, to prevent vessels engaged in the coasting trade and fisheries from becoming the medium of the introduction of smuggled goods, under the security and cover of their license. The words of the act are, "If any ship or vessel shall proceed on a foreign voyage," &c. Had the section stopped here, perhaps the construction of the attorney for the United States would have been very strong; but in the same sentence the legislature explain what they mean, by adding, "without giving up, &c., to the collector of the district comprehending the port, from which she is about to proceed on such foreign voyage." Such foreign voyage then is, to proceed from the port; not to commence within it; and the same expression is again repeated in the proviso.

The 32d section of the same act may throw some light on the subject. That provides that a licensed vessel shall be forfeited with her cargo, if found employed in any other trade, than that, for which she is licensed. Now if the Friendship had not given up her license, she would have been liable under this section; and, if the attorney for the United States be right, under the 8th section also. But I presume that the legislature intended the 8th section to apply to all cases, where a foreign voyage was pursued under any circumstances; and the 32d section to all cases, where the trading was in port or coastwise, when it was unauthorised by the license. I am somewhat confirmed in this construction by the language of the first and second sections of the act of 9th January, 1808, c. 8 [supra], which requires, that vessels employed in the coasting trade and fisheries should give bonds not to proceed to a foreign port, but to reland their cargo in the United States: and of the 3d section of the same act, by which the proceeding to a foreign port subjects the vessel and cargo to forfeiture. And by a subsequent act (March 12, 1808, § 1 [2 Stat. 473]) the same bonds are required of vessels, which are not registered, licensed, or possessing a sea letter. By these sections the legislature manifestly require a proceeding to a foreign port before a forfeiture is incurred. Now if the legislature did not declare a licensed vessel forfeited under the embargo acts, until she had actually arrived in a foreign port on a foreign voyage, but

suffered her departure on giving bonds, it would seem that it hardly contemplated that a foreign voyage was actually in progress while the licensed vessel was within our own ports. I do not, however, rely upon these acts, because, being passed on temporary occasions, they can hardly be considered as connected with the general system of our laws.

But what is the allegation in the libel? That the said vessel did "proceed from the said port of Ipswich upon a foreign voyage, without first giving up her enrolment and license, &c., and without being registered for said voyage." The plea is, "that the said vessel did not proceed from said port of Ipswich, &c., on any foreign voyage." Now it is undoubtedly true, that mere surplusage does not vitiate, and that an immaterial averment may be rejected. But it is also true, that when an averment is of substance, and is more specific than is necessary, and cannot be rejected without a fatal defect, it must be proved as laid (1 Chit. Pl. 231, 233); and penal actions in this particular are subject to as great, and formerly to greater, nicety, than others. In Rex v. Stevens, 5 East, 244, Lord Ellenborough said, that he did not find any authority in the law, which warranted him in rejecting any material allegation in an indictment or information, which is sensible and consistent in the place where it occurs, and is not repugnant to any antecedent matter. Now the allegation, that she did proceed from the port of Ipswich, is material. It was certainly material to state, that she proceeded from some place, or was at some place; for otherwise it would be impossible to know, to what offence the party was to answer, and he could hardly be enabled to produce evidence to defend his property from forfeiture, as every proceeding of the vessel, during the whole existence of the license, might equally come under review. In a case like the present, it would be peculiarly necessary, as no foreign voyage is alleged to have been completed to any foreign port.

If, then, the place be material to be laid, it should be proved as laid. In the Attorney General v. Moyer, Bunb. 260, the illegal importation was laid in the information in London, and the evidence showed it to be at Cowes, and the court held the variance fatal. If, however, I could get over this objection (on which I do not decide), and if I could also overlook various other errors and irregularities of form in the libel, I could not easily persuade my mind to adopt the construction adopted by the court below. For the opinions of that court I entertain every respect, because I know they are well considered and carefully weighed: But sitting here, it is also my duty to exercise my own judgment, and to decide accordingly. It is to be remembered, that this section of the act is highly penal. That the intent of the act, nay, the language of it, may be fully satisfied, without this rigorous construction. That it is the actual proceeding, and not the attempt to proceed, on a foreign voyage that is punished. That the great object of that act is, to secure the revenue of the United States from frauds, and to prevent a foreign trade from being carried on under color of a coasting license. With such considerations I cannot but interpret the law, as requiring, that the evidence of a foreign voyage shall at least be manifested by a departure from the port before the forfeiture attaches.

The decree of the court below [case unreported] is, therefore, reversed, and the property is to be restored to the claimant; but I shall certify reasonable cause of seizure. Decree reversed.

Case No. 5,125.

The FRIENDSHIP.

[1 Gall. 111.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

SEIZURE—CERTIFICATE OF PROBABLE CAUSE.

A doubt of law is a proper case for a certificate of probable cause of seizure. In what cases such a certificate ought to be allowed.

[Cited in The Gala Plaid, Case No. 5,183; The Active, Id. 33; Averill v. Smith, 17 Wall. (84 U. S.) 93.]

[Appeal from the district court of the United States for the district of Massachusetts.

[This was a libel in admiralty against the schooner Friendship and cargo (Thomas Watkins, claimant).]

G. Blake, for the United States.

B. Whitman, for claimant.

STORY, Circuit Justice. The schooner Friendship and cargo were, on the 24th of April, 1809, libelled for taking on board goods and merchandise without a permit, contrary to the second section of the act of 25th April, 1808, c. 66 [2 Stat. 499]. Since the decision of the supreme court of the United States in the case of The Paulina v. U. S., 7 Cranch [11 U. S.] 52, which declared that no forfeiture accrued for a violation of said section, but the only penalty was, a denial of a clearance, the information has been abandoned, and the only ground of controversy is, whether the court ought to grant a certificate of reasonable cause of seizure.

Upon the hearing of the cause, it appeared that the schooner, with a cargo of fish on board, was taken possession of at Provincetown, by the collector of Barnstable district, on or about the 20th of December, 1808. Her cargo was laden without a permit, and without being under the inspection of any revenue officers. It is quite

[1] [Reported by John Gallison, Esq.]

clear, that the collector originally took possession of the Friendship and cargo, without an intention of seizure under the 2d section of the above act, and with an intention to detain the same under the authority given by the 11th section of the same act. As late as the 15th of February, 1809, the collector does not appear to have changed this intention; for a letter from him of that date, declared the property still detained under the 11th section aforesaid. Subsequently to this time, and about the middle of April, 1809, the collector made application to the district attorney on the subject, and by his advice and consent, the schooner and her cargo were eventually libelled. A great deal of evidence has been introduced to fortify, or to rebut, the presumption, that at the time of the detention, the schooner and cargo were bound on an illegal destination. I lay the whole of it out of the present case, because it can be material only in a suit, in which the right or propriety of that detention comes in controversy, which is not strictly the present case; for the seizure is the only question here, which the parties have chosen to litigate; no question as to damages has intervened.

Now it has been solemnly adjudged in U. S. v. Riddle, 5 Cranch [9 U. S.] 311, that a doubt as to the true construction of the law is as reasonable a cause for seizure, as a doubt respecting the fact. The 2d section of the act before us has been a vexata questio; judges in different districts have held opposite opinions, and until last February term of the supreme court, the question was still floating. Now the court in the case of The Paulina, which settled the doctrine, deemed it proper to certify, that there was reasonable cause of seizure. They therefore held in effect, that this act was so doubtful in construction, that collectors acting upon it ought to have the benefit of the certificate. Since then, the facts in the present case show a lading without a permit, which is all the act was supposed to require to fix the forfeiture, I hold myself bound by the decision, which I have stated, to certify that there was reasonable cause of seizure.

Whether the detention, before the seizure made to support the filing of the information, will or ought to be protected by the certificate, I will not decide. If the claimant had, in the court below, put in contest the time of seizure, or had at this term moved for a special certificate, and agreed that it should avail pro tanto, I should have been disposed to grant it. If he will now move for it, after the 1st of March, 1809, I will restrain the certificate to that time, and leave him to his general remedy for the injury, if any, of the previous detention.

On motion, certificate restrained to 1st March, 1809.

FRIENDSHIP, The (DELIESSLINE v.). See Case No. 13,807.

FRIENDSHIP, The (PARTER v.). See Case No. 10,783.

FRIENDSHIP, The (STANNICK v.). See Case No. 13,291.

Case No. 5,126.

Case of FRIES.

[Whart. St. Tr. 458; 3 Dall. 515.]

Circuit Court, D. Pennsylvania. April Term, 1799.

TREASON — CONSTITUTIONAL DEFINITION—INSURRECTION TO RESIST EXECUTION OF A LAW — TRIAL IN ANOTHER COUNTY — PARDON — PROCLAMATION TO DISPERSE—PLEADING—EVIDENCE—CONFESSION—NEW TRIAL.

[1. Congress has no power to change in any way the crime of treason, as defined in the constitution (article 3, § 2), and its power is limited to fixing the punishment thereof. Therefore, the fact that congress, in the sedition act (1 Stat. 596), and in the act relating to rescue, and obstruction of process (1 Stat. 117, § 23), has created misdemeanors which may include acts amounting to treason, cannot be considered a legislative definition of "treason," whereby those acts cease to be punishable as such. It is for the courts alone to determine what is treason, within the meaning of the constitutional definition.]

[2. It was not, however, the intention of congress, in passing these acts, to innovate on the constitutional definition of "treason," for there may be rescues, and obstructions of process, as well as combinations and conspiracies to raise an insurrection, merely for the purpose of effecting a private purpose, possibly to injure individuals, and therefore without that intent to destroy the government which is essential to constitute treason by the levying of war.]

[3. Opposing, by force of arms, an act of congress, with a view of defeating its efficacy, and thus defying the authority of the government, is levying war against the United States, and constitutes treason.]

[Cited in Charge on the Law of Treason, Fed. Cas. Append.]

[4. The fact that nearly the whole of the county in which the alleged treason is charged to have been committed has been in a state of insurrection, and is at the time of the trial occupied by a military force, presents a case of "great inconvenience," which, under the judiciary act (1 Stat. 88, § 29) will justify the court in holding the trial of a capital case in another county.]

[5. Quaere: Whether the indictment is not a part of the trial, in such sense that, if the statute requires the trial to be had in the county where the crime was committed, the indictment must not also be found in that county; and whether if, after the indictment is found in a different court, a special court were to be appointed to be held in the county of the crime, the court could, by any process known to the law, order the indictment to be transferred into that court.]

[Cited in U. S. v. Dow, Case No. 14,990.]

[6. Where it is contended that a proclamation by the president, ordering the people to disperse, operates as a pardon of all offenses committed prior to the proclamation, such alleged pardon must be pleaded, in order that defendant may take advantage of it.]

[7. Such proclamation does not operate, even when it is obeyed, as a pardon of offenses already committed.]

[8. In a trial for treason, where the overt act has been proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose with which he went to the place where the treason is laid; and, if he went with a treasonable design, then the proof of treason is complete.]

[Cited in Charge on the Law of Treason, Fed. Cas. Append.]

[9. In a trial for treason, a voluntary confession made by the prisoner on his preliminary examination may be received in corroboration of matters already testified to by two witnesses; but, as to matters not thus testified to, it must be disregarded.]

[10. The court has power in criminal, as in civil, cases to grant a new trial; but the new trial can only be granted in favor of the prisoner, and not to his prejudice.]

[Cited in U. S. v. Cornell, Case No. 14,868; U. S. v. Keen, Id. 15,510; U. S. v. Gibert, Id. 15,204.]

[11. A new trial should be granted where it appears that one of the jurors, before the trial, had used expressions to the effect that the prisoners ought to be hung, and that the community would not be safe unless they were hung.]

[Distinguished in Hollingsworth v. Duane, Case No. 6,618. Cited in U. S. v. Hanway, Id. 15,299.]

[12. In a capital case tried in a federal court in a different county from that in which the crime was committed, it is no ground of new trial that the record does not show that "great inconvenience" prevented the trial from being held in the county, the court having in fact decided that such was the case.]

[This was an indictment against John Fries for treason against the United States.]

IREDELL, Circuit Justice (charging jury).[1] Gentlemen of the Grand Jury: The importance of the duties you are now called upon to fulfil, naturally increases with the increasing difficulties of our country. But however great those difficulties may be, I am persuaded you will meet them with a firm and intrepid step, resolved, so far as you are concerned, that no dishonor or calamity (if any should await us) shall be ascribable to a weak or partial administration of justice.

If ever any people had reason to be thankful for a long and happy enjoyment of peace, liberty and safety, the people of these states surely have. While every other country almost has been convulsed with foreign or domestic war, and some of the finest countries on the globe have been the scene of every species of vice and disorder, where no life was safe, no property was secure, no innocence had protection, and nothing but the basest crimes gave any chance for momentary preservation; no citizen of the United States could truly say that in his own country any oppression had been permitted with impunity, or that he had any grievance to complain of, but that he was required to obey those laws which his own representatives had made, and under a government which the people themselves had chosen. But in the midst of this envied situation, we have heard the government as grossly abused as if it had been guilty of the vilest tyranny; as if common sense or common virtue had

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[1] By the act of July 9, 1798 [1 Stat. 580], provision was made for the registering of the number and the measurement of the windows in each house, for the purpose, however, not of laying a tax upon the windows themselves, but of obtaining an approximate valuation of the house, which was the real subject of taxation. Understood in the cities, the progress of the excise officers, charged as they were with this somewhat inquisitorial duty, was regarded with indifference; but in the interior, and particularly in the north-eastern corner of Pennsylvania, the treatment which they received was far different. At first the matter appears to have been given up to the women, who treated the invaders of their fire-sides with every species of indignity, resisting, as the trial will show, the measurement of their windows by all the domestic artillery; but in a short time the discontent spread itself throughout the whole population, and the result was that the execution not only of this particular law, but of the process of the United States in general, was entirely frustrated. A proclamation was forthwith issued by the president, which is subjoined; and then, either finding himself, on the spur of the moment, unable to muster sufficient force to compel submission, or yielding to the suggestions that to dispel a state disturbance, state militia would be most serviceable, he directed a demand to be made on the governor of Pennsylvania.

By the President of the United States of America: Proclamation. Whereas, combinations to defeat the execution of the laws for the valuation of lands and dwelling-houses within the United States, have existed in the counties of Northampton, Montgomery and Bucks, in the state of Pennsylvania, and have proceeded in a manner subversive of the just authority of the government, by misrepresentations to render the laws odious, by deterring the officers of the United States to forbear the execution of their functions, and by openly threatening their lives. And whereas, the endeavours of the well-affected citizens, as well as of the executive officers, to conciliate a compliance with those laws, have failed of success, and certain persons in the county of Northampton, aforesaid, have been hardy enough to perpetrate certain acts, which, I am advised, amount to treason, being overt acts of levying war against the United States, the said persons, exceeding one hundred in number, and armed and arrayed in a warlike manner, having on the seventh day of the present month of March, proceeded to the house of Abraham Lovering, in the town of Bethlehem, and there compelled William Nicholas, marshal of the United States, and for the district of Pennsylvania, to desist from the execution of certain legal processes in his hands to be executed, and having compelled to discharge and set at liberty, certain persons whom he had arrested by virtue of a criminal process, duly issued for offences against the United States, and having impeded and prevented the commissioners and assessors in conformity with the laws aforesaid, in the county of Northampton aforesaid, by threats of personal injury, from executing the said laws, avowing as the motive of these illegal and treasonable proceedings, an intention to prevent, by force of arms, the execution of the said laws, and to withstand by open violence the lawful authority of the government of the United States. And whereas, by the constitution and laws of the United States, I am authorized, whenever the laws of the United States shall be opposed, or the execution thereof obstructed in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by powers vested in the marshal, to call forth military force to suppress such combinations, and to cause the laws to be duly executed; and I have accordingly determined so to do, under the solemn conviction that the essential

fied from our country; and those pure principles of republicanism, which have so strongly characterized its councils, could only be found in the happy soil of France, where the sacred fire is preserved by five directors on ordinary occasions, and three on extraordinary ones—who, with the aid of a republican army, secure its purity from violation by the legislative representatives of the people. The external conduct of that government is upon a par with its internal. Liberty, like the religion of Mahomet, is propagated by the sword. Nations are not only compelled to be free, but to be free on the French model, and placed under French guardianship. French arsenals are the repository of their arms, French treasuries of their money, the city of Paris of their curiosities; and they are honoured with the constant support of French enterprises in any other part of the world. Such is the progress of a power which began by declarations that it abhorred all conquests for itself, and sought no other felicity but to emancipate the world from tyrants, and leave each nation free to choose a government of its own. Those who take no warning by such an awful example, may have deeply to lament the consequences of neglecting it. The situation in which we now stand with that country is peculiarly

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interests of the United States demand it. Wherefore I, John Adams, president of the United States, do hereby command all persons being insurgents as aforesaid, and all others whom it may concern, on or before Monday next, being the eighteenth day of this present month, to disperse and retire peaceably to their respective abodes: and I do, moreover, warn all persons whomsoever, against aiding, abetting or comforting the perpetrators of the aforesaid treasonable acts, and I do require all officers and others, good and faithful citizens according to their respective duties and the laws of the land, to exert their utmost endeavours to prevent and suppress such dangerous and unlawful proceedings. In testimony whereof, I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia, the twelfth day of March, in the year of our Lord one thousand, seven hundred and ninety-nine, and of the Independence of the said United States of America the twenty-third. By the President, John Adams. Timothy Pickering, Secretary of State. Philadelphia, Friday, March 22, 1799.

War Department, March 20th, 1799. Sir:—To suppress the insurrection now existing in the counties of Northampton, Bucks and Montgomery, in the state of Pennsylvania, in opposition to the laws of the United States, the president has thought it necessary to employ a military force, to be composed in part of such of the militia of Pennsylvania, whose situation and state of preparation will enable them to march with promptitude. The corps of militia first desired on this occasion are the troops of cavalry, belonging to this city, and one troop from each of the counties of Philadelphia, Bucks, Chester, Montgomery and Lancaster. These troops, I have the honour to request your excellency will order to hold themselves in readiness to march on or before the 28th instant, under the command of Brigadier General Macpherson. I have the honour to be, with the greatest respect, your excellency's most obedient and humble servant, James McHenry.

His Excellency, Gov. Thomas Mifflin.

The response was as follows:

Sir:—The secretary of war has this moment communicated to me the president's intention to employ a military force, in suppressing the insurrection now existing in the counties of Northampton, Bucks and Montgomery, with a request, that the troops of cavalry belonging to this city, and a troop from each of the counties of Philadelphia, Bucks, Chester, Montgomery and Lancaster, may be ordered to hold themselves in readiness to march, on or before the 28th inst., under the command of Brigadier General Macpherson. You will, therefore, immediately issue general orders for complying with the president's request; and communicate by express, with the commanding officers of the several corps. As soon as the troops are ready to march, you will make your report to me; sending the returns of the officers, from time to time, as you receive them. I am, sir, your most obedient servant, Tho. Mifflin. Philadelphia, March 20th, 1799. 3 o'clock P. M. To Peter Baynton, Esq. Adjt. General of the Militia of Pennsylvania.

The legislature of the state being then in session, and having received the president's proclamation, under cover of a message from the governor, put it in charge of a committee, who reported as follows:

The committee to whom was referred a message from the governor respecting a proclamation of the president of the United States, announcing the combination to defeat the laws for the valuation of lands and dwelling-houses, which has existed in the counties of Northampton, Montgomery and Bucks report, that they have had the said message under their serious consideration, and find cause of deep regret, that combinations to defeat the laws of the United States, have a second time made their appearance in the state of Pennsylvania; that such combinations are repugnant not only to the pure principles of republicanism and the spirit of our constitution, but also highly dishonourable to the character of a portion of the citizens of our state. That laws tending to lay the heaviest burthen on the most opulent part of the community, should be opposed by those on whom it operates lightest; proves that the opposition has arisen from ignorance, or the most dark and malignant designs. Your committee cannot hesitate to express, with the most lively sensibility, their entire disapprobation of such unwarrantable conduct, tending to the dissolution of our government, and subversive of the principles of tranquility and good order, and it is the duty of every good citizen to discountenance such treasonable combinations, yet, as the general government has sufficient power to compel obedience to the laws, and the president has, in his proclamation, determined so to do in this instance, and has not thought the aid of the state necessary. The committee offer resolutions: Resolved, that this house will, when required, co-operate with the general government, with alacrity and promptitude, to suppress unlawful and treasonable combinations to defeat the execution of the laws of the United States, but as no such co-operation is now required, this house consider their interference at present as wholly unnecessary.

A motion was made by Dr. Logan, and seconded by Mr. Eyre, to add the following resolution to the report of the committee.

Aurora (Friday), March 25th, 1799. Resolved, that the governor be, and is hereby requested to cause full and due inquiry into the causes of the said riots, and to make special report to this house, thereupon, and particularly of any circumstance which may be alleged or discovered, tending to show the origin of the same in the agency of foreign incendiaries, or

critical. Conscious of giving no real cause of offence, but irritated with injuries, and full of resentment for insults: desirous of peace, if it can be preserved with honour and safety, but disdaining a security equally fallacious and ignominious at the expense of either; still holding the rejected olive branch in one hand, but a sword in the other—we now remain in a sort of middle path between peace and war, where one false step may lead to the most ruinous consequences, and nothing can be safely relied on but unceasing vigilance, and persevering firmness in what we think right, leaving the event to Heaven, which seldom suffers the destruction of nations, without some capital fault of their own.

Among other measures of defence and precaution which the exigency of the crisis, and the magnitude of the danger suggested to those to whom the people have entrusted all authority in such cases, were certain acts of the legislature of the United States, not only highly important in themselves, but deserving of the most particular attention, on account of the great discontent which has been excited against them, and especially as some of the state legislatures have publicly pronounced them to be in violation of the constitution of the United States. I

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the seditious views of domestic traitors. On the question, will the house agree to the said resolution? The yeas and nays were as follows: Yeas, 27. Nays, 45.

The following is a translation of a manifesto in the German language, issued to the inhabitants of the counties of Northampton, &c., by General Macpherson, the officer in command—which gives a general view of the object with which he was charged.

William Macpherson, Brigadier General of the Armies of the United States, Commander of the Troops Ordered to Act against the Insurgents of the Counties of Northampton, Montgomery, and Bucks, in the State of Pennsylvania:—To the People of the Aforesaid Counties. Fellow Citizens:—Being ordered, by the president of the United States, to employ the troops under my command, or, according to circumstances, further military force, to procure submission to the laws of the United States, and to suppress and disperse all unlawful combinations which have there been made to obstruct the execution of the aforesaid laws, or any of them, by main force or power; I, therefore, have thought it proper to inform the people of the said counties, and all others whom it may concern, of the danger to which they expose themselves by combining in unlawful proceedings, or giving any assistance or encouragement to those who are concerned therein; and likewise to represent to them, how just it is to submit to the laws in general, but, particularly to those against which they have opposed themselves in the most violent manner. It cannot be unknown to you, my fellow citizens, nor to any part of the people of the United States, that submission to the laws, constitutionally made, is absolutely necessary for the support of the government; and that in a republic, where laws are made by general consent, this consent must be manifested by the majority of such persons as have been appointed for that purpose by the people in general, according to the constitution. The whole mass of the people cannot meet together to make laws, as it is clear, in places where a debate takes place, there will always be a difference of opinion, and that, therefore, no decision can ever take place unless the voice of the majority prevails. The people of the United States were so well convinced of this truth at all times, that, since their first settlement in this country, they suffered themselves to become governed by assemblies, which they chose themselves to represent their persons; and, whenever it was necessary, they compelled by force of arms everybody to submit to the laws made by a majority in such assemblies. The federal government is as well a government of the people, as freely chosen by them to represent them, and to make laws for their benefit, as the governments of the respective states. It was established and ordained by the people themselves, as is expressly declared by the constitution, "To form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." In order to obtain these great and desirable ends, for which the first articles of confederation were found to be altogether insufficient, they gave congress several powers specified in the constitution.

From the nature of the government, sometimes doubts may arise, and have already arisen, whether some of these powers authorize congress to make certain laws; nevertheless, there is a regular and lawful manner to decide such questions when they occur, to which all good citizens should resort, and submit to them without reserve. But, in the present case, no such doubt has ever been entertained, nor can it take place; because, in the constitution, it is expressly declared (article 1, § 8) "that congress" shall have power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States." The constitution giving this power to congress, that body has to decide when and in what manner it shall be exercised, and this decision must be expressed by a majority; and when this is once expressed, it must be obeyed, or else the constitution must fall, and with it, all good government, law and order, must be annihilated, and discord, civil war and anarchy must follow thereupon, where, without government, all things would be overturned and plunged into confusion. The act against which the present treasonable opposition is made, is that for laying and collecting a tax for the common defence and general welfare of the United States, therefore an act which congress is expressly authorized by the people to make; yea, on the least consideration, it is plain, that it is as necessary and equitable in itself, as agreeable to the constitution, and even favourable to those people who now oppose the execution thereof. Nobody has denied, nor can anybody deny, that the United States, at the time the act was passed, was threatened with the resentment of a very powerful, very ambitious, and very revengeful nation, and are so yet. From what this resentment originated, or whether it might have been obviated by a different course of conduct, are only accidental questions. The main question is, whether we should submit to those humiliations which that nation has heaped upon us, and subscribe to the scandalous conditions demanded of us, or prepare ourselves for resistance and the defence of our rights, as it becomes a free, independent nation. With respect to this question, which congress was obliged to decide upon, according to its duty "To provide for the common defence and general welfare of the United States," there was no difference of opinion, or at least, there was none declared. All agreed that we should not submit to what France proposed, but prepare for our defence in case she should attempt to carry them by force. The only question was,

deem it my duty, therefore, on this occasion, to state to you the nature of those laws which have been so grossly misrepresented, and to deliver my deliberate opinion as a judge, in regard to the objections arising from the constitution. The acts to which I refer, you will readily suppose to be what are commonly called the alien and sedition acts. I shall speak of each separately, so far as no common circumstances belonging to them may make a joint discussion proper.

I. The alien laws, there being two. To these laws, in particular, it has been objected: 1. That an alien ought not to be removed on suspicion, but on proof of some crime. 2. That an alien coming into the country, on the faith of an act stipulating that in a certain time, and on certain conditions, he may become a citizen, to remove him in an arbitrary manner before that time, would be a breach of public faith. 3. That it is inconsistent with the following clause in the constitution (article 1, § 9): "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

With regard to the first objection, viz.,

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in what manner we should prepare, and how far these preparations were to go. Who were to decide this question? the majority or the minority? A majority, and a large majority of the people's representatives, chosen by themselves according to the constitution, made the decision, and resolved upon the manner of proceeding which has been observed. This manner of proceeding required money, and in order to obtain that a tax became necessary. If a different manner of proceeding had been adopted, money and the tax would nevertheless have been necessary; because it is impossible to defend the country in any way, or to make preparations for the defence thereof, without money. Even if there had been any base enough to propose a submission to the conditions of France, and the proposal had been agreed to, nevertheless, money and taxes would have been necessary; because France demanded of us before all things, the loan of many millions of dollars, and gave us to know that their further demands would be in proportion to our ability to pay. In order to raise this unlimited tribute, we should have been obliged to submit to much heavier taxes than congress has now laid for our defence. They certainly afterwards pretended to give up this demand; but, after all, so doing was only the consequence of our resistance and our preparations, and these preparations had already rendered the tax necessary. In laying this tax, congress paid the greatest attention to the situation and wants of the people, and distributed it in such a manner, that the burthen almost totally falls on the richer part, and the poorer class are greatly screened from the effects thereof. It is laid on lands, dwelling houses, and slaves; but as there are no slaves in this state, the whole tax falls upon the lands and dwelling houses. The lands are to be taxed exactly to their value, be the owner who he may, but the dwelling houses are appraised at a different rate. The poor man, whose house, out-houses, and lot, not exceeding two acres, are worth less than an hundred dollars, has nothing to pay; and if it were worth one hundred, the tax would be only twenty cents. According to the same rule, other houses of a higher value pay as follows:—

If $200	40 cents
300	60
400	80
500	100

From which you will perceive, my fellow citizens, that the house-tax is according to the value of the house, at 20 cents to $100; but for houses from $500 to $1000 value, the tax rises for each $100, 30 cents; so that a house of the value of $600 will have to pay six times 30 cents, or $1 80 cents.

If worth $700 pays	$2 10 cents
800	2 40
900	2 70
1000	3 00

At this rate, the rich man, with a house rated at $1000, has to pay three times as much of the tax as the poor man whose house is rated at one half that sum, viz., $500; and thus the tax operates progressively to the most costly houses and opulent people, until the value of their houses is taxed in proportion five times as high as those of their poorer fellow citizens, whose houses are worth only from $100 to $500. A house worth $100 pays 20 cents, which is only the one fifth part of one per cent. of its value; a house worth $30,000 pays $300, which is one whole per cent. of its value, and consequently five times as much in proportion as the other.

Hereby, my fellow citizens, you must be convinced that an opposition to this tax in our counties is not only contrary to the constitution, the laws, and every principle of good government, but in itself is inconsistent and ridiculous, as the tax which is opposed is the most easy on the poorer citizens, whom they irritate to opposition. Many of their houses, however, would have no tax to pay, and very few more than one dollar each, for very few of their houses will be rated at more than $500. It is true they will be subject to a land tax, but the tax on houses must first be deducted from the whole quota of the state, and what is then deficient will be laid upon the land. The houses in this state will probably pay the greatest part of the tax, perhaps the whole, and in that case no tax will be laid upon the land; and those whose houses are rated at less than $100, will be exempted from the tax. As a further proof of the attention of congress to the wishes and accommodation of the people, they have, during the last session, repealed that part which required a statement of the windows of each dwelling-house, and which, as it afterwards appeared, was more disagreeable than necessary and useful. Therefore, no further account of the windows has been demanded. To ascertain the value of the lands and houses was a difficult matter, and connected with a great deal of expense; but when once done, need not be repeated. Great pains were taken, and the most effective measures employed, to select people of good character, who understood the business well, and whose interests were equally involved with their fellow-citizens, to have the business accurately executed.

Besides, this act is not perpetual, being only for one year, and will not be continued, unless the public good demands it, and not otherwise than with the consent of the people through their representatives; as for those who have in so treasonable a manner opposed the execution of such lawful, necessary, and, for that part of the citizens who were the least able to pay taxes, indulgent law, there can therefore be no excuse; the bad consequences which they draw upon themselves by their criminal conduct, they cannot impute but to their own blindness, obstinacy and malice. On the contrary, every necessary step will and must be taken to bring them, and all others who have aided and abetted them, to submission, and trial by due

"That an alien ought not to be removed on suspicion, but on proof of some crime." It is believed that it never was suggested in any other country, that aliens had a right to go into a foreign country, and stay at their will and pleasure without any leave from the government. The law of nations undoubtedly is, that when an alien goes into a foreign country, he goes under either an express or implied safe conduct. In most countries in Europe, I believe, an express passport is necessary for strangers. Where greater liberality is observed, yet it is always understood that the government may order away any alien whose stay is deemed incompatible with the safety of the country. Nothing is more common than to order away, on the eve of a war, all aliens or subjects of the nation with whom the war is to take place. Why is that done, but that it is deemed unsafe to retain in the country, men whose prepossessions are naturally so strong in favour of the enemy, that it may be apprehended they will either join in arms, or do mischief by intrigue, in his favour? How many such instances took place at the beginning of the war with Great Britain, no body then objecting to the authority of the measure, and the expediency of it being alone in contemplation! In cases like this, it is ridiculous to talk of a crime; because perhaps the only crime that a man can then be

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course of law, in order that their punishment may serve as an example to others, and prevent the like crimes in future. The necessity of employing arms against a number of our fellow-citizens is painful, but the consequences must be imputed to those whose traitorous conduct has produced the present disturbances, and not to government, who, according to their most sacred duties, are obliged to maintain order and enforce obedience to the laws. But all those who return quietly to their homes, and abstain from any participation in these unlawful acts, either through open aid or secret abetting, counsel, or information, shall obtain the utmost protection to their persons and property. Every precaution shall be taken that the march of the troops shall not be troublesome to the citizens; all subsistence shall be punctually paid for, and the strictest discipline observed. Let me, therefore, my fellow-citizens, warn and entreat you, as you love your country, and estimate the happiness concomitant of liberty, order and peace; as you wish to avoid the necessity of human bloodshed, which is as much repugnant to my wishes, as to those of the president; as you abhor the horrors of a civil war, and the crimes and punishments of traitors, let me conjure you to shut your ears against the counsels of those malicious persons who would lead you to destruction, in order to satisfy their ambition, while they screen themselves from the punishment due to their crimes; who try to seduce you to take up arms against the laws and government of your country, and to involve yourselves in a contest as hopeless as it is criminal, against the whole power of the United States; who speak to you of peace and liberty, while they are kindling civil war; who complain of expenses, while they are forcing the government to augment them, in order to suppress sedition and revolt; and who plume themselves upon being republicans, while transgressing the most essential principles of republican government; to wit, obedience to the laws made by the decision of the majority. Therefore I forewarn you not to aid or abet those violaters of the law in any manner, so that you may avoid a participation of their crimes, and the consequent punishment.

Given under my hand and seal, at head quarters, April 6th, 1799. Wm. Macpherson. By order of the Governor. Jonathan Williams, Aid de Camp.

This manifest was accompanied with a letter from the Rev. Mr. Helmuth, a Lutheran minister of Philadelphia, conspicuous for his piety and zeal.

To the people of Northampton County: Friends and Brethren in the Faith: Excuse my addressing these lines to you; where there is fire, everybody is bound to extinguish it, and the clergyman is no more to be blamed for lending his aid than any other citizen. I am depressed with anxiety on your account. I know the consequences of conduct like yours; many of you will doubtless be apprehended and confined, some perhaps will pay the forfeit with their lives. You know it is the duty of the clergy of the city to warn such miserable persons, and prepare them as much as in their power for the awful change; my heart was much oppressed. I thought, alas! perhaps the same circumstances as those of 1794 will again occur; perhaps other thoughtless people will fall into the same wretched situation, because they were ignorant, and were deluded, and what would be your feelings if you had to witness their sorrow and anguish, their agonies of death? You should have warned the miserable creature; he would then perhaps have been saved; but you neglected to warn him, and are, therefore, responsible for the destruction of him and his. Such were the melancholy reflections that induced me to write you these few lines. I trust that you will think, when you read this, as you may in all truth: This man is sincere in his wishes for our welfare—why then should we think it improper in him to send us this advice? If he even should now and then say some things that are not perfectly agreeable to us, we will still take it in good part, for perhaps he is in the right, perhaps we have been deluded, we may have been deceived: If such be your thoughts, you will soon find them perfectly correct. You have hitherto entitled yourselves to the character of industrious and religious citizens of the Union, and most of the Germans still deserve that praise; but, sorrowful to relate, you have suffered yourselves to be spurred on to the most abominable injustice, to actual rebellion against the government you yourselves have chosen. How happy it is that your number is but small amongst the serious, and that the far greater part of them view your inconsiderate conduct with detestation! You all know that government cannot exist without taxes; at least your Bible would so instruct you; read Romans, xiii. 1–7; read it attentively. Do but reflect seasonably on your conduct. Even the holy passion week have you profaned with the works of actual rebellion. You have undertaken to oppose a tax which is as favourable to the country people as any tax can possibly be; for the rich inhabitants of the cities pay by far the greatest proportion of it; you have undertaken to oppose a tax which never would have been made had not the government been necessitated to make defensive preparations against the attacks of the French; a nation that aims at the overthrow and destruction of all religion, against a people that would scarcely have dared to attack and plunder us, if they had not been certain that they had their advocates amongst us. You do not consider the dreadful consequences of such opposition as you have made; I will therefore inform you of some of them. In the first place, an army of several thousand men will be marched into your neighbourhood; you well know that, in spite of every possible attention of commanding officers,

charged with, is his being born in another country, and having a strong attachment to it. He is not punished for a crime that he has committed, but deprived of the power of committing one hereafter to which even a sense of patriotism may tempt a warm and misguided mind. Nobody who has ever heard of Major Andrè, that possesses any liberality of mind, but must believe that he did what he thought right at the time, though in my opinion it was a conduct in no manner justifiable. Yet how fatal might his success have proved! If men, therefore, of good character, and held in universal estimation for integrity, can be tempted when a great object is in view, to violate the strict duties of morality, what may be expected from others who have neither character nor virtue, but stand ready to yield to temptations of any kind? The opportunities during a war of making use of men of such a description are so numerous and so dangerous, that no prudent nation would ever trust to the possible good behaviour of many of them. Indeed, most of those who oppose this law seem to admit that as to alien enemies the interposition may be proper, but they contend it is improper, before a war actually takes place, to exercise such an authority, and that as to neutral aliens, it is to-

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excesses will be committed by an army. You will be more or less prevented from following your usual occupations, and yourselves and families will be put in the greatest terror and apprehension. 2dly. The army will cost money, and this money the government will have to raise by new taxes, for which you must thank your own opposition. The Western Expedition in 1794, cost a million of dollars; from this you may judge what expense you will bring on yourselves and fellow-citizens by your scandalous insurrection. 3dly. If you make any farther opposition, you will necessarily be treated as rebels, and before a month has passed, many of you will be in prison. They will be torn from their wives and children, and some will probably suffer an ignominious death. Alas! my heart bleeds for you. You have been told a thousand falsehoods. You have been told that the militia approved of your violence, and would not march against you. But you have been wrongfully deceived. For my own part, I have heard many speak of your conduct, but I have not heard one approve of it; your best friends, (if those are your best friends who agree with you in political opinion,) say, the occurrences in Northampton are very unjustifiable; the insurgents must be subdued; what would become of us if everybody was to create an insurrection? This is the substance of what is thought and said of your conduct—and you may depend upon it, that the government could, at a very short notice, muster upwards of twenty thousand men, if such a number were necessary, who would willingly march against you. Every one cries, shame! shame! upon you. I beseech you to mark well the character of those men who have enticed you to this insurrection. Are there not many of them who spend more money at the taverns in the course of a few evenings, than their whole tax amounts to? Honest Christian men will never advise to rebellion, but more especially against a government which has scarcely its equal under the sun. No, they are wicked, restless men, who have deceived themselves and you. It is your misfortune that you have suffered the habit to grow upon you, of scandalizing government; of cursing, instead of blessing it; and then indeed there are enough to be found, who, having particular ends in view, will scheme with you; persons who wish for your friendship on election days, in order that they may get a lucrative office under the very government that they blaspheme. When matters come to extremities, these deluders know perfectly well how to slip their necks out of the halter, and let the deluded suffer; these, who in comparison with the former, are innocent, will be left to bake, as their deceivers have brewed. Think of me, when you experience this sorrowful truth. Alas! you have been most scandalously deceived: from my soul I pity you. But what is now to be done? Listen, and take my advice. It is possible, that the marshal will be sent with an armed force to seize the wretches who opposed him in arms. For God's sake, do not let yourselves be prevailed upon to abet those rebels; for, should you be found in their company, you will certainly be punished with them. Rather endeavour to persuade them to deliver themselves up to the proper authority, (and this would be the wisest course they could pursue;) but if they will not do so, give the marshal every assistance he may require, for it is your duty. Take my advice. Affection for you, and the impulse of conscience, have compelled me to write you this letter. If you follow my counsels, you will do well; if not, I have done my duty. Be assured that I remain your friend, J. Henry Ch. Helmuth. Philadelphia, March 28th, 1799.

The view taken by the opposition generally of the "insurrection," may be gathered by the following notices in the Aurora.

(Tuesday) March 12, 1799. The public attention has been engaged for two or three days by some occurrences that have taken place in Northampton county, in this state. Efforts are making to magnify these occurrences into a terrible and bloody conspiracy against the government, &c. We shall, therefore, briefly state such facts as have been communicated to us on this subject. It is a well known circumstance, that in the schedule made out for the appreciation of the house tax, passed at the session of congress before the last, there was a column set apart for registering the number and measurement of the windows in every house, although no tax had been laid on windows. This circumstance caused a considerable degree of discontent throughout all parts of the Union; in some places the assessors were induced to desist from the admeasurement, and a member of congress in the last session, suggested the omission entirely of that measure, which was generally supposed by the people to be intended as the basis of a future tax. In Northampton county, while a person was in the act of measuring the windows of a house, a woman poured a shower of hot water over his head; in other places they were hooted at, and every expression of odium made use of, but no other violence done than the hot water war carried on by the female. Several of the assessors were intimidated from pursuing the duties for which they were appointed, and complaints were laid against several persons, who had uttered their dislike for what they called the window tax. The matter was taken up by the executive committee of the Union, and the marshal of this state district was directed to arrest several persons for a violation of the law. The marshal proceeded to the different places where the people reside, arrested them, and took bonds for their appearance at an inn in Bethlehem; all the accused appeared agreeably to appointment, except three out of seventy persons. The order of the marshal was to bring them to this city, and they were preparing to set out for Philadelphia, when a body of the people, some on horseback and others on foot, several of them belonging to the volunteer uniform corps, ap-

tally inadmissible. To be sure the two latter instances are not quite so plain; the objection I am considering belongs equally to them all; for if an alien cannot be removed but on conviction of a crime, then an alien enemy ought not to be removed but on conviction of treason, or some other crime showing the necessity of it. If, however, we are not blind to what is evident to all the rest of the world, equal danger may be apprehended from the citizens of a hostile power, before war is actually declared as after, perhaps more, because less suspicion is entertained; and some citizens of a neutral power are equally dangerous with the others. What has given France possession of the Netherlands, Geneva, Switzerland and almost all Italy, and enables her to domineer over so many other countries, lately powerful and completely independent, but that her arts have preceded her arms; the smooth words of amity, peace, and universal love, by seducing weak minds, have led to an unbounded confidence, which has ended in their destruction, and they have now to deplore the infatuation which led them to court a fraternal embrace from a bosom in which a dagger was concealed.

In how many countries, alien friends as to us, dependent upon them, are there warm

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peared, and demanded the liberation of the prisoners. The prisoners remonstrated in vain, and insisted on proceeding to Philadelphia, relying upon the laws, but the people that were collected, were not to be diverted from their purpose; the persons were set at large, and the marshal has returned to Philadelphia. It is but justice to the marshal to say, that he has conducted himself with propriety in the whole of this business, and the persons that were first arrested behaved with the utmost propriety and deference for the constitutional authorities. We are informed that a body of volunteers are to be called out and marched into Northampton county, but we cannot believe that such a measure can be deemed either necessary or wise. The discontents in Northampton county were directed against the window admeasurement; the same discontents have prevailed elsewhere. No tumult has arisen, or violence has been done to any person but what was done with the hot water, and as to the rescue of the persons arrested, there are means more effectual to bring them to justice, than by the odious means of an armed military force, which can answer no other purpose than to stir up new jealousies and harass the public mind. The offence of such a measure is among the least considerations on this occasion, and possibly there may be found some unfledged Alexander, desirous of burning up some of the flourishing towns, in the course of such an expedition, in order to give spirit and energy to the military movements.

(Friday) March 22, 1799. On Wednesday Herman Hartman, Adam Stephan and Henry Skanweiller, of Millerstown, Northampton county, arrived in town and delivered themselves up to the marshal, who conducted them to Judge Peters; before whom they entered into recognizances for their appearance at the next circuit court of the United States. These men were amongst the most violent opposers of the law in Northampton county, and we are informed that others of the principal rioters are on their way to this city for the purpose of making the like submission. Messrs. Hartzen, Horn, and Kern, members of the legislature, arrived in town from Northampton. The report of these gentlemen we gave in yesterday's Aurora. Whence is this precipitation on the part of the government of the United States, to march a body of troops against the people of Northampton and Bucks? Are those people in arms against the government? No one will dare to say they are. Whence, then, it may be again asked, such precipitation? When the disturbance took place in Western Counties, what was the conduct of the late President Washington? He first conferred with the governor of the state on that subject, then sent commissioners to expostulate with the deluded citizens, and to endeavour to bring them to their duty, and not till all failed did he resort to military force. He was not of the opinion that men like himself were first to be tossed upon the bayonet, and afterwards instructed in their duty. He was not of the opinion that our laws, like those of Draco, ought to be written in blood, and that disobedience to them should subject the offender to immediate military punishment. He was not of the opinion that the lives of his fellow citizens were of such little consequence, that they were to be taken away when their only crime might be ignorance or misinformation. He was not of the opinion that the state government should be treated with contempt, and that no consultation with its executive should be had. It is true that in a despotic government, where there are no citizens, but all are slaves, and where force and not reason is the alphabet of instruction, in such a government, indeed, it would be incongruous to argue the people into obedience. The logic of the bayonet is there the only one employed, and it is applied with promptitude. Is there any analogy between such a government and ours? If not, why such a similarity of measures? No republican can justify the conduct of those people who resisted the marshal in the execution of his duty; it was highly reprehensible, and ought to be punished. But has any endeavour yet been made by the administration to arrest the transgressors? Has the civil power proved inadequate to the object? Has the language of reason been addressed to the offenders? No, not by the administration. It has been employed, and with effect too, by private citizens; but it was a private and not a public voice that proclaimed it. Tranquility and submission are the consequences. Even Fries has declared his readiness to submit, and to take his trial whenever summoned thereto; and yet we hear of nothing but military movements. And for what purpose let Timothy Pickering declare.

Mr. Wolcott, then secretary of the treasury, in a letter to Frederick Wolcott (2 Gibbs' Life of Wolcott, 230), however judicious may be his views as to the tumult itself, certainly does not want as to raciness of sentiment as to the materials upon which the tumult was to act.

"There is a paltry insurrection here, which I am inclined to think will be subdued without difficulty. It may, however, be nursed into something formidable. Pennsylvania is the most villainous compound of heterogeneous matter conceivable. Though there are many good men and good things, yet as a state it is bad in the extreme. The governor is an habitual drunkard. Every day, and not unfrequently in the forenoon, he is unable to articulate distinctly. The efficient powers of the government are exercised by Judge McKean and Dallas. Of these men I can sincerely say that I believe them to be as vile as Porcupine represents them. What lies in their power towards promoting rebellion against the government, they will effect. McKean pretty openly supports the United Irishmen. One or two rascals who assaulted Brown and were committed by the mayor, were immediately released by the judge."

partisans not nominally French citizens, but completely illuminated with French principles, electrified with French enthusiasm, and ready for any sort of revolutionary mischief! Are we to be guarded against the former and exposed to the latter? No, gentlemen. If with such examples before their eyes, congress had either confined their precaution to a war in form, or to citizens of France only, losing all sense of danger to their country in a regard to nominal distinctions, they would probably justly have deserved the charge of neglecting their country's safety in one of its most essential points, and hereafter the very men who are now clamorous against them for exercising a judicious foresight, might too late have had reason to charge them, (as many former infatuated governments in Europe may now fairly be charged by their miserable deluded fellow-citizens), as the authors of their country's ruin. But those who object to this law seem to pay little regard to considerations of this kind, and to entertain no other fear but that the president may exercise this authority for the mere purpose of abusing it. There is no end to arguments or suspicions of this kind. If this power is proper, it must be exercised by somebody. If from the nature of it, it could be exercised by so numerous a body as congress, yet as congress are not constantly sitting, it ought not to be exercised by them alone. If they are not to exercise it, who so fit as the president? What interest can he have in abusing such an authority? But on this occasion, as on others of the like kind, gentlemen think it sufficient to show, not that a power is likely to be abused (which is all that can be prudently guarded against), but that it possibly may, and therefore to guard against the possibility of an abuse of power, the power is not at all to be exercised. The argument would be just as good against his acknowledged powers, as any others, that the legislature may occasionally confide to him. Suppose he should refuse to nominate to any office, or to command the army or navy, or should assign frivolous reasons against every law, so that no law could be passed but with the concurrence of two-thirds of both houses! Suppose congress should raise an army without necessity, lay taxes where there was no occasion for money, declare war from mere caprice, lay wanton and oppressive restraints on commerce, or in a time of imminent danger trifle with the safety of their country, to gain a momentary breath of popularity at the hazard of their country's ruin! All this they may do. Does any man of candour, who does not believe everything they do, wrong, apprehend that any of these things will be done? They have the power to do them because the authority to pass very important and necessary acts of legislation on all those subjects, and in regard to which discretion must be left, unavoidably implies that, as it may be exercised in a right manner, it may, if no principle prevent it, be exercised in a wrong one. If the state legislatures should combine to choose no more senators, they may abolish the constitution without the danger of committing treason. If to prevent a house of representatives being in existence, they should keep no law in being for a similar branch of their own, deeming the abolition of the government of the United States cheaply purchased by such a sacrifice, they may do this. They have the same power over the election of a president and vice president. What is the security against abuse in any of these cases? None, but the precautions taken to procure a proper choice, which, if well exercised, will at least secure the public against a wanton abuse of power, though nothing can secure them absolutely against the common frailty of men, or the possibility of bad men, if accidentally invested with power, carrying it into a dangerous extreme. We must trust some persons, and as well as we can, submit to any collateral evil which may arise from a provision for a great and indispensable good that can only be obtained through the medium of human imperfection. At the same time it may be observed, that in the case of the president, or any executive or judicial officer wantonly abusing his trust, he is liable to impeachment, and there are frequent opportunities of changing the members of the legislature, if their conduct is not acceptable to their constituents.

The clause in the constitution, declaring that the trial of all crimes, except by impeachment, shall be by jury, can never in reason be extended to amount to a permission of perpetual residence of all sorts of foreigners, unless convicted of some crime, but is evidently calculated for the security of any citizen, a party to the instrument, or even of a foreigner if resident in the country, who, when charged with the commission of a crime against the municipal laws for which he is liable to punishment, can be tried for it in no other manner.

The second objection is, "that an alien coming into the country, on the faith of an act stipulating that in a certain time and on certain conditions, he may become a citizen, to remove him in an arbitrary manner before that time, would be a breach of public faith." With regard to this, it may be observed, that undoubtedly the faith of government ought, under all circumstances, and in all possible situations, to be preserved sacred. If, therefore, in virtue of this law, all aliens from any part of the world had a right to come here, stay the probationary time, and become citizens, the act in question could not be justified, unless it could be shown that a real (not a pretended) overruling public necessity to which all inchoate acts of legislation must forever be subject, occasioned a partial repeal of it. But there are certain conditions, without which no alien can ever be admitted, if he stay ever

so long; and one is, that during a limited time (two years in the case of aliens then resident; five in the case of aliens arriving after), he has behaved as a man of a good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. If his conduct be different, he is no object of the naturalization law at all, and consequently no implied compact was made with him. If his conduct be conformable to that description, he is no object of the alien law to which the objection is applied, because he is not a person whom the president is empowered to remove, for such a person could not be deemed dangerous to the peace and safety of the United States, nor could there be reasonable grounds to suspect such a man of being concerned in any treasonable or secret machinations against the government, in which cases alone the removal of any alien friend is authorized. Besides, any alien coming to this country must, or ought to know, that this being an independent nation, it has all the rights concerning the removal of aliens which belong by the law of nations to any other; that while he remains in the country in the character of an alien, he can claim no other privilege than such as an alien is entitled to; and consequently, whatever risk he may incur in that capacity, is incurred voluntarily, with the hope that in due time, by his unexceptionable conduct, he may become a citizen of the United States. As there is no end to the ingenuity of man, it has been suggested that such a person, if not a citizen, is a denizen, and therefore cannot be removed as an alien. A denizen in those laws from which we derive our own, means a person who has received letters of denization from the king, and under the royal government such a power might undoubtedly have been exercised. This power of denization is a kind of partial naturalization, giving some, but not all of the privileges of a natural born subject. He may take lands by purchase or devise, but cannot inherit. The issue of a denizen born before denization cannot inherit; but if born after may, the ancestor having been able to communicate to him inheritable blood. But this power of the crown was thought so formidable that it is expressly provided by act of parliament, that no denizen can be a member of the privy council, or of either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands from the crown. Upon the dissolution of the royal government, the whole authority of naturalization, either whole or partial, belonged to the several states, and this power the people of the states have since devolved on the congress of the United States. Denization, therefore, (in the sense here used,) is a term unknown in our law, since the right was not derived from any general legislative authority, but from a special prerogative of the crown, to which parliamentary restrictions afterwards were applied. So much so, that if an act of parliament had passed, giving certain rights to an alien with restrictions exactly similar to those of a denizen, I imagine he would not have been called a denizen; because the royal authority was not the source from which his rights were derived. As to acts of naturalization themselves, they are liable in England, by an express law to certain limitations, one of which is, that the person naturalized is incapable of being a member of the privy council, or either house of parliament, or of holding offices or grants from the crown. Yet I never heard, nor do I believe that such a person was ever called a denizen; for which, as there is no foundation in precedent, or in the constitution of the United States, I presume it is a distinction without solidity. Fixed principles of law cannot be grounded on the airy imagination of man.

The third objection is, "That it is inconsistent with the following clause in the constitution, viz.: 'The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on said importation not exceeding ten dollars for each person.'" I am not satisfied, as to this objection, that it is sufficient to overrule it, to say the words do not express the real meaning, either of those who formed the constitution, or those who established it, although I do verily believe in my own mind, that the article was intended only for slaves, and the clause was expressed in its present manner to accommodate different gentlemen, some of whom could not bear the name slaves, and others had objections to it. But though this probably is the real truth, yet, if in attempting to compromise, they have unguardedly used expressions that go beyond their meaning, and there is nothing but private history to elucidate it, I shall deem it absolutely necessary to confine myself to the written instrument. Other reasons may make the point doubtful, but at present I am inclined to think it must be admitted, that congress, prior to the year 1808, cannot prohibit the migration of free persons to a particular state, existing at the time of the constitution, which such state shall, by law, agree to receive. The states then existing, therefore, till 1808, may (we will say) admit the migration of persons to their own states, without any prohibitory act of congress.—This they may do upon principles of general policy, and in consistence with all their other duties. The states are expressly prohibited from entering into an engagement or contract with another state, or engaging in war, unless actually invaded, or in such imminent danger, as will not admit of delay. The avenues to foreign connection being thus carefully closed, it will scarcely be contend-

ed, that in case of war, a state could, either directly or indirectly, permit the migration of enemies. If they did, the United States could certainly, without any impeachment of the general right of allowing migration, in virtue of their authority to repel invasion, prevent the arrival of such. And as such invasion may be attempted without a formal war, and congress have an express right to protect against invasion, as well as repel it, I presume congress would also have authority to prevent the arrival of any enemies, coming in the disguise of friends, to invade their country. But, admitting the right to permit migration in its full force, the persons migrating on their authority must be subject to the laws of the country, which consist not only of those of the particular state, but of the United States. While aliens, therefore, they must remain in the character of aliens; and, of course, upon the principles I have mentioned, be subject to a power of removal, in certain cases recognized in the law of nations; nor can they cease to be in this situation, until they become citizens of the United States; in which case they must obey the laws of the Union as well as of the particular state they reside in. But, gentlemen argue as if because the states had a right to permit migration, the migrants were under a sort of special protection of the state admitting it, lest the United States, merely to disappoint the purpose of migration, should exercise an arbitrary authority of removal without any cause at all. It would be just as consistent to say, that if such migrant was charged with a murder on the high seas, or in any fort or arsenal of the United States, he should not be tried for it in a court of the United States, lest the court and juries, out of ill will to the state, should combine to procure his conviction and punishment, in all events, to defeat the state law. The two powers may undoubtedly be made compatible, if the legislatures of the particular states, and the government of the United States, do their duty, without which presumption, not an authority given by the constitution can exist. They surely are more compatible than the collateral powers of taxation, which, under each government, go to an unlimited extent, but the very nature of which forbids any other limitation than a sense of moral right and justice. If we skepticize in the manner of some gentlemen on this subject, suppose each legislature should tax to the amount of 19s. in the pound; each has the power; but is such an exercise of it more apprehended than we apprehend an earthquake to swallow us all up at this very moment? All systems of government suppose they are to be administered by men of common sense and common honesty. In our country, as all ultimately depends on the voice of the people, they have it in their power, and it is to be presumed they generally will choose men of this description: but if they will not, the case, to be sure, is without remedy. If they choose fools, they will have foolish laws. If they choose knaves, they will have knavish ones. But this can never be the case until they are generally fools or knaves themselves, which, thank God, is not likely ever to become the character of the American people.

Having said what I thought material as to the alien laws, upon the particular objections to them, I now proceed to discuss the objections which have been made to what is called the "Sedition Act," one of which equally applies to the alien laws as well as to this. But I think it proper previously to read the law itself.

The objections (so far as I have heard them) to this act, are as follows: 1. (And this applies to the alien law also.) That there is no specific power given to pass an act of this description, though in the particular specific powers given, there is authority conveyed as to other offences specially named. 2. That this law is not warranted by a clause in the constitution, conveying legislative authority, which, after designating particular objects, adds: "And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other power vested by this constitution in the government of the United States, or in any department or officer thereof."—Because it is not necessary and proper to pass any such law in order to carry into execution any of those powers. 3. That, admitting the former positions are not maintainable, yet the exercise of this authority is incompatible with the following amendment to the constitution, viz.: "Congress shall make no law respecting an establishment of religion, or prohibiting the full exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

With regard to the first objection, I readily acknowledge, that soon after the constitution was proposed, and when I had taken a much more superficial view of it than I was sensible of at the time, I did think congress could not provide for the punishment of any crimes but such as are specifically designated in the particular powers enumerated. I delivered that opinion in the convention at North Carolina, in the year 1788, with a perfect conviction, at the time, that it was well founded. But I have since been convinced it was an erroneous opinion, and my reasons for changing it I shall state to you as clearly as I am able.

It is in vain to make any law unless some sanction be annexed to it, to prevent or punish its violation. A law without it might be equivalent to a good moral sermon; but bad members of society would be as little influenced by one as the other. It is, therefore, necessary and proper, for instance, under the constitution of the United States, to

secure the effect of all laws which impose a duty on some particular persons, by providing some penalty or punishment if they disobey. The authority to provide such is conveyed by the following general words in the constitution, at the end of the objects of legislation particularly specified: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." A penalty alone would not in every case be sufficient, for the offender might be rich and disregard it, or poor, though a wilful offender, and unable to pay it. A fine, therefore, will not always answer the purpose, but imprisonment must be in many cases added, though a wise and humane legislature, will always dispense with this, where the importance of the case does not require it. But if it does, from the very nature of the punishment, it becomes a criminal, and not a civil offence; the grand jury must indict, before the offender can be convicted. This general position may be illustrated by a variety of instances under the Penal Code of the United States, which have, I believe, never been objected to as unconstitutional, though there have never been wanting penetrating and discerning members who were ready enough to take exceptions where they found any plausible ground for them. I shall enumerate a few. In the act entitled, "An act for the punishment of certain crimes against the United States" (1 Swift's Ed., p. 100 [1 Stat. 112]), among other crimes specified, are the following: Murder or larceny in a fort belonging to the United States. Misprision of felony committed in any place under the sole and exclusive jurisdiction of the United States. Stealing or falsifying a record of any court of the United States. Perjury in any court of the United States. Bribing a judge of the United States. Obstructing the execution of any kind of a process issuing from a court of the United States. In the collection act (volume 1, p. 237 [1 Stat. 175]) it is provided, that in all cases where an oath is by that act required from a master or other person having command of a ship or vessel, or from an owner or assignee of goods, wares, and merchandize, his or her factor or agent, if the person so swearing shall swear falsely, such person shall, on indictment and conviction thereof, be punished by fine or imprisonment, or both, in the discretion of the court, before whom such conviction shall be had, so as the fine shall not exceed one thousand dollars, and the term of imprisonment shall not exceed twelve months. In the act laying duties on distilled spirits (volume 1, p. 324 [1 Stat. 208]), in the 39th section, it is provided as follows: "If any supervisor, or other officer of inspection, in any criminal prosecution against them, shall be convicted of oppression or extortion in the execution of his office, he shall be fined not exceeding five hundred dollars, or imprisoned not exceeding six months, or both, at the discretion of the court; and shall also forfeit his office." These instances deserve great consideration; because I believe no candid man will deny that these provisions were constitutional exercises of authority, within the scope of the general authority conveyed, though not specially named as objects which it should be competent for congress to provide for. And they certainly derive weight from the consideration, that the principle of them (which I believe was the case) was never objected to, though the expediency of some of the provisions may have been.

In further illustration of this subject, I shall state a case which was determined in this court, — U. S. v. Worrall [Case No. 16,766], — where there was an indictment against the defendant for attempting to bribe Mr. Coxe, the commissioner of the revenue. The defendant was found guilty, and afterwards a motion was made in arrest of judgment, assigning, together with some technical objections, this general one, that the court had no cognizance of the offence, because no act of congress had passed creating the offence and prescribing the punishment, but it was solely on the foot of the common law. The very able and ingenious gentleman who is the reporter of that case, and was the defendant's counsel in it, in the course of his argument, makes the following observations, part of which are remarkably striking and pertinent to my present subject: "In relation to crimes and punishments, the objects of the delegated power of the United States are enumerated and fixed. Congress may provide for the punishment of counterfeiting the securities and current coin of the United States; and may define and punish piracies and felonies committed on the high seas, and offences against the law of nations. Art. 1, § 8. And so, likewise, congress may make all laws which shall be necessary and proper for carrying into execution the powers of the general government. But here is no reference to a common law authority. Every power is matter of definite and positive grant; and the very powers that are granted cannot take effect until they are exercised through the medium of a law. Congress had undoubtedly a power to make a law, which should render it criminal to offer a bribe to the commissioner of the revenue; but, not having made the law, the crime is not recognized by the Federal Code, constitutional or legislative; and consequently, it is not a subject on which the judicial authority of the Union can operate." So far the observations of the defendant's counsel. Judge Chase, who on that occasion differed from Judge Peters as to the common law jurisdiction of the court, held, that under the 8th section of the first article, which I am now considering, although bribery is not among the crimes and offences specially mentioned, it is

certainly included in that general provision; and congress might have passed a law on the subject which would have given the court cognizance of the offence. Judge Peters was of opinion, that the defendant was punishable at common law; but that it was competent for congress to pass a legislative act on the subject.

I conclude, therefore, that the first objection is not maintainable.

With regard to the second objection, which is, that this law is not warranted by that clause of the constitution authorizing congress to pass all laws which shall be necessary and proper for carrying into execution the powers specially enumerated, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof; because, it is not necessary and proper to pass any such law, in order to carry into execution any of those powers—it is to be observed, that, from the very nature of the power, it is, and must be, discretionary. What is necessary and proper, in regard to any particular subject, cannot, before an occasion arises, be logically defined; but must depend upon various extensive views of a case, which no human foresight can reach. What is necessary and proper in a time of confusion and general disorder, would not, perhaps, be necessary and proper in a time of tranquillity and order. These are considerations of policy, not questions of law, and upon which the legislature is bound to decide according to its real opinion of the necessity and propriety of any act particularly in contemplation. It is, however, alleged, that the necessity and propriety of passing collateral laws for the support of others, are confined to cases where the powers are delegated, and do not extend to cases which have a reference to general danger only. The words are general, "for carrying into execution the special powers previously enumerated, and all other powers vested by the constitution in the government of the United States, or any department or officer thereof." If, therefore, there be anything necessary and proper for carrying into execution any or all of those powers, I presume that may be constitutionally enacted. Two objects are aimed at by every rational government, more especially by free ones: 1. That the people may understand the laws, and voluntarily obey them. 2. That if this be not done by any individual, he shall be compelled to obey them, or punished for disobedience. The first object is undoubtedly the most momentous; for, as the legitimate object of every government is the happiness of the people committed to its care, nothing can tend more to promote this than that, by a voluntary obedience to the laws of the country, they should render punishments unnecessary. This can never be the case in any country but a country of slaves, where gross misrepresentation prevails, and any large body of people can be induced to believe that laws are made either without authority, or for the purpose of oppression. Ask the great body of the people who were deluded into an insurrection in the western parts of Pennsylvania, what gave rise to it? They will not hesitate to say, that the government had been vilely misrepresented, and made to appear to them in a character directly the reverse of what they deserved. In consequence of such misrepresentations, a civil war had nearly desolated our country, and a certain expense of near two millions of dollars was actually incurred, which might be deemed the price of libels, and among other causes made necessary a judicious and moderate land tax, which no man denies to be constitutional, but is now made the pretext of another insurrection. The liberty of the press is, indeed, valuable—long may it preserve its lustre! It has converted barbarous nations into civilized ones—taught science to rear its head—enlarged the capacity—increased the comforts of private life—and, leading the banners of freedom, has extended her sway where her very name was unknown. But, as every human blessing is attended with imperfection, as what produces, by a right use, the greatest good, is productive of the greatest evil in its abuse, so this, one of the greatest blessings ever bestowed by Providence on His creatures, is capable of producing the greatest good or the greatest mischief. A pen, in the hands of an able and virtuous man, may enlighten a whole nation, and by observations of real wisdom, grounded on pure morality, may lead it to the path of honour and happiness. The same pen, in the hands of a man equally able, but with vices as great as the other's virtues, may, by arts of sophistry easily attainable, and inflaming the passions of weak minds, delude many into opinions the most dangerous, and conduct them to actions the most criminal. Men who are at a distance from the source of information must rely almost altogether on the accounts they receive from others. If their accounts are founded in truth, their heads or hearts must be to blame, if they think or act wrongly. But, if their accounts are false, the best head and the best heart cannot be proof against their influence; nor is it possible to calculate the combined effect of innumerable artifices, either by direct falsehood, or invidious insinuations, told day by day, upon minds both able and virtuous. Such being unquestionably the case, can it be tolerated in any civilized society that any should be permitted with impunity to tell falsehoods to the people, with an express intention to deceive them, and lead them into discontent, if not into insurrection, which is so apt to follow? It is believed no government in the world ever was without such a power. It is unquestionably possessed by all the state governments, and probably has been

exercised in all of them: sure I am, it has in some. If necessary and proper for them, why not equally so, at least, for the government of the United States, naturally an object of more jealousy and alarm, because it has greater concerns to provide for? Combinations to defeat a particular law are admitted to be punishable. Falsehoods, in order to produce such combinations, I should presume, would come within the same principle, as being the first step to the mischief intended to be prevented; and if such falsehoods, with regard to one particular law, are dangerous, and therefore ought not to be permitted without punishment—why should such which are intended to destroy confidence in government altogether, and thus induce disobedience to every act of it? It is said, libels may be rightly punishable in monarchies, but there is not the same necessity in a republic. The necessity, in the latter case, I conceive greater, because in a republic more is dependent on the good opinion of the people for its support, as they are, directly or indirectly, the origin of all authority, which of course must receive its bias from them. Take away from a republic the confidence of the people, and the whole fabric crumbles into dust. I have only to add, under this head, that, in order to obviate any probable ill use of this large and discretionary power, the constitution, and certain amendments to it, have prohibited, in express words, the exercise of some particular authorities, which otherwise might be supposed to be comprehended within them. Of this nature is the prohibitory clause relating to the present object, which I am to consider under the next objection.

4. That objection is, that the act is in violation of this amendment of the constitution, 3 Swift's Ed. p. 455, art. 3 [1 Stat. 21]. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The question then is, whether this law has abridged the freedom of the press? Here is a remarkable difference in expressions as to the different objects in the same clause. They are to make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press. When, as to one object, they entirely prohibit any act whatever, and, as to another object, only limit the exercise of the power, they must, in reason, be supposed to mean different things. I presume, therefore, that congress may make a law respecting the press, provided the law be such as not to abridge its freedom. What might be deemed the freedom of the press, if it had been a new subject, and never before in discussion, might indeed admit of some controversy. But, so far as precedent, habit, laws, and practices are concerned, there can scarcely be a more definite meaning than that which all these have affixed to the term in question. We derive our principles of law originally from England. There, the press, I believe, is as free as in any country of the world, and so it has been for near a century. The definition of it is, in my opinion, no where more happily or justly expressed than by the great author of the commentaries on the laws of England, which book deserves more particular regard on this occasion, because for near thirty years it has been the manual of almost every student of law in the United States, and its uncommon excellence has also introduced it into the libraries, and often to the favourite reading of private gentlemen; so that his views of the subject could scarcely be unknown to those who framed the amendments to the constitution: and if they were not, unless his explanation had been satisfactory, I presume the amendment would have been more particularly worded, to guard against any possible mistake. His explanation is as follows: "The liberty of the press is indeed essential to the nature of a free state. And this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controversial points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press, 'that it was necessary to prevent the daily abuse

of it,' will entirely lose its force when it is shown (by a reasonable exercise of the laws) that the press cannot be abused to any bad purpose, without incurring a suitable punishment: whereas, it never can be used to any good one when under the control of an inspector. So true will it be found, that to censure the licentiousness is to maintain the liberty of the press." 4 Bl. Comm. 151

It is believed that, in every state in the Union, the common law principles concerning libels apply; and in some of the states words similar to the words of the amendment are used in the constitution itself or a contemporary bill of rights, of equal authority, without ever being supposed to exclude any law being passed on the subject. So that there is the strongest proof that can be of a universal concurrence in America on this point, that the freedom of the press does not require that libellers shall be protected from punishment. But, in some respects the act of congress is much more restrictive than the principles of the common law, or than, perhaps, the principles of any state in the Union. For, under the law of the United States, the truth of the matter may be given in evidence, which at common law, in criminal prosecutions, was held not to be admissible; and the punishment of fine and imprisonment, which at common law was discretionary, is limited in point of severity, though not of lenity. It is to be observed, too, that by the express words of the act, both malice and falsehood must combine in the publication, with the seditious intent particularly described. So that if the writing be false, yet not malicious, or malicious and not false, no conviction can take place. This, therefore, fully provides for any publication arising from inadvertency, mistake, false confidence, or anything short of a wilful and atrocious falsehood. And none surely will contend, that the publication of such a falsehood is among the indefeasible rights of men, for that would be to make the freedom of liars greater than that of men of truth and integrity.

I have now said all I thought material on these important subjects. There is another upon which it is painful to speak, but the notoriety as well as the official certainty of the fact, and the importance of the danger, make it indispensable. Such incessant calumnies have been poured against the government for supposed breaches of the constitution, that an insurrection has lately begun for a cause where no breach of the constitution is or can be pretended.[2] The grievance is the land tax act, an act which the public exigencies rendered unavoidable, and is framed with particular anxiety to avoid its falling oppressively on the poor, and in effect the greatest part of it must fall on rich people only. Yet arms have been taken to oppose its execution; officers have been insulted; the authority of the law resisted; and the government of the United States treated with the utmost defiance and contempt. Not being thoroughly informed of all particulars, I cannot now say within what class of offences these crimes are comprehended. But as some of the offenders are committed for treason, and many certainly have been guilty of combinations to resist the law of the United States, I think it proper to point your attention particularly to those subjects. The provisions in regard to the former, so far as they may at present be deemed material or instructive, are as follow: (Here the passages referred to were read.)

The only species of treason likely to come before you is that of levying war against the United States. There have been various opinions, and different determinations on the import of those words. But I think I am warranted in saying, that if, in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the congress of the United States altogether (as for instance the land tax act, the object of their opposition), any forcible opposition calculated to carry that intention into effect, was a levying of war against the United States, and of course an act of treason. But if the intention was merely to defeat its operation in a particular instance, or through the agency of a particular officer, from some private or personal motive, though a higher offence may have been committed, it did not amount to the crime of treason. The particular motive must, however, be the sole ingredient in the case, for if combined with a general view to obstruct the execution of the act, the offence must be deemed treason. With regard to the number of witnesses in treason, I am of opinion that two are necessary on the indictment as well as upon the trial in court. The provision in the constitution, that the two witnesses must be to the same overt act (or actual deed constituting the treasonable offence), was in consequence of a construction which had prevailed in England, that though two witnesses were required to prove an act of treason, yet if one witness proved one act, and another witness another act of the same species of treason (as for instance that of levying war), it was sufficient; a decision which has always appeared to me contrary to the true intention of the law which made two witnesses necessary—this provision being, as I conceived, intended to guard against fictitious charges of treason, which an unprincipled government might be tempted to

[2] [This refers to the insurrection in the counties of Northampton, and Bucks, against the execution of the act of July 9, 1798 (1 Stat. 580) providing for registering the number and admeasurement of the windows in each house for the purpose of fixing the value of the house for purposes of taxation.]

support and encourage, even at the expense of perjury, a thing much more difficult to be effected by two witnesses than one. An act of congress which I have already read to you (that commonly called the sedition act) has specially provided in the manner you have heard, against combinations to defeat the execution of the laws. The combinations punishable under this act must be distinguished from such as in themselves amount to treason, which is unalterably fixed by the constitution itself. Any combinations, therefore, which before the passing of this act, would have amounted to treason, still constitute the same crime. To give the act in question a different construction, would do away altogether the crime of treason as committed by levying war, because no war can be levied without a combination for some of the purposes stated in the act, which must necessarily constitute a part, though not the whole, of the offence.

Long, gentlemen, as I have detained you, for which the great importance of the occasion, I trust, is a just apology, it will be useful to recollect that, ever since the first formation of the present government, every act which any extraordinary difficulty has occasioned, has been uniformly opposed before its adoption, and every art practiced to make the people discontented after it; without any allowance for the necessity which dictated it, some seem to have taken it for granted that credit could be obtained without justice, money without taxes, and the honor and safety of the United States only preserved by a disgraceful foreign dependence. But, notwithstanding all the efforts made to vilify and undermine the government, it has uniformly risen in the esteem and confidence of the people. Time has disproved arrogant predictions; a true knowledge of the principles and conduct of the government has rectified many gross misrepresentations; credit has risen from its ashes; the country has been found full of resources, which have been drawn without oppression, and faithfully applied to the purposes to which they were appropriated: justice is impartially administered; and the only crime which is fairly imputable is, that the minority have not been suffered to govern the majority, to which they had as little pretension upon the ground of superiority of talents, patriotism, or general probity, as upon the principles of republicanism, the perpetual theme of their declamation. If you suffer this government to be destroyed, what chance have you for any other? A scene of the most dreadful confusion must ensue. Anarchy will ride triumphant, and all lovers of order, decency, truth and justice be trampled under foot. May that God, whose peculiar providence seems often to have interposed to save these United States from destruction, preserve us from this worst of all evils! And may the inhabitants of this happy country deserve his care and protection by a conduct best calculated to obtain them![3]

April 30.—Mr. Lewis preferred the following motion to the court in writing.

And now the prisoner, John Fries, being placed at the bar of this court, at the city of Philadelphia, being the place appointed by law for holding the stated sessions thereof, and it being demanded of him if he is ready for his trial for the treason in the indictment mentioned, he moves, ore tenus, that his trial for the same offence may not be proceeded on here, and that the same may be had in the county in which the same acts of treason in the said indictment mentioned are laid, and where the offence therein mentioned is alleged to have been committed.

Mr. Lewis stated this motion to be founded on an act of congress entitled the "Judiciary Act," passed 24th September, 1789, § 29 [1 Stat. 88]: "That in cases punishable

[3] The publication of the charge was elicited by the following note.

Philadelphia, May 15, 1799. Sir:—The grand jury of the circuit court of the district of Pennsylvania have heard with great satisfaction, the charge delivered to them, on the opening of the court. 'At a time like the present, when false philosophy and the most dangerous and wicked principles are spreading with rapidity, under the imposing garb of Liberty, over the fairest countries of the Old World—they are convinced, that the publication of a charge, fraught with such clear and just observations on the nature and operation of the constitution and laws of the United States, will be highly beneficial to the citizens thereof. With these sentiments strongly impressed on their min's, they unanimously request, that a copy of the said charge may be delivered to them for publication; especially for the information of those, who are too easily led by the misrepresentations of evil disposed persons, into the commission of crimes, ruinous to themselves, and against the peace and dignity of the United States. Isaac Wharton, Foreman, J. Ross, Edward Pennington, Philip Nicklin, Joseph Parker Norris, Benjamin W. Morris, Thomas M. Willing, Robert Ralston, John Craig, Samuel Coates, David H. Conyngham, John Perot, James C. Fisher, Daniel Smith, Gideon Hill Wells, William Montgomery, W. Bulkley.

Honourable Judge Iredell.

To the Gentlemen of the Grand Jury of the United States, for the District of Pennsylvania. Gentlemen: I receive with great sensibility the honour of this address, from gentlemen whom I personally respect so much. Believing, as I have long done, that the constitution and laws of the United States afford the highest degree of rational liberty which the world ever saw, or of which perhaps mankind are capable, I have seen with astonishment and regret, attempts made in the pursuit of visionary chimeras, to subvert or undermine so glorious a fabric, equally constructed for public and private security. It cannot but be extremely pleasing to me that the sentiments on this subject I delivered in my charge, should meet with your entire approbation; and as you are pleased to suppose the publication of them may be of some service in correcting erroneous opinions, I readily consent to it, considering your sanction of them as giving them an additional value, which will increase the hope of their producing a good effect. James Iredell. Philadelphia, May 15, 1799.

with death, the trial shall be had in the county where the offence was committed; or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence." He stated the advantages resulting from this section to the accused to be, that a man might be tried by his peers, where he is known, and where there can be no difficulties to procure witnesses in his behalf. This inestimable right, he said, was one of the grounds of complaint to the United States, which promoted their separation from the mother country, and this was one cause of her taking up arms. This advantage, congress had held in just estimation, and upon this, no innovation was to be admitted; on which account, the most pointed and positive terms were used, and the divisions of vicinage reduced to counties. But nevertheless, he observed, this rule had an exception, which was where "manifest inconvenience" occurred, twelve jurymen were to be summoned from that county, and therefore before the court could consider themselves authorized to proceed to the trial in that place, their honours must be well satisfied that trial could not take place in the county of Northampton without "manifest inconvenience." These words did not refer to the inconvenience the judges might feel in travelling, or the time spent; but an inconvenience arising from some cause which congress did not foresee at the time of the passing of the act. The trouble and inconvenience to the judges could be no greater than to the prisoners, whom the government had brought to this city.

Mr. Lewis said he was aware of an objection which would be raised to the force of the section above quoted, founded on a subsequent law passed March 2, 1793, § 3 [1 Stat. 333], which directs that a judge of the supreme court, with a district judge, "may direct special sessions of the circuit courts to be holden for the trial of criminal causes, at any convenient place within the district, nearer to the place where offences may be said to be committed, than the place or places appointed by law for the ordinary sessions." The places appointed by law for the state of Pennsylvania are, York Town and Philadelphia. This, he presumed, must refer to causes of a civil nature, or to criminal acts of a less grade than what is peremptorily required in the act first quoted from, to govern "cases punishable with death." The same act says, that trials in capital cases should be elsewhere, and not at the stated places, unless manifest inconvenience attend it. And what, he asked, was the great inconvenience in the present case? Was there any objection of a nature to render it improper or impossible to try the prisoner in that county? It was true that a considerable number of persons in that county had been misguided, but was it to be inferred thence that all were? or that a fair trial could not be had there? No doubt an able and impartial jury might be obtained in that place, and therefore an impartial trial could be had. In bad times, with corrupt judges, if ever such a time and such judges should unhappily be in this country, the section of 1789 would form a protection to the citizen against any innovation of his privilege, and prevent their dragging him from his family and friends to a distant part, where he might be unknown, to be tried. Surely it could not be urged that the safety of the United States, or the protection of the court, made it necessary to try this cause in Philadelphia. The prisoners might have been confined in the jails of that county; the troops of the United States were even now remaining there, to protect the law. The vicinity of that spot to the witnesses who beheld the transactions was an additional argument for the plea. Some, to be sure, had come to the city; others perhaps might come forward; sickness or age might operate to prevent some coming. It was also inconvenient to the prisoner in preventing his neighbours or relatives affording him that comfort which they might wish. But all this, he said, was immaterial; the law was definite, and nothing could supersede its mandate. Here was a list of ninety-eight witnesses, furnished the prisoner by Mr. Attorney, who were to appear against him, and hence the necessity of time and opportunity being allowed the prisoner to examine that numerous train of evidence, and to prepare to controvert them.

Mr. Lewis then referred to a similar motion which he made before the court, respecting a person tried for high treason in the Western Insurrection, in 1795, for which he referred to [U. S. v. Hamilton] 3 Dall. [3 U. S.] 18. The motion was then rejected, but upon different grounds than could possibly be now urged. Judge Wilson stated it as the opinion of the court, the plea being made at a previous court, that the circuit court, at which the prisoner was to be tried, was so near, that there was not time to send to the witnesses and bail, on account of the great distance of the county from the city, as they were subpoenaed to attend at the next session. The reason was, that the supreme court could not order a special session to over-rule the stated session, and therefore the inconvenience was great and manifest; but no such excuse could hold good in the present case: the mandatory language of the former clause must be obeyed. Further, he observed that a man might be charged with the crime of treason, and committed for that crime, or bound over, if the case would allow it; yet it was impossible to know that he would be indicted for treason by a grand jury; and no court held previous to the indictment could say whether it was a case punishable with death, or a misdemeanour, and therefore the time to move the plea was the present time, after the indictment was returned, and when the defendant was ar-

raigned for trial, and till then the motion would be inapplicable. He observed that he considered this motion of considerable importance to the prisoner, and not to him only, but to every citizen of the United States: this was the security of his rights, and those of every man in the court, and therefore he hoped the justice of the court would grant the plea.

Mr. Sitgreaves said he had not been able to distinguish whether this motion had been preferred to the court as a matter of unqualified right, or whether it was merely an application, as a matter of favour in this particular instance; but he would attempt an answer to both. With respect to the 29th section of the judiciary act, if the first part of the paragraph was to stand alone, without a qualification, it would be a positive direction, and would not bear an objection, yet there would be a difficulty arise how it could be executed: But it was not so. At the time that law was passed, there were stated places, as well as stated times, for holding the federal courts; there was no provision whatever for holding them elsewhere than the appointed place, although the judges had special powers to alter the time of holding them: whether that reason, or some other, excited the legislature to put the discretion as to place in the judges also, he could not tell, but although the first direction is positive, an alternative is immediately introduced: twelve jurors summoned from the county where the crime was committed, may suffice, at the discretion of the court, and this second branch of the rule is to avoid what the court may judge a great inconvenience, against which no general rule of common law can provide. In order to prevent any misinterpretation, and remove the embarrassments which a wrong use of the law of 1789 might produce, the provision of March, 1793, still more defines that discretion, without making any material alteration: that says, "the court might be held at any convenient place within the district, nearer to the place where the crime was committed than the place for holding the stated session." Certain it is that this provision does not require it to be held in the same county; indeed it is extremely questionable, whether the court have authority to remove it there; they may nearer the place, but the word "nearer" excludes the place itself; if the place was intended, the phraseology would be more accurately inserted. He would now remark that no place nearer the scene of insurrection than this city could have been selected, and here the discretion of the court had fixed it. The law must have been made for one of two reasons: either for the facility of public justice, or to favour the prisoner. Respecting the first, the crime was committed, not in one county only, but in three adjoining counties, and, therefore, agreeably to the arguments of the gentleman, the trial must be held in three counties, by three juries, and the witnesses be harassed to appear three times; but even if the court should determine upon one of those counties for the trial, which was to be selected?

Mr. Lewis questioned the propriety of this argument, since it appeared all the cases of treason except one (in Bucks) happened in Northampton county, and no inconvenience could accrue from holding the trials at one place.

Mr. Rawle said that he should produce evidence to prove the crime of treason committed in the three counties.

Mr. Sitgreaves proceeded to state, that, as the act of 1793, as well as 1798, left a discretion for the court to determine according to existing circumstances, and not according to any known definite principles of law, it would be impolitic, if not illegal, to hold the court in the county, this city being, agreeably to one argument, next to one of the counties, and on the other view, the stated place for holding the courts, the arguments must fall, and the motion be rejected. Philadelphia, he said, was as near to the place where the crime was committed as the court-house of that county, and here, it was probable, the purposes of public justice could be most completely answered. If, then, the argument was not supported on public convenience, it must be the convenience of the prisoner which the gentleman aimed at; but he had failed to show any such thing, and therefore had precluded any answer. He had argued for the comfort of the prisoner; having his neighbours about him, &c.; but it must be observed that the residence of the prisoner was in Bucks, whereas the crime was committed in Northampton, and there he must have been tried, if the decision should turn in favour of his arguments. Now, Philadelphia was as much an adjoining county to Bucks as Northampton, and therefore as much his vicinage, and each place of holding the courts at about equal points of distance from his residence. Even if it was held in Northampton county, it would neither facilitate the trial nor be of advantage to the person. Another question he would suggest was, whether this application was made soon enough? It was nearly, or quite a week, since the indictment was given to the prisoner, and it was a much longer time since he was committed: if it was proper that any application should be made to the court, either as a matter of right or of favour, it ought to have been made in due time, so as not to delay or defeat the question of public justice. It would be unnecessary to say that the question was fully determined in the year 1795, and if it was a matter of law, and as such mandatory, every case which was then decided on was a case of mis-trial, and the whole court and counsel must have been guilty of a great dereliction. But he believed it was asked of the court at that time, not as a

matter of right, but of favour, and it appeared by the report quoted, that if the favour could have been granted, it would, but the decision was against the possibility of it, and certainly stronger reason would have weighed for it then than now, on which account there is now, at least, equal grounds for refusing it.

Mr. Rawle observed, that while he professed as much humanity as any gentleman in court, yet as counsel for the prosecution he felt as much desire for the just execution of public justice. He could scarcely persuade himself that the gentleman who moved the court could be serious, at this late period of the business; after seven days had elapsed since the indictment was found, after all the inconveniences of a preparation for trial had been incurred, this new, this additional inconvenience of summoning the witnesses and jurors to another place, could not be either to the advantage of the prisoner, or agreeable to a just construction of the law adverted to. The law of March, 1793, does not apply to a case which the offence first charged would make capital so as to affect life. The question seriously was, Mr. Rawle said, whether granting the motion would not deprive the country of the power of prosecuting the trial at all, or even after full proof of the guilt of the prisoner, it would not prevent the court from passing sentence. The act read by Mr. Sitgreaves gave the judge the power to hold courts throughout his whole district,—2 Laws U. S. 226 [1 Stat. 333],—but the act of 1789, which fixed the place, only gave the court power as to times of holding special sessions,—volume 1, p. 51 [1 Stat. 75]. The 29th section of that act was very ambiguously worded, because the fifth section of the same act had put it out of the power of the court to remove as to place. Whatever, then, was the intention of the legislature, the courts had not power to effect a change, and as when an act failed in explaining the intention, the intention could not be carried into execution, to remedy the inconvenience of the court being bound in all cases as to place, the clause of 1793, p. 226 [supra], was passed.

Mr. Rawle contended that a special court was more than an adjourned circuit court: it was a substantive court of itself, held for special purposes, and could not issue certiorari for any other court; if, therefore, a special court was to be held for this trial, it must begin de novo: a new grand jury, a new petit jury, must be called; the witnesses must be summoned anew, which would be a bad precedent, besides a great delay. The impropriety was evident: after a bill had been found, and the prisoner had seen a list of the jury and witnesses; after having had time to calculate its chances, at the seventh day of the proceeding, he came forward to remove the trial! If the prisoner had not had time to inquire into the character of the jurors or witnesses, some other reason would have been given; but as nothing of that kind had been attempted, and as the inconveniences of delay and removal were so manifest, he trusted the court would not accede to the motion.

Mr. Dallas declared that it was not the design of the counsel for the prisoner to try experiments by the present motion; they conceived that he had a right to be tried in the county where the crime was charged: the act of congress was mandatory, unless "manifest inconveniences" should appear. He conceived that distance could not be an inconvenience, because the act contemplated the possibility of crimes being committed in Alleghany as well as in Chester county. Nor could time. The importance of a capital trial was not to be so played with. Congress designed that an impartial trial should be had in all cases, without regard to such trivial objections. He was sure the honourable court would not consider their personal inconveniences as meant, and therefore should not mention it. Mr. Dallas wished it to be observed, that the crimes were recently committed, and public justice had not been long suspended; and, even if the present motion was acceded to, the hand of public justice might shortly give the blow, by appointing an early special session. It was not certain, before the court sat, that a bill would be found for high treason, merely because the parties were bound over for high treason; and therefore the prisoner might not be able to meet that charge. Again, the time since the bill was found and the party informed, and served with the enormous list of ninety eight witnesses, has been very short. It was Wednesday last, seven days only, two of which must be left out, Thursday having been the fast-day, and Sunday intervening. Many of these witnesses and jurors he had never seen nor heard of, and it was necessary he should have time to inquire who they were. There had been no catches on the part of the prisoners. It would be an easy thing for the court, at this time, since all the parties were upon the spot, to bind them over to appear again. In the case read by Mr. Lewis, Judge Wilson expressly declared, that there was a desire in the court to comply, but the difficulties were insurmountable. With respect to the other cases, the mandatory language of congress imposed a necessity on the officers of justice, where it was possible. The clashing of courts, he presumed, could not be held up for excuse at this time. He did not know how much time the present circuit might consume; but as the supreme court would not meet until August, no doubt there could be a period for the business of a special court spared during the recess; but if the period should be filled up, in the August session arrangements might be made to hold one. With respect to the holding of district courts, Mr. Dallas observed, that the law—volume 1, pp. 49, 50 [1 Stat. 74]—allowed a discretion as to the places of

holding them; page 51 gives discretion, as to the circuit court, to the judges of supreme court with respect to time. These provisions respected all cases alike within the jurisdiction of those courts; but the subsequent act referred to made an exception with regard to cases of a nature highly criminal, or capital. Certainly, then, if ever the congress meant there should be a trial at all in the proper county, one like the present must come under that intention. The language of the two acts—volume 2, p. 67 [1 Stat. 88], and volume 2, p. 226 [1 Stat. 334],—Mr. Dallas observed, was different. The first declared that cases punishable with death should be tried in the county, &c. The second, that special circuit courts may be holden nearer the place where the offences may be said to be committed than the place of the ordinary sessions. But, one thing was worthy of notice. The first relates only to offences punishable with death, while the other is worded as crimes only, of whatever nature. Cases of insurrection and rebellion must have been in view of the legislature; and in them it would be very probable that part of more than one county would combine, and they could have excepted such cases if it had been meant so to do. It was farther said, that part of the crimes were committed in two counties, and therefore the prisoner had deprived himself of the common law vicinage. This was not clear. The vicinage where the offence was committed would, at any rate, have it in their power to declare what they had seen of the conduct of the prisoner. As to the stage at which the application was made, no loss of time had been felt; and if it had, it would be extremely severe, if it was in the power of the court to order it otherwise, so that the prisoner in so important a case should be injured thereby. On the whole, he trusted, unless manifest inconvenience should appear, that the court would grant the motion.

Mr. Lewis said, it was strange, mischievous, and unfounded doctrine that this application had not been made in time. Three clear days from the notice of the indictment being allowed by law to the prisoner, he was not bound to answer the indictment until yesterday. The trial did not then proceed, and he appeared this day; but, in his sincere opinion, from mature reflection, two, three, nor four days, should have weight with the court, because the act of congress was binding upon them, whatever the learned gentleman had advanced to the contrary. He had a right to demand it; and if their honours, the judges, proceeded to hold the trial in any but the right place, they, and not the prisoner, would offend. Mr. Attorney had supposed, if this was granted, all which had been done would be null and void. Grant this for a moment. Did Mr. Attorney or John Fries direct the proceedings of the grand jury, &c.? Certainly the attorney. In this Mr. Lewis believed he had done strictly right; here was the proper place for the issue to be joined; but Northampton is the proper place for the trial of that issue. It was objected, because it was said the crime was committed in three counties. But, suppose it were in three or thirty counties, the overt act in the bill is laid in one county only, and there only does the law support the claim for trial. The two laws referred to are unnecessary in capital cases, if they do extend to them at all, because the first law makes ample provision not only as to time,—page 51 [1 Stat. 75],—but as to place,—page 67 [1 Stat. 88],—and is not superseded by the other. With reference to the law of 1793, p. 227 [1 Stat. 335], which says, that criminal causes may be tried nearer to the place where the offences were said to be committed, the argument was taken up by Mr. Sitgreaves to mean "nearer to the county"; hence he says that Philadelphia county is the adjoining one of the insurgent counties. In the indictment, Bethlehem is mentioned as the "place." Now, the law directs a special session to be held nearer to Bethlehem than is Philadelphia; that act does not say whether it shall be held in or out of the county, but near the place. The gentleman appeared to have thought he was in another place, and not at the bar, in his view of the discretionary power of the court, which would leave it to be regulated according to the ebbs and flows of the passions of the judges, or the temper of the times; but he should recollect this discretion was of a legal, and not of a political nature, which the necessity of the case called for. All that must be considered to operate on the question is, whether justice cannot be done between the United States and the prisoners, if the trial is held in the county of Northampton; if it can, we rise to claim this as the right of John Fries, and nearly allied to the interests of every citizen.

Judge IREDELL said it was held by Judge Hale, that an indictment was part of the trial; if so, he should be glad to be told what they were to do with the present indictment, if the trial was to be removed? If so, the prisoner must be indicted as well as tried in the county. Foster, 235, 236. Another question would be, could the court order the dismissal of the indictment?

Judge PETERS could not see how part of the proceedings of this court could be transferred to a special court, and therefore how it could be removed to the county, and while a doubt remained, it would never do to renovate a criminal case of so much importance. He could not see the force of the reasoning in favour of the removal. He thought that, however humanity ought to lean towards the prisoner, still the proceedings of the court ought to ensure justice to the United States, and to the prosecution, and therefore that public justice ought to be as well guarded as the prisoner's convenience; a fair and impartial trial ought to be had, which he was certain could not be held in the county of

Northampton, and if he were now applied to, in his official capacity, to take the necessary steps for that event, he would refuse.

Mr. Rawle said there were opportunities enough for a motion like this to be made before a bill was found, after the parties were bound over. The accused ought to be preparing for trial from his first commitment, to remove all the inconveniences which delay, until after the proceedings were going on, would occasion; it appeared to him to amount to a technical trap, laid to involve difficulties. It was well known that the prisoner could not wait till it was too late to obtain many privileges to which he was entitled by an earlier attention to his interests, of which the present was one. With respect to the difficulties his honor, Judge IREDELL, had mentioned on the indictment, they were too serious and important to be dispensed with.

Judge IREDELL delivered his opinion in effect as follows:—With regard to the lateness of the application, as it does not relate to the merits of the defence, I think the arguments in favor of the motion preponderate, and that no advantage should be taken from the prisoner without full ground. It is evident that, in this case, a number of circumstances might be mentioned which would render a trial inconvenient in the county of Northampton. I am inclined to think with the counsel for the prisoner, that the court have the power to order a special court to be held there if they should think proper, and therefore I should not scruple to admit it, if all concurrent circumstances admitted its prudence. The question then is, whether, according to the legal discretionary power of the court, this court think it their duty to admit the force of the motion. When these offences were first known to have been committed, and when the gentleman with whom I have the honor to sit was in that country, it was possible for a court to have been ordered there for the trials, but it appeared to those with whom the power rested, to be improper. And why?—The president in his proclamation had publicly declared that the lawful authority of that county could not be carried into execution without the aid of a military force. Would it not therefore have been improper for us to order a special court to be held at that place? If a special court could not have been held there, the only thing to be done was to bind the parties over to this court. There are two very important difficulties in the way of this motion; I say important, because they are such as no gentleman of the law can be perfectly clear upon. First, whether, if we order a special court, we can order, by any process known to the law, this indictment to be transferred to that court. This is a doubt stated by Judge Wilson, of the supreme court, at the time of a former motion alluded to; and I am inclined to think this was a great reason which guided the decision; otherwise a doubt would not have been intimated. If this cannot be done, what would be the consequences of the removal of the case? If this indictment were to be taken there, with a doubt in point of law on it, a motion might be made after trial for a new trial; that not being regular, part having been held in another place. Whether this would be moved or not, I cannot say, but I know at best it is doubtful. The court therefore ought to proceed in the clearest manner not to run the risk of defeating the prosecution of a cause so important. It is the great desire of this court to do the most impartial justice between the public and the prisoner, and not from private humanity on the one hand, or resentment on the other, to lean either way. As to the common law principles of vicinage, there are advantages and there are disadvantages attending it. The advantages are, that the parties are known by, and know their jurors and witnesses, that their characters may be viewed, and the most impartial justice done. But if nearly one whole county has been in a state of insurrection, can it be said that a fair trial can be had there? We may at least presume it could not, because the President of the United States ordered a military force there, to enforce the execution of the laws. It was by this military force that the prisoners are now convened in this city, and I have reason to believe, from the opinion and knowledge of the judge with whom I now act, that it would be exceedingly improper to hold the trials there. It was hinted that troops are still there, and they could promote the execution of justice; but what sort of justice is that of the sword? If they would operate at all, it would be by intimidation, and this would be to the prejudice of the prisoner, and in no respect in his favor. This consideration alone, in my opinion, would make it "manifestly inconvenient" for a trial to be held there. With respect to the principles of common law, the gentlemen well know that the venire may be changed, that is, that parts of the jury may be summoned from other counties. I do not know whether there is a power in the courts to change the venire in England in a criminal case, but I know that in some difficult cases, where partiality was to be apprehended, an act of parliament has been passed to remove the trial. This was done respecting the rebellion in Scotland, for the manifest reason of partiality. This proves that we ought not to look to one side only, but to both, and then form our determination.

Upon the whole, I am clearly of opinion that, as the motion could not be granted without running the risk of these uncertainties, but certain inconveniences, it would not be expedient to allow it, and therefore the trial must go forward.

Indictment in the Circuit Court of the United States of America, in and for the Pennsyl-

vania District of the Middle Circuit. The grand inquest of the United States of America, for the Pennsylvania district, upon their respective oaths and affirmations, do present that John Fries, late of the county of Bucks, in the district of Pennsylvania, he being an inhabitant of, and residing within the said United States, to wit, in the district aforesaid, and under the protection of the laws of the said United States, and owing allegiance and fidelity to the same United States, not having the fear of God before his eyes, nor weighing the duty of his said allegiance and fidelity, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquillity of the said United States to disturb, on the seventh day of March, in the year of our Lord one thousand seven hundred and ninety-nine at Bethlehem, in the county of Northampton, in the district aforesaid, unlawfully, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him the said John Fries, he, the said John Fries, afterwards, that is to say, on the said seventh day of March in the said year of our Lord one thousand seven hundred and ninety-nine, at the said county of Northampton in the district aforesaid, with a great multitude of persons, whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit, to the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, clubs, staves and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States, and then and there, with force and arms, in pursuance of such their traitorous intentions and purposes aforesaid, he, the said John Fries, with the said persons so as aforesaid traitorously assembled, and armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy public war against the said United States, contrary to the duty of his said allegiance and fidelity, against the constitution, peace and dignity of the said United States, and also against the form of the act of the congress of the said United States, in such case made and provided. William Rawle, Attorney of the United States for the Pennsylvania District.

The prisoner having been set to the bar, pleaded not guilty.

The petit jury impanneled, consisted of the following gentlemen: William Jolly, City. Samuel Mitchell, Bucks. Richard Leedom, do. Anthony Cuthbert, City. Alexander Fullerton, City. John Singer, City. William Ramsay, Bucks. Samuel Richards, City. Gerardus Wynkoop, Bucks. Joseph Thornton, City. Philip Walter, Northampton. John Rhoad, Northampton. Some difficulties arose as to the two latter gentlemen being qualified, they being Germans, and not sufficiently understanding the English language: however, it was agreed that any difficulties of that nature might be explained to them, and it was urged that they would understand many of the witnesses better than others, several of those being Germans also, and could not speak English, on which account Mr. Erdman was sworn for interpreter.

Mr. Sitgreaves opened the trial as follows: Gentlemen of the jury:—By the indictment which has been just read to you, you perceive that John Fries, the prisoner at the bar, has put himself on trial before you, on an accusation of having committed the greatest offence which can be perpetrated in this, or any other country, and it will devolve on you to determine, according to the evidence which will be produced to you on the important question of life or death. It is the duty of those that prosecute, to open to you, as clearly as they are able, those principles of law which apply to the offender, and then to state to you the testimony with which the accusation is supported. This duty has devolved upon me, and I hope, while I regard my duty as accuser, I shall do it in such a way as shall do no injustice to the prisoner. However, if I should be incorrect, there are sufficient opportunities for me to be corrected by the vigilance which the counsel engaged on behalf of the prisoner will use, and the order which the court will observe. These are sufficient to correct any mis-statements, but I will use my utmost endeavours to be guilty of none.

The prisoner is indicted of the crime of treason. Treason is defined in the constitution of the United States (section 3, art. 3) in the words following: "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." This crime appears to be limited to two descriptions: the one, levying war against the United States, and the other adhering to its enemies. With respect to the latter branch of the description, there will be no occasion for any explanation, or to call your attention in the least to it, because it is not charged upon the prisoner; he is charged with having committed treason in levying war. This expression, phraseology, or description as adopted by our constitution, is borrowed from a statute of Great Britain, passed in the reign of Edward III., which has, ever since it passed, commanded the veneration and respect of that nation, almost equal with

their great charter: it is considered as a great security to their liberties. Indeed the uniform and unanimous consent given to this statute, through a great lapse of time, by the most able writers on law; its never having undergone the least alteration amidst the most severe scrutinies, and its adoption into the constitution of the United States, without the least amendment, are sufficient encomiums to prove its worth. I shall state to you, as far as is necessary to the present application of that statute, the most able and judicious expositions, but without recurring to a variety of authorities which might be quoted.

The crime of treason, as it has been laid down by those writers, generally allowed to be the most able on law, whose accuracy is unquestionable, is the highest crime that can possibly be committed against the good government of a nation, and a considerable inroad into the libertics of a subject. In discussing this crime, I shall only recur to the notes which I have taken, and my own knowledge of the law; if that statement should be inaccurate, there are sufficient opportunities for amendment in the course of this trial. Treason consists in levying war against the government of the United States: it may confidently be said not only to consist in joining or aiding the hostile intentions of a foreign enemy; nor is it confined to rebellion in the broad sense in which that word is generally understood; or in the utter subversion of the government and its fundamental institutions: but it also consists in the raising a military force from among the people for the purpose of attaining any object with a design of opposing the lawful authority of the government by dint of arms, in some matter of public concern in which the insurgents have no particular interest distinct from the rest of the community. This is the best description of the crime of treason, as it relates to the matter before you, which I am able to give. A tumultuously raising the people with force, for the purpose of subverting, or opposing the lawful authority of the government, in which those insurgents have no particular interest distinct from the people at large. Agreeably to the division made in the definition of treason by Lord Hale. it must consist both in levying war, and in levying war against the government of the United States. Respecting levying of war, it is to be understood, agreeably to the most approved authorities, that there must be an actual military array. I mention this because I think it proper to be particular in so essential and important an inquiry, and because I think we shall prove to you that this was actually done by the prisoner. Another thing I wish you to bear in mind is, that war may be sufficiently levied against the United States, although no violence be used, and although no battle be fought. It is not necessary that actual violence should take place, to prove the actual waging of war. If the arrangements are made, and the numbers of armed men actually appear, so as to procure the object which they have in view by intimidation, as well as by actual force, that will constitute the offence. It must be war waged against the United States. This is an important distinction. A large assemblage of people may come together; in whatever numbers; however they may be armed or arrayed, or whatever degree of violence they may commit, yet that alone would not constitute treason; the treason must be known; it must be for a public and not a private revenge: it must be avowedly levying war against the United States; if people assemble in this hostile manner only to gratify revenge, or any other purpose independent of war against the United States, it will only amount to a riot; but if it is an object in which the person has no particular interest, this constitutes the offence of treason. There are a variety of instances which might be produced in order to illustrate this definition of the law, but it is not necessary to turn to them. Suffice it to say that it is the intention or end for which an insurrection is raised, which constitutes the crime. This of course you will have in mind when the testimony is gone into. I will just observe, as applicable to this case, that one instance which is defined, of the crime of treason, is, to defeat the operation of the laws of the government; any insurrection, I will be bold to say, to defeat the execution of the public laws, amounts to treason. Having given you this explanation of treason, so far as I suppose it is connected with the present awful occasion, I shall now proceed to state the amount of evidence we mean to produce, in order to prove that the unhappy prisoner was guilty of that high crime.

It will appear, gentlemen, from the testimony which will be presented to you, that, during the latter months of the year 1798, discords prevailed to an enormous extent throughout a large portion of the counties of Bucks, Northampton, and Montgomery, and that considerable difficulties attended the assessors for the direct tax in the execution of the duties of their assessment. It is not in the nature of this inquiry to explain for what purpose, or by what means, the opposition was made: it is not necessary to say whether the complaints urged were well or ill founded, because it is a settled point that any insurrection for removing public grievances. whether the complaints be real or pretended, amounts to treason, because it is not the mode pointed out by law for obtaining redress. It will then be sufficient to show you that discontents did exist, and that in various townships of those counties: that in several townships, associations of the people were actually formed, in order to prevent the persons charged with the execution of those laws of the United States from performing their duty upon them, and more particularly to prevent the assessors from measuring

their houses: this opposition was made at many public township meetings called for the purpose; in many instances resolutions were entered into, and reduced to writing, solemnly forewarning the officers whose duty it was to execute the laws, and these, many times accompanied with threats if they should perform that duty. Not only so, but discontents prevailed to such an height, that even the friends of the government in that part were completely suppressed by menaces against any who should assist those officers in their duty. Repeated declarations were made, both at public as well as at private meetings, that if any person should be arrested by the civil authority, such arrests would be followed by the rising of the people, in opposition to that authority, for the purpose of rescuing such arrested prisoners. It will appear to you farther, gentlemen, in the course of evidence, that, during those discontents, indefatigable pains were taken by those who were charged with the execution of the laws, to calm the fears, and to remove the misapprehensions of the infatuated people; for this purpose, they read and explained the law to them, and informed them that they were misled into the idea that the law was not in force, for that it actually was; at the same time warning them of the consequences which would flow from opposition; and this was acompanied with promises that even their most capricious wishes would be gratified on their obedience. The favour was in many instances granted, that where any opposition was made to any certain person executing the office of assessor, in some townships proposals were made for the people to choose for themselves, but notwithstanding this accommodating offer, the opposition continued. After having shown to you the general extent of this combination and dangerous conspiracy, which existed in all the latitude I have opened to your view, we shall next give in evidence full proof that the consequences were actual opposition and resistance: in some parts, violence was actually used, and the assessors were taken and imprisoned by armed parties; and in others, mobs assembled to compel them, either to deliver up their papers, or to resign their commissions; that in some instances they were threatened with bodily harm, so that in those parts, the obnoxious law did remain unexecuted in consequence of this alarm. Seeing that the state of insurrection and rebellion had arisen to such a height, it became necessary, in order to support the dignity, and indeed the very existence of the government, that some means should be adopted to compel the execution of those laws; and warrants were in consequence issued against certain persons who had so opposed the laws: these processes being put into the hands of the marshal of the district, were served upon some of them: in some instances, during the execution of that duty, the marshal met with insult, and almost with violence: having, however, got nearly the whole of the warrants served, he appointed head quarters for these prisoners to rendezvous at Bethlehem, where some of them were to enter bail for their appearance in the city, and others were to come to the city in custody, for trial. It will appear to you, that, on the day thus appointed for the prisoners to meet, and when a number of them had actually assembled agreeably to appointment, a number—parties in arms, both horse and foot, more than an hundred men, accoutred with all their military apparatus, commanded in some instances by their proper officers—marched to Bethlehem, collected before the house in which were the marshal and prisoners, whom they demanded to be delivered up to them, and in consequence of refusal, they proceeded to act very little short of actual hostility, so that the marshal deemed it prudent to accede to their demands, and the prisoners were liberated.

This, gentlemen, is the general history of the insurrection. I shall now state to you the part which the unfortunate prisoner at the bar took in those hostile transactions. It will appear that the prisoner is an inhabitant of the township of Lower Milford, in the county of Bucks; that some time in February last, a public meeting was held at the house of one John Kline in that township, to consider, in relation to this house tax, what was to be done; that at that meeting certain resolutions were entered into, and a paper signed; (we have endeavoured to trace this paper, so as to produce it to the court and jury, but have failed;) this paper was signed by fifty-two persons, and committed to the hands of one of their number: John Fries was present at this meeting, and assisted in drawing up the paper, at which time his expressions against this law were extremely violent, and he threatened to shoot one of the assessors, Mr. Foulke, through the legs, if he did proceed to assess the houses. Again, the prisoner, at a vendue, threatened another of the assessors, Mr. S. Clarke, that, if he attempted to go on with the assessments, he should be committed to an old stable, and there fed on rotten corn: we shall further prove that, upon its being intimated by some of them to Mr. Chapman, principal assessor, that if they might choose their own assessors, things would go on quietly, he directed that they should do so; but still they continued in opposition to the law, and would not choose an officer at all. A general meeting was called to read and explain the law to the people, and thus remove any wrong impressions and misapprehensions: the principal assessor was at that meeting; but the rudeness, opposition and violence, used by the people, prevented him from doing so, which was an evident proof that they did not want to hear the law, and that they understood enough of it to oppose it: thus the benevolent intentions of that meeting were frustrated. We shall farther show you that the assessor of Lower Milford was intimidated so as to de-

cline making the assessments, and that the principal assessor, together with three other assessors, was obliged to go into that township to execute the law; that they proceeded in the execution of their duty during a part of the day of the 5th of March last, without any impediment; that, at eleven o'clock in the morning, Mr. Chapman met, at the house of Jacob Fries in Lower Milford, with the prisoner, when he, the prisoner, declared his determination not to submit, but to oppose the law, and that by the next morning he could raise 700 men in opposition to it: that, upon Mr. Chapman telling him that many houses were assessed, the prisoner flew into a violent passion, absolutely declaring that it should soon be in this country as it was in France. We shall farther show you that, at another time during the same day, the prisoner met with two of the assessors, Mr. Rodrick and Mr. Foulke, whom he warned not to proceed in the execution of their duty, accompanied with threats that if they did, they would be hurt; and left them in a great rage. Farther, he proceeded to collect parties, with whom he went in search of those men, and attacked them in executing their duty; one of them escaped, but the other he took; but not having got Mr. Rodrick, who appeared to be a particular object of resentment, he let Mr. Foulke go, telling him he would have them again the next day. He told Mr. Clarke that if he had met with Rodrick, he would not have let him go so easy, and declared to him solemnly and repeatedly, that it was his determination to oppose the laws. We shall farther show you that, after having discharged Foulke, he proceeded to collect a large party in the township, in order to take the assessors the next day. Accordingly, on the day following, a numerous party—to wit, about fifty or sixty, the greatest part of whom were in arms—collected together, and pursued the assessors, and not finding them in that township, pursued them into another, in order, not only to chase them out of the township, but generally to prevent them executing their duty. This party collected, not only many of them in arms, but in military array, with drum and fife, and commanded by this Captain Fries and one Kuyder: Fries himself was armed with a large horse pistol. Thus equipped, they went to Quaker Town, in order to accomplish their purpose, where they found the assessors, two of whom they took, but Rodrick fled. Fries ordered his men to fire at the man who fled, and a piece was snapped, but did not go off. Fries did then compel Foulke to deliver up to them his papers, but not finding in them what they expected, they were returned; but at the same time exacting a promise that he, the assessor, should not proceed in the valuation of the houses in Lower Milford. Fries was in many instances extremely violent against this law, and peremptory in his determination not to submit to it, as will appear by the evidence.

When they left Quaker Town, they met with a travelling man who expressed some good will towards the government, and for that expression they maltreated him very much, and expressed their general dislike to all who supported the same principles. During the time they were at Quaker Town, intimation was received that the marshal had taken a number of persons prisoners in consequence of opposing the execution of this law, whereupon a determination was formed among these people to go and effect their rescue; and the people of Milford were generally invited to assist in this business. When they were going, the party halted at the house of John Fries, and then a paper was signed, by which they bound themselves volunteers to go upon the execution of this design. This paper was written by the prisoner at the bar, and signed by him and the rest; therein they engaged to go and rescue the prisoners who had been arrested by the marshal. On the morning of the next day, twenty or more of them met at the house of Conrad Marks, in arms, to go on with their design. John Fries was armed with a sword, and had a feather in his hat. On the road, as they went forward, they were met by young Marks, who told them that they might as well turn about, for that the Northampton people were strong enough to do the business without those from Bucks county. Some were so inclined to do; but at the instance of Fries and some others, they did go forward, and actually proceeded to Bethlehem. Before the arrival of these troops, a party, going on the same business, had stopped at the bridge, a small distance from Bethlehem, where they had been met by a deputation from the marshal, whom he had prevailed on to go and meet them, in order to advise them to return home. They agreed to halt there, and send three of their number to declare to the marshal what was their demand. It was during this period that Fries and his party came up; but it appears that when they came, Fries took the party actually over the bridge, and that he arranged the toll with the man, and ordered them to proceed. With respect to proof of the proceedings at Bethlehem, it cannot be mistaken; he was there the leading man, and he appears to enjoy the command. With the consent of his people, he demanded the prisoners of the marshal; and when that officer told him that he could not surrender them, except they were taken from him by force, and produced his warrant for taking them, the prisoner then harangued his party out of the house, and explained to them the necessity of using force. And that you should not mistake his design, we will prove to you that he declared, "that was the third day which he had been out on this expedition; that he had had a skirmish the day before, and if the prisoners were not released, he should have another that day. Now, you observe," resumed he, "that force is neces-

sary, but you must obey my orders; we will not go without taking the prisoners; but take my orders, you must not fire first; must be first fired upon; and when I am gone, then you must do as well as you can, as I expect to be the first man that falls." He further declared to the marshal, that they "would fire till a cloud of smoke prevented them seeing one another." And, executing the office of commander of the troops, which at that time overawed the marshal and his attendants, he harangued the troops to obey his orders, which they accordingly did, and the marshal was really intimidated to liberate the prisoners; and then the object was accomplished, and the party dispersed, amidst the huzzas of the insurgents. After this affair at Bethlehem, it will be given you in evidence, that the prisoner frequently avowed his opposition to the laws, and justified that outrage; and, when a meeting was afterwards held at Lower Milford to choose assessors, the prisoner refused his assent to the accommodating object of the meeting, and appeared as violent as ever.

These are some of the points we mean to prove before you. I shall, therefore, at present, proceed to introduce our testimony.

William Henry testified substantially as follows:

I arrived at Bethlehem on the evening of the 6th of March, 1799. We had heard that there was a party of men would collect, for the purpose of rescuing the prisoners who were there in custody of the marshal; in consequence of that, I went to assist the marshal, and, if possible, prevail on the people to desist. I was one of the judges of the court of common pleas for the county of Northampton. About ten o'clock on the morning of the 7th, two men, with arms, arrived at the tavern where we were; who, when inquired of by the marshal as to their intention in coming armed, appeared to be diffident about an answer; after first saying that they came upon a shooting frolic, one of them said they were coming in order to see what was best to be done for the country. After that, came in several others, armed and on horseback, two of them in uniform, with swords and pistols. The two first men were placed with the marshal in a separate room, in order to await the issue. At this time a considerable number of people had assembled. The marshal first went and spoke to these men as to their intention; I also walked out for the same purpose, requesting them to withdraw, and not appear in arms in order to obstruct the process of the United States laws. They answered, that they were freemen, and might go where they pleased with their arms. I told them that they ran great risk by appearing in arms for such a purpose as I feared they were come. They came in a number, but I don't know how many particularly, as they mixed among the crowd. We requested them to deliver up their arms; but they refused. I also, at the same time, told one of them that it would be best for him to surrender himself, and not oppose the process; the others gave me answer, that they had come to accompany their friend, and to see that no injury was done to him. After this I returned into the lower back room of the house; by this time there were a number more collected round the house, but mostly armed. I don't recollect whether it was before these three men arrived, or not, that the marshal had sent off four men of his posse in order to meet the men with arms who were coming forward; and after we were up stairs three men arrived as a deputation from the armed body, making inquiry as to the intention of the marshal in taking these prisoners; with these three men, the four deputed by the marshal had returned from the armed body that was on the other side of the bridge, in order to learn the marshal's object. The marshal assured them of the legality of the process, and reasoned with them as to the consequences of opposition, or threats to him, or preventing him from executing his duty; but I believe he liberated the two men that were first put in confinement, and returned them their guns. During the time that these two men were in confinement, we examined their guns, and found them loaded. I was pretty much in the lower part of the house, backwards, and there was much of the proceedings of these people I did not see, in the front of the house; but I endeavoured to converse with as many as I knew, informing them of the badness of their conduct, and the consequence of it; but it appeared to be to no effect. About one o'clock I think I first saw what was called the main body of this armed force, marching up the street. A party of horse, preceding the foot, came riding up two abreast; I am not certain whether they had their swords drawn, but I believe they had; and then followed the foot, marching up in Indian (single) file. When they came up, the foot marched twice round the tavern, and placed themselves in front of the house, where they stood some time drawn up in single rank; I believe they were riflemen; they continued there till the rescue was effected. During this time I frequently heard that the prisoners were demanded by them, and they insisted on their release.

Cross-Examined.—I did not hear this demand made, but I heard in the house that it had been made; I also heard that they intended to force their passage up stairs. I observed a party coming up stairs, particularly one, whom I did not know, pointing a rifle up the stairs, as though levelling it at some particular person. The people appeared very noisy in the lower part of the house, all this time; I frequently heard the cry of "deliver up the prisoners," and it appeared to come from the party at the foot of the stairs. During the affair, I am not certain

whether it was previous to this or not, I looked out and saw six or eight men at the foot of the stairs, and the prisoner on the stairs conversing with the marshal; while I was standing there, an old man came running in from the front door, and called for Captain Fries in German, telling him there was his sword (offering it); I think he called three different times, on which I observed the prisoner wave his hand and tell him to wait, it was not quite time yet; shortly after the prisoners were given up. I was not by to be able to hear the conversation between the marshal and the prisoner. Fries was going backward and forward among the men, as though he had command, and I saw him marching into the town in front of the footmen. After the prisoners were delivered up, the principal part of the men marched off. They did not take the prisoners with them. I heard two or three men in the back room say that they must see the prisoners, and insisted they should be let go before they would leave. These prisoners were arrested for combinations and misdemeanours. There was, among the company in the lower room, a man who declared himself very violently; he said if the damned Stamplers[4] had only fired a shot, we would have showed what we could do. He really expressed a wish that it had been done. The words were spoken in German. There were twelve or fourteen of the horse in a military dress, as well as armed: I believe there were none of the foot, except that about ten or twelve had cockades of blue and white, blue and red, &c. They had shot pouches, particularly the rifle company, and I believe all who had guns. The man who was first disarmed had a powder horn in his pocket: his piece was a common fowling piece, the others were mostly rifles, as far as I could perceive from the window. I did not count the number, but there appeared about an hundred, or rather above that number. The whole crowd assembled, I think, could not have been less than four hundred. I think that the marshal had with him for his posse comitatus to arrest these people fourteen or fifteen persons. I believe there were eighteen or nineteen prisoners. I understood that releasing the prisoners was the object they had in view, both from themselves and from several persons with whom they had conversed on the subject.

William Barnett.—I was summoned to attend the marshal on the seventh of March at Bethlehem, as one of his posse. I came there about eleven o'clock in the forenoon: I was there but a very little time, when I understood there were some men coming with arms: the marshal then appointed four of us to go out and meet them, in order to prevail upon them not to come into the town. We went on about a mile from Bethlehem, and crossed the Lehigh, and there we met a party of horsemen: they were armed. I did not know any of them, but understood they were from Northampton county, near about Millarstown. When we came up to them, we asked them for their commanding officer. They made answer that they had no officers; they were all commanders. We then told them what our errand was—to try to prevail upon them not to go on any farther; but they did not seem to mind it much. We were with them but a very little time, before a company of riflemen came up, who were armed as well as the others. We told them our errand, but they did not seem to mind us. We then returned, and came on with them to the bridge of the Lehigh, where we halted. There we talked with them a great while, but still they wanted to go on. We told them we came from the marshal, and asked them what they wanted by going into Bethlehem with their arms. They said the marshal had two of their men that had come to Bethlehem under arms, and had put them under guard, and they wanted them, and they would have those two men set at liberty. As I found that they were determined to go, I asked if they would not allow that if any had done wrong, they ought to suffer for it: They agreed that they ought, but they should not be taken to Philadelphia, but have their trial in Northampton county. When we found that they were determined to go on, we agreed that they had better send two or three men over to the marshal, and not to go bodily. This they agreed to, and appointed three men to go, and sent them over. There was some stipulation that I should return the men safe; they were afraid these three men would be confined also; but we promised them that we would see them safely returned. We then all went over together to the tavern at Bethlehem, where the marshal was. They spoke to him, told him what their business was, and he gave the two men up to them. When they were given up, we went back with them, in order to go to where we had left the remainder of the men. Going down through Bethlehem, we met a party of horsemen, and we stopped them: they were armed; part of them were light horsemen; and part were other horsemen: they all had swords or some arms or other. The light horse had their swords drawn. We told them that they had better go back, and not go up into the town; but they seemed very anxious to go up. One of them made answer something like this: "This is the third day that I was out, I had a fight yesterday, and I mean to have another today if they do not let the prisoners clear." To the best of my knowledge the prisoner was the man who said so; I never saw the man before, but I took notice of him then. He had a sword. This was a distinct body

[4] A Stampler was explained to be a nick-name given in that country to the friends of government, originating from their support of the stamp act.

from those we had left at the bridge; these were others who had come up during the time we were gone. I let them know that the two persons whom they had demanded were liberated; and the three men who went with us told them this also. The horsemen did not wait one moment, but hurried on: they all then marched up town, and formed right in front of the tavern; I returned with them. After they were formed there, I was among them, and talked with them a great deal, but could not do anything with them: if there were ten or twelve that agreed to be moderate, the others would all insist upon it, that they would have the prisoners, all of them. We were there for nearly or quite two hours. This man, whom they called Captain Fries, came out and mentioned to his men that he would now have the prisoners, if any of them would go into the house with him: he had been in backward and forward several times. He said he should go foremost. He told them that he would ask the favour of them, that they were none of them to fire first, if they went in. He mentioned to them likewise, that there were some armed men on the stairs belonging to the marshal. I did not expect he would go in: I was talking to some men there, when I looked round and saw some of the men at the door: he said he would go foremost: he signified, talking in German, that he should get a blow or a stroke: the nearest translation was, "I shall get it."—I looking round, saw the men going in at the door, and I followed them in: they were armed men. I did not see the prisoner after he had spoken those words. I got in, between the men and the stairs, at the foot of the stairs: they halted there, I got in there, in order to keep them back from going up stairs: I was there but a few minutes, when I saw the prisoners coming down stairs. Captain Fries said, when he told the men to come forward, that if he did get it, they should not be scared; they then must do as well as they could: he said he expected to get some stroke; he told them they must take care of themselves: I do not recollect that he said they should shoot, yet I recollect something he said; I think it was "slay, strike, or do as well as you can." The prisoner at the bar went before, and he rather wished the men to follow him.

Cross-Examined.—When I went out at the request of the marshal, it was to speak to these people, and they told me their object was to obtain the liberation of the two men belonging to their party. The crowd began to disperse immediately on the release of the prisoners.

John Barnett.—On the 7th of March in the morning early, just as I got up, the deputy marshal handed me a summons, to be at Bethlehem at 10 o'clock, to aid and assist the marshal in executing the laws of the United States. About 10 o'clock I arrived at Bethlehem. I was there but a very short time, when somebody came in, and said he had met twenty men at one place, ten at another, &c., walking towards a tavern, on the road, about three or four miles from Bethlehem; I cannot recollect its name. The marshal, and others agreed that they thought it would be best to send three or four men to meet them, and to stop them on the road: it was then to be decided who should go. I mentioned that I thought John Mohollan and William Barnett could do more with them than anybody else. They were agreed upon, as was Christian Roth (or Rote) and another, but Isaac Hatsel went in his place. This was, conformably to agreement, two Federalists and two Anti-Federalists. They went and met them; I remained at the house. They were not gone very long, indeed I think it was just as they were getting upon their horses; there were two men, arrayed, and with arms; one had a rifle, and the other a smooth-bore piece. When they were come into the yard, the marshal went down into the yard to them, and talked to them; what he talked to them, I did not hear. However, he took their arms away from them, and carried them up stairs, and put them by themselves. Directly after that, there were five or six horsemen came. The marshal and Judge Henry went down to meet them; they asked them what they came there for: they said, they only came there to be Shankwyler's bail: and Judge Henry then asked them what they did with their arms? They said they did not mean any harm with them. They then got off their horses, and went into a room with the judge and the marshal; what they said there, I do not know, for I did not hear them. Presently after, there came up a troop of horse, and behind them there were two companies of riflemen. They marched up right into the yard, and formed before the door of the tavern. There were about fifty riflemen, and the light-horse had their swords drawn. On a rough calculation, I suppose there were one hundred and thirty or one hundred and forty armed men, and about sixteen or seventeen of the marshal's posse. After they had formed a line in the yard about fifteen or twenty minutes, Captain Jarrett arrived when they gave three huzzas. He then went into the house and talked with the marshal; the marshal requested him to get the men to withdraw. He professed he would. He had arrived from Philadelphia, whither he had been to give bail. After this, Jarrett staid at the tavern about two hours. The men kept regular order, and never separated. The marshal appointed four of us, me and three others, to keep the guard of the stairs, armed with pistols, two at the bottom and two at the head. I served my time, and the second time I was ordered on guard by Capt. Henry Snyder; I staid on the platform at the turn of the stairs, when Fries, the prisoner, came up to me, and wanted to go up stairs. I

told him that he could not be permitted to go up stairs without the marshal's leave. I then asked him what he wanted? He answered that he wanted to see the marshal. I told him that I expected he could see him, and told some men at the head of the stairs to call the marshal out of the room. He came out, and I then told him these two gentlemen wanted to talk to him. He said I should let them pass. As Fries was the first man, I let him pass on between me and the other guard. The other man wanted to go up, but I told him that one at a time was enough, and that when the other had done, he would be permitted to talk to him too. Fries then went up and told the marshal what he came for; he replied that he was come for the release of the prisoners. I stood close by them when they were talking. The marshal made answer that he could not give them up to him; he then told the marshal that he would have them. Well, then, said the marshal, you must get them as well as you can; for he said it was out of his power to deliver them up; he dared not do it. Fries then told the marshal that he had a skirmish yesterday, and he expected to have another one to-day; he then said to the marshal, "As for you, marshal, I will vouch that none of my men will hurt you, but as for the other company, I will not." With that, both of them marched off. I remained on guard. A little while after this, I saw the men coming in at the door, and they got into the entry, with arms. I did not know one of those who came in except Fries; he returned with those armed men. He had a sword in his hand, but I think it was in its scabbard. When they got into the entry, they were pressed upon by the posse, who soon got them clean out of the door. I then got off guard. The language of the men was, that they would have the prisoners. I could not hear many of their expressions, because I was chiefly up stairs; but I heard them say they would not leave the ground till they had the prisoners. The marshal at this time had gone back into the room. Before the prisoners were released, I was relieved. When they made the second attempt, I was up stairs, looking out of the window. These prisoners were at this time up stairs in a room by themselves. About sixteen or eighteen prisoners were there. I believe there was not any kind of acquaintance or friendship between Fries and any of the prisoners. The prisoners said they did not wish to be rescued by those people; they said that they knew none of those people that were before the door. If they had done anything wrong, they said they were willing to go anywhere to take their trials. The minister, and the Lehigh people were all there.

Cross-Examination.—I saw them point their guns towards the window often enough. No violence offered to any person, besides what was offered to the marshal.

Christian Winters.—I was summoned on the 7th of March to go up to Bethlehem, and I went accordingly; when I came there, which was about 11 or 12 o'clock—about the middle of the day—the first man that I saw come there armed, was one Keiser; another, I think his name was Paul, came with him to the tavern; the marshal went out, and brought them into the house, and took them up stairs: I was on guard at that time, and with another, I was set to stand guard by them. (The rest of the testimony of this witness was similar to that of the preceding.)

Christian Roths.—On the 7th of March, I was summoned to go to Bethlehem, but did not know what it was for. About 11 o'clock I got to Bethlehem; when I came, Mr. Eyerly came to me, and told me some men were coming there to rescue the prisoners; I thought it not possible, but he told me it was certain. When we had been there about three hours, there came two men on horseback, and had their arms, whereupon Mr. Marshal, myself, and Mr. Philip Sheitz went down and asked them what they were about. They told us they were informed that there were a number of men met there to-day, so they said they came there to see how they came on: they did not say what they heard they were to meet for. We took them and put them into the house under guard, and took their arms from them. I then thought there was something in what Mr. Eyerly had mentioned to me. I then made an observation to Mr. Eyerly if he did not think it proper that one or two men should go and prevent these people coming. Mr. Eyerly told the marshal of it, and he thought it would be proper that some men should go. I agreed that if no one else would go, I would go by myself. I do not know who spoke to the others; but I, Judge Mohollan, Major Barnett, and ——, went out. We met them within a mile of Bethlehem. I did not know a single man of them; but Judge Mohollan and Major Barnett spoke to them first; but I did not understand what they said. I went farther back, to the rear: I said to them, "What in the world are you about, men? you will bring yourselves into great trouble." One of them said, "We don't know you;" I mentioned, "If you know me or not, you will thank me for it." I said, "If you do not do as I advise you, you will be sorry for twenty years after this;" so there was one of them that levelled his gun at me: said I, "Little man, consider what you are about; don't be too much in a hurry:" then some of his comrades pushed him back. Then that man hallooed out, "March on; don't mind this, people." I do not know his name. They then marched on to the bridge, and there we stopped them again. They then agreed amongst themselves that they would send three men with us to the marshal, to see if they could get the two prisoners we took at first, liberated, and gave their honor that

none of them should come over the bridge with arms. We then went with these three men to the tavern at Bethlehem. They then went to the marshal, and agreed with him, and the two prisoners were discharged; but he set down their names. I do not recollect their names. When these two men were discharged, we went to go back with them again; but when we came to the lower end of Bethlehem, there was that company and another coming on, and there was no stopping them again. The bridge is about half a mile from Bethlehem. These two men went with us, I think; but I am not sure. I endeavoured to stop them, to reason with them, but they would not: and I then told them if they were determined not to hear, they might do as they pleased. As I came back to Bethlehem, I went up stairs to Mr. Eyerly and the marshal. The men paraded before the tavern, and there I think they were for two hours. I suppose one hundred and twenty men, or upwards, were drawn up. I saw those two men that were first kept prisoners mix along with these people. The light horse were armed, and with their uniforms. They had not their swords drawn till they came near to the tavern; then they drew their swords, a great number of them. Before we started from the bridge, we asked them again what they were about. They told us that they were informed that they had taken a number of prisoners, and that they would take them to Philadelphia, and put them in jail there; and no bail would be taken for them. We asked them what prisoners they meant. They mentioned one name only that I recollect, which was one Shankwyler. They mentioned that they would not suffer Shankwyler to be put to jail in Philadelphia; they mentioned that they would give bail ten double for him, or that they might put him in jail in our own county, and try him in our own county. I saw one Schwartz come up into the room where the marshal was No one abused, threatened, or insulted Mr. Eyerly that I know of. I heard no threats against any one.

Colonel Nichols, the Marshal.—Some time between the 20th and 26th of February, the warrants I now hold in my hand were given to me by the attorney of the district, with orders for me to go to Northampton county to execute them. I set out on the 26th, and after serving some subpoenas on the road, in order to get some evidence, I got to Nazareth on the 1st of March; next morning, Mr. Eyerly and myself went into Lehigh township to serve some warrants upon some persons who had given their opposition to the house-tax law. I think we got twelve of them that day; the others were not to be found. I think there were five of them, however they came in afterwards. We then returned to Bethlehem, and there met with Col. Balliott. We went then to Macungy township, and there we met with no difficulty till we went to the house of George Syder; I had a subpoena on him: he and his wife insulted us very much; his wife began abusing us first, and he came out with a club, and would by no means be persuaded to receive it, I suppose not understanding it: I gave it to a Mr. Schwartz, a neighbour, who undertook to deliver it to him. We then proceeded to Millarstown, a few miles farther: on the way we stopped at the house of the Rev. Mr. Buskirk, where we left our horses, and walked into the town, to the house of George Shaeffer, to serve a warrant on him; but were informed that he was not in town. We returned to the tavern, about the centre of the town, and there we saw a considerable number of people assembled. Mr. Eyerly and myself walked over to Shankwyler. As we walked out, many people ran after us, and many ran past us, and getting into the house, filled the long room. There appeared to be about fifty men. Near the house in which Shankwyler lived, we concluded it was bad policy to ask for him, for by that means it was not likely we should find him. And therefore, as Col. Balliott knew him, I got him to point him out to me; but upon observing me, he withdrew into the crowd; I followed him, and laid hold on him, and told him he was my prisoner, in the name of the United States. I told him I was the marshal of the United States for the Pennsylvania district. He retreated towards his barn. He afterwards called out that he would not hurt the marshal, but Eyerly and Balliott were damned rascals: after this the people called out to each other "Schlaget! schlaget!" (strike! strike!) This seemed to be the general voice of the people. David Shaeffer seemed to be a prominent character. I told them the consequence of their attempting to strike: I had a pair of pistols, and finding the danger we were in, I pulled open the buttons of my great coat, that I might, if necessary, get a ready gripe at them: whether they saw them or not, I cannot say, but when they found that I was determined not to suffer these people to be abused, they were then a little quiet: they, however, pulled the cockade out of Mr. Balliott's hat, and I believe would have done more violence to him, had they dared. I called on Shankwyler to go with me to Bethlehem, and thence to Philadelphia; but he swore he would not: I told him the consequence of resisting the authority of the United States, that it would be ruin to him; he declared and swore he would resist; he would not submit, be the consequence what it might. I told him it would ruin his interest and family; he said he would do it, if it was to the destruction of his property, and children. However, he finally agreed to meet me at Bethlehem, but never promised to submit, or surrender himself as prisoner. He spoke a good deal about the stamp act, and the house tax; that seemed to be the bone of

contention, and he said he had fought against it, and would not submit to it now; I told him he appeared to be too young to have fought on either side during the war: he then said his father had; he then added that there were none in favour of those laws but Tories, and officers of government. I told him that, as to Tory, that could not apply to me; that I had had a share in the Revolution; and that I was as fond of liberty as any of them. We came away, and as we came out, Mr. Eyerly and Mr. Balliott came out of the door, they huzzaed for liberty: I told them that I should join them in that, if they would huzza for liberty of the right kind; but this was licentious liberty. We then went with a constable to arrest Adam Stepham, Herman Hartman, and Daniel Everly. When I returned, I was informed that the rescue of the prisoners at Bethlehem was intended. This was on the 6th of March. I could scarcely conceive it possible; I thought it was somebody for their own diversion had raised it merely to alarm us, until we got to Bethlehem, where we got that night. There we were informed that the report was serious, and that it would be attempted by a body of armed men. On which I consulted with Judge Henry, Mr. Balliott, Mr. Eyerly, Mr. Horsefield, and General Brown. I had taken a bond of the Lehigh people, with sureties for their appearance. I sent Mr. Weed over the mountain to arrest Ireman, the minister, and John Fox, which he did. Seeing this matter very serious and important, I requested General Brown to remain at Bethlehem, as he had very great influence in that county: he said he was so near home, that he should go home, as he had been so long from his family. I then asked him to return in the morning, but he seemed to think there was no necessity for it, and did not. I then consulted what steps it would be necessary to take; I had seen an attorney, and told him I was ordered to call a posse comitatus in case of necessity, and also that I was ordered that they should not be an armed force; I then spoke to Judge Henry, expecting that he could call out armed men, but he told me he could not, for he had received similar instructions. We then concluded to call about twenty men. He called this posse from the neighbourhood of Bethlehem and Easton; about eighteen of them came in. About 10 or 11 o'clock two men riding into the yard, dismounted, and placed themselves opposite the door, by the side of each other; one of them had a long smooth bore gun, and the other a rifle. Some people in the house went out to speak to them, and asked them what brought them there: they seemed to be at a loss for an answer; I think one of them said they came out on a shooting frolic. I then asked them what they meant to shoot: they did not know, not could they explain the object of their coming. I asked them what they meant to do: one of them said they meant to do what was best for the country. I then supposed that they would all come in by straggling parties, and therefore thought it was the best way of making the business easy to lead them into the house, which I did, and put their arms into the garret. Shortly after, three horsemen, armed, and, I think, in uniform, came into the yard with Shankwyler; I went and spoke to them, and some went with me. I asked Shankwyler if he was come to deliver himself up; he answered no. I asked him what he came for, if he did not come to surrender himself; he answered that he came to see his partner: on farther inquiry, I found he meant his accuser. By this time the people were collecting very fast, and some persons mentioned that there was an armed force down by the bridge. On consulting with the gentlemen who were with me, it was agreed that a few men should be sent to speak to them, and warn them of the danger they were in, if they persisted in the measure which we supposed they intended. It was accordingly agreed that four gentlemen should go, which they did, and in a little time returned with three of their force, as a deputation from them to speak to me. I asked them what was meant by this armed force, and what they intended by it: they answered me that they wanted to prevent my taking the prisoners to Philadelphia. I told them that could not be, nor must it be attempted; they had much better go back, and tell the people to go to their respective homes. I think they asked me particularly for the two men who had first been made prisoners; I forget whether I gave them up then, or some short time after; however, they were given up, and their guns were given up to them: they were both loaded, and one of them was putting a new flint into his gun in the yard, before I went out to speak to them. The same gentlemen who went down to speak to them at the bridge, went down to them again, and, a short time afterward, we observed that they were coming up in force, up the street, Mr. Mohollan riding with the foremost of them, and speaking to them: the horsemen, such as had swords, had them drawn: the infantry marched with trailed arms. The prisoner at the bar was at the head of the infantry, with his sword drawn: the horse marched into the yard, and formed in front of the house; the infantry marched round the house, and the captain, with the leading file, came in at the upper gate. I had a great deal of conversation with different persons among them, who seemed to take a lead. They were all strangers to me; I told them the consequences of their attempting to rescue the prisoners; I told them they might rest assured that things of this kind would be severely punished by the government; that it would be considered a high offence, and that every insult offered to me, would be an insult to the United States. I had a good deal of

conversation with the prisoner at the bar, without knowing that he was Captain Fries, till he made himself known to me. I remonstrated strongly against the measures, and told them the consequence, but they seemed regardless of it, and seemed determined that I should give them up. They spoke generally of the prisoners. During this conversation, he was without his sword. The substance of the conversation was, he demanded of me the prisoners; I refused to give them up, and told him the consequences of his demands. On his still insisting, I told him that he and those about him would be severely punished for this conduct, that he would surely be hanged. He said they could not be punished; he said something to the effect that the government were not strong enough to hang him, for that if the troops were brought out, they would join him. His reason was, that he was opposed to those laws—the alien law, the stamp act, and the house-tax law; and said they were unconstitutional. He also spoke of bringing people charged with crimes to Philadelphia to be tried as an oppressive thing; they had no objection, he said, to be tried in their own courts, and by their own people. We parted, and met in the crowd two or three times, for the house was much crowded; he still demanded of me the prisoners; I told him I could not give them up; I told him I was commanded to bring them to Philadelphia; he insisted upon having them, and I that he should not. He then went and talked to his people, and came to me again. He told me that if I did not give them up, he would not answer for the consequences; he told me that he would not hurt me; he was the oldest captain in the rank, but he would not answer for them that were with me; that he took command of the whole by rank. By this time Captain Jarrett came in, and by this time there was much noise and huzzaing. I was told that this noise was on account of the arrival of Captain Jarrett: I wished him pointed out to me in confidence, that, as he had come to submit to the laws, he would be able to persuade others to do the same. He was shown to me; he had a pair of pistols in his hand. He showed me that he had entered into recognizance for his appearance. I then begged him to use his influence in persuading the people to disperse, and go to their respective homes, and told him what would be the consequence if they did not. His answer was that he had no influence; that he could do nothing. After this, I consulted with Judge Henry and others, what was best to be done; it seemed to be their opinion that I had better submit, and give up the prisoners; I told them I would not do it; I would immediately march the prisoners to Philadelphia, and if the armed mob thought proper to take them from me, they might; it would then be their act, and not mine; I went to them and told them to prepare for march immediately, for that we would set off to Philadelphia. The Lehigh prisoners said they would not do so, they would not expose themselves to so much danger; but if I would suffer them to go to their homes, they would meet me in Philadelphia on the Monday or Tuesday following. I met Mr. Fries about the foot of the stairs, and he still persisted in his demand of the prisoners, that I must give them up.

Cross-Examination.—I do not think he had a sword at that moment. I refused, and went into the back room, and a person whom I did not know, told me, that if I did not give them up, I should not be hurt, but the lives of Balliott, Eyerly, and Henry were in danger. This was not an armed man. I did not like to expose the lives of those men, so I gave up the prisoners. Fries came in directly, and said I had not given up Ireman, the minister. I told him I had; he then went out, and came in again, and said he was without. He then mounted and went off. I did apprehend that the lives of those gentlemen would be in danger if I refused the prisoners.

Philip Schlaugh.—When I was at Bethlehem, which I expect was the 7th of March, the first I saw was that the company was ordered in rank, and when that was done, this Fries was in the entry of the house, where he was speaking loud. I inquired who that was; they said it was Captain Fries. He said they who were the greatest Tories in the last war, were the head leaders now; then I went out of the house, and he went up to the marshal, and when he came out again, he went up to his company, and told them, "Well, brothers, I went up to the marshal, and asked him about the prisoners, and told him I would have the prisoners, but the marshal told me he dare not give them up willingly; I tell you, brothers, we have to pass four or five sentries, but I beg you not to fire first on them, till they first fire upon us; I shall be the foremost man; I shall go on before you, and I expect I shall get the first blow." Then he turned himself round. Mr. Molhollan and others begged him that he would not go on in this matter; they would rather go and speak to the marshal that he should deliver up the prisoners willingly, if they would absolutely have them. The men, when he told them this, followed him. He then said to them, "You must not fire first; but if they do fire upon you, then I will order you to fire too, and help yourselves as well as you can." I did not wait till the prisoners were released, for when I heard this, I thought there was going to be warm work, so I got upon my horse, and rode off to Easton as fast as I could.

Joseph Horsefield, Esq.—I live in Bethlehem; am a justice of the peace there, and was there on the 7th of March. Shortly before the last general election, the spirit of discontent and opposition was sensibly felt

in the county of Northampton; there were different meetings called in different parts of the county; among others I was informed there was one at which the militia officers were particularly to attend, which I understood was intended to prepare a ticket for the election. At that meeting, sundry resolutions were passed, which appeared in public prints; among others, one was that petitions should be formed to obtain a repeal of the alien and sedition laws, and the land-tax act. I was informed that the captains of the militia companies were to be served with a copy of each of these petitions; I was likewise informed that this was done, and a five-penny-bit each paid freely for a copy, though the Germans love their money so well. I think the people were told that the petitions merely contained a request for the repeal of the house and land-tax law. I have seen none of them. On the election day, the people pretty generally collected, and, at least in the district where I had a right to vote, the spirit of opposition against the measures of government was so universal, that a friend of government, by saying one word in favor of it, was ready to be abused; and I understood it was so in every election district in the county; and the county in general gloried that they had gained the day. Nothing material occurred, to my knowledge, from that time till the marshal arrived there. The spirit of opposition which had begun before the election, daily increased before the marshal arrived. The marshal arrived at Bethlehem about the 3d of March. I, having some personal acquaintance with that gentleman, waited on him, when he told me he was sent to the county on business for the United States, and desired me to inform him where several persons resided, against whom he had precepts from the district judge. I acquainted him. He then went to Nazareth, and returned again about the 5th, telling me he had summoned a number of persons in Lehigh township, and that they were to be at Bethlehem on the 7th. On the 6th, I was informed he had returned from Millars town, and on the 7th in the morning I went up to town, when he told me that he expected there would be some disturbance that day, and also told me that he had issued summonses for the posse comitatus. Between 10 and 11 o'clock the posse came; I think they were about fourteen in number. A considerable number of people from the neighborhood of Bethlehem had collected unarmed. Mr. Dixon arrived from Emaus about 11 o'clock, and informed the marshal that, on his way, he met with a number of people collected at a tavern called Reiter's, in arms, both horsemen and footmen, about six miles from Bethlehem, and that he met a number on the road partly armed, partly unarmed. About half past eleven, two men arrived at Bethlehem armed, from that quarter; they were disarmed, and sent up stairs into a room; about the same time a number of persons arrived from Lehigh township, who were also sent up stairs by the marshal in a room by themselves; they were about eleven in number. I was present when Mr. Eyerly spoke to these prisoners, telling them that an armed force was formed with intention to rescue them; the prisoners answered that they by no means wished it; that they would submit to go with the marshal, rather than be rescued. In about an hour, I was looking out of the window up stairs, and saw riding into the yard a number of horsemen, besides some footmen; I said to the marshal I thought it was best for us now to go down and see these people. I went down and asked one of them what was his name; he answered Daniel Shaeffer. He had a sword at his side, and two pistols; next to him on horseback was Henry Shankwyler; next to him was another horseman accoutred in the same manner, whose name was Philip Daesch; there were also John Dillinger and Jacob Cline, not in uniform, but with swords in the scabbard. I asked them what they wanted: we are all civil people, and have no arms, was my observation to them. Dillinger, who seemed to speak for them, said that yesterday the marshal had taken Shankwyler and some other of their neighbours prisoners; that they were come to see Shankwyler's partner (accuser). The marshal told them that the United States was the accuser of Mr. Shankwyler. Dillinger, said he thought it was not right that he should be taken to Philadelphia. The marshal said that the judge had ordered it so. I told him that I thought they were unacquainted with the government of the United States, and I thought they were in a very critical and dangerous situation; that the United States in less than twenty days could muster 10,000 men, which power I thought they could not withstand, and that it was best for them to surrender the prisoners to the marshal, and go home. They said that Shankwyler and the others were their neighbours, and that they would wait and see what should become of them. They did not mention the other names. I asked whether any more armed men would be there; Jacob Cline answered, fifty more. With that we went into the house. After dinner the people collected very fast, and Dillinger began again to speak in behalf of Shankwyler. The marshal told him it could not be otherwise, go he must; Shankwyler answered that he had a family to take care of, and that he would not go. With this, the marshal and myself walked up stairs, and there saw a great number of armed people round the house, I think one hundred and twenty or thirty, and about two hundred and fifty unarmed. I suggested to the marshal that my suspicions were very gloomy; that I doubted whether he would succeed in taking off the prisoners, for I had quietly heard among the people that were in the house, and out of doors, that nothing should satisfy them but the deliv-

ery of the prisoners: in front of the house was drawn up a number of men armed. I went up stairs, and there I perceived several times, guns pointed up to the window of the second story, at which I began to feel very disagreeable. Mr. Eyerly, Mr. Balliott, Mr. Henry and the others were occasionally at the windows, though I do not recollect Eyerly being at the window, but the others were: I walked down stairs, and there saw men armed close before the door, pressing in; I pressed through them, and heard two men say if Henry, and that damned Eyerly, and that damned potgutted Balliott were there, they would tear them to pieces; this man did not attempt to come into the house. I thought this was bad news, and I walked back again, and proceeded my way up stairs, and desired Mr. Levering (the tavern-keeper) to close the bar, thinking there was madness enough without stimulating it, which was immediately done. I desired the marshal not to protract the delivery of the prisoners to the law. Mr. Mohollan and several others there pushed them back, but just then I heard some of the officers say, "Boys, in the ranks! in the ranks!" I looked out of the window again up stairs, and there I saw a second pressure, to come in at the door; some of the men who were in the ranks, thumped their guns upon the ground, and jumped, pronouncing some unintelligible shrieks, savage-like shrieks. I begged the marshal, for God's sake, to deliver up those men up stairs, for the rescue was perfect, in my opinion: the closing of the men would be only butchering, and I had no doubt the government of the United States would not let its dignity be trampled upon in this way. The marshal still continued to hesitate. By this time a number of persons had got into the house, adorned with large three-coloured French cockades. The posse staid up stairs at this time: I then worked my way down stairs again, in order to be ready for a jump. By this time I understood that the prisoners were delivered. After the prisoners were gone about ten minutes, there was not a single armed man in, or about the house: some of the neighbors who had collected were still there, some of whom were approving, and others disapproving of the conduct of the insurgents, but in my opinion, the majority were approving. I never saw the prisoner till I came down to this place, but I frequently heard the name of Captain Fries called. Mr. Balliott looked out of the window, but stepped back again pretty quick, afraid of the muzzles of the guns.

John Mohollan, Esq., after describing the preliminary proceedings to the same effect as the preceding witnesses, proceeded: Having met with those horsemen before we came back to the bridge, we returned with them, and all made a halt in the yard. I spoke all I could to dissuade them from the purpose about which they came, but all to no purpose. I had no answer that I could understand, for they generally spoke in German or broken English, which I could not understand. I always understood, generally, that they wanted the prisoners, and that they wished to give in security, and let them be tried in the county: that if they had done anything that was wrong, it was right they should suffer, but that it was not right to take them to Philadelphia. I heard Major Barnett say this, who interpreted what they said in German. After being a considerable time engaged with people as actively as I could, but it appeared to be but to little purpose, I then went up stairs with a view to take something; as I was returning, the stairs were so crowded I could not easily get down. Coming down, I saw a person whom I understood to be Captain Fries, and the marshal standing talking to him. I believe it was the prisoner at the bar. I heard them talk a few words; the marshal said that they were not doing right, and that they must suffer: but I cannot recollect anything particularly that was said, but I observed that he often made a demand of the prisoners, but that he should not be hurt; that he would be answerable for himself and the company, that none of his men should hurt him that day, but that he would not be answerable for any others that did not belong to his company. I think he repeated this twice. I was there but a few minutes. I made some observations to the men, advising them to consider what they were about, for I considered it dangerous, and very wrong to proceed in this way. At this time there was a noise in the entry: I was afraid something had happened, so I went down, but I do not recollect seeing Fries the whole day afterwards. There was a great deal said, but none of them spoke to me in English.

Jacob Eyerly.—As to what happened on the seventh of March, I am not able to say much. I was out with the marshal the day before, when he served the process. As we heard that the rescue was intended, it was agreed to send express to Easton, in order to obtain the posse to aid him in the execution of his duty: they accordingly arrived between ten and eleven o'clock, to the number of fifteen or sixteen. Mr. Dixon of Emaus told us, that he had seen about twenty armed men at Reiter's tavern, and some at another tavern, besides some on the road, and that he understood from them that they were coming to rescue the prisoners. It was then agreed to take these prisoners, who had surrendered, up stairs. There were a number of people now collected from the neighbourhood, and then it was agreed to send the deputation to meet the armed men. About that time I went down stairs into the back room, and there I saw those two men whose arms had been taken from them: I did not see them come in. I then went up stairs again; this was the last time I went down stairs, till after the prisoners were released. I then saw those three men come with Shank-

wyler. I did not hear what passed, but saw Mr. Horsefield and Judge Henry go to them. Sometime afterwards, I saw an armed force coming in, a great many on horseback, and many footmen with muskets on their shoulders: the horsemen had their swords drawn. The greatest part of those on horseback came from Bucks county. Afterwards, the marshal came up stairs and said that they were determined to have the prisoners, and he believed that Mr. Balliott and myself would be in danger of our lives if we went out of the house, and then desired me to undertake to guard the stairs, and told me to give orders that if anybody would come up with force, they should shoot them. I placed the guard on the stairs; at first there were but two. Some of the posse were at this time below talking to the people. After some time the guard told me that they had got violent, and threatened to come up stairs with violence, and requested of me that I might double the guard, which I did. As I was in the room, I looked out of the window and saw a company of riflemen, all with three-coloured cockades, marching Indian file round the house: I counted them; there were forty-two in that company; another person besides myself was counting them, but I do not recollect who it was, though I rather think it was Mr. Balliott: they marched twice round the house. Another time when I was walking about the room, a person who was along with me, I do not recollect who, told me that they were pointing their guns up to the window, and that he was sure it was dangerous for me to show myself at the window. There is not the least doubt upon my mind, from what I heard, and from what I saw, and from the marshal's testimony, that if I had gone to any place where they could have done it, they would have shot me; because the people in general appeared to be in such a rage that there was no reason in them. I abstained from showing myself at the window, or amongst the people, as much as possible. There was nothing particular that I saw, except at one time when I was in the room, I heard a terrible huzza: this was in the afternoon. On this I went to the window to see what produced this noise, and I saw that Captain Jarrett had arrived: he had just dismounted his horse, and had his pistols in his hand, and was walking up towards the stairs. I did not remain long at the window, but just looked out, and saw him come in, and shortly after he came up into the room where I was; he had not his pistols with him then: I had that moment received a letter from Mr. Rawle, attorney of the district, that Mr. Jarrett had surrendered himself and given bail, and that he declared he was a strong friend to government. I then said to him, "If you are a friend to government, as you profess to be, you ought to go down and tell your people to desist:" to which he made no reply at all. He walked about in the room for some time, and then went down stairs. I did not see anything more till the prisoners were released. The only time I saw Mr. Fries, the prisoner, was a few minutes before the prisoners were delivered up. I walked out of the room, and saw Mr. Fries upon the head of the stairs, speaking with the marshal: shortly after, the prisoners were requested to go down; but the minister, staying a little while up in the room, there was a call made for him particularly, and therefore I went and requested him to go down. Shortly after, the armed men went off. I looked out of the window, and saw Mr. Jarrett parading his light horse in rank before the door. He then gave orders to march, and they went off. That was the only time I saw the prisoner during the day.

I was one of the commissioners appointed to carry into execution two acts of congress; one for assessing houses, and the other for laying a direct tax. After I had received my commission, which was some time in August, 1798, I had received a letter from the secretary of the treasury, requesting me to take some pains to find out suitable characters to serve as assessors. I did, in consequence of that, write some letters to some of my friends, in the counties of Northampton, Luzerne and Wayne, which constituted my division: in Wayne and Luzerne, I found no difficulties whatever, but received a number of applications sufficient, and accompanied with recommendations. In Northampton county I was not so successful; I had but two recommendations from that county; it was, therefore, necessary for me from the best information which I could obtain, to endeavor to find men of suitable characters in each township; and likewise to get a number of blank commissions, in case some of those appointed should refuse to accept of the office. I received information at Reading, at the time the board of commissioners met, from the commissioner in Bucks, that he had received information from a gentleman in Philadelphia (Mr. Chapman) that he had travelled through a great part of Northampton county, and that in every tavern where he stopped, this tax law was the general topic of conversation, and that great pains were taken to find out who the persons were that were friends of the government so much as to be assessors, in order to persuade them not to accept of the appointment. Although I could not believe it was the case at that time, yet I found it was the case afterwards. Agreeably to my duty, I gave notice to the assessors to meet me at a certain place. I should have first said that I appointed the assessors agreeably to the best information I could collect; I took one man from each township, such as was thought qualified for the business. I sent them their commissions, and with them notices to meet me at a time and place appointed in order to receive from me their instructions. I appointed a meeting of the assess-

ors of the third district of Nazareth, on the 3d Thursday in November; two of them did not attend, and some of the others who did attend begged to be excused from serving. I asked their reason, and told them I could not very well excuse them; they told me that the people in their different townships were very much opposed to the law; that they thought it was dangerous for them to accept of it. I found that they, as well as the people, had a wrong idea about the law; and I was so happy that day as to prevail upon all those that wished to be excused accepting the appointment, upon explaining the law to them, to accept it. The next day I met the assessors of the second district at Allentown, where all attended but one. I had the same difficulty there as at the other place, and it was not without much difficulty that those who did appear, were persuaded to accept of the appointment. I then left the blank commissions with Mr. Balliott, and requested him to appoint some persons in the room of Mr. Horne, who had refused. The Monday following I met the assessors of the other district at Chestnut Hill township. Previous to that, I had seen Mr. Kearne, who was the assessor appointed at Easton; when I mentioned to him that he was appointed an assessor, he told me that it would not suit him to accept of it. I requested of him that he might name some suitable person, and qualified for it, and I would be willing to accept him. He mentioned Jacob Snyder, and told me he would notify Mr. Snyder to meet me with the rest. When I came there, two of the assessors did not appear, and one from Hamilton did not appear willing to accept of it, but after a great deal of explaining and persuading he was prevailed upon. Just as we were going, Snyder came; he told me that he had received his notice, and that he was willing to accept it; that the people were very much opposed to the law, and he did not very well understand it himself; but he thought he would endeavour to get some information; and that when he came there, the information he received was such, that he was determined to go after me, and accept of the appointment, if he were to ride fifty miles in order to accept of it, for that he had been wrong informed about the law. I then went up to Wayne county, where I had no difficulty, except that one assessor told me that he was persuaded with difficulty to accept of the appointment. As I was going to Luzerne county, the assessor from Hamilton township (Nicholas Michael) came after me, and told me that he had been obliged to fly from his house in the night to save his life, and begged of me to accept of his resignation; I told him I could not accept of it, but that I would see perfect justice done. At my request he went with me to Easton, where we went to see Mr. Sitgreaves, attorney of the district; but not finding him at home, we went to Judge Trail, in order to take his deposition. He begged that I would grant the favour for him to consider of it till the next morning; I did, and next morning he came to me and begged me, "Mr. Eyerly, for God's sake, put me to jail, so that I may be secure of my life, for if I inform against these people, I and my family shall ruined." I told him that I would do no such thing, for that I had too much friendship for him; that I would give a few lines to the constable to request him to call a township meeting, and I would meet him in the township. I requested Mr. Henry to go there with me: I had reason to believe that this opposition arose from misrepresentation, which I supposed was given to the people by a few gentlemen, who had travelled through the country a few days since. When we came to Hamilton township, there were about sixty or seventy persons assembled, three or four of them in uniforms; their arms were behind the door at the house of Mr. Hellers. I then told them that I was come as their friend, and without any design of taking the least advantage of their conduct in opposing the assessors; that I had come to read the law to them, and explain it. I did so, and pointed out the impositions practiced on them. Mr. Henry assisted me as much as he could, but all to very little purpose. The assessor, after this, again begged me, for God's sake, to accept of his resignation. As there was a number of them that complained against the assessors, I proposed to them that, though I had no authority to it, yet if I thought it would be a favour to grant them that indulgence, to elect their own assessor themselves, I would grant him the appointment. They told me they would do no such thing, for, said they, "If we do this, we at once acknowledge that we will submit to the laws; and that is what we won't do." I then inquired for a suitable man, and John Hufton was mentioned, who was likewise elected assessor for the county rates. I called him into a room, and requested him to accept the appointment; he told me it was impossible at the present time, but he should, whenever things appeared more favourable, so that he could go through, be willing to do it.

The last week in December, or the first of January, I received a letter from Mr. Heckavelter, the assessor of Upper Milford; by which, he informed me that he was stopped by a regular deputation from the township meeting, consisting of three men. I sent a line to Mr. Heckavelter, and wished him to give notice to Mr. Schymer, Mr. Moretz, and some of the leading men in the township, that I would meet them at such a time, and explain the business to them. When I came, in consequence, within four miles of the place, I was requested by a friend not to go, for that the people were so violent, that if I did go I should certainly be killed: I replied to them that I would go; I was not afraid of any of them. I took Mr. Henry

along with me; when we came there, I found about sixty or seventy persons collected at the house of John Schymer. I suppose about twenty of them had French cockades in their hats, red, blue, and white. Mr. Schymer then took me into his own room; there were about eight or ten in the room. Mr. Schymer asked me if I had seen the petitions; he gave one of them to me, and requested that I would read it, which I did in the presence of another person; there were but two in the company that understood English. While I was reading, these two men began to shake their heads; they said it was not such a petition as they had been told. I then asked them whether the general opposition was not on account of the stamp tax, and the house tax; they said yes. I then told them there was not a word in this petition against the stamp act; they seemed to be altogether satisfied, and said that they had been made to believe it was. I then went into the next room, where the people collected; some of them appeared to be extremely violent and very abusive. I told them I had not come there to be abused by anybody; that I had come there as a friend, to inform them of the law, which it was important should be understood. There was a report among them that it was no law; I read the law to them, and explained it in the German language, and told them it was their duty to submit to it. One of them of the name of George Shaeffer jumped up before me, and said, "Mr. Eyerly, it is no law;" I told them that if they did not believe me, they might inquire of Squire Schymer whether it was or not. Mr. Schymer told them it was a law; upon which Shaeffer replied, "admitting it is a law, we will not submit to it." He then further said, "Here I am, take me to jail; but you shall see how far you will bring me." Upon which a great many of them jumped up and said, "Yes, by God, if they shall only attempt to take any one to jail, we would soon have him out again." Some of them made use of very abusive language against the assessor, calling him a Tory rascal and the like; and as the assessor had requested me to accept of his resignation because it was not in his power to go through with it, I proposed to them, that if they had any objections against the assessor, they should elect one, and I would give him his appointment: to which some of the most sensible and most moderate replied, "No, if it must be done, Mr. Heckavelter shall do it;" and some of the others said, "We will do no such thing: if we do, we at once acknowledge that we submit to the law, and that is what we will not." I then went over to the tavern close by, with Mr. Schymer, when Mr. Heckavelter came to me and told me that he was in danger; that there were three of the Shaeffers were going to give him a licking; I requested him to stand by me, and I would see him safe. We then went off.

Cross-Examined.—All three of them came up to beat him. Mr. Heckavelter told them he would not have anything to do with them, and they charged him something respecting a liberty pole at Millars town. The liberty pole was erected two weeks before that, but after the dissensions arose, with a few exceptions, poles were erected nowhere but where this opposition prevailed. The law was not executed at Millars town, nor at Upper Milford, till about two or three weeks ago at farthest. I then agreed to go to Millars town, where one of the Shaeffers lived. Mentioning this to an assessor, (John Roming,) he requested I would not do it; he told me that the people were so violent that he would not go upon his duties if anybody would give him £500; if he did, he must run the risk of losing his life. I then desisted.—I then went to Mr. Trexlers, where I saw Mr. Bobst, who gave me information of Heidelberg, Wiessenberg, Lynn, and Low Hill: he told me that at a meeting at one of those places the people had drawn up a paper not to submit to the laws: he then told the people that they were certainly doing wrong, and that they would bring themselves into trouble if they went on that way: upon which they (the people themselves) destroyed the paper. He said the same of Heidelberg. He likewise informed me that in the township where he lives, it was impossible to execute the laws. The laws were executed in those four townships only since the troops have been there. All in the township opposed the execution of the law, except three or four. In Penn township the assessor did not meet us; he refused to accept the appointment, well aware of the difficulties that would occur; and a general rule was admitted to meet those difficulties. I received information from Mr. Balliott that he had found a man in that township who was willing to execute the office. At my request, he sent him a commission, but the man was obliged, before he took the oaths, to return it again, declaring it was impossible to do it. This was some time in January. Some time afterwards he wrote to me of another man who would accept. I requested him to sign his commission. I received information, while the marshal, Mr. Balliott and myself were about the country, that as soon as the people in the township knew that he had received his commission, they raised a mob. Penn township was assessed about ten days ago. Owing to the opposition in that township, the law could not be executed. In Moore township there was some opposition; but when the assessor was opposed, he called a town meeting. That township has been assessed about two months. On the first or second of March last, when the marshal came to Nazareth, and told me that he had process against a number of persons in Northampton county, he requested me to go with him; I went with him first to Lehigh township, where the marshal served process upon those peo-

ple for opposing the assessments, without any difficulty: we then came to Bethlehem, and then to Emaus: the first subpoena the marshal had to serve was in a house upon George Syder, where, after being abused by the house, we were sworn at and abused by him; he had a large club in his hand.—He called us rascals, highway robbers and the like: the marshal told him he only had a subpoena to appear at Philadelphia to give testimony; to which he answered in German, he would be damned if he would go. The marshal, finding he could do nothing with him, requested Daniel Schwartz, sen., to read and explain it to him, and we left it with him to serve. We then went to Millars town to serve a warrant on George Shaeffer, but we were told he was gone to Philadelphia: we went to Seward's tavern. The marshal and myself then went to Shankwyler's, where there were at least fifty assembled in the room. Not knowing Shankwyler, Mr. Balliott pointed him out, and the marshal took him: while the marshal was talking with Shankwyler, the crowd closed upon us, and abused us very much, and in a very menacing manner, accompanied with an almost universal cry of "Strike! strike! strike!" so that for some time we did not know what would be the consequence. The marshal this time was persuading Sankwyler to submit, telling him the consequence of opposition: he at first declared he would not, but at length he said he would do as Jarrett did. Some of the people then said that if Shankwyler was to be taken out of his house, they would fight as long as they had a drop of blood in their bodies. The marshal then turned round to the crowd, when they were so violent, and told them that Mr. Balliott and myself were under his protection. I forgot to mention that, while the marshal was talking to Shankwyler in the bar, one of the persons present tore the cockade from Mr. Balliott's hat, while he was turning round to speak to the marshal: Mr. Balliott did not for the present know but it was a blow some one had given him. They then made back a little. Having found it impossible to do anything farther, Shankwyler promised to meet the marshal at Bethlehem. We then went out of the room, but before we came out of the house, there was a terrible huzza in the room. I then sent for a constable, at the request of the marshal, to go with him and show him the persons and places of those against whom he had process. I remained while he served the process at Mr. Irexler's, and it was there we first received information that an attempt would be made the next day to rescue the prisoners. We arrived at Bethlehem that evening, the 6th of March, and then the occurrences happened of which I have given testimony as far as I know.

Samuel Toon.—(The testimony of this witness being in entire accordance with the two immediately preceding, is here omitted.)

Andrew Shiffert.—I was one of the armed party that went to Bethlehem on the seventh of March, and belonged to Jarrett's company. I was informed by John Hoover that all the light-horse were to meet at Martin Ritter's at ten in the morning: I went to Ritter's the next morning, (on the seventh of March,) and when I came there, I asked what was to be done. Their answer was, that they were going to Bethlehem to release the prisoners from the marshal. I told them that if they were to do this, they would find what would be the consequences. The others said that if they got the prisoners clear that day, there would be noth ing done; it would be all over: that if the soldiers came with arms against them, it would be all at an end. At Ritter's I wanted to go home, but they would not let me, telling me that Fogle would be at Guise's tavern, whereupon I agreed to go so far with them. Coming there, Fogle was not there, and I and Samuel Toon wanted to go home, for there were no officers there. They then agreed to choose an officer, when the choice fell upon me; I told them I would not go with them without they would obey my orders, and not say any more about taking the prisoners from the marshal. They professed to do so, whereupon we proceeded to within half a mile of the bridge, and there we were met by four gentlemen from Bethlehem, and as they repeated again that they would have the prisoners, I said I would have no more to do with them. They then went into Bethlehem, but I did not go with them; but in about two hours I went in to see what they were about: I staid this side of the bridge till then. When I got to Bethlehem, I was informed that they had got the prisoners out. I remained there about half an hour, and then rode home, so that I know not what happened.

The evidence here was closed so far as related to the affair at Bethlehem: and the district attorney then proceeded to introduce the following testimony in regard to preceding and succeeding events to show the state of the country, and the prisoner's intention, the material portion of which is here given.

John Dillingher.—It was rumored in my neighbourhood that the marshal was coming up to arrest some persons; before he came, it was suspected that some persons would be arrested. The report was that they were to be taken to Philadelphia. It was said, that if any person was to be arrested innocently, it would be very hard for such a man, and he ought not to be suffered to suffer. And further, it was said that somebody had sworn against Shankwyler that he had two pistols and a sword on his table, and that he had sworn that if the assessors should come, he would shoot them.

William Thomas.—On the fifth of March we heard that the assessors were going round to assess the houses in Bucks county: they had assessed a few of the houses

about already: my brother was at Jacob Hoover's, and I was there when he told me to tell two of our neighbours to let the assessors go round. On the sixth in the morning, I met Captain Kouder: he told me I must come down to the mill, that his company was assembling there. When we got there, several were met; part of them were armed. There were about fifteen in the whole. We went to Jacob Fries' tavern; then the people said they went to see the assessors, but I don't know what for. There were a great many more people there, I think about thirty. Two horesmen were sent to see if they could find the assessors. Their direction was, that if they could find them, they should bring them to Quaker town, or to Jacob Fries' tavern. After the horsemen were gone, then the order was for the company to go to Quaker town. A great many were armed, and many who were not, had clubs. I cannot tell how many were armed, but the greatest part had either arms or clubs. There was a drum and fife when we were at Quaker town.—We all stood in a rank, and fired off, and hallooed huzza. Soon after we were there, the assessors came along. They were Esquire Foulke, John Rodrick, and Cephas Childs. I was at Zeller's when they came along, and they all began to run out of the tavern. When I came out, they had Foulke by his horse's bridle, and him by one leg, and they told him to get off. It was Captain Kouder that had hold of him; then John Fries came up and told him to get off. Fries told Foulke to get off; he wanted to speak to him. Then another came up, and stood at the back of the others, giving one of them a knock with the butt of his gun, and told them to pull him off; Jacob and John Hoover told them they should not abuse the man, for he would get off without. With that the esquire rode up with them to the shed, and got off. They then went into the tavern together. Then John Fries told him that he had forewarned them yesterday not to assess the houses, and yet they had come to-day again; he then told him that he should show his writings, what he had done in the township. Which he did, and John Fries read them, and gave them to him back again. I then went into another room, and when I came out again, Childs, the other assessor, was sitting on the table, with five or six about him. When I came up to him, I told him that they should not abuse him, for I used to know him: at this time they were abusing him. I do not recollect what they said, but they told him he should not have gone about when they had forewarned him the day before, and they made him promise that he would not come again till farther orders—till they knew how the law was. They told him they thought they had as fit men in their township as what he was, and they wished to choose a man in the same township, if they must have it done. A travelling man named Captain Seaborn was there; he was drunk, and some of them asked him whether he was for liberty or government: he said government; some one said if he said that again, he should be whipped. They were all pretty well drunk, but I was not drunk. I do not recollect ever seeing Fries drunk: Kouder was, and so might Fries, for what I know; but I had known him some time, and knew he was a sober man. They talked of Tories and stamplers: Foulke was one they called a Tory, and so were several others. Next morning I went to Marks' tavern, in consequence of a message they had left for me that night before with my mother. By ten o'clock we were all there. John Fries was there. John Fries had the command; but he did not command till he got to Bethlehem; he gave no orders on the road. The substance of the conversation before we went from the tavern was, that they were going to Millars town: I did not know that they were going to Bethlehem. Should there be prisoners there, Marks said that he wanted us to show ourselves. The Northampton people had a mind to take the prisoners again: I understood that the night before at Fries', and along the road before we got there. About three or four miles from old Marks', we met young Marks; he said it was not worth while to go to Millars town, that the prisoners were up at Bethlehem, and that the Northampton people and the light horse had all gone there. Some were then for going back again: some, as they had come so far, was for going up to Bethlehem, to see what was going on there; so we went on. Old Marks and John Fries said so. Then we went on about a mile, and stopped at Ritter's: there was a liberty pole there. Then we went on to Bethlehem. When we came to the bridge, the people had stopped; there were some riflemen and some light horse. Some asked the reason why they stopped there: they said they could not get over, the bridge was shut: then John Fries rode up, and asked whether they required toll or not; they said—Yes. Then he told them to count his men, and told us to follow him. The words he used were, "Now, boys, follow me." I do not know whether he counted all or only his own men. I do not know who paid the toll; we did not; we were all mixed together. I did not hear of three men being sent forward. I heard of their having taken some prisoners. I believe only the Bucks county people followed Fries over the bridge, without it was some few of Staeler's riflemen, who came pretty soon after over the bridge. From Marks' to Bethlehem, it is about twenty miles. When we got over the bridge, two men met us, and said we should not hurt them: Fries told them that he should hurt nobody without they hurt him first. Then Judge Mohollan came and spoke with him afterwards, but I do not know what either he or Fries said. When we got up to the tavern at

Bethlehem, the whole of Staeler's rifle-company were there. They marched round the house twice; we did not stand in ranks; we were separate. They wanted one to go up and talk with the marshal, and they from Bucks and Northampton said John Fries was more fit to go up than e'er a man that was there. Then John Fries and one Hoover went up stairs. After a while Hoover came down; Fries staid up; when he came down, he kept dashing and swearing, and said force should do: give him nine or ten of the best riflemen in the company, and he would storm the house; a great many of them told him he should not do it; he said he would. Jacob Hoover, Mitchel and Mr. Mohollan endeavoured to keep him off. Fries, when he came down stairs, fetched some writing down with him, that he got from the marshal, which he read to the company. He said the marshal dared not give up the prisoners, and therefore that they would take them by force of arms. At this time the Bucks county people were separate from the others. He spoke to the whole of them. Then he asked, "What shall we do now—take them by force of arms or how?" Several of them said, since they came so far now, they would have them. Frederick Henry said, since they were come so far, it was a damned shame not to have them. Then Fries went up stairs again, and said he would go and talk to them once more. When he came down again, he said that the marshal dared not give them up, without they took them by force of arms. They then told him that he should go and do something pretty soon, for it was getting late. Some of them said it was better to let Fries have the whole command of all the men. Then it was concluded to go into the house, and he spoke five or six times. Fries, when it was concluded to go into the house said, "For God's sake, don't fire boys, till I am fired upon first:" he said this three or four times over. Then we moved on to go in; he was before us. A good many at last followed him. I could not see who they were, the house was so full. Then Fries went up and talked to the marshal about half way up stairs. Henry told me that Fries was telling the marshal that if he did not give up the prisoners, they would fire on them, so that they should not see each other for smoke. After that, the door was opened, and I saw some of them come down.—Some came down while Fries was talking to the marshal. There was some not down; they called for them, and they came down. Fries said he was glad Hoover did not go in along with him, because he was too much of a fool; he thought this would not have done so well as it did: he did not want him there. We retired from Bethlehem altogether when we had got the prisoners. Fries went to the minister after he was released, in another room: he pulled off his hat to the minister, and told him he must thank him that he had got out; he said he was out, but he could not thank him, for all. The marshal was again called to reconcile some seeming difference in relation to the last conversation Fries held with the marshal, and of the prisoners coming down at once. The marshal said, that the last conversation he held with the prisoners was at the foot of the stairs. Mr. Fries declared that he would force his way up stairs, if I would not give them up; I told him that this would be punished with the utmost severity, but that if he was determined to rescue the prisoners, he should not go up stairs, but that I would, and order them down. Finding myself not in a situation to resist his force, I went up and ordered them down.

Cross-Examined.—At no time when I was in conversation with Fries, did the Lehigh prisoners come down stairs. There might be others that would not submit, but none from the room in actual custody: if they did, it must have been while I was speaking to them in the crowd; it was possible for them to do it at that time. They were in the room, and the guard remained there till I went up; it was placed there to prevent any person going up or down. After this conversation with Fries, I went up stairs to order the prisoners down. They were all in the room at that time, though I did not count them. Upon my order, they came down, and I came down with them.

George Mitchel.—I keep tavern in Lower Milford township, Bucks county. There was a great disturbance and discontent in my township respecting this house law; a meeting was advertised for the 8th of February, at the house of John Cline, to consult about the house tax law. No names were signed to the advertisement, that I recollect. A number of the inhabitants met; it was pretty late in the day; they all seemed discontented, but they were in doubt whether it had passed into a law or not. There was something in the newspaper of an amendment which made them doubt whether it was in force. They formed an instrument of writing, but I cannot recollect the particulars of it. It was drawn up by John Fries; I assisted him. We passed home after that. I had no particular conversation with anybody after the paper was signed; it was signed by about fifty or fifty-two of the inhabitants. Captain Kuyder was directed by the meeting to give notice to the assessors not to come forward till they had informed themselves farther, whether it was a law or not. I am not sure who put up the notice of this meeting; perhaps it was myself. John Hoover and several had talked about it, and we thought we would call a meeting. This was on Friday. On the Monday following, James Chapman came to my house, and told me I should tell Jacob Hoover that he should give notice over the creek (I live nearly at the end of the township), that if they would

choose an assessor of their own, they should be welcome; and any man that was capable of the business would be admitted into the office. One Valentine Hoover came to my house that same day, he lives over the other side, and I told him what Mr. Chapman had told me; likewise I informed Jacob Hoover that day myself. Who opposed it, I don't know; but it was reported that it was not adopted. Squire Foulke sent me word to advertise a meeting. Israel Roberts and Samuel Clark called on me and told me. They informed me that Mr. Foulke was of opinion that the people were ignorant of the law, and he would read it for them, and explain it to them; this was the purpose of the meeting. So we advertised the meeting to be held at my house some time in February toward the latter end. It was on a Saturday, and there were a great many of the inhabitants at the meeting; Squire Foulke and Mr. Chapman attended it. The people behaved very disorderly; but I cannot recollect any of the conversation that passed. Jacob Kline came in and asked me what the meeting was intended for. I told him that I understood by Squire Foulke, that the Germans were very ignorant of the law, and that he called them together to read and explain it to them; I desired him to try to pacify the people; and I believe he did his endeavour, but it proved in vain: at least they did not read the law. I did not understand that anybody offered to read it; he thought it was in vain, there was such a clamour. After Mr. Chapman was gone, Marks asked me how I came to meddle with the advertisement. John Fries was not at the meeting. I don't recollect anything afterwards till the assessors came, which was the 5th of March. They took the rates of my house and my neighbours. The assessors were Mr. Childs, Mr. Foulke, and Mr. Rodrick.—I went from home the rest of the day, and the next morning when I returned, (6th of March), I heard there had been an uproar about driving away the assessors. It was talked of that they were going to Millars town the next day. Hearing of such an uproar, I concluded to go and hear what was going on; they said they were going to meet the Northamptons who were going for the relief of the prisoners. I do not know the names of any of the prisoners. There was a talk at Marks' house (7th of March) about going to the tavern above Emaus: Marks said his son would bring word. We went on then till we met young Marks, and he beckoned that we should halt or go back; so we did; he said he had been up at Ritter's tavern, and they had started before he came there. I do not know of any in particular who took the command. Some wished to go to see Bethlehem, some to see the bridge; so they concluded to go on. I cannot say who were for going on, and who were not. We were overtaken by several people going to Bethlehem. None were armed, that I can recollect. When we got to the bridge at Bethlehem, there were a great many armed men and light horse, and two rode over the bridge towards us from the other side. I did not hear the conversation that passed at the bridge; but after a while we went over to Bethlehem. A great many of the company was formed before the house, who seem to speak out that they would have the prisoners. Fries went in, I saw him start to go in; but I did not hear who ordered him, or who desired him. A short time after, in the course of five or ten minutes, Henry Hoover came out to us, and said he was sergeant of their company, and he was chosen to demand the prisoners. He said he went up stairs, and somebody gave him a push, and had like to have tumbled him down stairs, and he came out in a great passion. He went on in a great rage; he said if they would only give him ten men, he would storm the house. A short time after that, I observed Fries come out, and he said "Silence!" to the people there. He seemed to be as much among Staeler's company as among ours. He then afterwards said, "Gentlemen, an officer of the United States says he cannot deliver up the prisoners, unless they are rescued by force of arms; so, he said if you are willing, we will; I will go foremost, but if we do, I beg of you, none of you fire till they fire on us first, till I give the word, and if I drop, then you must take your own command." He repeated these words, at least once more. I heard nothing afterwards of the proceedings in, nor out of the house, that I recollect. Some time after this, on the 18th of March, a meeting was held at Marks'. The object of the meeting was to choose a committee of the three counties of Northampton, Bucks and Montgomery. The meeting was to consult what was best to be done, and it was determined to leave it to the committee. John Fries was there. After the meeting, I had some conversation with him: while the committee was sitting, I said to him: "John Fries, you never intended to resist the law, did you?" He made me answer, "Yes, I did." We did not in particular mention any laws. There was a meeting after this at my house, on Easter Monday, March 25th. The object of that meeting was to appoint an assessor. The one that was appointed was to do the business, if he pleased; if not, the person they chose was to do it, or both together. John Fries was at that meeting at the beginning of it, but I do not recollect that he was at the time they gave in their votes. He said it would not suit him to vote now, as he had been against the law throughout.

Cross-Examined.—At the meeting at Marks', it was generally agreed that there should be a submission to the laws. After the business was over, they made mention of it, but I do not know that they made any report of it. I believe the people never knew to the contrary but there would be a return made.

It was recommended to submit, and I believed it was agreeable to the meeting; I heard no opposition to it. The return was made in writing. On the 15th of March, we received the proclamation, and that evening I took it down to Frederick Henny's; I read the proclamation to Frederick Henny, and he agreed to submit; he made no opposition. When Fries said it would not suit him to vote for the assessor, he seemed rather opposed at that time to the laws, than the appointment of an assessor. This proclamation was communicated to the meeting on the 18th of March.

James Chapman.—I was a principal assessor under the act for laying a direct tax; I believe in all but Lower Milford, the assessments were carried into effect without opposition, or in a majority of the townships, except some little threatenings. The assessor of Lower Milford was taken sick, and did not proceed. His name was Samuel Clark; I called upon him afterwards, to know whether he was able to proceed or not: he thought he should be able in a few days: I had occasion to go to Newtown, and was several days from home, but found there was nothing done respecting it; I found the people had had a meeting, and there appeared to be great opposition to the rates being taken. The day after I returned from Newtown, Clark called upon me, and told me he thought it was not safe to go about, from the disposition of the people at that time. I told him that I would meet him the next day at Mitchel's tavern in Milford, and meet the people to know what their complaints were. I met Clark at a house just by, and he told me he would be in at Mitchel's in a few minutes. I examined Mitchel, to know what were their complaints: Mitchel signified that the people were dissatisfied that the assessor was appointed without their having a choice: for they wished to choose for themselves. I told Mitchel if they would choose a man of character, I would use my influence with the commissioner to have him appointed, and I desired him to give notice of it to Jacob Hoover. I wrote to the commissioner, stating the situation we were in, and told him what I had done; but he seemed not to be willing to indulge them with it. Seth Chapman was commissioner for that district.—I told him it would ease the minds of the people if it were done. At length he consented, but seemingly with reluctance. However, they never chose one. I do not recollect that it was made known to the people.—I met him at a meeting of the assessors which was held at the house on John Rodrick. On my return home I was told, I think by Squire Foulke, that the township was advertised to meet at Mitchel's. He said, if I would attend there, he would meet me. I got there between one and two o'clock. Just as I got to the house, before I went in, I saw ten or twelve people coming from towards Hoover's mill; about half of them were armed, and the others with sticks. I went into the house, and twenty or thirty were there. I sat talking with some of my acquaintance that were well disposed to the law. Conrad Marks talked a great deal in German, how oppressive it was, and much in opposition to it, seeming to be much enraged. His son, and those who came with him, seemed to be very noisy and rude; they talked all in German, which, as I did not know sufficiently, I paid but little attention to them. They were making a great noise; huzzaing for liberty and democracy, damning the Tories, and the like. I let them go on, as I saw no disposition in the people to do anything toward forwarding the business. Between four and five I got up to go out; as I passed through the crowd towards the bar, they pushed one another against me. No offer was made to explain the law to them while I staid; they did not seem disposed to hear it. They did not mention my name the whole time of my being there, but they abused Eyerly and Balliott, and said how they had cheated the public, and what villains they were. I understood it was respecting collecting the revenue, but I did not understand near all they said. I recollect Conrad Marks said that congress had no right to make such a law, and that he never would submit to have his house taxed. They seemed to think that the collectors were all such fellows; the insinuation was that they cheated the public, and made them pay, but never paid into the treasury. After getting through the crowd to the bar, I suppose I was fifteen minutes in conversation with Mitchel: he said perhaps they were wrong, but the people were very much exasperated. Nothing very material happened, and I asked Mr. Foulke if it was not time to be going. So I got into the sleigh, and went off; soon after they set up a dreadful huzza and shout. I stopped at Jacob Fries' tavern, and waited for Mr. Foulke, who soon came: Clark, the assessor, was likewise there. After talking a little more on the subject, Clark still persisted in not having anything to do with it, for he thought it was not safe for him. We thought it was best to give the other assessors notice, as their assessments were nearly finished, to meet us at a certain day to take the rates in that township. I then wrote to the other assessors, requesting them to meet at Quaker town, on the 4th of March. Rodrick, Childs and Foulke met me there: we waited till evening, but no others came; so we agreed to meet at my house next morning at 9 o'clock. We met, and I went with them to Milford, to Samuel Clark's, but he was not at home. It was thought best for me to go to look for Clark, as he was engaged in a moving. I went to Jacob Fries' tavern to wait for him; they went to Mitchel's to take the rates. Clark soon came: he told me he could not undertake to take the rates, for that he might as

well pay his fine, if it cost him all he had, for they were so opposed to it at any rate, that he could not think himself safe, for at least he should receive some private injury. Finding he would not do it, I said no more. John Fries was coming up just then: he told me he was very glad to see me: he told me that he understood I had been insulted in their township, at one of their meetings: he was very sorry for it, he mentioned Squire Foulke as well as myself: had he been there, he said, it should not have been done: I turned it off by this: that there was not a person among them that spoke a word to me. I told him I thought they were very wrong in opposing the law as they did: he signified that he thought they were not, and that the rates should not be taken by the assessors. I told him that the rates certainly would be taken, and that the assessors were then in the township taking the rates. I repeated it to him, and he answered, "My God! if I was only to send that man (pointing to one standing by), to my house to let them know they were taking the rates, there would be five or seven hundred men under arms here to-morrow morning by sunrise." He told me he would not submit to the laws. I told him I thought the people had more sense than to rise in arms to oppose the law in that manner: if they did, government must certainly take notice of it, and send an armed force to enforce the laws. His answer was that "if they do, we will soon try who is strongest." I told him they certainly would find themselves mistaken respecting their force; he signified he thought not: he mentioned to me the troop of horse in Montgomery county, and the people at Upper and Lower Milford, and something about infantry, who were ready to join. He said he was very sorry for the occasion, for if they were to rise, God knew where it would end: the consequences would be dreadful; I told him they would be obliged to comply: he then said huzza, it shall be as it is in France, or will be as it is in France, or something to that effect. He then left me and went off. Fries did not appear to be intoxicated. I scarce ever saw him intoxicated. A short time after he was gone, on the same day, the assessors came to Jacob Fries' tavern. We then ordered our dinners there, and I believe it was Childs undertook to take the rates of Jacob Fries' house. We had not gone out of the room after dinner, till John Fries came in; he addressed himself to Squire Foulke, telling him he was very sorry to see him there; he was a man that he had a great regard for, but that he was opposed to the law himself. "I now warn you," said he, "not to go to another house to take the rates; if you do, you will be hurt." He did not wait for any reply, but turned himself about, and went off out of the room. I do not recollect anything farther was said to him. He seemed much irritated. The assessors concluded to proceed upon their business. Rodrick and Foulke agreed to go together, and Childs went by himself: this was an agreement between themselves. There had been no meeting of the assessors since Mr. Clark had refused, complaining that he found it inconvenient to proceed with the assessment. This new arrangement was not communicated to the board of assessors at all.

John Rodrick.—I was one of the assessors under the direct tax law, appointed for Lower Milford. I took the oaths the law directed. There were twelve townships in our district, and there were six assessors to serve them. We were all six sworn at a meeting held at my house, by the commissioner, Seth Chapman: Squire Foulke got his warrant afterwards; he was appointed, I think, in addition to Samuel Clark. We met the commissioner on the sixteenth of February, when it appeared all the other townships were nearly done, except Lower Milford; at that meeting all attended but Clark. The principal assessor, James Chapman, was likewise there. We were informed that Lower Milford was not done, for Clark was afraid to go about. The commissioner told the principal assessor that he must inform the other assessors, that if anything could be done in it, we must try to do it. We all agreed that we would. Mr. Foulke was appointed before this meeting, and was present at it. Not long after this, we got orders from the principal assessor to meet him at Quaker town on the fourth of March, and to go the next day to get the rates at Milford. Only three of us attended. We agreed to meet at the principal assessor's house the next morning, which we did, and thence we went to Clark's to have him to go with us: as he was not at home, however, we proceeded on, taking the rates, Mr. Childs, Mr. Foulke and myself. We had taken between fifty and sixty assessments when we came to the house of Jacob Fries. All were at home when we took the rates, I think, except one, and there we left a notice. When we came to Jacob Fries' we met the principal assessor. After dinner, while we were sitting at the fire, John Fries came into the room: we had a room by ourselves. He said he heard we were come to take the rates of the township; we told him yes. He said he would warn us not to proceed, else we should be hurt. He said he was sorry for Squire Foulke, and I believe Mr. Chapman he mentioned, for he always respected them very much. He said he was opposed to the law, and he would not submit to it. He then left the room. He seemed to be a little in a passion. We got on our horses, and proceeded at taking the rates: I and Foulke went together, and Childs by himself to some who, we thought, were quiet people. We proceeded on till about sunset, when we were going to the house of one Singmaster, and as we turned down a lane, out from the road, we heard somebody halloo to us: we stopped, and saw it was John Fries

and five men more. We stopped, and they came walking towards us. John Fries was in the front. Fries said that he had warned us not to proceed and we would not hear, and now they were come to take us prisoners. I believe I asked by what authority: with that he made a grapple at the bridle of my horse; I wheeled my creature round, and he just catched hold of my great coat, but he could not hold. I rode off then: after I had got about two rods, I turned my creature round again; and he was a little way from the rest. I told him I was surprised at his conduct, that he had behaved so. He began to damn and curse, and walked back towards the other men: he mentioned that if he had a horse, he would soon catch me. He was about two or three miles from his own house then. I rode up nearer to those other men: they had stopped Squire Foulke: as Fries returned back to his men, he said, "Men, let Foulke go, as we cannot get Rodrick; to-morrow morning we will have him. I will have seven hundred men together to-morrow, and I will come to your house, and will let you know that we are opposed to the law." We then went and took the assessment of Singmaster's house. We had agreed, before we left Jacob Fries', that we would meet the principal assessor the next morning, to see what course we should take. Singmaster was at home, when we met: we said that it was not worth while to attempt anything more; we could not proceed. James Chapman then wrote a letter to the commissioner to state matters. We agreed to quit taking the rate at Lower Milford at that time, as we thought we should not be able to do anything. When we were going home through Quaker town (on the sixth of March) Cephas Childs rode before us. I and Squire Foulke rode together. When we came to Quaker town, Childs turned into Squire Griffith's: we found a great many people armed with guns and with uniforms; so I said to Foulke, "Here is Fries and his company." I said, we won't stop if we can help it: I rode through them, but when I had got half through them, they hallooed to me to stop; a great many hallooed, and came running on both sides the road, some with their clubs and muskets to strike me. They did not strike me. I rode quickly through them. I saw them running to come to strike. I had passed Roberts' tavern, and when I came to Zeller's tavern, there was John Fries at the porch; he hallooed to me to stop, for I was going to pass by, and not to stop and give myself up: there was another man with me. They followed me to stop me: I stopped, and wheeled my creature round, and asked Fries what he wanted. They damned me, and told me I should deliver my self up; I told him as long as he used such language, I would not. There was order then given to fire at me. I cannot tell who gave the order, but there were two men standing close together at Zeller's door; they pointed their guns: as I saw that, I rode off. I did not hear whether it was Fries or not who ordered them to fire. They hallooed to stop me: they hallooed out to get horses to pursue me, but they did not pursue me. I cannot say that Fries had anything in his hand at that time, but the others had clubs. Fries was from me at that time perhaps five or six rods. There was an old man standing with him.

Cephas Child.—I was one of the assessors under the act for the valuation of houses in Bucks county. (Witness showed his warrant, and proved his qualification, dated November 5, 1798.) At the meeting at Rodrick's, when we were qualified, we had our instructions given us by the commissioner; he informed us that there were six assessors to twelve townships, which we were all equally concerned in assessing, and it would be proper for us to point out which townships we would severally take. I think this meeting was about the latter end of December. Clark and myself fixed upon a day when I should come and assist him for two days, and another time was appointed for him to assist me. I had made some beginning in my own district before that day came. Before we separated, the assessor pitched upon an early day to make our returns of what we had done, in order to examine whether we had proceeded right or not. I went up to Clark's, agreeably to appointment, and found he was not able to go on: I therefore attended to my own district.

We met to make our returns at Rodrick's: Everhard Foulke, I think, met with us; I know nothing of his appointment. This was on the 5th day of the Bucks court (6th of February). Not having gone through our business, we were to meet on the 16th again. Foulke, I understood at the former meeting, had been appointed. When we met, Foulke told James Chapman that he dared not go into the township, for he understood that some threats were thrown out against him, and he rather wished that the people would appoint some other person, themselves, to do it. The commissioner did not seem to agree with it; finally, he consented so far as to intimate to James Chapman, that if they should make such an offer, and appoint one, he would recommend him; if not, he said we must go and assist in that township. There were some proposals made who of us should go, excuses were made, and then the commissioner informed us that we were all enjoined as much to assess that township as our own. Upon which he told the principal assessor that if it did not go on, he was to write to us, and we were to attend to the call. I received a letter about the first of March, or the last of February, from the principal assessor, that he had been to Milford, and it did not seem likely the assessments could go on, and I was ordered to meet the rest in Quakertown on the 4th of March. Accordingly, Foulke, the principal assessor, and myself, met there. We had

word from two others that they were not able to come. We concluded to call upon Clark to go with us, and divide the township so as to complete it in a short time. The next morning we met to begin the business; we went to Clark's, but he was not at home. It was agreed, then, that we should go on with the rates, and James Chapman was to go to Jacob Fries' to wait for Clark. The first house we went into was Daniel Weidner's; I went in first, and told him I was come to take down the rates, under the revenue act of the United States: he appeared to be very angry; I reasoned with him, telling him, if he wished to read the law, he might; I told him the consequences of opposition, but he might have ten days to consider of it, and give in his account if he chose to take that time. He, seeing me thus, said, "Take it now, since it must be done." He gave me his account accordingly, and appeared contented. He said further, "We have concluded not to take it, as we expect the act will be repealed." He meant they had concluded not to take it till they knew what congress would do with the law. I made reply to him that I believed that was already done, for I had seen a report of a committee of congress, that it was inexpedient to repeal it, and it was not done. He made some remarks, but I told him it was very wrong. I cannot tell what he said in particular. One thing I think was, that the assessors were to have very extravagant wages. "It does not matter," he said; "you may as well give in my return." I did not get on my horse till I got up to Mitchel's, where the other two assessors were. Weidner went out a little before me, and he was there when I came, walking about, seemingly very angry. I again reasoned with him. Another objection he made was, that the houses of high value were to pay nothing, while smaller ones, and of small value, were to pay high. I forgot to say that, after the rates of Weidner's land were taken, he returned, and said he had forgot, there was another piece of land: he then sat down with a heavy sigh, and said, "They will play the devil with me; what shall we do?" I asked him what he meant; he made no answer. I told him I hoped every one would be as well convinced as he was. I took several houses in my way, and went to Jacob Fries. As I was going in at the door, I met John Fries, who shook hands with me, told me he was glad to see me, and asked me to take a drink. He came in again after we had done dinner, and said, "I forbid you going to any other houses in the township." He then mentioned that Foulke and Chapman, or Rodrick, were men he much esteemed. He said if we did go to any other houses, we should be, or would be, hurt. We then proceeded to assess. Where English people lived, there appeared no objection, except at one place. The people there said, that if they did give in the account, there were some ordinary people in the neighborhood, and they would be set on by them to do them an injury. That afternoon I went to David Roberts'; his wife seemed very anxious, and wished her husband had been there, for she said I should not go home alive. I went afterwards when he was at home, and he said he had no objection, only for his neighbours. After some conversation, he said the people there had agreed not to let the rates be taken yet: he said they had already chosen an assessor in their own township: I told him I wondered they did not let him go on: he signified that he was a person of an obnoxious character, and therefore they did not wish to accept of him. In our return home, I called at Squire Griffith's: as I got off my horse, his wife told me that they were come there to take us, and that there were forty or fifty men there, and she did not know what they were about. A little girl just after came in and said that they had hold of Squire Foulke's horse by the bridle, going to take him: I went to the window, and saw them all around him. I did purpose to go out; but at their persuasion I staid. The little girl came in again, and said they had taken Mr. Foulke into Enoch Roberts' tavern. After a short time Fries came over into the house where I was sitting: he took me by the hand, and I rose up; he said, "Mr. Childs, you must go with me to my men:" as we walked along, he said, "I told you yesterday that you should not go to another house, and if you did you would be hurt, and we are now come to take you prisoner, if we find that you will go on with the assessments." My answer was, we are obliged to fulfil our office, and we cannot do otherwise, unless we are prevented. I was endeavouring to inform him of the manner in which I had obtained the warrant, in hopes that I should prevail upon him to go on with the business, as Roberts had proposed, but he would not hear me. When we went into the house, he addressed himself to his men and me: "Here are my men—here is one of them." He appeared to be angry, but he did not appear to show any revenge to me, or to talk angrily. I do not recollect that I knew any one in the house, except the tavern-keeper. Some of them soon began to use rough language. A person then came behind me, and caught me by the collar over the shoulder, and said, "Damn you, Rodrick, we have got you now; damn you, you shall go to the liberty pole and dance round it;" the house was then crowded as full as it could crowd, and they pushed me up so close, that I could not turn round sometimes for a considerable time: the person who caught me, seemed to wish to keep behind me, but he still kept hold of me: during this time, I had several thumps, which seemed more with the knee than the fist. After some time, he got to see my face: he damned me that I was not Rodrick, but

that I was the other damned son of a bitch that he saw sitting at Rock hill; he had mistaken me. A short time after this, a person came up to me and said, "Keep a good heart, and you will not be hurt." I turned, or endeavored to turn to them and said, "I am not Rodrick, nor did I ever assess in Rock hill:" he said, "You are a damned liar." With that there were still more of them came up, and pressed about me more, and more took hold of me. There was a good deal of talk, some in German, and some in English. I then told them that my name was Cephas Childs; that I was not a man known in the country; but I had no doubt many of them, though they did not know my face, knew my name: and that there were some there who knew me as coroner of the county. A man then said, "If he is Childs, he is no better than the other." He asked me where I assessed: I told him: a number of them asked how they liked it where I had been. I told them some of them had appeared dissatisfied in the first instance, but now, as I believed, every man almost in the townships where I assessed was satisfied; they again said I was a damned liar, for the people had told them that they would join them in the suppression of it, and my own neighbours would fight against me. I told them I thought I knew better than they; that if I was well informed, they would not do so. Then they began again at me. Then they asked me if I had taken the oath of allegiance to the United States of America: I told them I had: they asked me when: I told them I could not recollect the time, but I knew it was as soon as the law required it of me: they asked me if I was a friend to the government of the United States; I told them I was: they then began to damn the government, and the governor, and shoved me about, many of them taking their Maker's name in vain: there then was a person who spoke very good English: they damned the house-tax and the stamp act, and called me a stampler repeatedly: they damned the alien law and sedition law, and finally all the laws: the government and all the laws the present congress had made. They damned the constitution also. They did not mention what constitution, whether of this state or of the United States. They damned the congress, and damned the president and all the friends to government, because they were all Tories, for that none were friends to the present government except Tories. They asked me if I had been out in the last war: first I told them the law did not require me to go, and then I said I was under the tuition of my parents: they said they had fought for liberty, and would fight for it again. They said they would not have the government, nor the president, and they would not live under such a damned government: "We will have Washington;" others said, "No, we will have Jefferson, he is a better man than Adams: huzzah for Jefferson." They then insisted on my taking an oath of allegiance to them, alleging that, if I did so, I should not be hurt. They insisted on it several times, till at length I had no way to waive it, and then I asked them what their government was. One answered Washington: I said I had taken an oath of allegiance to Washington's government already. They then said Jefferson; "We will have none of the damned stamplers, nor the house tax." So they went on. They said they embodied themselves to oppose the government; they meant to do it, and that was their design in coming there. I do not know who said it, but the words were these: "We are determined to oppose the laws, and we have met to do it; the government is laying one thing after another, and if we do not oppose it, they will bring us into bondage and slavery, or make slaves of us: we will have liberty." And then they mentioned the number of men that had joined them, or sent them word that they would join them. They mentioned, some a hundred, some more, some less, than they had there, would do it; besides they said all Northampton county to a man would join them, except some Tories as they called them. Between Quakertown and Delaware river, I recollect they said they could raise ten thousand men, if they should be wanted, to oppose the sedition and alien laws. I cannot be certain, but I think he said (as he spoke in German) and fifty other damned laws. However, I am not certain as to the number. They likewise said that General Washington had sent them account that he had twenty thousand men all ready to assist them in this undertaking to oppose the laws. I begged them not to believe it, for it could not be, and somebody was endeavouring greatly to impose upon them: I thought I knew the situation of things better, and as for General Washington, I was sure he never would undertake such conduct as that. A great many of them spoke in German, but one or two of them spoke very good English, but they were altogether Germans. This passed while I was in custody.

Cross-Examined.—Fries took me in there, and leaving me in custody, went away. They said General Washington had certainly wrote to them so and so. One of them said he would be damned if it was not so, for he had seen the letter from Washington; or something to that effect. During this time, they were constantly pushing me; one would come to my back and get his knee up: they would endeavour to push me on the stove; one or two had hold of my hips, and endeavoured to throw me down; others seemed ready to lick me, and particularly after this conversation about Washington. About that time Captain Fries came toward me, and seemed very much surprised: he said, "Mr. Childs, I understand some of my men have abused and insulted you." He really did ap-

pear to be very serious; he said he would not allow me to be abused; he appeared to be really distressed for the usage I had received, and if I would tell him who it was, he said he would make him behave himself. He then told me to come into the room. He said he respected me, and did not wish me to be abused. I told him I thought it hard that he should leave me amongst a parcel of intoxicated people. I do not particularly recollect what I said, but he told me he hoped I would not impute that conduct to him: I told him I was not much injured, and, therefore, hoped he would not think about it. He said his men were civil men, and seemed to wonder such a thing had happened. I think he then gave me something to drink. He took me into a room, the farthest side of which seemed to be empty. When I got in there, he demanded my papers while I had been an assessor. While he was with me, no person insulted me; indeed, some of them, when he came forward into the room where I was, pushed off out of the way. I then told him all that I had done, and reasoned with him, but notwithstanding that, he insisted on my papers; I then told him I had no papers about me relative to the assessment. I do not recollect anybody particularly, but there were a great many crowded into the room after me. He insisted that I had the papers; I told him I had not got the papers; he said I had, and he would have them. I told him I had no papers about me, but what related to my office of coroner. I was going to deliver up to him my county tax papers; but he said I had other papers; I said I had not. He then looked on those I had given him, and saw Hilltown at the top; then he said, "Hoho! my boys, we have got what we wanted;" and then turned about, and went away. He left the pocket-book, taking the papers with him. There was a considerable huzza made, and they most of them followed him out of the room. They were gone but a few minutes, till they rushed in again as hard as they could rush, without Fries, and some got hold of me. They brought Daniel Weidner along with them: some had pistols, guns, clubs, &c., and some swords. They seemed very angry, and were pushing upon me, while some endeavoured to put them off. Weidner came up to me, and insisted on the return of the rate I took of him yesterday; he said he would have it. I desired him just to acknowledge to the truth—Did not he give it me freely yesterday? This while a person had hold of me. Some of them then stepped up, and said it was fair. I then asked him, Did I not say I would not take the measure of your house by force, but you gave me the rates with a free will? Yes, he said, "but I was not forced, and, therefore, I want it again." Some of them then went out, and directly others came in and shook me very hard: one came in and threatened me, and said I should be shot; some brought in their guns and showed them to me, and told me if I should be seen in Milford township on the business, I should be shot. Weidner went off. This person with the sword threatened a good deal. He was called Marks, the elder. I believe him to be the same man I have seen here. While I was in this conversation, William Thomas came forward, and said he knew me, and that they should not abuse me. That gave me an opportunity of talking farther, and then I reasoned with them of the bad tendency of such conduct, and told them that I really thought if I had the law with me, I should persuade them to allow of it. One of them who had abused me before, came to me and acknowledged he had abused me, and was sorry for it, and wished me to forgive him. I think his name was Smith, but I am not sure. After passing some time in conversation, Fries came back again with the transcript, and delivered it to me, and told me as near as I can recollect in these words: I must go home, and must never come back again to assess, or I should be shot; and insisted on my promising I would not do it. My reply was, that from the pains I had taken, I had left the township with a view of not returning to it, unless compelled by authority, and from their present treatment, if they ever catched me going back without that authority, I would give them leave to shoot me. He then told me, Foulke and you may inform the government what has been done as soon as you please; we can raise one thousand men in one day, and we will not submit to it. They said there were a number of laws they were opposed to, and one of those laws was now putting in execution, and they appeared to think if that was stopped, the others would be. This was how I understood it. The words were that they were determined to oppose the laws, and not let them be put into execution; there were so many laws coming on, it was time to stop them, and if they were known to oppose them, they expected the others would not be brought forwards. Fries was not present when these words were used.

Judge Peters (one of the bench) sworn.[5]

Ques. Will your honour please to give the jury an account of the circumstances of your issuing warrants in Northampton county, and of circumstances within your knowledge previous to the examination of John Fries on the 6th of April? Ans. The first time I heard officially of this uneasiness in the counties of Bucks, Northampton and Montgomery, was some time in February, I cannot precisely recollect what time. I had heard of it before as a piece of news, but this was the first time I heard it officially: it was by depositions being sent to me by the attorney of the district (Mr. Sitgreaves) relative to a number of persons. After that, I examined some witnesses relative to it, and up-

[5] The questions, as well as the answers in Judge Peters' testimony are given in full.

on the whole I concluded to issue my warrants against the parties charged. Being much engaged in the district court, the attorney of the district drew up the form of the warrants for my signature and approbation. We had concluded, by way of ease to the people, that these warrants should be drawn up in a form of order for the defendants to appear before some justice of the peace, or judge of the county, in order to give bail for their appearance at the circuit court of the United States. Neither of us then knew that those insurgents, as it turned out afterwards, had got to such a head. But I doubted myself of the propriety of the form and substance of the warrants, because I thought that the justice, or judge before whom bail was taken, ought to be acquainted with the whole case, and ought to have the proof of the fact before him, on which the proof of the warrant was found. I had some doubt, too, whether it was legally right for persons taken by my warrants to go before an inferior magistrate. For though a justice of the peace of any state has a right by the laws of the United States to take cognizance in the first instance of crimes against the United States, and bind over the offenders to the proper court, yet I did not think that, as such justice had not had the original cognizance of the matter, there would be a propriety in my ordering him to take secondary notice of it. While I was hesitating on this point, I received information of the length to which, at that time, this opposition to the law had arrived. I doubted very much, and this thought was afterwards clearly confirmed to me, whether the magistrates of those counties, and particularly Northampton, would choose to take cognizance of such offences, or would choose to do any business concerning them. There were two of the magistrates, one of them a justice of the peace, the other a state judge, who had done themselves much honour in persevering so far as they did, in endeavouring to bring those criminals to justice. But finally it turned out that they were obliged to abandon even every endeavour towards executing this business. So that the law and the public authority so far failed as it respected that county, that the judicial authority of the United States became entirely prostrate. I found that some of the very persons who were charged before me were magistrates, and I wish I could say that they were the only magistrates who were engaged in this business. These were the reasons that induced me to alter the form of my warrants. I found that too many magistrates were concerned in flattering the prejudices of the people, and engaging in seditious practices, and encouraging the people in their mistakes, for me to trust them; and I finally found that there were but two magistrates that could be depended upon, and they told me that they were insulted in the performance of their duty to the United States: of this I had good evidence. And further: it arrived to such a pitch that I could not get one of these gentlemen even to issue a subpoena to examine witnesses, and save them the great trouble and expense of coming before me. This was the opinion of those two gentlemen; one of them wrote me, and the other informed me, that they were afraid to perform such an act. They could not only not get persons to serve the process, but they could not get the witnesses to appear before them. This I do not bring as a charge against any particular person, but as a reason why the warrants were thus issued. Another reason was that those people had taken up the fallacious notion that they would not appear before me, and therefore I thought it best, though this should not have been my leading motive, to convince them that every person in this district ought to obey a warrant issued by me, and appear at such time and place as I directed; the whole district being to be considered the same as a county in respect to a state. The witness then produced the warrants, dated February 20, 1799. One of which was read. The marshal wrote to me official statements at sundry times, of the difficulties he met with, and at one time informed me that the prisoners had been rescued, by force of arms, from his possession. The account he gave me it is unnecessary to state, being much similar to what has been given in evidence: He took some engagement from those prisoners, particularly those of Lehigh township, that they would appear before me, which, the prisoners themselves told me, was cheerfully given. I understood from them, and other channels, that they several times attempted to come down before me and deliver themselves up; but they were prevented by persons who interrupted them, and would not let them come.

Ques. Was John Fries brought before you after you got up there? Ans. Yes: I had previously issued my warrant against him.

Ques. Was this the examination he signed in your presence? The witness was then shown Fries' confession, which was as follows:

The Examination of John Fries—6th April, 1799. The examinant confesses that he was on the party which rescued the prisoners from the marshal at Bethlehem: that he was also one of a party that took from the assessors at Quakertown, their papers, and forewarned them against the execution of their duty in making the assessments. The papers were delivered with the consent of the assessors, but without force; perhaps under the awe and terror of the numbers who demanded them, and were by this examined and delivered to the assessors. He confesses that, at the house of Jacob Fries, a paper was written on the evening preceding the rescue of the prisoners at Bethlehem, containing an association or agreement of

the subscribers to march for the purpose of making that rescue; but he is not certain whether he wrote that paper: He knows he did not sign it, but it was subscribed by many persons, and delivered to the examinant:—He does not know where that paper is—The examinant confesses also, that some weeks ago, he wrote (before the assessors came into that township) an agreement which he, with others signed, purporting that, if an assessment must be made, they would not agree to have it done by a person who did not reside in the township, but that they would choose their own assessor within their township—A meeting has been held in the township since the affair at Bethlehem, for the purpose of making such a choice: the examinant went to the place of election, but left it before the election opened.—The examinant further acknowledges that his motive in going to Bethlehem to rescue the prisoners was not from personal attachment, or regard to any of the persons who had been arrested, but proceeded from a general aversion to the law, and an intention to impede and prevent its execution. He thought that the acts for the assessment and collection of a direct tax did not impose the quota equally upon the citizens, and therefore were wrong. He cannot say who originally projected the rescue of the prisoners, or assembled the people for the purpose—The township seemed to be all of one mind. A man unknown to the examinant came to Quakertown, and said the people should meet at Conrad Marks' to go to Millerstown. The examinant says that, on the march of the people to Bethlehem, he was asked to take the lead, and did ride on before the people until they arrived at Bethlehem—The examinant had no arms, and took no command, except that he desired the people not to fire until he should give them orders, for he was afraid, as they were so much enraged, that there would be blood shed.—He begged them, for God's sake, not to fire, unless they had orders from him, or unless he should be shot down, and then they might take their own command.—That he returned the papers of the assessors which had been delivered into his hands, back to the assessors privately, at which the people were much enraged, and suspected him (Fries) of having turned from them, and threatened to shoot him, between the house of Jacob Fries and Quakertown. John Fries. Taken 6th April, 1799, before Richard Peters.

Witness.—It is my constant practice to tell a prisoner that he is not bound to be evidence against himself: I did not make any promise or threats to extort it from him, but he chose to make a voluntary confession, which if they do not choose to do, I commit them without it. I am particularly delicate on this subject of confession, and I do not like to encourage it.

Judge IREDELL.—The gentlemen of the jury will observe that the law requires a judge to examine a prisoner, and it is left quite at the option of the man to confess or not.

The counsel for the prisoner hoped, as it was a case of treason, upon which the law and constitution were extremely cautious how evidence was admitted, the jury would consider that proof of the overt act must be given by two witnesses independent of any confession the prisoner might make.

Witness. The prisoner appeared to me to be not at all disinclined: his manner was that of a man not having done anything wrong, but perfectly collected, and possessed of his faculties. It was read to him afterwards, to which he accorded, and, thinking a part not fully enough explained, added the latter part. I have now brought it to my recollection that there were three magistrates in that county, instead of two, to whom we were peculiarly indebted for assistance.

Question.—Were any others applied to besides those three? Answer.—Some were, but we found much disinclination to do the business, and therefore thought it quite unnecessary to apply farther.

Question by Dist. Attorney to Judge Peters.—Did you not discover manifest signs of terror coming from the districts where the army had not marched? Answer.—Yes, in many instances—some very strong; it was even attempted to raise troops to oppose the army, if they went up. There were one or two instances of testimony given to me that troops were endeavoured to be raised, and nothing, I believe, but the rapidity of the progress of the troops prevented its execution. I did believe that unless the army had gone through the whole country, there would have been the most atrocious instances of violence. Did not some of the witnesses give their testimony under great reluctance, owing to fear? Yes, I had, in some instances, to state the protection of the United States, and their determination to lay hold of persons who should threaten, in order to stimulate them: some said, after they had given their testimony, that they were afraid to go home. I can really say, that, in general, they were the most unwilling witnesses I had ever examined. I got evidence that some of them were forming associations for actually opposing the troops. One man was even afraid because I was in his house, asking for some refreshment, as, he said, he should be suspected for harbouring me; however, after I had expressed my own security, he seemed satisfied.

Judge Henry again called.

I was an associate judge of the common pleas for the state. I issued a number of subpoenas about the 15th of January to make some inquiries respecting the opposition to the tax law: these were issued at the instance of Mr. Eyerly, one of the commissioners, as he and others could not proceed

in the execution of their duty and particularly in Lehigh township. The witnesses generally appeared much afraid at opening themselves: and he could say, that among the people, there were many much opposed to the law. I agreed to meet a number of persons at Trexler's, commonly known as Trexler's town: there Captain Jarrett appeared with a part of his company of light horse. Shortly after the arrival of Mr. Eyerly, Mr. Balliott, and myself, the people seemed to be walking about, and looking in at the window, and seemed to make game at us and mouths; I observed Henry Shiffert in particular;—they were mostly in uniform. It was not muster day. I understood it was the general conversation there that Jarrett meant to display his consequence, and to intimidate. One witness in particular appeared to be in great terror: when he was called up to give his testimony, he cried like a child, and begged, for God's sake, that we would not ask him, for that the people would ruin him when he returned home. Indeed, all the witnesses were much agitated. I discovered a general opposition to the execution of this law, and was apprehensive of danger from the threats which were given.

Cross-Examined.—I sent for the captain, and requested him to keep his men in order, for all I wanted was to examine witnesses. There was nothing beyond insult offered to us. The captain assured me that he would do all that lay in his power.

Mr. Chapman and Mr. Childs were again called, at the suggestion of Mr. Dallas, to be asked how the measurement of a house was taken?

It was always, in every instance, given by the owner; we never measured any houses. Size, length, and breadth were told us, or the proprietor had ten days to send it in: we left a note for those people that were not at home. The people who were at home in Milford mentioned the dimensions of their houses.

Mr. Chapman here proved the letter which was mentioned in his evidence to have been written by him to the commissioner.

Mr. Sitgreaves produced and read the warrants under which those persons at Bethlehem were held; also the commission from the President of the United States, appointing one of the commissioners under that act.

Mr. Eyerly again called.

Question.—How were the principal and assistant assessors appointed? Answer.—At the time I received the notice from the first commissioner that was appointed in the commission, the commissioners were to meet at Reading on the 22d of October. After a board were met, every commissioner was desired to make a plan of his division, and to divide it into such a suitable number of assessment districts, as to have the law executed in a reasonable time; at the same time each commissioner was requested to make out lists of persons qualified for the office of assessors in each division. As soon as this was done, as the law gives a power to the secretary of the treasury to reduce the number of assessors if too large, the clerk made out a list, and sent it to the secretary of the treasury; a list was also entered in the commissioner's book. Some few alterations were made in some districts afterwards, but at the time the board was sitting. After this was done, the form of the warrant was agreed upon by the commissioners, and ordered to be printed. They were then filled up, and every warrant signed by all the commissioners. A rule was then adopted to call all the assessors together in each district, and the commissioners were to meet and qualify them, and give them instructions. The country was not in a pacific state, except where the army marched. After the president had issued his proclamation, I wrote up to the principal assessor in Northampton county, and to Mr. Balliott, to request them to go on, and have their returns made in a certain time, and to give notice to all the other assessors so to do. I received an answer from Mr. Balliott that he had received information that it was impossible to do the business in the execution of the law.

Mr. Dallas here remarked in substance that, though they wished to give as little trouble on the part of the defendant as possible, yet he should produce two or three witnesses, in order to show that this indisposition, which was manifested to permit the assessment, was owing to the uncertainty those people were in, of the real existence of the law; that the prisoner himself was under the idea that it was no law; and that they had no intention of opposing congress by force of arms, but that they wished for time, in order to ascertain its real existence, and if the law was actually in force, that they wished, agreeably to their former custom, to appoint assessors from their own respective townships. It could be shown also that Fries was perfectly quiescent after the proclamation, and that Mitchel was entirely mistaken as to the expressions said to be used by Fries, at the meeting at Conrad Marks'. As the defendant's counsel, however, wished to have time previously to examine the witnesses, he stated that they would not be able to produce them at this stage of the trial.

Mr. Rawle then opened the constitutional definition of treason, as consisting of only two parts: "levying war against the United States, and aiding the enemies of the United States." As it is only the first of these species of treason that the prisoner is charged with, it is only necessary to ascertain what is meant by levying war against the United States. Mr. Sitgreaves has stated that, levying war against the United States consisted, not only in a broad sense of rebellion openly manifested, with an avowed intention of subverting the government and constitution of

the country, but also with force of arms, or by numbers sufficient for that purpose, to cause an impression of terror: either one of these, or altogether, used to prevent the execution of the laws, or of any particular law of the United States, from motives, not of a special but of a general nature—is treason. This position, I believe, is perfectly correct, and has already received the sanction of a court of the United States, respecting the insurrection in the western parts of Pennsylvania. See U. S. v. Mitchell [Case No. 15,788]. This doctrine is laid down in terms short and concise, and is such as is founded on the particular authority of all the writers on English law. "Bradford (Attorney).—The design of the meeting was avowedly to oppose the execution of the excise law; to overawe the government; to involve others in the guilt of the insurrection; to prevent the punishment of the delinquents, &c." "Patterson (Justice).—The first question to be considered is, what was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of congress, by force and intimidation, the offence, in legal estimation, is high treason; it is a usurpation of the authority of the government; it is high treason by levying war. Taking the testimony in a rational and connected point of view, this was the object. It was of a general nature, and of a national concern."

Let us attend, for a moment, to the evidence. With what view was the attack made on General Neville's house? Was it to gratify a spirit of revenge against him as a private citizen, as an individual? No:—as a private citizen he had been highly esteemed and beloved: it was only by becoming a public officer, that he became obnoxious, and it was on account of his holding the excise office alone, that his house had been assailed, and his person endangered. On the first day of the attack, the insurgents were repulsed; but they rallied, returned with greater force, and fatally succeeded in the second attempt. They were arrayed in a military manner: they affected the military forms of negotiation by a flag; they pretended no personal hostility on General Neville; but they insisted on the surrender of his commission. Can there be a doubt, then, that the object of the insurrection was of a general and public nature?

Patterson (Justice) in the charge against Vigol, says: "With respect to the intention, there is not, unhappily, the slightest possibility of doubt: To suppress the office of excise, in the Fourth survey of this state; and particularly, in the present instance, to compel the resignation of Wells the excise officer, so as to render null and void, in effect, an act of congress, constituted the apparent, the avowed object of the insurrection, and of the outrages which the prisoner assisted to commit. Combining these facts and this design, the crime of high treason is consummately in the contemplation of the constitution and laws of the United States." U. S. v. Vigol [Case No. 16,621].

This, you will perceive, gentlemen of the jury, is not preventing the execution of all the laws, or all the authority of the government, but of "an act of congress." It is a usurpation of the authority of the government, and thus it is levying war, and is high treason. Taking it in this point of view, this was the very object of the insurgents at Northampton, and was of a public, of a general, and not of a private or special nature. In the case I referred to, the prisoner acted different from the prisoner at the bar; he acted in a subordinate station; he does not appear to be a first character in that treasonable enterprise. Gentlemen, the law thus laid down by the court, upon that occasion, was derived from the English authorities to which I shall now refer you. 4 Bl. Comm. p. 81, defines that branch of treason of which we are now treating,—"Levying war against the king (substitute here the U. States for king), is, pulling down all enclosures, meeting-houses, prisons or brothels." [6] Although bawdy-houses are illegal, yet by any individuals not authorized, taking the authority which alone is vested in the government, it is a usurpation of the authority, and the act being of a general, and not of a special nature, is treason. Lord Chief Justice Hale, whose name will ever be endeared by the piety, the humanity, and the sound legal learning which characterized him, has a chapter upon this subject of levying war against the king. Hale, P. C. 105. He says, to march with colours flying, drums beating, &c., if on a matter of a public or general nature, is high treason; but if on a private quarrel or for a private purpose, it is not treason. Treason in levying war, by this definition, consists of two sorts. First, marching expressly, or directly against the king's forces: secondly, interpretatively, or obstructively; doing a thing of a general nature. If to pull down a particular inclosure, it is only a riot; but if to pull down all inclosures, it is levying war against the king, because it is generally against the king's laws. Insurrections, in order to throw down all inclosures, to alter the established law or change religion, to enhance the price of all labour or to open all prisons—all risings, in order to effect these innovations, of a public and general concern by an armed force, are, in construction of law, high treason, within the clause of levying war; for though they are not levelled at the person of the king, they are against his royal maj-

[6] The language of Blackstone (4 Comm. 82) is, "To resist the king's forces by defending a castle against them, is a levying of war: and so is an insurrection with an avowed design to pull down all inclosures, all brothels, and the like; the universality of the design making it a rebellion against the state, a usurpation of the powers of government, and an insolent invasion of the king's authority."

esty, and besides, they have a direct tendency to dissolve all the bands of society, and so destroy all property and all government too, by numbers and an armed force. Insurrections, likewise, for redressing national grievances, and for the expulsion of foreigners in general, or indeed of any persons living here under the protection of the king; or for the reformation of real or imaginary evils of a public nature, and in which the insurgents have no special interest—risings to effect these ends by force and numbers, are, by construction of law, within the clause of levying war. Fost. Cr. Law, 211. 1 Hawk. P. C. c. 17, § 23, p. 37, is much to the same effect; and see also Doug. 590, in the case of Lord G. Gordon. The case there on the part of the prosecution was an attempt to force the repeal of an act of parliament, and this was called high treason, although the defendant was not convicted. J. Kel. 70, 75. So in the Case of Messenger, Appletree and others.

It will probably be said by the defendant's counsel that this should be simply considered as a rescuing prisoners from the custody of the marshal, and that is not treason, and that a number of crimes of a less degree must be committed in order to make it treason, as arson, burglary, and murder. But I would observe, that when these crimes are committed, one or more of them, they are not component parts of treason, but they lose their qualities and their name in the absorbing crime—treason. So when General Neville's house was burnt, it was said only to amount to arson: to that it was answered by Judge Patterson, were it not for the treasonable purpose with which this was done, it would be so; but the guilt rose to treason in the intention. Admitting it is a crime, and worthy of a punishment, the question is, whether or not it must be considered as one of the means made use of to obtain the end in view? If a man break open prison, except where a person is convicted for treason, it was ruled to be only a great riot: if several were rescued thereby, it was a riot and rescue, except those persons rescued were convicted for treason; and where it was without any particular view to the persons themselves, and where the prisoners were unknown, then the rescue becomes a part of the treasonable act, and that, with other facts, constitutes the person guilty of treason. 1 Hale, P. C. 133. In 4 Bl. Comm. you will find an answer to what Mr. Dallas said this morning ought to be in favour of the prisoner: to wit, an ignorance of the existence of the law. Suppose every man who would profess himself ignorant of the existence of a law was exculpated from the observance of it, or from the consequences of breaking it, to what would that doctrine lead! It would be for the interest of every man who wished to oppose a law, to keep himself under the shelter of this want of knowledge, in order that he might sin with impunity—without knowing it. This is a mistaken fact, and an error in point of law. I make these observations, not because I suppose that the defence will be seriously set up, or that, did it exist, you would be in the least guided by it, but under the impression, that when you come to examine all the facts, you will discover that it was not so. Unless these points which I have laid down are controverted, I shall not trouble you with more points of law, and shall leave the observations I am farther to make, to a later period of the case.

Mr. Dallas opened the defendant's case as follows:—It has become so uncommon in the state of Pennsylvania to be employed in a cause, upon the issue of which the life of a fellow-creature depends, that, I am confident, the court and jury, as well as the counsel on both sides, are prepared to give a solemn, candid and patient attention to the present investigation. It is, gentlemen, a question of life or death; and if what we have heard is true, that the prisoner is a husband and a father, it is a question whose importance extends beyond his own life, to the existence and well-being of a miserable family. If I should manifest, therefore, an extraordinary solicitude to secure the attention of the jury, as long as the occasion shall require, these considerations would, I think, furnish a sufficient excuse; yet, permit me to add to my justification another remark. It is not only the life of John Fries, and the well-being of his family, that are at stake on this trial; but, we all know, that the impressions made on your minds, and communicated to the public by your verdict, may reach the lives and families of many more unhappy men now under indictments for a similar crime. I must confess that I feel agitated by the prospect: for, if it appears so awful, so interesting, as it evidently does, to the court and audience, how must it affect us who are the counsel for the prisoner, charged with the development of every principle and of every fact, that can tend to an acquittal? As it relates to the counsel for the prosecution, the difficulties are comparatively small. They have had an opportunity amply to explore all the facts; to calculate the effects to be produced, and to point their testimony precisely to the object of the charge. We, who are counsel for the prisoner, are ignorant of the man and of his connections. Till you were impanelled, we knew nothing of the evidence to support the prosecution; and could, therefore, be little prepared to encounter and repel it. Besides, in all our inquiries for the means of defence, as well as in our examination of the witnesses, we have been embarrassed by the foreign language in which the parties have spoken. That some of you, however, as well as the opposite counsel, understand the German, has been a source of consolation to us; for, it is your province to decide on the facts. But these are not the only obstacles which we have

to encounter. I am sure I shall not be misunderstood when I say, that the prosecution appears to be strongly marked with the authority and influence of government.

It is, I grant, incumbent upon the government to exercise its powers for the punishment of crimes; but it is essential to a fair discussion of every accusation, that the acts of the government should not be estimated as proofs of the prisoner's guilt. Thus, though you find by the proclamation of the president (which, doubtless, he thought, with a wise and upright intention, was required by the extraordinary circumstances of the times), that the disturbances in Northampton were deemed overt acts of treason by his advisers; and though this denunciation was followed by the march of a considerable army for the express purpose of subduing and apprehending the traitors, you will recollect, that you are to decide whether treason has been committed, from the evidence of the witnesses, and not from the opinions of the government. Again: great inconveniences have been experienced by many meritorious citizens, who relinquished the pursuits of business and the pleasures of domestic life, to assist in the suppression of the insurgents; but you will not allow the irritation and resentment proceeding from this source, to transfer from your judgments to your passions, the determination of the cause. Far be it from me to contend that outrages have not been committed, which are disreputable to the state or society at large, and to the character of Pennsylvania in particular; or to endeavour to shelter from the punishment of the law, the instigators and perpetrators of such offences. Every citizen is interested, and is bound to assist in detecting, prosecuting, and punishing the offenders; but every citizen, let it be remembered, is still more interested, that even the greatest criminals should only be punished in the manner and to the degree which the law prescribes. However we may differ on speculative points of politics abroad, however we may be disposed to approve or to disapprove the measures of administration, and however we may controvert or assert the constitutionality or the expediency of particular laws, all party spirit, all personal animosity, must be abandoned when we are called upon to act as ministers of justice; or we shall, in the indulgence of a moment's vengeance, overthrow those barriers which are our own security, and the pledge of safety to posterity. Whatever you may have thought, whatever you may have said, whatever you may have heard, in other scenes, must now be obliterated from your minds. The character of private citizens, with all the privileges of private opinion and feeling, is here exchanged for the character of public functionaries, with all the restraints of law and justice. Your opinions, as private men, will only be regarded according to their intrinsic merit; but your verdict, as a jury, will be forever obligatory, bearing all the authority of a precedent. Though, then, a proclamation has issued, an army has marched, and popular resentment has been excited, we claim an unbiased attention; and, circumscribing your view of the subject to the evidence, we confidently expect a fortunate result. What has happened in England upon a similar occasion, we think will happen here. The British privy council announced a traitorous conspiracy to the British parliament. The British parliament declared that the party recognized and confirmed the charge of high treason; and thus, the whole weight of public authority in that country, legislative and executive, instituted a prosecution, which was afterwards conducted with the greatest zeal and talents, with such zeal and talents as the present prosecution has displayed. What was the event? A jury (that inestimable palladium) without fear, and without favor, examined and pronounced that no treason had been committed. I allude to the recent cases of Horne Tooke, and Hardy.

I shall, I presume, be excused, if I intimate to you some other disadvantages under which the prisoner's case labours; for, it is not merely necessary to produce evidence, to explain, extenuate, or refute the charge; we must guard your minds against any previous bias, any latent pre-determination to convict. The accused gentleman and his companions, you will recollect, are not upon their trial among persons with whom they have been accustomed to live. This is a disadvantage which every candid man will acknowledge. They are to be tried likewise, by a jury, selected and returned by the marshal, the very officer who has been personally insulted, and whose appointment depends on the will and pleasure of the executive magistrate, that magistrate by whom the offenders have already been described as traitors. I mean not to cast the least reflection upon the laws of congress, nor upon the officers of the government; but to make a general remark on the defective state of our judicial institutions. The conduct of the marshal has, indeed, been highly exemplary throughout the transaction; and when, with such powers, he returned such a jury as I have the honour to address, he manifests an impartiality and independence of character that entitle him to the respect and plaudits of his country. Nor is it here that the prisoner's disadvantages terminate: but I hope, I believe, that never till this day, was the press employed in a base and sanguinary attempt to intimidate the jury and counsel from a faithful execution of their duty in a capital case! Since, however, the jury have been summoned; nay, since the court have been sitting upon this very trial, there have been the grossest, the most insidious practices in a public newspaper, to warp your sentiments, and to deprive the unfortunate prisoner of the benefit of the best tal-

ents which the bar of Pennsylvania can afford. On the other hand, a gentleman, whose abilities we all respect, and whose long residence in the offending counties must greatly facilitate the progress of the prosecution, is associated without censure, and certainly without being answerable, in the duties of the attorney of the district. While our ignorance of characters and circumstances perplexes the defence, his accurate information and experience enable him to probe every witness to the quick, and forcibly to combine and interweave all the incidents of the transaction. But his motives are pure; for, if he does arraign, if he does convict, if he does punish, it is because his patriotism and public spirit enable him to soar far beyond the little affections of a neighbourhood.

Gentlemen, in this situation we appear before you as advocates for the prisoner. I declare, that as far as my mind is capable of being impressed by a sense of duty, I feel a terror lest anything should be left undone or unsaid which is essential to the cause; and, therefore, complicated as the discussion must necessarily be, accept, I pray you, my sentiments under the following heads. First, I will endeavour to establish such points of law, as seem to me to be applicable to the facts which have been given in evidence. Secondly, I will consider the general state of the discontents, and how far the rescue at Bethlehem was connected with the previous disturbances. Thirdly, I will take a review of the conduct of the prisoner in particular.

Mr. Dallas here went into an examination of the law of treason, taking the same general grounds as those opinions maintained by Mr. Lewis, and thus proceeded:—

Now, gentlemen, I challenge the prosecuting counsel to say, in what part of the evidence it has appeared, that these insurgents went further than to declare that the law did not please them; that, though they did not mean to compel congress to repeal it, they had some doubts, and wished to ascertain whether it existed or not; to know whether the country in general had submitted to it; to know whether General Washington was not dissatisfied with it, and to see whether they could not get the assessor appointed by themselves. Under these impressions many irregularities occurred, but I ask the adverse counsel to point out, if they have discovered, through the whole course of the business, any insurrection existing, any traitorous design, till the meeting at Bethlehem; or whether, till that moment, the people of Northampton could be said to have been guilty of any crime? We are told that the Case of the Western Insurgents in 1794, is in point, and that the decisions upon the trials that then took place are precedents on the present occasion; but, with great deference, I declare that it seems impossible to bring cases more dissimilar into view, where violence has been committed in both. At this stage of the argument, however, I shall only remark, that whatever may have been the language of the judge who then presided, I am sure the attorney of the district will be good enough to recollect, and candid enough to state, that the opposition, though in its origin excited against the excise law, was conducted with the avowed purpose of suppressing all the excise offices, and compelling congress to repeal the act. See U. S. v. Vigol [supra].

Let us for a moment, gentlemen, trace the motives of the people by looking at their conduct, not at large, but in the lawless scene at Bethlehem. What did they do? why they rescued the marshal's prisoners; but the moment they had effected the rescue, did they not disperse? Their whole object then was consummated; for, I must presume that they contemplated nothing farther, as I see them attempt nothing more; and yet the time was very favourable to accomplish a more extensive design, if it had ever been meditated. Men intending to compel, by every hostile means, the repeal of a law, when they had in their hands the obnoxious agents of that law, (Mr. Balliott, Mr. Eyerly, the marshal and others,) would hardly have let the moment pass without some effort to triumph in their advantage. It was, indeed, rumoured to be their intention to dispatch Mr. Eyerly; but where does it appear? Was he not completely in their power? Was he not constantly in their view, though he incorrectly says that he was constantly out of their view? No: I repeat that the rioters, having accomplished the rescue, dispersed; and will you, under such circumstances, in a case of life and death, determine that they came to commit treason—rejecting the plain fact, and adopting a constructive inference? But if they proceeded no farther than I have stated, let us again look to the law of England, to define their crime, as distinguished from treason; and you will not cease to bear in mind that you must establish the distinction. 1 Hale, P. C. pp. 133, 134; 6 Bac. Abr. pp. 513–515.

2. Having thus delivered my sentiments upon the points of law that arise on the evidence, I shall now enter upon the consideration of the second proposition—"The general state of the discontents in the Northern counties; and how far the rescue at Bethlehem was connected with the previous disturbances." And here I find, gentlemen, that the source from which proceeds much, if not all, of our political good, discharges, likewise, much, if not all of our political evil: I mean the business of elections. You will recollect the testimony of Mr. Horsefield. That gentleman, when he wished to give you a description of the origin of all the mischief that we deprecate, pointed his finger emphatically at the election of 1798. Now, I pray that I may not be misunderstood in the progress I shall make through the scene which is thus disclosed: let it not be sup-

posed, that I am depraved enough to justify the misconduct that has been exhibited, because I am firm enough to contend, that it did not proceed from motives directed to treason, nor lead to consequences that amount to treason. At the eve of our election, it is natural for the citizens of a free country to canvass what has been done by the public agents; to applaud the good, and reprobate the bad; and in doing this they exercise a right; nay, they perform a duty. No intelligent and candid man will say that the constitution of a representative republic can be preserved in a vigorous and healthy state, unless the people, from whom it derives its vital principle, are vigilant and virtuous in the exercise of the elective franchise. For this purpose they retain the right of opinion; and though they may use it upon mistaken, or erroneous grounds, if they use it fairly and peaceably, there is no power to control or obstruct them.

I ask, then, what were the ostensible causes of discontent? They will be delineated by the opposite counsel as spectres of the most visionary, yet most horrible aspect: but notwithstanding any sincere abhorrence of the manner in which the discontent has been manifested, I cannot admit that the causes did not afford a legal ground for exercising the right of opinion. For instance, the alien and sedition laws. They are a novelty in this country, and their novelty might alone attract the popular attention and displeasure. But were the inhabitants of the Northern counties of Pennsylvania the only dissatisfied citizens? Peruse the debates examine the files of congress, and you will find the most pointed declarations of the public opinion, the most unequivocal marks of dissatisfaction, throughout the United States. Exercising the right of opinion, the people disapproved the laws, and the law-makers. Exercising the right of election, they endeavoured to promote the success of those candidates who would regularly procure a repeal of the laws. Again: the stamp act was strongly objected to, and produced the nickname of "Stamplers," which was applied generally to the friends of government. Now, in my opinion, there cannot be a more convenient mode of taxation than an imposition on stamps; but that was not the opinion of the people of Northampton and Bucks. They had imbibed a prejudice against a stamp act in the year 1775, and not considering properly the ground of American opposition to the tyranny of taxation without representation, they confounded the name with the principle of the law. I repeat that I do not agree with them, but I contend that they had a right to speak freely on the subject.

Again. The house tax was objected to; not from the real, but from the imaginary burdens which it imposed; for if it had been intended to devise a tax for the relief of the poor, at the cost of the rich, for the benefit of the country at the expense of the city, there could not, I think, be a more ingenious plan than the present law exhibits. The opposition must evidently, therefore, have arisen from misconception or misinformation. But if their opinion of the law was sincere, however erroneous, it is entitled to indulgence. The fallibility of the human understanding, and the frailty of our passions, must be respected in every wise and benevolent system of politics, or law. A man who honestly acts under a false impression of facts, may be pitied as a weak man, but he ought not to be punished as a wicked one. Then, the rioters were under an evident delusion, as to the principle of the land tax, the purity of the government, and the compensation of public officers. They had not the ordinary access to information, since our laws are published in English, and most of them only understood German: and this being a question of property, they acted upon the first blind impulse of their avarice, proving the truth of Mr. Horsefield's observation, "that the Germans are fond of their money, and do not like to part with it." But still there is a criterion which, in applying a rule of law, ought always to be regarded:—I mean the moral character and mental attainments of the men who are arraigned. If a discontent exists, we cannot fairly expect the same mode of expressing it from illiterate, uncultivated men, the scattered inhabitants of a remote district, that we may reasonably exact from men of education and manners, formed by the luxury and refinements of a metropolis: these will take care, if they do express their discontents, to avoid personal indignity and legal embarrassments; while those without skill to ascertain the limits of the law, as without delicacy to respect the inviolability of the person, rarely act without being riotous, or complain without being abusive. Plain men, then, have but plain ways to manifest what they feel; and they ought not to be tried and condemned by a more perfect and, generally, a more artificial standard. A disturbance similar to the one under consideration is not uncommon in England; but the government, instead of entering prosecutions against the discontented, for treason, has sometimes thought it proper to acquiesce in the wishes of the people. We all remember the popular influence in depriving Lorth North of the reins of government. The attempt of a minister (Mr. Pitt) to involve that nation in a war with Russia, was a very unpopular measure; murmurs and complaints reverberated through the kingdom, and, finally, he was obliged to abandon his project. The shop-tax was sanctioned by all the branches of the parliament; but it generated clamours so loud and so acrimonious, riots so numerous and so outrageous, resistance to lawful authority so daring and so injurious, that the government itself might justly be said to be assailed; and the act of parliament to be repealed by force

and intimidation; yet, not a single indictment for high treason was projected. Hence it is that I think risings of the people, like the present, should be viewed with the determination to punish, on account of delinquency, but, also, with the disposition to mitigate, on account of prejudice or ignorance. In a country where party spirit beats high, there should be peculiar caution on the subject; for, even in the present case, has not the joy testified by the triumphant majority at the late election, been classed with the symptoms of popular discontent and hostility to the government? Nor will it be denied that there actually did arise in the minds of the people a serious doubt, whether the law was in existence or not; and although, I repeat, that ignorance is not a legal excuse, yet you must take into view the state of information, before you can understand the degree of guilt. Under this ignorance, in this state of doubt, can the refusal to permit the assessors to enter a particular township, be construed into a fixed and deliberate intention of levying war against the government? Though the law had been enacted, we find that the subject of the law had been brought anew before congress, and petitions were sent in abundance, praying for a repeal. These discontented people might have supposed that a repeal was effected, or intended; though we, who were at the seat of government, knew the object of the revision was merely to amend, and not to rescind the law. At the meeting at Kline's, (acting, probably, under the mistake that I have suggested,) there was an express declaration that the people did not think the law was in force at that time: And here let me remark, that the prisoner, who is called the great parent of the discontents, was not present at Kline's, which appears to have been the first step in the opposition to the land-tax. Such was the state of information at that period. Mr. Horsefield has said that there were general discontents prevailing throughout the country: but his allegation is too vague, too comprehensive, to be understood or acted upon. The citizens of a free government have a right, if they apprehend that a violation of their constitution is intended, or if they think that any encroachment is made on the bulwarks of liberty, or property, to express their opinion; but is it practicable so to express that opinion as not to encounter from their political opponents the charge of discontent and sedition? How, in the present instance, was the popular discontent expressed? At first, petitions to the government were proposed, framed and subscribed. This was the result of Kline's meeting; and in this, I presume, no hostility, no levying war, can be discovered. At every subsequent meeting, whether convened by the assessors, or by the people themselves, the reliance on legislative redress was never abandoned; though, it is true, there was great intemperance of manner and of language. The assessors were sometimes interrupted in their journeys, and sometimes jostled in the crowd; and the unmeaning epithets of Stamplers and Tories, were rudely applied to the friends of government. But however censurable, where is the treason in such proceedings? A rioter and a traitor are not synonymous characters; and let us say what we please about nicknames and slander, the society that patiently submits to the scurrility of the Philadelphia newspapers, will never be disgusted or enraged at the indecorum or vulgarity of the northern insurgents. But the insurgents went further; they intimidated the assessors: and is that treason? No; it is the very gist of the offence for which the sedition act explicitly provides. Is it not the very phrase of that act, that if any persons shall combine to intimidate an officer from the performance of his duty, he shall be deemed guilty of a high misdemeanour, and be punished with fine and imprisonment? Now let us go step by step through the evidence, and I defy the most inquisitional ingenuity to discover anything beyond the design, and the effect, of a system of intimidation. Is there any actual force resorted to? No! I find the bridle of one assessor seized, and his leg laid hold of; but the man is not pulled off his horse, nor is he the least injured in his person. I find that a witness thinks that he heard the word "fire" given, and that he saw two men from a neighbouring porch present their rifles at another assessor: well, did the riflemen fire? No. They had guns; their guns were, probably, loaded; and if any thing more than intimidation was meditated, how shall we account for their not firing? But we hear a great deal of the personal jeopardy of the commissioners and assessors; and yet who of them sustained an injury? Mr. Chapman, Mr. Foulke, and Mr. Childs, are, generally speaking, treated as men of merit and consideration; and, in particular, wherever the prisoner met them, they were respected and protected; as at Jacob Fries' and Roberts' taverns. To repel the plea for favour founded on such correct deportment towards the officers, we shall be told that the prisoner was an artful man, that he was the leader; and it will be strongly urged against him, that he called on the officers to surrender the public papers. Of his conduct as a leader, I shall speak hereafter; and of his demand of the papers, it is surely sufficient to observe, that, in opposition to the sense of the rioters, and at the risk of his life, he returned the papers, privately, in the same state in which he had received them.

Having spoken of the assessors, I would wish, likewise, to review the evidence with respect to Mr. Eyerly, the commissioner, and Col. Nichols, the marshal. (Here Mr. Dallas entered into an investigation of the evidence, to show, that although the people acted violently at the several meetings which Mr. Eyerly had called to explain the law to them;

that although Mr. Eyerly accompanied the marshal in his whole progress for serving process, and that although he was conspicuously present at Bethlehem, no personal violence was ever offered to him, or to the marshal; and all the ill-treatment they encountered, amounted to no more than an attempt to intimidate them, but which they both declared was without effect. Mr. Dallas then continued as follows.) And are we to be told, sir, that these acts without force, without any apparent object but to intimidate the assessors of a particular district; that distinct acts of inconsiderate riot and folly shall, when connected and combined, constitute a deliberate treason, by levying war against the United States? If no treason was actually perpetrated, if none was intended when the transactions occurred, I insist, that nothing previous to them, nothing ex post facto, can make the prisoner a traitor; the intention at the time must have been treasonable, or the act can never be punished as treason.

Let us now, however, proceed to inquire into the circumstances of the rescue at Bethlehem, and its connection with the previous disturbances. I think the evidence is strong in support of the assertion, that the sole, independent, consummate object of the assembling of the people at that place, was to rescue these prisoners. Is there any satisfactory proof of a combination between the people of Northampton and of Bucks? I know that an expression is said to have escaped the prisoner, that, in this general discontent with respect to the land-tax, certain persons of a part of Northampton would join the inhabitants of Lower Milford; but let the foundation of his opinions be tested by the facts, and it evidently arose, not from negotiation, conspiracy, and compact, as the prosecution supposes, but from a general knowledge, which he possessed in common with thousands, that the land-tax was unpopular throughout the adjacent country. It is enough, however, for the defence, that no combination or correspondence is proved; since the rule declares, that in legal contemplation, what does not appear and what does not exist are the same. You do not find the people of Bucks attending any meetings but in their own county, nor entering into the county of Northampton at all, previously to their appearance at Bethlehem. Gentlemen, it might surely be expected, that a concerted insurrection for treasonable purposes, prevailing throughout the three counties of Bucks, Northampton, and Montgomery, and cemented by common interests and passions, would have been inspired and conducted by one common counsel; but is there the slightest proof of such a co-operation? I am aware of the communication made by Captain Staeler to the son of Conrad Marks; but the communication itself was merely accidental, and amounts to nothing more than the request of one individual of Northampton to an individual of Bucks. I am aware, likewise, that a message was received at Quakertown (as one of the witnesses says), mentioning the arrest of the Northampton prisoners and inviting the people of Bucks to assist in rescuing them. Who brought this message, and to whom it was delivered, I don't recollect; but it seems, that a compliance was resolved on, and a paper expressing the resolution, was prepared and signed by Fries, with a number of other persons. But was the object of the invitation, or of the resolution to comply with it, treason, or rescue?—to commit a riot, or to levy war against the United States? I repeat, that the sole, independent, and exclusive purpose, was to rescue a particular set of prisoners. Now if, in the previous part of this transaction, nothing has struck your minds as traitorous in the acts, or the intention of the people, I beg you to follow me, gentlemen, with strict attention, to a consideration of the object that was actually effected, and the means of effecting it. The object was to obtain a rescue; a rescue was effected, but it was effected with circumstances of military array; will this alter the original character of the riot? No, sir: if the people did not repair to Bethlehem with a traitorous intention, their arms and military equipments will not convert them into traitors. As on the one hand, I grant, that the circumstance of military array is not necessary to an act of treason, if the intention is traitorous, so I insist, on the other hand, that the circumstance of military array will not constitute treason, without such intention. (Here Mr. Dallas entered into an investigation of the evidence in relation to the assembling of the people, their march to Bethlehem, and their conduct there. In the course of the detail, he endeavoured to establish, that the sole object of the rioters was to rescue the prisoners; that no injury was offered, or intended against the marshal, the commissioners, the assessors, or the posse comitatus; and that although the prisoner was forced into a conspicuous station among the rioters, his conduct had been marked with civility towards the public officers, and a solicitude to avoid the effusion of blood. On the last of these points, Mr. Dallas concluded as follows.) And here, permit me to remark, that if the conduct of John Fries was such as to justify his being selected as a subject for capital punishment, I cannot see the policy or justice of the selection, nor forbear from deprecating the consequences of the precedent. A good man may sometimes affect to join a mob, with a view to acquire and to exercise an influence in suppressing it; or an intelligent and temperate man may, for awhile, be associated for an illicit purpose, with a furious and ignorant rabble, who will naturally look up to him as a leader; but, in either case, the power and the disposition to avert or to limit outrage, will be dangerous to the prominent indi-

vidual who displays them, and his only safety is in mingling with the crowd, whatever may be the direction or the devastation of the storm!

Gentlemen of the jury, I have now gone through two of the general propositions into which I divided the consideration of the defence; and, in the course of my observations, I have anticipated much that related to the third proposition, the particular conduct of the prisoner. I should here, therefore, break off, as I feel that my strength, and I fear that your patience, are exhausted, but that the proclamation of the president demands a moment's further attention. By the laws of the United States it is provided, that, under certain circumstances, the president may call out the militia to suppress an insurrection, having previously published a proclamation requiring the insurgents to disperse. This proclamation is obviously in the nature of an admonition; and if the admonition produces the effect, I ask, whether in the present, as in every other case, it ought not to produce impunity? Then I argue, on general principles, that if the rioters did peaceably retire to their homes upon this authoritative warning, they ought to be sheltered from punishment for any offence previously committed. Nor is the argument without a sanction from the positive authorities of the law. 1 Hale, P. C. 138. And the court will recollect, that the principle is incorporated into the statute, which is usually called in England, the riot act. There must surely be some object in requiring the president to issue his proclamation; and the one which I suggest is equally benevolent and politic. On the present occasion, it produced an immediate and decisive obedience to the laws. Besides, when we recollect that the president has the power to pardon offences, to discontinue prosecutions, and to grant a general amnesty, as in the case of the Western insurrection, why may we not consider the proclamation as emanating from that attribute of mercy, since no specific formula is prescribed, by which its exercise shall be expressed or announced?[7]

Mr. Dallas then proceeded to point out the differences in the nature, progress, and turpitude, of the Northampton insurrection, and of the Western insurrection—U. S. v. Mitchell [Case No. 15,788]; and analysing again the Case of Lord George Gordon, he contended that upon that authority alone, the prisoner ought to be acquitted. In the Case of Lord Gordon, the direct, the avowed object, was to obtain the repeal of a law; and as petitions and remonstrances were unavailing, a body of forty thousand men were convened and marshalled to surround, intimidate, and coerce the parliament. Riot, arson, murder, and every species of the most daring outrage and devastation, ensued; and yet, the only prosecution for high treason was instituted against the leader of the association; and that prosecution terminated in an acquittal. View, then, the riots of Lord George Gordon in their origin; estimate their guilt by the avowed object; aggravate the scene with the cotemporaneous insults and violence offered to the persons of peers and commoners; and close the retrospect with the horrors which the British metropolis endured for more than eight days; and then say (exclaimed Mr. Dallas) what was the guilt of John Fries compared with the guilt of Lord George Gordon? What is there in the English doctrine of treason that has justified an acquittal of the latter? What is there in American doctrine of treason, that will justify a conviction of the former?

Gentlemen, I can proceed no longer. The life of the prisoner is left, with great confidence, in your hands. There are attempts to make him responsible, under the notion of a general conspiracy, for all the actions and all the words of meetings, which he never attended, and of persons whom he never saw. But this is too, too harsh in a case of blood. It is inconsistent with the humanity, the tenderness of life, which are characteristics of the American people, and especially of the people of Pennsylvania. Nor is it called for by the policy or practice of those who administer our government. I believe that to the chief magistrate, to every public officer, to every candid citizen, it will be matter of a gratification, if after so fair, so full a scrutiny, you should be of opinion that treason has not been committed. Such an event will by no means ensure impunity to the delinquent; for, though he has not committed treason, though the punishment of death is not to be inflicted, the violation of the laws may be amply avenged upon an indictment of a different nature. The only question, however, now to be decided is, whether the offence proved, is like the offence charged, treason against the United States. The affirmation must be incontestably established as to the fact and the intention, by the testimony of two witnesses to the same overt act; but remember, I pray you, what the venerable Lord Mansfield stated to the jury on Lord Gordon's trial, remember that it is enough for us in defence of the prisoner, to raise a doubt; for, if you doubt (it is the principle of law, as well as of humanity) you must acquit.

The counsel for the prisoner then called the following witnesses.

John Jamieson.—Some time after last February court, John Fries came to my house; I had heard, on my way coming to Newton, that there was to be a meeting at Kline's. I asked him whether there were

[7] Judge Iredell, says the reporter, here interrupted Mr. Dallas, observing that he thought it irregular to make any use of the proclamation as a pardon, without pleading it. Mr. Dallas said, that he only meant to infer from the facts of the warning and the dispersion, that the insurgents never meditated treason.

many people there, and what they had done. He told me there were, and they had agreed not to allow the assessments to be made in the township as yet; he said the reason was, because they did not know whether there was a law passed on it or not; I told him I really believed there was, for though I had not seen it myself, I had heard of it. He likewise told me that Mitchel had undertaken to draw up an instrument of writing, but he could not go through with it, and that he called upon him to assist him to do it, which he did. On the sixth of March, I had occasion to go to the township meeting on account of a pauper which was likely to become chargeable, calling at Jacob Fries'. I had been there but a short time, before a parcel of men came there, some with arms, and some without. They called for liquor, freely. They then proceeded to make inquiry whether anybody knew whether the assessors were going about the township or not: I do not know whether they got any information or no, but they agreed to go up to Quakertown; after they were gone a little while, Jacob Fries and I concluded that we would ride up after them: we went to the house of Enoch Roberts. We went into a room, but nothing occurred there; and I then asked Jacob Fries if he would ride down to Daniel Penrose's: after we had been there some short time, one of the family told us that our horses were getting loose, so we went out, and there we saw Mr. Rodrick, who halted: he appeared to be much frightened; so I asked him what was the matter; he told me they had catched Foulke and Childs, and that he was afraid they would kill them, and insisted on my going back to try to prevent them being hurt: I told him I would not, except he would too; he said he would, if I would engage they should not hurt him; I told him I would not do that, for I did not know what they had against him. However, at his desire, I went to town, and when I got there, I think I was told they had Foulke in the stable; so I rode up, and called him by name, and I think he answered me. At my desire, he came into the house; while we were walking along, I told him it was a pity he should assess the township till they were more reconciled: I told him I thought the best way to quiet the people, was to show them the small assessments he had made, and promise not to go about again till they were satisfied. He said he was willing to do that. We then walked into the room, and soon after we were there, Conrad Marks walked towards us with a kind of sword in his hand, though I believe sheathed, and said to Foulke, "What! I hear you are going about this business again! did not I tell you not to do this business? but I cannot tell you in English like as I could in Dutch; but it is for the sake of those few dollars that you go about this business." Foulke answered him that he did not do it for the sake of the money. Marks answered, "Did I not tell you that if you could not do without, come to my house and I would keep you four or five days? but if you had to do this for half a crown a day, the devil would not send you about the township." I then told Marks what I had advised Foulke: he said if he would do that, he would use him like a gentleman. Then the affair of Captain Seaborne [8] took place, which seemed to draw the attention from Mr. Foulke. I saw John Fries looking over some papers, but I did not know what they were; I went away.

A day or two after the affair at Bethlehem, John Fries came to me and told me the circumstances, much the same as was related by the marshal, to the best of my knowledge: he then said he did not know what to do with these Germans, for that they had got it grafted in them that General Washington was opposed to this law, and that, so poor a man as he was, he would not grudge half the expense of a man to go and get his opinion on purpose to satisfy the Germans. The next knowledge I got about it, was from two gentlemen who came from Philadelphia in order to carry the proclamation about, and they gave me some proclamations, desiring me to do all I could to get submission to the laws. I spoke to many of them, and there was a meeting called at Marks's on the Monday following. There were one hundred and fifty people or more there from the three counties. It was agreed by several people that it would be best to have men chosen to form a committee, from the three counties, to consult what to do for the best. This was agreed to, and four men were chosen from each county. I was one of four chosen from Bucks, with George Kline, David Roberts and Conrad Marks. Dr. Baker, Squire Davis, and I think Squire Jarrett were some. We unanimously agreed to recommend to the people, as near as I can recollect, to desist from opposing any public officer in the execution of his office, and enjoined upon the citizens to use their influence, to prevent any opposition, and to give due submission to the laws of the United States. I did not hear anybody, but did not consent to what was done by the committee. The people of Lower Milford thought it would be necessary to have the assessments taken. David Roberts said, that he believed Mr. Chapman would agree for them to appoint an assessor in their own township. It was then agreed that we should ride to him to know; which we did next day: he said he had once made an offer, but it was now out of his power. He then said Mr. Clark had been first appointed, and that he had not yet given up his commission, and he did not know how another could be appointed now; that if Mr. Clark would go about it, it would answer the end. On returning home, I called at Frederick Henny's, and desired him to draw out some German advertisements, and send them

[8] See Thomas's testimony.

over towards Marks's, to desire the people to meet, and consent to let Clark go about. I believe he did it. At the time of appointment, the people met at Mitchel's; perhaps there were about forty there. John Fries and Frederick Henny were there. The people in general agreed to let Clark go about; I believe Fries and Henny did not vote. I went to Fries and asked the reason: he said he had no objection to the people voting for him, and he wished it was done; but as he was first opposed to Clark going about the township, he thought it would not be right in him to vote. I believe Henny said about the same. I saw Fries again a few days before he was taken. He told me he had heard a report which troubled him more than anything in his life: I asked him what it was: he said that a report was in circulation that he was collecting up men to assist the French. He said, "Damn the French; if they were now to come to invade this country, so old a man as I am, I would venture my life against them; but I want nothing to do with them."

Cross-Examined.—I do not recollect any proposition made there about signing a submission paper. I recollect Fries said that if he was called upon, or summoned, he would come forward and deliver himself up. This he said at Marks'.

Jacob Huber.—I was at the meeting at Conrad Marks'. It was after the proclamation, and we were choosing the men to meet in the committee; Fries and I got to talking together. He says, "Now, Jacob, you see the error we got into by going to Bethlehem." I answered to him, that the assessors would have to go about and assess the houses; he said, they should not assess his before he gave them a dinner, then they might take the assessment of his house; and "If I am not at home," said he, "my son will give them a dinner." After this meeting, the general situation of the township was quiet. John Fries was as peaceable and quiet as any man could be; I never afterwards heard of the least opposition.

Cross-Examined.—I saw George Mitchel at Marks', but was not much with him: I had no conversation with him: he was clerk of the meeting.

Israel Roberts.—After the proclamation arrived in our neighbourhood, there was a statement in the next week's newspaper, stating the conduct of John Fries, which I procured, and took to John Fries. After looking over the paper, he seemed pretty submissive, but said nothing: he appeared, I thought, much distressed in his mind. I told him that I wanted to have some conversation with him relative to it. I then asked him whether he had rightly considered this matter, whether he had not run himself into danger inconsiderately, and told him the consequences I thought might attend it. He said he never had considered it so much as he had within a few days before. He said he had not slept half an hour for three or four nights, and that he would give all he was worth in the world if the matter was all settled, and he clear of it: he likewise said, if the government would send for him, he would go with him, even if a little child was sent. After the proclamation was read, there was still some little opposition to the law in Milford township; but I do not know that there was any made by the prisoner. I recollect that John Fries further expressed himself to me at that time, that he was charged with taking part with the French, which he took very hard, and signified his determination to defend the country against any invasion; if any army should invade our land, he would, at any time, lay all this aside, and turn out against them, and particularly France.[9] There was a meeting at Mitchel's after that, to choose an assessor; Fries was there: he was asked to vote, but he said he would have nothing to do with it. More than once I heard him say that he did not believe it was an established law, and therefore he was determined to oppose it. I think this was the 5th of March, not far from Jacob Fries' tavern, on the road. He said he would oppose it till he had known other counties had agreed to it—then, said he, we must submit; but he would choose Lower Milford should be the last. At the last meeting at Mitchel's, there appeared a disposition to wait till they should have assistance from any other place. It was said that a letter had arrived to George Mitchel from Virginia, stating that there were a number of men, I think ten thousand, on their way to join them: that letter was traced from one to another, through six or eight persons, till at last it came from one who was not there! Some of the company at that time were in arms and uniform. I do not recollect what was said when the letter was mentioned, but they appeared to be more opposed to the law than they were before. At the meeting at George Mitchel's, at which Mr. Foulke and Mr. Chapman were present, which was held for the purpose of explaining the law, there were a number (about twelve) came up in uniform, and armed with a flag and "Liberty" on it. They came into the house and appeared to be very much opposed to the law, and in a very bad humour. I proposed to read the law to them; they asked me how I came to advertise the meeting: I told them I did it with the consent of a few others: one of them asked me what business I had to do it: I told him we did it to explain the law. He looked me in the face and said, "We don't want any of your damned laws, we have laws of our own," and shook the muzzle of his musket in my face, saying, "This is our law, and we will let you know it." There were four or five who wished to hear it, but others forbid it, and

[9] Judge Peters said he must do these people the justice to say, that from all he heard, and all he saw, they were generally disposed against the French; he found none at all in favor of them.

said it should not be read, and it was not done. I saw Fries on the evening of the 5th of March. He asked me if they had assessed my house? I told him they had: he then asked me if I had told anybody of it; I said I had not: he then added that he had forbade them to come into the township, as he did not believe it was an established law, and others should be gone through with first. I think he then added that they could not get hold of Rodrick: they had got Foulke, but let him go, and added, if they had got Rodrick, they would have put him under guard for that night. He seemed very much opposed to the law. He did not express his opposition to any other law that I heard, but to the law for assessing houses, that night: in a conversation I had with him before, he appeared to be opposed to the alien and sedition law also. I know that he expressed himself a number of times, that he did not believe it was an established law. I took it that he did not believe the law had ever passed; he seemed to doubt of its being established.

Everhard Foulke.—As I was coming from the house of James Chapman with the other assessors (John Rodrick and Cephas Childs), when I came nearly opposite Enoch Roberts', I saw the prisoner at the bar, and a number of others with their arms, (though I don't know that he had any, but the others had). Some of them held them nearly as high as my horse's side, on a level, with their arms hanging down. I spoke to them as I passed, and rode on till I got nearly to the other tavern, David Zellers'. When I got there, a number run out and cried "Stop!" Some of them addressing me by name, desired me to stop; which I did in a pleasant manner. Before any of them got to me, I think John Fries came over from Roberts'; when he was about a rod from me, he called me by my name, and told me he had told me yesterday that he would take me to-day, and he was now come to do it, or it should now be done, I don't know which he said. Captain Kuyder then ran up, and seized my horse by the bridle, and a number of others came round me; the prisoner did not come himself. Some of the people there (Jacob and John Huber) came and took Kuyder off, and he then seized me by the foot, and endeavoured to dismount me, but he failed. He then again took hold of the bridle, but Huber released me again. Fries came up and said, "Foulke, you shall be taken, if you will get off; there shall no man hurt you." He took hold of the bridle, and ordered Kuyder to hold it; I rode up to the stable, got off, and went into the house. When in the room, which was very thick of people, the prisoner came and demanded my assessment papers. I told him that I did not like to give them up; he told me not to hesitate, but to do it. In that situation I gave them to him, and told him I was in hopes he would not take them away without giving them to me again when he had looked at them.—I then went into another room with some of them, who exclaimed much against the law. Huber said they were not willing to submit to it yet. Fries then gave me the assessment papers again unhurt, and told me that he had used me better than I deserved, and that if I had a mind I might return him to court, which I had before threatened. He then went with me to the bar, and took me to my horse through the mob, and held the bridle while I got on, and I rode off. I received no injury. The prisoner said he knew, or thought he had transgressed the law in such a manner as to endanger his life, and that I might return him if I would. The day before he spoke of force that was expected to assist him, when he attacked Rodrick and me in the road. He said there would be 700 men there to-morrow morning, pointing to Jacob Fries' house. I was appointed assessor for the whole district; my appointment was on the last day of the court (January 28).

Mr. Ewing.—You are now, gentlemen of the jury, in the discharge of the most important duty which possibly has, or ever can fall to your lot as members of society. This is a cause of the greatest magnitude, of the first impression. Its importance is derived not only from a consideration that the life of the prisoner is now at stake, but also from the precedent that your verdict will establish in similar cases in future. From this view of it, it claims the highest and most serious attention that can be bestowed upon it. When I address you on this occasion, I feel diffident lest my ideas should not be clothed with that perspicuity or clearness that I could wish, or my sentiments delivered with that ease or elegance that might insure success. I shall rely upon your goodness to forgive any inaccuracy of style or sentiment that your penetration may discover in my address to you. When I address you on this occasion, it is with an anxiety of mind which I never before experienced, when I reflect upon the possible issue of this cause with respect to the unfortunate prisoner at the bar. The situation of the public mind, now roused to resentment; the place where this subject is made matter of inquiry; together with the prejudices that may exist against the defendant, all conspire to form strong obstacles to the defence which I shall attempt on this occasion. But when I consider your characters, gentlemen, I am fully persuaded that you will suffer no circumstances of this kind to bias your impartial judgments, to destroy that inflexible integrity which characterizes you, or prevent this defendant from receiving from your hands (which is all he asks) a fair, a candid, and an impartial trial; that you will hear his cause under every presumption of his innocence, until the contrary is proved by the most incontrovertible evidence. That it is essential to the very existence of every

government; that it is essential to the preservation of life, liberty, and property that offences should be punished, and that the crime of treason, the highest that a member of society can commit, is what I will admit; but I contend that it is equally essential to the existence of a government, and to our security as members of it, that every man indicted should have a fair trial; to have the offence defined with certainty, and proved in such a manner as to leave no possibility of doubt on the minds of the jury. That this man has been guilty of a flagrant violation of the law, an offence for which he deserves to suffer, and which the good of society requires should be punished, is what I readily admit; but I do contend, and I assert with confidence, because I think the law will bear me out, that no act the prisoner has committed can be construed treason by the most rigid or strained construction of law. Gentlemen, permit me to observe, that in proportion to the nature and magnitude of an offence, so ought the evidence to be. As the accusation against this man is of the deepest dye, as it is the highest possible offence against the laws and government that he could commit, so should the proof of it come from the purest sources, and be of that nature as to establish the crime beyond the possibility of a doubt. He is indicted for the crime of treason. Happy for us that we are not now left to the construction of judges, to the opinions of men of any kind, or we might be led astray in a variety of instances, and at times introduce accumulative treason. The people of this country, knowing the magnitude of this object, and the propriety of good security against such constructions, ingrafted into the constitution the definition of the crime, and transmitted it to us unimpaired. Congress recognized the constitutional definition, by ingrafting also the very words of the constitution into the act for the punishment of crimes; they have there prescribed the punishment; they have said that the perpetrators of this crime shall suffer death. We are now to consider how far the defendant is guilty of treason, as laid in the indictment. I had meant to have gone more largely and fully into this subject from the authorities of law writers of eminence, but my learned colleague has so ably, in so masterly a manner handled this cause, that less remains for me to do. I shall endeavour to show you what is to be understood by levying war against the government of the United States, and think I can rest on that ground with safety, to prove to your satisfaction that the prisoner has not been guilty of the crime of treason.

The defence rests upon three grounds. First. That he has not been guilty of the crime charged in the indictment. Secondly. If he has been guilty of any crime at all, the act of congress has sufficiently defined it, and prescribed the punishment not to be capital. Thirdly. I contend that the proclamation of the president should operate as a pardon to take off the guilt of actions done previously thereunto, if not continued in.

(Judge IREDELL here interrupted Mr. Ewing respecting the pardon, and said that a plea must be put in if that was insisted on, but the prisoner must plead guilty to plead pardon. The proclamation was read by Mr. Ewing, in which, he observed, there was no pardon promised. Mr. Dallas said he had begun speaking on this point before, but was interrupted from explaining his idea: he thought there was much difference between an assemblage before and after an admonition to disperse: it doubtless would have been treason had they continued in arms, but their future actions put a construction upon their past actions, and proved that they were guilty of riot and not treason.)

Mr. Ewing continued.—This opposition arose from ignorance: they did not know that the law was in force; and the first time they knew that, was by the proclamation, when they actually did disperse and submit to the law. The prisoner at the bar is not guilty of the treason laid in the indictment; for, first, there must be a traitorous intention; and, secondly, that intention must be carried into effect. In order to prove that, we must trace his conduct through Bucks county, and then proceed to Bethlehem, where the act of treason is said to have been committed. In order to discover what is meant by levying war, we are obliged to resort to the authority or decision of English courts on the statute of Edward the III.: but though everything that has been done there is not to be considered as a proper precedent for us here, yet there are some rules and constructions in England that will apply to particular cases here. Wherever a set of men take up arms to oppose themselves to the government generally, to subvert the laws, or to reform them, in that case they are said to levy war against the government. The great criterion to distinguish what amounts to this crime is the quo animo, or the intention with which the act was done. The object must be of a general nature, and not an assembly to do a particular act; this would not be treason. I shall now show, by the conduct of the prisoner, that his views were not of a general nature, and that it was by no means marked with that degree of malignity which the counsel for the prosecution have represented. You will consider that the residence of the prisoner was remote from the seat of government, and from that source of correct information which, as a member of society, he ought to have received, whereby to regulate his conduct. The people with whom he conversed were unacquainted with your language, warmly, and perhaps superstitiously attach-

ed to old established laws and customs of the place where they resided. Having been accustomed to be taxed and assessed by men of their own choice; men whose conduct they had a right to scrutinize, and whom they had used to bring to account, you need not be surprised that these people would at least hesitate at admitting innovations into their customs. The ideas which struck them naturally were, "From what source can this law arise, that should send a stranger into our townships to make assessments —a right which, exclusively, as we think, belongs to us?" They did not feel such prejudice against this law, considered as to its effects, but from the manner of its breaking upon their view. The introduction of this new principle alarmed them, but they assembled, not to oppose the law, but to gain time for information of the real existence of it. Under this delusion they laboured, because they had not the advantage we have of enjoying information, and the illiterate state they were in operated as a great source of their opposition. This ignorance and delusion were peculiarly manifested throughout all their conduct. Their first meeting was held to consider whether it was a law or not. Not being satisfied about it, and disappointed in their information, they met again, in order to tell the assessors not to come about their township to make the assessments until their doubts were removed. The assessors went on, however, and all this while the people were enveloped in darkness. They warn the assessors; they tell them, "We don't want to repeal this law by violence." No; if they had, arresting the assessors would not have done it; they must have gone to a higher source; and if they had gone there with a determination to repeal or oppose it, the act might have received the stamp of treason. I deny that they arrested any of the officers of the government in the execution of their duty. We have repeatedly asked upon what authority these men acted: we have asked, and have not obtained satisfaction, and we therefore presume the authority does not exist; and where there is no law, there is no transgression. But suppose they had produced their authority, to what would their opposition have amounted? To a riot, and no farther. What course did Fries take in this scene? Humanity and tenderness, wherever his interposition was necessary, and he was present, characterized him. So far from subverting the government; so far from preventing the execution of its laws; so far from injuring or punishing these assessors while entirely in his power, he prevented the very people who were with him from doing those acts, and he himself was industrious to release them, and lead them into a place of safety. If conduct like this is to be construed into the crime of treason, what act, I ask, will not by and by? If this is treason, it is unhappy for us, for thousands in the United States have been guilty of the same thing. Because a law exists, must we acquiesce implicitly? have we not a right, as freemen, to think? have we not a right to object to it? It is impossible that we should be all of one mind with respect to the beneficial consequences of a law; some difference of opinion will necessarily exist. The opposition was manifested in different places, but it was all to the same law. But the opposition did, in no instance, amount to a traitorous intention, nor was it ever manifested in their conduct from the beginning to the end. I ask you, if Fries ever took any active part in it, so as to distinguish him as their leader. It has been declared that he opposed the law, and likewise that he took men to Bethlehem to rescue the prisoners, but we do not find there was any command given. There was a difference of opinion on their way, whether they should go to Bethlehem or not. If he had commanded these men, and had intended to levy war against the government, some of them would not have returned; but he would have led them on to the object without consultation. Trace him towards Bethlehem: there were several who could not pass the bridge because toll was demanded. When he came up, he said "Count my men." No doubt he meant only the men of his own company, because we do not hear that he paid for more than his own. It does not appear that he had any communication whatever, informing him that such a party were to meet there that day, much less can it be imagined there were any treasonable communications. He went up with his men; but we find, while another company formed before the house, his men stood aloof: they did not form there in the ranks, nor did they come there for that purpose. The consideration that some of their country people were taken prisoners, and they thought it was unconstitutional and oppressive for them to be taken to Philadelphia to be imprisoned and tried, induced them to insist upon the rescue. What did they say, "We will bail them: if they are guilty, they ought to suffer." Bail is refused. The marshal could not have granted that request, but they did not know that. When they found this, their proposal, was rejected, they determine they will have the men. Then John Fries appeared: a man who had used the assessors respectfully: a man whose character was that of humanity: he was chosen to go in to the marshal to demand the prisoners. One said he should be commander of them; but it does not appear that he did take the command at all; but we hear of two others who commanded on that day. Fries went in and conversed on the release of the prisoners with the marshal, who, with great firmness, said that they must be taken from him. He went out again, and the men be-

ing pretty warm, he checked them: went a second and third time: all his aim was to prevent the shedding of blood. He pledged himself to the marshal that no harm should come to him from him or his company.

If the object of these people had been of a general nature, men so obnoxious in the county as Balliott, Henny, and Eyerly would not have escaped their vengeance or resentment, when they were so much within their power. Had their conduct been stamped with treason, they would not have been satisfied with rescuing the prisoners: the officers would have suffered; but not one, we find, was hurt. One strong trait, worthy your observation, is, that their view in going to Bethlehem was not to prevent the operation of the law, but simply to rescue the prisoners; and in this their conduct cannot amount to more than a riot and rescue: an offence defined, as well as its punishment, in an act of congress. As the overt act must be laid in the county where the offence was committed, and if it is true that treason was not committed at Bethlehem, where shall we look for it? The gentlemen will not attempt to prove, I presume, that the beginning of the treasonable act was in Bucks county, and its completion at Bethlehem. But Bucks has nothing to do with the present indictment at all, and ought not to be brought into view.

Mr. Ewing then referred to Fost. Cr. Law, 210, and 1 Hale, P. C. 143, and Lord George Gordon's Case, each of which, he said, far exceeded the case of the prisoner at the bar. But, he observed, as the time and patience of the jury, to which he felt himself so much indebted, had been so severely tried already in this lengthy trial; and as the defence had been so ably handled by Mr. Dallas, and what remained would be, he had no doubt, well conducted by the justly acknowledged great talents of another learned advocate, he should forbear enlarging. The verdict you give, gentlemen, said he, will not only be of vast moment to the prisoner, but will also establish a precedent for future similar cases, and it will be to your immortal honour if you preserve and decide with impartiality and firmness; while, on the contrary, it will be a source of shame and disgrace if you do otherwise, through the influence of prejudice or the operation of external circumstances. I can safely trust the life of my client in your hands, under a consciousness that those feelings of humanity, and a just estimation of the evidence, will outweight all other considerations, and thus will your righteous verdict gain you the gratitude of your country, the approbation of your own consciences, and the warmest thanks of the defendant.

Mr. Sitgreaves.—I acknowledge the propriety of an observation which dropped from one of the counsel for the prisoner in the course of his address to you: that is, that those who are concerned for the prosecution in criminal cases should not endeavour, by their eloquence or ingenuity, to divert the attention of the jury from the truth, or to stretch that truth so as to give them more unfavourable impressions on the facts than they will bear. This, I must acknowledge, would have been unnecessary advice to me, because the views I shall be able to take of this subject will be but feeble and imperfect. In the course of my limited and short experience, I have been but little conversant with criminal courts, and have paid but little attention to the Criminal Code, and never have been engaged in a case so important as the present, my public duties having, for some years past, drawn me from the bar. It may not be wondered, then, if I have not been able to bring into this court talents equal to meet those cared to the assistance of the prisoner. I must therefore say I shall not be able to do justice to the case. I confess I feel a desire that those persons who have been guilty of this second outrage and disgrace brought on the state of Pennsylvania may feel the punishment the law inflicts. I hope you and every one who hears me will join in this sentiment, for on it hangs much of our peace and security. I have no objection to going still farther. My lot is cast in that part of Pennsylvania where this unfortunate circumstance occurred. I feel particularly for the good order, peace, and prosperity of that part of the state; but I have unhappily seen it in such a situation that all the harmony of society was destroyed; and if I were not to feel a strong desire that peace, harmony, and good order should be restored, I should be destitute of humanity; for we all know that crimes can only be prevented by inflicting suitable punishments on the delinquents. I wish, gentlemen, that the law should be executed against those who were criminal; but when I say so, let me not say that I wish the prisoner at the bar to be executed. No: my earnest wish is that the general good of society may be procured. This man must be tried by the evidence that is brought against him, and upon that alone he must stand for his guilt or innocence.

Having said thus much, I begin now to premise one or two things which I think should be altogether set aside, but which have been much insisted upon. You have been told that the prisoner appears here on the charge of treason, under all the disadvantages of denunciation by the president of the United States in his proclamation. Any of the assertions in that proclamation are not to have weight on your minds, nor will it operate against the prisoner. He is to be tried by the evidence only, and you are not to regard anything you have heard out of doors before this trial commenced. Nothing should operate to doom the prisoner to a harder fate than the law, supported by fair testimony, provides. It is also as true, that nothing contained in that proclamation should operate to the benefit of the prisoner: if it should not convict him,

no more should it acquit him. The analogy which has been drawn does not exist between this proclamation and the riot act of England, as you have been told; but even if it did, the inference would not be just. You were told that all who disperse on the reading of that Act are pardoned for crimes previously committed. It is not so. But more of that presently. The proclamation of the president was issued for one purpose, and the riot act of England, is read for another. The president has no authority to call forth a military power but under certain circumstances. Wherever a combination should form which is too strong for the civil power to quell, then the military may be called in to aid the civil, but with a humanity intending to prevent the effusion of human blood, and to call out military force as seldom as possible, the law has provided that a proclamation shall be previously issued, that the offenders may disperse peaceably to their homes; but there is not a syllable about pardon in it. The president has the power to pardon, it is true, but he has not done it by that proclamation. The riot act, which passed in the reign of George I., was enacted in order to prevent tumultuous assemblies: if people refused to depart within one hour after it was read, they were guilty of felony, for which they were to suffer death, although the offence before was only a misdemeanour, yet the refusal to depart makes it felony; but it cannot be pretended that any such departure excused them from the riot, but, on the contrary, prosecution and conviction frequently take place for that crime, although they should disperse; and therefore it does not affect the merits of the case. The proclamation is as a blank paper before us, and therefore we must examine this case upon its own independent merits.

Gentlemen, in summing up this case on the part of the United States, the method most natural to adopt is, First, to consider the law as relating to this subject; secondly, what was the amount of the offences perpetrated at Bethlehem: and, thirdly, inquire whether the facts produced in evidence are such as to convict the prisoner, and make him guilty of the charge in the indictment as applying to his particular case.

First, with respect to the law on treason. I should have expected it was so well understood that there would have been no difference amongst us, however we might differ on its application to the prisoner; yet unfortunately there is, and we must endeavour to meet those objections. The statement which was made to you at the opening by myself, and a statement by the attorney of the district, I believe to be correct: I am confirmed in that opinion, and have no doubt it will be given to you by the court in the charge as correct. We are not at this day to distract ourselves with theory: The law of Edward III. of England, called by some "the sacred statute," and by others the parliament who enacted it is called "The Blessed Parliament," that law and our constitution have adopted the same words. The judges in England, as eminent for their patriotism, as eminent for their tenderness, and as eminent for their ability as any ever were in this country, have solemnly settled this particular in a variety of instances, and unfortunately, young as this country is, there has been the necessity for a court of the United States for this district to settle the principle likewise. The adjudications under this statute were made by men all well known for their love of liberty. We have no need to conjure up a different exposition, or different form of construction, than what has already been admitted in both countries: indeed, it is what cannot be shaken at this day. It is, that all insurrections by a multitude of people with intention to usurp by violence or intimidation the lawful authority of the government in matters of a general and public concern, in which the insurgents have no interests distinct from the rest of the community, is treason. From the best consideration I have been able to give the subject, I have formed this definition, which I believe comprises the whole that can be said about it, and I believe no more: I think this assertion will appear to be justified by the best authorities. If this description is just, the offence is clearly settled, and amounts to "levying war against the United States." In the most essential parts, I think this rule has been settled by the counsel for the prisoner.

The intention, which constitutes the gist of the offence, is proved to have been to some general object; if the intention was to gratify some private concern or interest, even if there be all the apparatus of war, as guns, fifes, drums, &c., whatever violence should be committed under it, it cannot amount to treason, because the intention is not to a public matter, whatever other crime it may amount to, and whatever enormities may be committed. This may be the case, in order to gratify some particular passion, or some particular interest. It is the intention, which distinguishes treason from other crimes: Riot is generally much like it, but not being of a public nature, is only a misdemeanour: Treason, on the contrary, is the greatest crime known to the laws of any country. Lord Mansfield, at the trial of Lord George Gordon, expresses the same opinion. If this is a true position, it is certainly an irresistible inference, that insurrection for the purpose of suppressing and preventing the execution of a public law, is to prevent or obtain a public object, and of course must be high treason within the rule of our constitution. Yet this has been repeatedly denied by the gentleman to be high treason; nay, he even went on so far as to say, that in England no such thing had taken place; he says it must be a combination to oppose all the laws; or, at least, to force the repeal of a law. Gentlemen, I think I have stated enough to convince you that this is erroneous: If treason

is the unlawful pursuit of an object of a public nature, then the suppression of a public law is treason. But I would not have you rest on my definition, if I cannot bring you full proof in favour of it. See 1 Hawk. P. C. c. 17, § 25; 1 Hale, P. C. 133. And this position is confirmed still further by a precedent of our own. U. S. v. Vigol [Case No. 16,621], &c. I consider this settles the question beyond all doubt, and it ought to rest so forever, the decision was so serious and solemn in both countries. I shall assume this as an acknowledged point throughout the whole of my inquiry. I should have added the opinion of Mr. Erskine, in Lord George Gordon's trial. Speaking on the treason statute, he says—None of them have said more than this, that war may be levied, not only by destroying the constitution, or the government itself, but by assuming the appearance of war, to endeavour to suppress a law which it has enacted. It is certain that British cases go much farther, and if it was necessary, and the case required it, it could be justified by decisions in England upon points infinitely less strong than those I have quoted: points which were settled at a very early period, which neither the parliaments nor the courts have ever interposed to change. Cases of public grievances, whether real or pretended, whether they grow out of law or out of practice, as pulling down all enclosures, &c., which are the invasions of private right, from its universality—is high treason. Again, usurping the powers of the government by pulling down all bawdy houses, is high treason. The case referred to by Mr. Bradford, in Mifflin county, was, that a particular judge was driven from the bench: they did not oppose the sitting of the court, but they had a resentment against the individual, and therefore the prosecution was for riot. This will assist us in our farther inquiries upon the present occasion. This crime is said not to be treason, but a rescue and bare obstruction of process, and within the sedition law, or within a clause of the penal code, and therefore not treason. But whatever nature an offence may be of itself, if it is accompanied with this particular act of treason, the act becomes treason: I willingly admit that a rescue of prisoners may be without treason: a person may be willing to risk the law rather than his friend should suffer, and may therefore rescue him; this would be but misdemeanour: If ten men in arms go to an officer and rescue his prisoner, if it be done in a private manner, it is no more than a misdemeanour; but if these same ten men in arms go from motives of a public nature, then it becomes treason. The intention, therefore, makes the crime to differ. It is said farther, that the legislature of the United States have passed a solemn opinion upon it, and that they have called it no more than a combination of certain facts; a rescue, &c., against which it has provided; and therefore it cannot now be called treason. I think this received a good answer by Judge Wilson, —U. S. v. Mitchell, [Case No. 15,788],—and the objection was solemnly overruled by the court. The sedition act was not made at that time, to be sure; but if it had, there can be no doubt but it would receive the same answer, and meet the same fate by this judge if read in objection. But the first section of the sedition act describes a different sort of combination, and is not levying of war. There must be of necessity a conspiracy in levying war, but there may not be one in an unlawful combination.

(Judge PETERS.—Whatever the crime would have been without a treasonable intention, with a treasonable intention it would constitute the overt act.)

Mr. Sitgreaves.—The cases in the books are strongly demonstrative of this particular. In Benstead's Case, Fost. Cr. Law, 212, "certain unpopular measures having passed in the council, the odium was thrown on the Archbishop of Canterbury. A paper was pasted up in London, exhorting the apprentices to rise and sack the archbishop's house at Lambeth, and accordingly some thousands went with a declaration that they would tear the archbishop in pieces." It was not attacking the individual, but the officer, that became high treason. The same with respect to the attack on General Neville's house during the Western insurrection; the attack on him was, because he was an officer, and therefore being upon the office and not the man, it was upon the government, and high treason.

Such is the general opinion of treason: the great inquiry will now be, what was the intention with which the offence at Bethlehem was perpetrated? It is allowed to be a rescue; it is conceded also that there was an obstruction of process: If it was so, it was a part of the general system which, being of this public nature, obtains the magnitude and operation of treason. Before I go into the examination of this, I will make an observation on what has been said: that the overt act must be proved in the county where it is laid. I heard this position, but I did not discover any application of it, and therefore I am at a loss to know how to treat it. There exists in England, and in the state of Pennsylvania, a form in the direction to the grand jury, which deserves notice; they are sworn to inquire for the body of the county. This causes considerable difficulty, particularly where something done out of the county is required as an ingredient in the charge, and if the beginning of a crime was in one county, and its completion in another, the difficulty would be greater; but even those difficulties are remedied. The idea of his houour, Judge PETERS, the other day, appears to be sound. That a district is the same as it respects the United States, as a county is to a state, and, therefore, the grand jury are drawn, not from the body of the county, but from the body of the district, and the whole extent of the district is equally connected with the venue, if it be laid there. As to the evidence,

therefore, I consider the crime may be laid in one county and proved in another. 2 Hawk. P. C. c. 46, § 182. I consider whatever rule applies in England, or in our state governments relative to counties, is the same respecting districts under the general government of the United States; likewise, if the overt act be proved in the county where it is laid, you may go out of the county for evidence to show the intention with which it was committed. This, I think, cannot be denied. In Fost. Cr. Law, 9, we see that an overt act not laid, may be brought as evidence to support one that is laid, in order to show the intention.

With respect to hearsay evidence, the rule of law is, that the circumstance of the oral testimony is regarded, as it may tend to establish other evidence, though of itself it be no proof. There are a variety of instances in which it is necessary to be admitted, though there is a rule against it in others. In all cases where proof is to be made by evidence of general reputation, it is useful; so, upon this occasion, it is competent to us to prove the general state of the country; if proper to show the general state of a country where insurrection prevails, it is as proper in order to show the general combination, the design and intention, because it may be the only effectual way of coming at that knowledge. For instance; this information, which was received by the commissioner in the discharge of his official duty, is proper evidence to show why the law was not carried into effect, and, consequently, the criminal spirit of the country. Poph. 152.

Mr. Sitgreaves then went into the case of Lord George Gordon, which had not been represented to the jury by Mr. Dallas to his satisfaction. He related the circumstances of that riot at length. He said the acquittal of that gentleman was not a certain proof of his innocence; doubts might have arisen on the minds of the jury as to the sufficiency or character of the evidence, or there may have been a contradiction of testimony, by which all the credit of it would be taken away. Besides, it did not appear to him that the act of high treason was committed; the multitude who accompanied Lord George to the parliament house, did not go to compel a repeal of the law, or to overawe the parliament, but from a report that the numerous signatures were not rightly obtained, they went to stamp truth on the instrument, and convince parliament of the respectability of the signers. Besides, the main point of evidence of what a person heard Lord Gordon say in the lobby, was received doubtfully by the jury. Many things went to make the testimony not so unambiguous as it ought to be on a trial for life or death, and on that account, perhaps, the learned judge charged them, if a doubt hung upon their minds, to acquit the prisoner. Upon the whole, no inference can be drawn from that case.

Gentlemen, another extraordinary position was taken, by both the counsel, in defence of the prisoner. It was said, that it could be no offence to rescue prisoners who were taken up for acts committed against men who acted without authority, nor to oppose men who had not authority to assess under this law. It was attempted to be shown you that some of the assessors had not received their warrants agreeably to the act of congress, and, thence, all the outrages were tolerated! I do not suppose that the gentlemen, engaged for the prisoner, mean to go beyond the case in which they are engaged, but I must say that their zeal on this occasion, has introduced a dangerous principle. If the apostle of any insurrection had come reeking from the gore of Europe, and had preached up to you this doctrine, he could not have done it more completely than those gentlemen; agreeably to this, the whole country may raise themselves into array against those who, de facto, exercise the authority of the government and the laws, yet, if called to account, the court must be informed, if the ingenuity of the counsel can find a fault in the appointment of the persons engaged in the execution of the laws, that they have not transgressed the laws, and upon that account! Is not this at once sapping the foundation of society, and by a kind of encouragement of insurrection, striking hard at the root of all government? This is an opposition, in my opinion, upon a dangerous and destructive ground. I am not disposed, at this time, to enter into any argument whether it is necessary to prove the appointment of the officers, but, admitting it is true, that upon the indictment of persons for obstruction of process, or obstruction of a public officer in his duty, it is no offence without he prove his due appointment, yet it does not follow that facts given in evidence to prove an outrage, should require all that strictness of examination. You will observe that the prisoner does not stand charged with anything but the rescue at Bethlehem; he is not now charged with the offences he committed in Bucks, or anywhere else, much less with anything where he was not present. These previous transactions are given you to show the intention with which the last outrage was committed; it is only to show the tendency of the design. These gentlemen exercised the offices, and it does not appear that there was the least doubt expressed in those counties of their authority, neither by the prisoner nor any person whatever, who associated with him, at any time or on any occasion; their opposition was not founded on any such pretext, but it grew merely out of the law, and, therefore, it must appear that the outrage was an unequivocal fact, conducted with the intention, so far as we can collect, to defeat the law. On these grounds there is no necessity for proof of due appointment. But what are the objections, or what proof do they require? There is no pretensions to a doubt respecting the

legal appointment of any officer but the two assessors at Penn in Northampton, and Milford in Bucks; Mr. Eyerly himself tells you, that all the rest were appointed by the board of commissioners, and that at Penn, the assessor refused, and Mr. Balliott had the blank to fill up. Respecting the other, Mr. Foulke supplied the place of Clark, who held his appointment, and Mr. Foulke was appointed to assist him. How, then, gentlemen, from those two cases, could a general inference be warranted that the appointments were irregular, and upon that ground, these outrages be justified? We have heard much about the danger of following English precedents, and about the words "high treason." There is a species of treason in England which cannot exist here; that is, conspiring against the life of the king, and speaking of mere words, which have frequently been construed into that crime. It has been a question of great doubt whether words can be called treason, but in that country or this, it is necessary to prove the intention with which a crime was committed; and, therefore, mere words, though it is true cannot convict, yet if a man has done a lawless act, we may exemplify the design by words, even of the prisoner himself. With respect to an action done publicly and notoriously, that is a matter capable of positive and absolute evidence, plain to the senses; those who see it can tell of it, but there can be no way of diving into the heart. If the party himself, from that recess, should develop his designs, these declarations made, either by himself or others who heard him, can prove the intention of his actions, and for that purpose is good evidence.

Gentlemen, I have now said all, which I think necessary, with respect to the law on treason. I am confident I have not done justice to it; but what I have omitted will be amply supplied by the attorney of the district, and their honours upon the bench. I shall now proceed to investigate the facts as they have appeared in evidence, and apply the law to those facts, in order to show you what share of guilt the prisoner transacted. In doing which I shall only select the most prominent features of the testimony which may go to prove my position.

First, with respect to levying war. I think it will require but few words to show that there has been an insurrection in the three counties; that at Bethlehem there was a multitude of people in arms, amounting to the full sense of the words of "levying war with arms;" the insurgents had all the apparatus and accoutrements of a regular military force, and they went there in military array. This is proved by fifteen witnesses, not by two, merely. It is farther certain that this multitude of people perpetrated atrocious and lawless offences, and in contempt of all legal authority, after solemn, reiterated, and repeated warning; that the marshal, conformably to that humanity which characterized him, sent a deputation to them, requiring them to go home and to abandon their purpose; that he selected persons who were most likely, from their political opinions, to procure the object: but, nothing would do for them short of what they set out upon, and the mission failed.

We will next consider for what purpose this outrage was committed. It was said to be simply for the purpose of releasing the prisoners; this was the abstract and naked design. If such is the fact, the prisoner must be acquitted: but if he had an object beyond that; if it should appear that this was one link in the chain of opposition to the laws, then it mounts higher, it mounts to treason. It is my purpose to show you that their object was higher than a mere rescue, and that it did not flow from any particular regard to the prisoners in custody, but it was a public opposition, and one means used with a view to prevent the execution of a law of the United States. Gentlemen, the mere recital of one or two facts will be sufficient to bring this home to the mind of any man who is not determined to shut his eyes against plain testimony.

It is in full and complete proof before you, that, in the counties of Northampton and Bucks, the opposition was almost general, and that in the township of Milford, all along the river Lehigh, and both sides of the mountain, there was a union in opposition to the law, uniformly conducted with system, menace, and threats; that the persons who thought proper to assist in the execution of that law, were previously intimidated not to accept of it, and after they had accepted, they were prevented from executing it, and in many places until the march of the army, the law did actually remain unexecuted. I shall not state to you the particulars of this evidence, but remark that the system was general, and that it was accompanied with threats and menace, and that the friends of the law, and those who were peaceably inclined, were prevented, under the influence of this terror, from speaking their minds on the occasion; and even the magistrates of the country were so impressed, or so intimidated, as not to perform the duties of their office: that the law was completely prostrate, and persons who would have given testimony against them for these proceedings, were afraid to do it. In the course of this proceeding, it was repeatedly declared, that if any person should be arrested for opposition to the law, they should be supported. This system of menace was general; it was not an opposition grounded particularly upon the obnoxious characters of persons who were employed in the execution of the law, but upon the law itself. There was an offer of a particular commissioner to use his influence, that they might choose their own officer, but that would not satisfy their object; no, they said

if they accepted that offer, it would be approving the law, and that they would not do. Mr. Eyerly, the commissioner, had been for many years the representative of this district in the legislature. Mr. Balliott had been in the legislature, in the council, and in the state convention, which proves they were men of confidence in their district, and that the particular dislike now exemplified was not to them as men, but as officers under the law. One of the counsel for the prisoner went minutely into all their views, and the veins through which they acted, and endeavoured to palliate or excuse the conduct of these insurgents; while, at the same time, he appears to know what were the views of government in prosecuting the delinquents; but there is no necessity to answer that, because the prisoner is not on his trial for obstruction of process. I most solemnly disavow that political party spirit enters at all into this prosecution, and beg the jury will dismiss all party spirit and prejudice from their minds. However we may differ on points of law, we must agree with them that the people had a right to examine and explain the law, and express their dislike to this or any other law. Their opposition to this law might have been right or wrong; it does not alter the case; and God forbid that any motive of the kind should influence us to revenge. These are natural rights under a free government, which every citizen has a right to exercise. We are not now inquiring into the nature or grades of any or all those particular offences; whether this particular outrage is a riot or that a misdemeanour, or whether it amounts to treason; we are simply showing to you, from the evidence collected, the weight and force of those facts; to wit, that there was opposition to this law, and that universally, and that these people did their utmost to endeavour to stop the execution of the law; and that these acts were in strict union with the last act at Bethlehem, of the intention of which the previous acts collectively are plain proof; for, certain it is, that an act illegal in its nature, may receive color and complexion from one that is strictly legal. Suppose a man had reduced his thoughts on the subject to writing, without any intention of communicating it to any person; suppose, in that writing, his intentions are fully declared with which such writing was drawn; then this act, though innocent in itself, would be competent evidence to show the intention with which a subsequent outrage was perpetrated, and it would be in full proof to show that a violent opposition to the laws in that county, particularly to the act for the valuation of houses, and that it was not from a personal or private motive, but generally an aversion to the law itself, so that a long time after the period fixed for its execution, the law actually remained unfulfilled. In several parts, the people returned to a sense of their duty and submitted to the laws, and happy would it have been for the government as well as themselves if they had all done it; for, then, this investigation would have been prevented. But, in some parts, the marshal, and those who were with him, who were not volunteers as has been insinuated, but acted in conformity to their duty as public officers—these were insulted, arrested, and obstructed as officers. The marshal was abused by numbers of people at Millar's town, and he was not able, though he touched Shankwyler, to execute process on him. Gentlemen, all I ask of you is to connect the circumstances in your minds,—the general course of events which gave rise to what afterwards was consummated at Bethlehem. The prisoners who were rescued were desirous of accompanying the marshal to Philadelphia; they would rather not be liberated; they were taken from various parts of the country, unknown to each other, and more so to the persons who rescued them; there was no private attachment, regard, or resentment; what, therefore, could be the motive of the insurgents? Could it be interest? No! it would be bad policy to spend dollars to oppose a tax law rather than cents to support it. Was it a private, distinct interest they had, which did not concern the community? If not, agreeably to Judge Foster, it was treason. I have said that these prisoners were not known to the insurgents; I would make the exception of Shankwyler; but you will observe that he never did surrender himself to the custody of the marshal, and though some said they were come to see him as a neighbour, others to see his partner (accuser), &c., yet he was not de facto in custody. It could not be to rescue him that this large armed body met, because he could have been safe by keeping at home. But one solemn fact respecting the others demands a solemn inference. The Lehigh prisoners had cordially submitted to the law, and thus desired to recommend themselves to the mercy of the government by penitence, and actually at last gave the marshal their individual assurances to meet him at Philadelphia. I ask, then, by way of inference, what becomes of all the private object or the neighbourhood esteem necessary to vindicate these insurgents? It was not for the prisoners' sakes, but through opposition to the law, that they did this act, for it is plain that the persons in custody of the marshal were afraid as much to trust themselves in the hands of the mob, as Mr. Eyerly or Mr. Balliott were. They doubtless had a treasonable, a rebellious determination to oppose the government; the previous declaration of the party was, that "if any persons were there in confinement who were opposed to the law, they should be rescued," was a plain indication of their opposition to the law, and that this rescue was a part of the general opposition. Mr. Sitgreaves then went into a review of the evidence re-

specting the meetings at Upper Milford, and at Schymer's where, he said, opposition to the law marked the conduct of the people, but at Lower Milford, the prisoner at the bar by his own confession, eminently displayed his intention; and, after recapitulating the evidence, proceeded. Gentlemen, when these facts are taken into view, so immediately preceding and so directly pointing to what took place at Bethlehem, can you hesitate, as honest men desiring to do justice, and speak impartially between the prisoner at the bar and his country, that he went there, not merely to rescue prisoners, but to execute a part of the general opposition to that law of the United States? If he has done so, he is guilty of treason. Let us now attend to the evidence which grows out of the avowal of the parties themselves at Bethlehem, at the time of the outrage. These are previous indications, which certainly point as truly to the intention as the needle points to the pole.

After a full consideration of the testimony, Mr. Sitgreaves proceeded.—

Here, then, gentlemen, the evidence closes. We find this man is not of a yielding texture; he still continued in his opposition, even at the time there was a recommendation to submit to the laws: at a meeting at Marks', it was determined to recommend submission to the officers, and all the laws of the United States, and to desist from opposition to the laws. This is proof that there had been opposition to the laws in the three counties. When these things were done, Mitchel asked Fries if he ever did intend to oppose the laws. "Yes, I did," was his answer. In the testimony of Mr. Roberts, we have proved the general state of opposition, as well as the guilt of the prisoner: this witness was called by the prisoner's counsel. To be sure he proved the prisoner's penitence and submission. If he had not been guilty, he could not have been penitent. He said he had not slept for several nights: an acknowledgment so much the more pertinent to prove that he had been doing what he knew was wrong.

Gentlemen of the jury, I have endeavoured to show you this subject in all the points of view I am able, so as to give you a right understanding of the facts; and permit me to declare to you that I have not wilfully perverted either the law or the facts, to the best of my knowledge; yet it is possible I may have done it; if so, you will be undeceived in those particulars by the court. Gentlemen, you have a solemn duty to perform: we have all had a disagreeable and tedious undertaking: I pray you to do it in such a way as may do justice to the prisoner at the bar; and at the same time consider how much the happiness, the peace, and tranquility of your country depend upon a fair, impartial and conscientious verdict, which there is no doubt but you will deliver.

Mr. Lewis.—It is now become my duty to address you on behalf of the prisoner at the bar, who is arraigned before you on the important issue of life or death: I do it with the more confidence, because I have not been able to learn from the counsel for the prosecution, a single instance of English law that comes up to the present case, in good times or in bad times, so as to denominate it treason, except in a determination during the bloody reign of Henry VIII., and that is mentioned among the evils of the time: I have not been able to find it under any existing circumstances whatever, and yet any person who is the least acquainted with English history or law, must know that the excise law and the shop-tax, as well as some others, have led to riot and insurrections, and a variety of trials have been held upon them. It may be right to make the experiment upon the present case; but, unless this prosecution is warranted, established in good times, and upon solid grounds, I am sorry to say, but truth compels me to declare, that it is a burning torch in the hand of a madman; it is a flaming sword in the hand of a tyrant, and has done immense injury in England. I know there is no intention in the attorney, in this case, to do anything that is wrong; yet I wish more reflection had been used, before the prosecution had gone on. Thus it was in England respecting Hardy, Tooke, Thelwel, and others; those who most understood the whole of the charges were not satisfied to call their crime a misdemeanour, though there was no direct point, in ancient or modern law, warranting any other indictment, yet the experiment was tried; but an English jury appreciated it in its proper light, and they resolved to do nothing which their ancestors had not done, not even in the application of constructive treason; and, therefore, after a mature discussion, they returned a verdict of not guilty. When, on the present occasion, the causes and proceedings are duly considered, I am satisfied you will feel it a duty you owe to the prisoner now before you, and to your country, to pronounce a like verdict. It is not because a circumstance any way similar to this has once taken place, and been argued upon the same grounds, that therefore it is right it should take place upon the present occasion; adopting a principle of this kind has often made courts, in arbitrary times, take gigantic strides over the statute of Edward III., so that a man could not know how to look, act, speak, or even think, without difficulty and danger. I have said that I am not able, except during the mandatory reign of Henry VIII., to find the trace of a single instance where rescue, under any circumstances whatever, has been found to amount to treason, and if succeeding ages did not consider themselves bound by that practice, I trust you will not sit here to establish a law, but to give it such a construction as justice demands of you. I have undertaken this cause the more readily, because I do not undertake to justify, to palliate, nor

to excuse; but I censure the transactions which have given rise to this trial as much as the counsel for the prosecution does: I am as sensible as they are, that those people violated the law without cause; and I came not here to set up a mock excuse for them: No, it is my opinion that they merit exemplary punishment, but that punishment must be comformable to law, or, when once the law is overturned, the consequences will be incalculable; offences higher than the present may be committed with impunity by some, while those of less grade will be severely punished in others. It is not for me to say that the prisoner is entirely innocent: To me, to the court, and to you, it is totally immaterial whether he has acted wisely or foolishly, guilty or innocently, if not guilty of the offence upon which he now stands upon his deliverance. I may be asked here, how I came to defend a man who, I had admitted, had violated the law, and in some degree set the government at defiance? My reasons are these: It is the privilege of every man to have a fair trial, and not to be condemned without being heard, especially in affairs of a highly criminal nature; few men are capable of defending themselves before a court, and in a capital case, from the perturbations of their minds, still less so than in any other: And woe betide that country, where a man so charged should not be entitled to every assistance that he can procure! By the statute of William III., which is the first that ever allowed counsel at all, the court were directed to assign counsel, who were obliged to render all the assistance in their power; the same is allowed by our act of congress (page 112, § 29); for without that, he may be considered as condemned unheard, and the public mind would be left unsatisfied as to the innocence or guilt of the accused. Those who have entertained the surprise I have hinted at, at my being thus engaged, have doubtless acted from the best of motives; but, not satisfied with this, and wishing to spill the blood of a man before he is proved guilty, some calumniating scoundrel has, in a public print, had the hardihood, during the present trial, to impute to the unhappy prisoner's counsel, the base influence of gold, when all concerned know very well that the prisoner has not a farthing to give, and not a farthing, nor even a promise of any, was ever given to those who have undertaken his defence. I will say no more respecting this vile attempt, but that the law says no publication shall take place which may tend to influence a court or jury, while a trial is pending, and therefore it is a high contempt thrown upon the court, and upon you, and the probability is that either the author or the publisher will be brought to answer for his conduct.

There is one thing, gentlemen, I would wish to caution you against. There are many citizens who suppose that the troops will never turn out again unless a conviction takes place on the present occasion, and that an insurrection will soon appear again: but this is paying a poor compliment to our volunteer troops, to suppose they would not be satisfied without shedding blood: Gentlemen, let no arguments or considerations have weight with you but what are supported by law, and then decide, regardless of the consequences. Another matter I would caution you against, is one with which I found very considerable difficulty to cope; but at length I divested myself of it, and I pray you to do the same: I mean all kinds of prejudice as to the party tried and trying. Our constitution and our laws are wisely calculated to preserve the happiness and interest of ourselves and posterity: our government is composed of tried patriotic characters, and our political bark, with such men at the helm, need not fear a storm; but notwithstanding this, it is vilified and abused. These are grounds for prejudice to work upon, and it is difficult, I can say by experience, to avoid its influence; but when we come to the sacred temple of justice, even if to decide between A and B, on a matter of trifling property, we are sworn to an impartial and unprejudiced decision; and how much more it is demanded of us in a case of life and death? It is necessary to enter that temple divested of opinion or bias, otherwise there is not a fair scope for our reasonable faculties to act, nor can our consciences be acquitted of guilt. I will take the liberty of reminding you that your oath is "that you will well and truly try, according to evidence;" this obliges you to expel everything from your minds which you might have heard out of doors respecting the whole business of the insurrection, excepting such only as proved by the evidence. Your present situation, gentlemen, imposes upon you a duty which is highly important; important as it concerns your country, the prisoner, and likewise yourselves: it concerns him, because his life or death is, in some measure, placed in your hands; it is upon your verdict it depends whether he shall continue with industry to spend the remainder of his life with his family and friends, or whether he must leave them all, and be suspended between heaven and earth to a gazing multitude. Your decision is of importance to your country, because we are now treading upon the dangerous and, I had almost said, unbeaten ground of constructive treason, and because it may and will operate as a precedent to future proceedings. Nor is it less important to yourselves, because, if, owing to honest intention and mistaken views, you should go farther than a reflecting moment would dictate, in some circumstance of a public nature which might possibly occur, the work would be irretrievably done, the reflection would come too late, and pardon would be out of the question.

I will now proceed to consider the particular offence imputed in the indictment to

John Fries, the prisoner at the bar, by which he must be convicted, if at all. (Mr. Lewis here read the indictment.) To this indictment he has pleaded not guilty, and you are sworn to decide upon the issue. The question is not whether he has, or has not, been guilty of a riot or rescue: he may have been guilty of a high misdemeanour, of this or the other description; but the question is, has he ordered, prepared, and levied war against the United States? That is the language of our constitution, and the act of congress formed thereupon. In order to insure the conviction of this man at all events, it has been stated to you, and that with no small degree of confidence, that, as the framers of our constitution have adopted the words of the English statute, the courts are bound to admit the expositions which have taken place upon it from time to time in the English courts: though we have laws of our own, yet in order to know the true meaning of our constitution, we are to go back into the remotest and most dark ages of English history, to understand its meaning! The English statute, or the opinions of the courts of justice, are equally become part of the Code in that country, it is true, and it was as possible for the framers of our constitution to have extended the one as the other to this country, had they chosen so to do, but their not doing it, is a presumptive proof that it was not acceptable. To me it appears strange, that while the English statute is not in force here, the English construction of that statute should! That is a position I never mean to subscribe, but controvert it from the beginning to the end of this case. As we have enacted laws of our own, and have not extended the laws of England to this country, we must put our own construction upon them, and not the determination of an English court. Neither the English laws nor the opinions of English judges are to be regarded any farther than is consistent with our good, to appreciate which, the situation of the times when those opinions were given, and whether the judges were dependent or independent, are important considerations. I do not mean to find fault with English decisions in general: I believe that with regard to property, since the judges have been rendered independent of the crown, it is as wisely administered as the laws of any part of the globe are: but they were not always in a situation to give impartial opinions, when they held their station at the will of an arbitrary monarch, who could hasten or delay causes at his pleasure, to which the judges were the most obsequious tools. Such has been the decisions of some periods respecting treason. But it is not true that the very words of the English statute are adopted in our constitution: they very materially differ: the statute of Edward III. does not provide that confession must be made in open court if received at all; it does not specify that two witnesses shall be necessary to establish the fact, but it was left to the court upon principles of common law; nor does it say a single word about an overt act. Since, then, the two statutes are so dissimilar in important points, it would be very wrong to admit of the same construction in both. So careful was our government of the lives of our citizens, viewing the injuries other countries had sustained by indefinite laws, they provided that the crime should be put in the indictment, and supported by the testimony of two witnesses. In England there might be one witness to one overt act, and another to another.

But I shall now proceed to show what does, or what does not amount to levying war: in doing this, we are not to go back to corrupt times, under corrupt judges, nor do I think the observation of those judges are in the least obligatory upon our courts; but how far they will be respected, is another question; we may rest assured they will be regarded no farther than reason will suggest. This I consider of importance, not only at present, but to posterity. Most of our laws, it must be remembered, are from England, and were brought with our ancestors as their birth-right: this was the case wherever British subjects emigrated; but as soon as we became independent states, we enacted laws of our own, although in a great degree copied from British States, but they became new under our constitution. I think, gentlemen, I shall be able to show you, upon the opinions of men sound in law knowledge in England, that the definition of treason in our constitution will not bear the construction that has been put upon theirs at an early period. We have an express and distinct meaning of this crime in our own acts of congress; in the act passed 1790,—volume 1, p. 100 [1 Stat. 112],—section 1 shows what treason is, and particularizes wherein it shall consist. Section 5 defines the punisument which should be inflicted on a rescue of persons committed to custody, or in the hands of the officer. But there was another act passed defining the precise circumstances attending this case—this was passed after the declaration of the judges on the Case of the Western Insurrection—and from its being enacted subsequent to all others upon this species of crime, appears to me to be binding upon our courts: I mean the sedition act. It appears to reach the present case in the fullest extent; the language of that act is, whoever shall combine or conspire, &c., shall be guilty of a high misdemeanour; this act does not specify the number: a township, a county, or twelve counties equally are within the law. Combining to prevent the execution of the law: this reaches the action, whatever may be the number of force used: it is a misdemeanour, and shall be punished with fine and imprisonment, not death. Whether the object shall or shall not be effected, the law says the punishment shall be

the same. Here, then, is a solemn declaration made by the legislature itself, the same body that enacted the punishment of death to what they termed treason by a prior law, and surely that authority had the greatest right to put a construction on, or make an alteration in their own law. If there is a legal definition of the crime committed by the prisoner at the bar, this act contains it: every case is here provided for by the punishment of fine and imprisonment, and had a prosecution taken place under this act, a conviction would have been certain, and the punishment would have been rigorous and exemplary.

Under this head of English construction, I would ask how it can apply to us, when we consider that before the act of William III., no person charged with high treason was allowed counsel to plead for him, unless he stated some objection in point of law which made an argument necessary, and even then he could not do it without first admitting the truth of the fact charged against him, and yet all the decisions of English courts alluded to were formed before that period! Further. Not only was the accused not allowed counsel, but if he had hundreds of the most respectable witnesses to prove the falsity of the allegations, he never had a right to bring them forward until the reign of William III. These decisions, gentlemen, of the English courts, which are called up as precedents for us to regard, were formed under these arbitrary circumstances. No counsel allowed, even though the prisoner was deaf and dumb, nor witnesses, if he could even prove he was hundreds of miles distant at the time. Further, to show what dependence can be placed on the sayings of these men, you will observe that, until the time of William III., all the judges held their commissions during royal pleasure only, and even until the first of George III., the judges were never completely independent, and of course were obliged to study the royal pleasure; their opinions being extorted before the trial commenced. The consequence of all this is plain, that no impartial opinion could be given. It was common before trial first to closet these dependent judges and bring them to submission, if their opinions ran counter. Bacon, the greatest, wisest, but meanest of mankind, thus stooped to become the tool of his master. Those who could not thus be brought over were deposed, and more obsequious persons placed in their room, and it was not till they could have a decision thus formed that persons were brought on their trial for high treason. And yet we are referred to these persons to tell us what is the meaning of our own statute on treason! Thus it was that many of the best citizens of England fell a sacrifice, and for no other purpose, many of them, than because they possessed exalted virtue. During the existence of this state of things, the judges would sit silent on their bench during a trial for life, and hear the crown officers, instead of acts and expressions of humanity to the unhappy prisoner, abuse him with the most opprobrious and insulting language. Influenced by this meanness, Sir Edward Coke, while attorney-general, descended to abuse the great and good Sir Walter Raleigh with the vile epithets of "traitor," "viper," and "spider of hell," &c., turning away from him with the greatest scorn: and this was the manner in which trials were commonly managed. See Fost. Cr. Law, 234.

It was well known that the statute of Edward III. made no provision whatever respecting the charging of an overt act in the indictment, nor does it say anything about proof: but a statute enacted in the reign of Edward VI. made two witnesses necessary in cases of high treason; but Foster says no great regard was paid to this better statute till near a century after, and the reason assigned was that it was not for the safety of the crown, or to the common well known rules of legal evidence. It was common to admit one witness of his own knowledge, and another by hearsay, if it was even from the mouth of that one, and at the third or fourth hand, and frequently the depositions were taken out of court to be read, rather than bring them into open court. This must appear an uncommon representation of the administration of justice, but it is a fair picture of the times under which the decisions took place which are brought against us. At the period in which the seven bishops were tried, Lord Camden declares that Justice Powel was the only honest man that sat on the bench. Blessed justice! I know that since the judges have become independent men in England, there has been as much independence in their conduct as in any country; but then, as Hale tells us, these decisions had already taken place, and therefore they must be abode by; but he takes care to caution future judges how they introduce new cases by putting new constructions. The question now is, whether this court and jury are prepared to be bound by judges thus principled and thus circumstanced, to form a decision upon our own law. I contend that these decisions are by no means binding upon us. We have the sedition law, which comprehends the whole case. In 1 Hale, P. C. 132, and 1 Bl. Comm. 69, it appears to be lamented that the independent judges of later days have no power to alter the rules of law established in the dark ages of English jurisprudence; otherwise, we have reason to believe, they would not be in existence at this day. Lord Kenyon, when counsel for Lord George Gordon, declared, that he did not think the parliament of Edward III. ever had any design that constructive treason should exist at all, or any wish to leave room for it to be introduced. We are certainly, therefore, untrammelled by every foreign rule; otherwise the

question would be, what rules we should adopt, and what not. It is a rule in law that statutes affecting life, should never extend beyond the letter of the law, so as to leave the possibility of a doubt. If that is a rule respecting penal statutes in general, abundant more so is it necessary respecting the high crime of treason. Above all things, if bad times should ever happen in this country—and bad times may come here as well as they have in all other countries—it will be of vast importance that the law should be known precisely; it will be of consequence to a citizen to know on what law he is to be tried, if he becomes the devoted object of any one's resentment, or commits a crime: it is of consequence that the flood-gates of usurpation and tyranny should never be left open, and the liberties of our citizens be thrown away ad libitum on the uncertain ground of construction. 1 Bl. Comm. 88; Fost. Cr. Law, 5S, we read that it ought to be "clearer than life itself."

We now come to examine the true, full, just and reasonable meaning of our own treason statute; for I do not admit that constructive treason ought to exist at all. A line is drawn, and if we ever cross it, where are we to stop? Treason against the United States, we find, consists in "levying war against them," &c. The question is, what is levying war? Levying war may fairly extend to the three following things: First. Where a body of men take up arms, and array themselves in a martial manner against the government, with a view to put an end to its existence. This is its plain natural meaning, but cannot be said to have been transacted by the prisoner at the bar, and therefore requires no farther definition. Secondly. It is expressly levying war, if a part of the Union throw off all allegiance and authority of the United States, totally disregarding its laws and institutions, and act as a divided people as though they did not belong to them. Thirdly. Where laws have been enacted by the Union, pursuant to the constitution of the United States, and a number of people, being dissatisfied, should, of their own authority, by numbers, or force of arms, take possession of the legislative or executive authority, and by this force of arms or numbers should undertake to compel either of the departments of government to act as they dictate, thus robbing the government of its legitimate power, by assuming it themselves.

No doubt the good of posterity was intended in the constitutional definition of treason, and we are to touch it with a trembling hand indeed, lest it moulder, and grow into God knows what. Now, as this is an act which was deliberately formed, if we go upon the dangerous ground of construction, that cannot be done so deliberately: No; I say it was to be handed down pure to posterity, and we ought not even to depart from a letter of it. If liberty of construction is to take place in any degree, by so much it tends to render the constitution vague and uncertain, and we know not where it will end. If the constitution only intended the three definitions of levying war which I have laid down, it is clear that a man cannot overstep those constitutional limits without intending to do it. Go beyond this, and you leave jurors and judges to make the constitution anything or nothing—a mere nose of wax, to be moulded into any form at their will; and they may be excused, because left to exercise their own judgment upon it; but Lord Hale has charged you not to do this, even though encouraged by a parity of reasoning: agreeably to his apprehension, it is deducible that if ever we have a bad president, presidential encroachment may wrest the constitution to everything that may serve any particular purpose. But God forbid either should ever happen.

(Mr. Lewis then went into a full examination of the English law, after which he said): I shall now proceed more particularly to state my reasons for alleging that the crimes with which the prisoner is charged are fully comprehended, and punishment provided for them, in the sedition law. This I shall consider first, as it relates to the rescue independently; secondly, I shall make some observations on the law, independent of the rescue; and thirdly, both together.

It is admitted, that the mere rescue of the persons from the custody of the marshal at Bethlehem, would not amount to treason; and it would not be necessary for me to say a word about that, were it not for the following reasons. Speaking of pulling down meeting-houses, brothels, prisons, &c., the crime is defined (4 Bl. Comm. 129): "Offences against public justice, is obstructing the execution of lawful process." This, there can be no doubt, is an offence at common law, and persons found guilty of a rescue of a person convicted of a crime, are adjudged guilty of the same crime, and would be punishable accordingly, had it not been for our act of congress (the sedition act); but that act reduces a rescue, generally, to misdemeanour. But agreeably to law, persons rescuing others not committed for treason, are not guilty of treason. A case in 4 Bl. Comm. 86, the party himself was guilty of felony at common law by making escape, but I believe it to be an entire new doctrine to make the offence of the accessories or assistants higher than those who are rescued: Rescue of persons for felony has been always felony, for treasons, &c. I think, therefore, it is clear to prove that every exertion has been used to attempt to make treason of this crime, by the gentlemen, but it is as clear that they have searched and tried in vain.

But it is farther said, that this business assumed a generality, and that the object was to defeat a law of the United States, for which purpose a number combined and conspired together, and more effectually to accomplish this, they rescued the prisoners, and therefore committed treason. Were I to admit this, I

might call upon the gentleman to support his conclusions by authority, to show that preventing the execution of process, or releasing prisoners before they were carried to jail, is treason. I repeat, that the only case mentioned, is in the disgraceful days of Henry VIII., which I think is inadmissible. But I deny the fact: I deny that there was any combination or conspiracy between the people of Lower Milford, in Northampton county, and those of Bucks county, at all upon the business. First, the people of both counties were alike averse to this law, and for similar reasons. I believe there are many unprincipled men who wish to injure their country, and go about preaching up sedition to the people, which, communicated in different directions, catch fire in the same manner, and perhaps at nearly one period; hence it is that their prejudices and opposition may appear from the same cause, without parties holding the least correspondence. I ask you whether there is a tittle of evidence to prove that ever the prisoner went into Northampton county till this circumstance occurred? was there any communication by writing, or any other way? No, not at all. Upon what foundation can a conjecture arise, then, that there was a combination? You are not to try by conjecture, or wild supposition: no, you are sworn to "well and truly try according to evidence." Does it appear, I ask you to recollect, gentlemen of the jury, that this conduct was instigated by any intercourse in any way held with Northampton county? No, it does not; but there is a strong presumption that the discontents took root and grew to that state without any combination at all. But whether or not treason was committed in Milford township, is not for you at present to say; the overt act is laid at Bethlehem, and there it must be proved, that he levied war upon the United States with a number, or by force sufficient for the purpose, and that with them he combined and conspired, &c. If he did this at all, he did it on the 7th of March, for it does not appear that he ever was there before in his life; now if there was a conspiracy, it must appear that he acted previously, and in concert with others, and the act would have been alike chargeable to all; but this does not appear. It is true Fries was heard to say "we will oppose you, and all the people of Northampton will join us;" but this could easily arise from his having heard that the people of Northampton were dissatisfied with the law, but it does not follow that, because there were discontents in Northampton county, he should be responsible for their actions, particularly since it all, at least, depends upon conjecture. Kelyng, 19, has a case to answer this, where rebellion existed in two parts at one time, but it was determined that this might happen without correspondence, since no such evidence appeared, and therefore no notice was taken of it. Then, gentlemen, if I were for a moment to admit that John Fries had committed treason in Bucks county, which I deny, it would be immaterial upon the present occasion, because upon every indictment for treason, the overt act must be proved in the county. But it is said that doctrine does not apply, each state being to the whole United States as a county to the state, because the grand jury have the district at large to inquire for; and therefore it is immaterial whether laid in one county or the other. If this be sound law, dreadful indeed must be the situation of the people of the United States, if the government should ever fall into different hands from those in which it is now happily placed, because an attorney may, at any time, keep a person, arraigned for a capital offence, in ignorance, till he comes to the place of trial, and of course not prepared to repel it at a very distant place from where the act is laid. But this, I will be bold to say, cannot be law. My reasons for thinking so are, first, the law of congress, called the judiciary act (section 29, vol. 1, p. 67), says, that in cases punishable with death, the trial shall be had in the county where the offence was committed: here I would remark that the law takes notice, not of a state or a district, but of a county, and therefore the analogy drawn by Mr. Sitgreaves, that a district to the United States is the same as a county to a state, is not in point. The trial is to be had in the county unless the judges shall determine that it cannot be had there without great inconvenience. See Fost. Cr. Law, 194. But let the offence be where it may, twelve jurors must be summoned from the county. See page 237 of the same book. If we examine these authorities, they will appear different from what they were represented. 2 Hawk. P. C. c. 46, § 34, is an authority to prove that upon a plea of not guilty to a specific charge as to place, &c., in an indictment, if the least variance appears from that place, it is sufficient to acquit the party, and is fatal to the prosecution. It is not necessary for me again to say that you are totally to exclude from your views whatever the prisoner did in Bucks county, since the charge is laid in Northampton, and since an acquittal from that charge will not prevent a prosecution in Bucks county. If it appears that no treason was committed by him on the 7th of March at Bethlehem, you must pronounce him not guilty.

Mr. Lewis then reviewed the testimony of Dellinger on the circumstances which led to the expedition to Bethlehem, which, he contended, had nothing to do with it, save the quo animo. It appeared that they heard Shankwyler was to be there; but it is not pretended that going there upon that account would be treason, and particularly as Shankwyler was not in custody; and it does not appear that the prisoner knew of any others being there at that time. Then the object particularly was to see Shankwyler. When they came to the bridge, it appeared to them that two men were detained at Bethlehem, and it seems they went forward to

rescue them. In this they were justifiable; for if the law was violated, it was by Major Nichols, in making an arrest which the law did not authorize him to do. They were illegally detained, and it was lawful for anybody to go and rescue them. 2 Ld. Raym. 1301. I am not disposed to blame the marshal; but I cannot justify him in point of law: his situation, no doubt, rendered it a prudent measure; but it was detaining men by false imprisonment, and was enough to alarm all the people of the state. I mention the circumstance only to prove that there can be no rescue, unless the persons liberated are legally confined. Instead of Fries being guilty for that action, a very worthy man (the marshal) was guilty of assault and battery in the act of detention. If this is fact, how does the affair stand afterwards respecting universality and design? I have justified Fries and the others in leaving the bridge to go up to Bethlehem, and the laws of their country will justify them, because it does not appear that they knew these people were discharged. When they got to Bethlehem, it appeared there were a number of persons under arrest; for, it does not at all appear in evidence that they ever heard before that Fox, Ireman, or the Lehigh prisoners, were there: the gentlemen on the other side only presume it; but you, gentlemen, must not go upon presumption. "You must well and truly try, and true deliverance make, according to evidence." It does not appear they knew of it; they came from a great distance, and from quite another part of the country than where the Bucks county people came from; Fox and Ireman had been just brought in, and none of them knew they were there; however, when they were got there, upon a lawful occasion, hearing of a number of persons being confined there, and that they were to be taken to Philadelphia for what they considered to be no crime, they generally waxed warm; but Fries was cool; he endeavoured to pacify them: he had brought his sword with him, but when he was appointed an ambassador of peace to treat with the marshal he left it behind him.

The whole of the transaction must be viewed as a sudden affray, like numerous cases mentioned in Hale, Foster, &c., where great and sudden riots arose. Where is the proof, I ask, of combination, of association, or of correspondence? None at all: they came there to a man without the least treasonable views, for it was merely by chance they came there at all. There was much rage among the people upon the first impression the knowledge of the prisoners in custody made, and had it not been for the cool conduct of the prisoner at the bar, blood and massacre would have been the immediate consequence, for, no doubt, liquor was operating pretty much in their brains. An altercation took place: they insisted on the prisoners; and in the prosecution of his delegation, from the peremptory demands of the people, he made use of language which I admit was unjustifiable, and violating the law, for which he ought to be punished, but not with death. 1 Hale, P. C. 153. But further: the persons were not in prison, they were only in custody of the marshal. These are materially distinct; the releasing of persons taken to prison, is only a misdemeanour, while releasing them after they are in prison, which is in some measure the sanctuary of the law, is felony. 4 Bl. Comm. 130. The breaking open of prisons generally is treason, but in no case is the releasing prisoners before they are taken there. J. Kelyng, 75, 63; Lord Gordon's Case, Demmaree's Case, 15 State Tr. 544, 600. It would not have been treason, therefore, if a number of persons had actually conspired to rescue these prisoners from the marshal, nor even if they had been confined in a jail, instead of a room, because it was not a general design to break open all prisons, but one only. But, on the contrary, they were not in prison; they were only in custody of the officer who served the process; how, then, in the name of reason and common sense, will it be made to amount to treason when it would not if they had been in jail. But, say the gentlemen, we will not call it rescuing of prisoners, but a general obstruction of the execution of the law, and the means here used were to support that general object. The rescue is of itself a specific offence, and of itself admitted by Mr. Sitgreaves to be only a misdemeanour. If it is so, how it it possible to convert a misdemeanour into a treason, and thus to take away the life of a man when imprisonment only is his desert! But what ground is there alleged for this position? It is said that the arming and arraying a number of men was with this intent. I deny the fact, and it has by no means been proved. The cases referred to in England are treason to a demonstration. Enhancing servant wages could not be done by force but by surrounding the parliament house, and this was justly denominated waging war against the king. Any rising to alter religion must be affected the same way. Religion is established by law in England, and that law must be altered by the parliament; therefore it could not be forcibly altered but by levying war. 4 Bl. Comm. 81. Reforming the laws must be done the same way, if at all. 1 Hawk. P. C. c. 17, § 25; see Erskine in Gordon's Case, 592. Not only open rebellion, but resisting the laws as enacted is treason. The laws are a proof of the authority of the commonwealth, and resisting those laws is making the parties independent of the commonwealth, and therefore a defiance of the authority of the state. Lord Mansfield, in the charge on the same trial, says, among other enumerations, that combinations, &c., to arrest the execution of militia laws, is treason. This strongly merits observation. Why does the learned and ex-

perienced Lord Mansfield particularly specify militia laws and no other? Why does he not say to arrest the execution of any law? Why the militia law? For the best of all reasons—the same reason as the taking or attacking a fort or a castle belonging to the king, because that is the place where he keeps his military forces, and because the military is the strength of the kingdom, and this is resisting the military authority. Therefore, it must be allowed, that a resistance of militia laws is upon a very different footing than any others, and, in time of danger, resisting this law would prevent the militia being drawn into the field when there is occasion for them. Now, gentlemen, these things all considered, plainly show, that what is now attempted is a novel experiment, like modern philosophy, an entire new thing, saving the solitary instance in the reign of Henry VIII., and it is clear that the resistance of no law is treason, but the militia law. I agree also with the doctrine Lord Mansfield lays down, that any attempt to oppose the laws, by intimidation and violence, is levying war, and treason.

It is unnecessary for me to turn to the books to prove that confession of the party, or words spoken by him, taken perhaps in the time of fear, are not to be regarded by you. This was so plainly improper, that the law of William III., making two witnesses necessary, or confession in open court, was enacted; I need only turn to our own laws (judiciary act). There must be one of two kinds of proof: the party in open court must confess, for confession out of court cannot avail, even if made before ten thousand witnesses; or else two witnesses must prove the same overt act, and he must be convicted upon that indictment, if any. If you are to go to all parts of the country for heated words, heard by anybody, in any circumstances, I must consider it as a very scandalous abuse of the statute of Edward III. I think it impossible to hesitate at what was the meaning of congress when they made this act, and, therefore, shall barely recur to the evidence. Here is a proof that the prisoner came up to Bethlehem, where he acted in a certain manner; but the gentlemen concerned for the prosecution, think that does not sufficiently indicate his design, and therefore they travel to Jacob Fries', to Kline's, and a number of other places: now suppose you convict him, I entreat you to inquire from what evidence you do convict him? Is it from the overt act committed at Bethlehem, or from that and other circumstances together? If this is the broad ground upon which you go, do you convict him upon the evidence of two witnesses, to the same overt act, transacted at the same place? No, you do it upon the evidence of two, and a number of other evidence besides, on a variety of circumstances. Let me suppose for a moment, that two witnesses had come forward, and given an account of his conduct at Bethlehem; but that evidence was not sufficient to answer the indictment: you hear of such and such conduct at Quaker town, at Kline's, &c. &c. I ask, would he have been convicted upon the evidence of those two, independent of any other? No, he would not. This is by no means agreeable to the statutes of William III., or Edward VI., and in my view totally inadmissible. What is the consequence of such a verdict? Why, a man charged with murder, assault or what not, may know who the witnesses against him are, while one charged with treason, the highest possible crime, may not know, if you can travel from town to town, and from county to county for the evidence, if you can bring correspondence, &c., from every part, of which the prisoner knew nothing until brought before the court. No man would be safe in the admission of such things, but you must form your opinion alone from the evidence of two witnesses relating to the act committed at Bethlehem agreeably to the indictment. The statutes, and our act of congress mean and intend to prevent this kind of rambling over the whole state for evidence; or, indeed, upon the doctrine of the gentlemen, notwithstanding the act says otherwise, they can with equal propriety go throughout the United States to collect evidence to support the prosecution, which was never seen nor heard of before.

I now contend, gentlemen, that the case of the prisoner at the bar does not come within the statute of treason; and I also contend that it does come within one of two other acts, for the judiciary act,—volume 1, §§ 22, 23, p. 109, [1 Stat. 117],—speaking of resistance of process and rescue, completely extends to the prisoner. No, say the gentlemen, it is not a mere rescue, but a rescue for certain intentions and designs. Have the congress distinguished any particular design, or have they not, in this law? No, they have not: then permit me to say, where congress have not distinguished it, nor the books, it is not for judges nor juries to distinguish: it belongs to congress to make or except such cases as they thought proper; they have not thought proper; and you have no right whatever to do it. But lest any objection should appear of weight to except it from the judiciary act, there is a very good law, but which has been shamefully vilified and abused, called the sedition bill, providing fine and imprisonment for any high misdemeanour, under which, as I observed before, the very actions of the prisoner are defined. This act has passed since the trials of the Western insurgents in 1794, so that the opinions of the judges respecting treason at that time, are most clearly and fairly superseded by this act, which has pointed out whatever has heretofore caused doubts about the meaning of treason in the statute, and thus put an end to any judicial construction. That act provides, that if any

persons should combine and conspire together, to impede the operation of any law of the United States, or to intimidate any persons holding places or offices under the United States, (this last is one of the many little things collected together, in order that, when brought into a mass, they may amount to treason,) and that, if they should advise, attempt, or procure any insurrection, riot, or unlawful assembly or combination, he or they shall be deemed guilty of a high misdemeanour, whether it be carried into effect or not. The very crimes which are here enumerated are charged upon John Fries, the prisoner at the bar. Now, if any act of description can be more just than this, I should wonder; it answers precisely every part of the crime charged, and every concomitant circumstance. Now the question is, whether or not, as the constitution did not define the punishment of treason, and as a misdemeanour is described here to be what some have thought used to be levying war, and as the punishment is less than what the other law respecting treason enacts—whether this should not operate as a repeal of the former law, so far as related to these points. As to the cases of Vigol and Mitchell, Western insurgents, I should doubt whether it would affect them at all, even if the law had then existed, because the circumstances very much differed from the insurrection in Northampton county. Wells and Neville were inspectors, and their offices were strictly belonging to the United States, and were deposits of the United States, and equally under the protection of the law with castles or citadels: in addition to this, the officers of government were driven from their own homes, and upon pain of death, they dared not approach their homes. Their offices were burnt by the insurgents, and there was no law that touched their case but the constitutional act defining treason; on which account, they were tried and convicted under it. I would introduce these ideas, to show you, that the decisions then formed by the court, are inapplicable at this time, since the sedition act is since passed, and agreeable to these circumstances, which materially differ from those of 1794.

It is now time to close. Gentlemen, the task which you have to perform is very serious, and very important; but I will not insult your understandings, by saying more than my indispensable duty claims from me, in behalf of the prisoner. You will, I have no doubt, consider the case calmly, wisely, and deliberately. You know the law, under the direction of the court: and I have no doubt you will decide according to the impulse of your consciences. I will only add, that the prisoner received, and has held his life from the authority of Him who is allwise, great and good, and by Him only can it be destroyed, except he has violated those equitable laws made by his country for the preservation of peace and order in society: he is, therefore, entitled to an equitable verdict: if he has done the acts named in the indictment, I have no doubt you will pronounce him guilty: if he has forfeited his life, go he must, and if he is to go, it is not in the power of men to prevent it. I shall, therefore, rest assured, that you will give a conscientious verdict, upon which you are bound to answer.

Mr. Rawle after his exordium, in which he expressed the importance of his situation as public accuser—hoped that while his duty peremptorily imposed upon him the necessity of doing justice to the United States, he should not be divested of candour towards the unfortunate prisoner at the bar, to whom he hoped full justice would be done.

He proposed, in the first place, to collect the detail of transactions, in the clear and unequivocal train they had been testified by the several witnesses, not only called to support the prosecution, but unhappily for the prisoner, corroborated by the witnesses called by himself. In the second place he should apply these facts to the laws and constitution of the United States: from both of which he thought it would evidently appear to the jury that the prisoner was guilty of treason in levying war against the United States. The prisoner stood indicted for opposing, in a warlike manner, two laws of the United States, the one entitled "An act providing for the valuation of lands and dwelling-houses," &c., passed July 9, 1798 [1 Stat. 580], and the other entitled "An act for levying a direct tax within the United States," passed July 14, 1798 [Id. 597]. Agreeably to these acts, certain commissions and assessors were to be appointed to carry the provisions thereof into execution. It appeared in evidence that Mr. Eyerly, one of the witnesses produced, had received a commission conformable thereto in a part of Pennsylvania, which he received in August, 1798, together with a request from the secretary of the treasury, that he would find suitable characters to serve as assessors to act in the division assigned to him. In the execution of this request, Mr. Eyerly found very great difficulties, although there was a perfect acquiescence in all other parts of the Union. Many whom he nominated declined on account of the unpopularity of those laws, although Mr. Eyerly very industriously, and in a praiseworthy manner, endeavoured to remove those objections.

In order to show the general difficulties there was in the execution of these officers' duty, Mr. Rawle recited the testimony of Mr. Eyerly, and its confirmation by Mr. Chapman, Mr. Henry and others, and went into an examination of the testimony demonstrative of the difficulties the assessors found in the execution of their duty and the insult they frequently met with, when engaged in their pacific efforts to explain the laws to the misled rabble. But sorry was he to say, that these commendable efforts were outweighed by the influence of certain leaders, among

whom he found several captains of militia, and Fries with the rest: he throughout the whole scene appeared the most prominent, and instead of attending to the good advice given him by his best friends, flew into a rage and renewed his opposition. A part of the effects of their hostility was accomplished in preventing Mr. Clark from fulfilling the office which he had undertaken, and the general reluctance there was in others, and indeed finally the abandonment of the assessments; for it appeared that, not only those who were unwilling to give their rates refused, but those who were willing were intimidated from doing it. To such a pitch was intimidation and disaffection arrived, that he was sorry to say, the very magistrates of the peace had so far neglected their duty as to join the opposition, and nearly all of them, from one or other of these motives, refused to issue process for the apprehension of delinquents, or examine persons who opposed the laws: and those who did attend to their duty, found the greatest difficulties to procure the attendance of evidences, who were prevented by the impulse of fear from coming forward. Many attempts were made to pacify these deluded people, who were under the most baneful advice, and the attempts accordingly miscarried, even though propositions were made in some townships to indulge them with the choice of their own assessors.

After a full and thorough consideration of the evidence, Mr. Rawle said:

These are facts; not founded on the testimony of a single witness, which is sufficient to convict a man in common cases; nor are they confined to the testimony of two witnesses, which is all the constitution requires; but they are corroborated by numerous witnesses, produced in order to remove every doubt from your minds as to the material facts of the crime. There is no case in our books more clear than the present; the evidence is so uniform that even the ingenuity and talents of the prisoner's counsel have not been able to contest one fact that has been related; indeed the whole is so fair, that the most incredulous must be satisfied of the accuracy of the charge, independent of the confession of the prisoner, which confirms the whole: it proves to a demonstration that his main object was nothing less than to prevent the execution of the laws which all men are bound to obey. Gentlemen, the counsel for the prisoner have endeavoured to diminish the force of that voluntary confession by telling you that no man can be convicted upon his own confession out of court, nor without the testimony of two witnesses; the same arguments have been used to nullify the expressions which we have produced proof that the prisoner frequently made use of, from which we evidently discover his intention. I allow that no man should be convicted for treason unless upon the testimony of two witnesses, or confession in open court; but when all the facts necessary to substantiate the crime are proved by two witnesses, the declarations of the prisoner, as well as his confession, may be produced as good evidence as to his intention, and this is not necessary to be proved by two witnesses; this tends to show the designs of his heart, which can only be known to his Creator and himself. These declarations should be known to the court in order to discover the intention with which the crime was perpetrated. In the Case of Lord Gordon, the words said to have been used by him in the lobby of the house were not rejected by the jury because it required two witnesses, but on account of the improbability of a declaration having been publicly used which no more than one individual could be produced to prove. We have proved by two witnesses that the overt act was committed by the prisoner, and have produced much corroborative testimony, in which we have not been confined to two, having heard it from twelve respectable witnesses. If we have succeeded to prove the intention, it is sufficient for the law, and if you believe the testimony, it indubitably substantiates the fact.

I shall now proceed to consider what is the law arising upon these facts, in going into the examination of which, I shall put out of the question two objections; one of them only has been produced, the other having barely been alluded to, rather than held up. A proclamation was issued by the president, on which Fries did then go to his home, whereupon it has been argued that no instance can be produced to prove a prosecution being commenced for acts committed prior to the reading of the riot act in England, if the mob thereupon dispersed, because they had complied with the proclamation. It is right in part: if the people do not disperse, the remaining mob are guilty of felony; but I ask the gentleman has the defence been at all set up on the ground of compliance with the proclamation? In the riot at Drury Lane Theatre by the footmen, and that which was held up in which the Earl of Essex and others were engaged, many of the rioters did disperse in consequence of the riot act being read, and yet were afterward punished for the enormities they committed while they were there. Alike trivial is the objection respecting the undue appointment of assessors. It is sufficient that such a person acts as commissioner or assessor; if he usurps that power, the law has provided a remedy by other means than the dangerous one of an insurrection to know merely whether A, B or C is regularly appointed to office. There are legal modes of application to ascertain the fact; there is the whole board of commissioners, or even a higher power may be applied to, to ascertain the authority, and no virtuous, honest citizen would think of opposition on that account. We do not think it necessary to trouble the court, since it was fully in the power of the prisoner's counsel to have brought the commissioners under this

act before them; but not having availed themselves of it, nor pressed it home to your notice, gentlemen, why was such a scarecrow insinuated, but to mislead you? There can be no doubt of the legality of those commissioners; if there was, it would not alleviate the crime of rebellion. But that was never used, neither by the prisoner himself, nor any of the insurgents, as a ground for the rebellion; it was not even a colour for it, nor does it appear that the insurgents ever doubted in the smallest degree, the legality of the appointments; their declarations were repeatedly, "No assessors shall act in the township, nor shall any assessments be made." No doubt was ever made of the powers used by the officers, and therefore the opposition to the law is alone to be considered.

Having disposed of those two points, I wish now to impress upon your minds a most solemn conviction, to wit: That the law under which the prisoner at the bar stands indicted, without being in the least doubtful, ambiguous, obscure, or perplexing, is well defined in, and composes a part of, the constitution of the United States (article 3, § 3). It is certainly momentous that you should be fully satisfied of the true meaning of that part under which the present crime is placed, to wit: levying war against the United States. I would premise that the indictment is worded precisely in the usual form, and that the only question now is, what is that levying war with which the prisoner is charged? To ascertain what is levying war, it is necessary for us only to consider what is the nature of civil and political society in the United States. The government is the organ which the people collectively have thought it their duty and interest to establish for their mutual safety—their will, publicly expressed in the laws, is the legitimate will of the majority of the people; all our laws are the acts of this majority; and it is a radical principle which will not be controverted, that the will of the majority is always binding upon the minority, and should be acquiesced in quietly by them, whether the administration of that government be in the hands of one person, or of many; those, therefore, who do not choose to continue in that society, ought to withdraw quietly from it, rather than disturb the quiet of the whole. Allegiance is a quiet submission and acquiescence to the supreme power. In monarchical governments it is placed in the king; but the citizens of America know of no allegiance but to the laws, for they alone are the binding principle by which society at large is kept in domestic peace and security. If, therefore, deviating from this allegiance to the laws, measures are taken to disturb the public peace by a resistance of the laws, accompanied by force of arms, or by the intimidation of numbers sufficient for the purpose, and it be applicable only to a grievance of a public or general, and not of a particular or private interest, such resistance then becomes the crime of treason, and particularly so if the views are to bring about the suspension or repeal of any of the laws; for there is no particular kind of law liable to exception; it is treason, because it is an attempt to overturn the fundamental principles of society, by endeavouring to impose into the system the will of a minority which has no right to be there; it is creating a new agency, a new species of legislature, and eventually dissolving the powers legally ordained. This definition may apply as well to any one law as to all the laws, for each is equally stamped with public approbation, and to none particularly is sanctity attached, all proceeding from one power, those who undertake to resist any one, may with equal propriety resist the whole, and treason appears to me to be the inevitable inference; otherwise it would be impossible to ascertain the limits at which this dangerous licentious conduct must stop, we should be at once thrown back into a state of natural society, which God prevent. I ask the gentlemen who argued for this distinction, to point out to me which law may be resisted with impunity! If one may be, the evil principle will go on to another and another, and where will it stop?

I have no occasion again to recur to the authorities we have produced, which the gentlemen pass over as the acts of bad times, corrupt judges, a profligate court, &c. The counsel, with all their learning and industry, seem to be satisfied with this general discharge of our authorities; but whatever might have been the baseness of the attorney-generals of those times, the meanness of the judges, the profligacy of the court, or the merits of the prisoner, we stand upon broad, established and general ground, which is not pretended to be obligatory upon us merely because it has heretofore been decided, nor is it obligatory in England upon that account, although you have been so told, but we go upon it, because it is right. That Sir Walter Raleigh was grossly abused by Sir Edward Coke, is notorious; it was the bad practices of those times; but this reference more regards the proceedings on trials, than the decisions; the decisions uniformly were, that usurpation of public authority in a certain manner amounted to treason. What! shall a man be permitted to attack the government by piecemeal? to take out a plank here and a plank there, till our political ship sinks, and such conduct not be called a treasonable division of the government! With respect to the authorities wherein it was stated to be necessary that the design should be to pull down meeting-houses, brothels, &c., generally, in order to constitute high treason, it must be observable that it was the assumption of the legal powers which constituted the crime; to pull down meeting-houses as such, was interfering with the toleration granted by government, and therefore treasonable. With respect to bawdy-houses, government, and not individuals, have a right to correct them, and

if individuals pretended to correct the evil, they were attainted of high treason.

We are told that no case is to be found in which a mere rescue is called treason. Hale, P. C. 133, in my opinion, is an authority in point. Bethlehem was the prison of the United States under the marshal; there the marshal held several persons in custody; and levying war, or attempting by force or intimidation to deliver those prisoners out of his custody, is certainly treason. Here we stand upon settled ground, we say, and I appeal, gentlemen, to your recollection, that there was no particular view to relieve any particular person, but that the words were "Shankwyler and others;" the claim was general, and the object was general—the repeal of the law was that object, and these were the means used to obtain it. This is declared to be treason even by that great and virtuous man who is held up to your notice as guarding us to beware of introducing more constructive treasons: Sir Matthew Hale, whose very name carried authority at the period of 1668, and with him all the judges, upon mature deliberation, have declared this to be sound law. As burglary, arson and murder may be made the means of treason, so may rescue; treason must have some means; sometimes the most atrocious, sometimes the means may be newly invented; but because newly invented, it cannot lessen the crime. With respect to the murder of Sir Theodosius Boughton by Captain Donnelan, in England, which was merely by a draught of laurel water, (which in that country is poison,)—a new invention for murder—the counsel might have argued against the conviction, because no former case had occurred, as well as that the innocence of this rescue should be held up, because new. But there was no such thing. A strong and important part of the combination was actually carried into effect, and it was not absolutely necessary to prove the rescue in order to prove the treason; it has been evidently shown to you in the transactions at Quaker town, that the rescue was only a part, and the termination of the general plan so far as it proceeded. I have no need to take up more authorities to prove that this is treason; it was so before the birth of our constitution; this principle was coeval with the reign of Edward III. in 1340. I take it to be a true and incontrovertible principle, that when we find an act on which previous decisions have been made, those decisions have been acted upon, and we should think proper to pass that act by ingrafting it into, and making it a part of our constitution, those decisions are of course adopted as our direction, whereby we are to understand the applications of that act. I would barely observe, that while those gentlemen are telling us that we are not to have recourse to those volumes of laws, (which we ought all to be acquainted with, as volumes of science, explanatory of the code by which we are bound,) they themselves resort to the same species of authority, to endeavour to prove that treason under the act of Edward III. is not treason in America. We have heard much about constructive and interpretative treason, and constructive levying of war. Agreeably to the form of government in England, the king is recognized as king in two capacities, one in his natural, as king, and one in his political, as sovereign: now, when that part of treason called compassing the king's death is mentioned, it refers to his natural capacity; but when of levying war against the king, it refers to his political capacity, and it was therefore necessary to show the distinction between different species of treason; this latter is termed constructive treason; but from the variety of its modes of introduction, cannot be so well defined; but its existence is necessary, in order to support society and preserve it secure: this is what is termed levying of war; it may consist in opposition to the king's forces, or by threats or force attempting to compel the king to remove his ministers or alter established laws. If you expunge what is direct levying of war, there can no such thing as treason be found; either the law is wrong, or the arguments used on the other side. Gentlemen, the law is established, but the arguments vanish like vapour before the morning sun; what, then, in England is called constructive levying of war, in this country must be called direct levying of war. The framers of our constitution were as learned and as wise as any gentleman now at the bar; they certainly saw that this was the only kind of direct levying of war that could exist in this country, and therefore if they had not intended that what was called constructive in England should constitute what they called "levying of war against the United States," they would not have introduced the crime at all: this is an absurdity they never would have been guilty of.

The learned gentleman admits that resistance against one particular law may be termed constructive treason, and may be the crime of treason here: he says that resistance to the militia law would be a restraint upon the principal dependence of the government, and therefore treason; gentlemen try our arguments by this test, and see whether resistance on the present occasion is not equally so. I ask you what is to become of the militia, the standing army, the eventual army, or the civil power itself, if you are unable to raise revenue? Who will fight, who will transact your civil concerns, if they are not paid? If by opposing revenue laws the government itself as well as the army is fundamentally undermined, is it not at least as much treason as though the militia law alone were more openly (but not more effectually) attacked? Nothing is so much entitled to respect and submission as laws which are the direct means of keeping society together. At the present time, when the feudal system is no more, but from necessity subsistence must be obtained

from employment and labour, the defence and preservation of the country must come from the revenue, and to destroy that is to give a mortal wound to the government itself.

Mr. Rawle then went into a review of some of the circumstances, alluded to by the opposite counsel, which characterize the insurrection, and the trials thereupon in 1795, which he insisted, though those gentlemen would not allow it, were very similar in circumstances to the unhappy affair now before the court, in which he drew the following parity between the cases: In 1794, the disturbance was to prevent the execution of one law—the excise law: In 1799, the house and land-tax laws. In 1794, four counties were engaged in opposition. In 1799, but three: Northampton, Bucks, and Montgomery. In 1794, the excise officers were attacked and prevented executing their duty. In 1799, the assessors were the same. In 1794, the insurgents collected into an army, in battle array, displaying their ensigns of triumph, with numbers sufficient to procure their object; say, 6000 men in Braddock's field. The object of 1799 was to do it in a similar manner, and they actually did, by their military appearance and boasts of much larger increase, impress a general opinion of their power sufficient to accomplish their purpose. In 1794, the insurgents made public declarations that the excise law should never be executed. In 1799, were not declarations of the same nature made by these insurgents?—that other counties, and even other states, would support them, and that it should never be done? The object of 1794 was to obtain a repeal of a law—the excise law. In 1799, it was the same, so far as related to them—the house and direct tax. In 1794, the excise officers were compelled to promise that they would not execute the law in that part of the country. In 1799, the same promise is exacted, and obtained respecting Lower Milford and other parts. There was some difference, it is true, as the gentleman stated, some of the officers at that time being banished from their houses, on pain of death. It was farther argued, that there was this striking distinction—that General Neville's house might be considered as a castle of the United States, because it was an office of excise; but the analogy still holds good; it was General Neville's dwelling-house, however, that was attacked; the attack was made only because he was an officer employed in the superintendence of a tax they disliked: Mr. Levering's tavern at Bethlehem was made the prison of the United States, and there was an executive officer of the United States; it was as much so as any other prison in the Union: this was the castle, the fortress of the United States, to protect which the marshal had assembled his posse comitatus, provided with weapons of defence. I consider this, therefore, a more violent breach of the law than the attack upon General Neville's house, so far as it went,—admitting that no guns were fired, nor lives lost, nor was any house burnt, otherwise, so far as it went, the case was rather stronger than the former. Happy is it for the prisoners that the scene of riot was not farther from the seat of government! if it had been more remote from the power of government, we cannot calculate upon the consequences, or increase of revolt and excess which would have been evinced. I will not pretend to anticipate them, for I wish not to inflame my own mind by the sad calculation, nor the minds of the jury; I only wish the facts to appear in their native colours.

Why, then, can we entertain a doubt, viewing all these circumstances, that the prisoner is guilty of treason? There can be none. We are told that the legislature have passed a law, entitled the sedition act, which shows the offence of the prisoner; and that the opinion of the legislature was to bring under this law the constitutional definition of treason, making it a misdemeanour! To me, of all the weak arguments which have been brought in behalf of the prisoner, this is the weakest. This law, which has been cried up from one end of the continent to the other by some persons as unconstitutional, is now to be brought into court to explain away what the constitution positively defines to be treason. If this ever had been the intention of the legislature, there certainly would have been something like treason, something like levying of war, introduced into that bill, but we find no such thing; the words do not at all occur in it, and that it is not intended, I think is clear. Sedition and treason are two distinct crimes, and two distinct punishments are enacted to meet them. The description of crime in the sedition act, is—those who combine with intent to impede the operation of the law, and those who intend to raise an insurrection: these are to be considered as guilty of a high misdemeanour. Now, those who conspire to commit treason are not considered guilty of treason; the treason must have been carried into effect. It cannot be treason for a man to counsel, advise, or attempt to procure insurrection, with intent to impede the operation of any law of the United States; but this is declared to be a misdemeanour, whether executed or not. Besides, the word "treasonable" is not inserted in the sedition law: thus, if a man be indicted for taking the property of another, unless the word "feloniously" is introduced, he is not liable to the charge. So in this case, the act must be traitorously done, or it is not treason. To show the absurdity of this doctrine, we need only for a minute suppose, that in the commission of any of the crimes specified in the sedition act, lives should be lost, houses burnt, &c. The laws of the United States have previously declared, that such offenders should be punished with death, and surely it ought to be carried into execution—not be mitigated by a future law to the mere penalty of five

thousand dollars, and five years imprisonment. If this was the intention of the legislature, might it not, at least, be expected that they would have declared so in the act; but they have manifested no such intention in that, nor in the present instance, with respect to which, had they done it, they would have overleaped their constitutional powers; for the constitution is an ark, into which the legislature itself dare not place its feet; if they were to do it, the judiciary have the power, and it is their duty to bring them back again, and say, "You have gone too far." They can as much restrain an unconstitutional act, as congress can make a constitutional act. This constitution gave congress the power to declare the punishment that should be inflicted on what it had defined to be treason. Congress had nothing to do with the crime, and if they have declared it, as the gentleman supposes, they have done it without authority, and it can be of no avail whatever. But no—they have rather, in the act alluded to, declared what should not be considered treason, or removed doubts upon that head. This being the case, the same opinion which operated on the judges in 1795, is still in force; because no legislative act has intervened to change it. Certain it is, that congress did not intend to enact an unconstitutional punishment for treason; but if they had intended it, they have not a right to do it, nor have they done it.

Now, gentlemen, whether these things are as we have represented, or not, is for you to judge, and decide upon your information; if you are satisfied that the prisoner at the bar was engaged in the affair at Bethlehem, and that affair was connected with your previous arrangements, you must convict him: otherwise, you must not. We consider, and think the evidence must prove to you, that all are parts of the same whole, were begun long before the 7th of March; and that they partly existed in Northampton and partly in Bucks counties. It must be upon a full conviction in your minds that the treason was committed by him in Northampton county, that you can convict the prisoner; and if you have not that full conviction, I firmly hope you will acquit him; if you have, you are bound to pronounce him guilty.

PETERS, District Judge (charging jury). Gentlemen of the Jury—As this case is important, both in its principles and consequences, I think it my duty to give my opinion, formed with as much deliberation as the intervals of this lengthy trial would permit, on the most prominent points of law which have been made in this cause. I have condensed my sentiments into as short a compass as possible. I shall leave remarks on the evidence, and more enlarged observations on the law, to the presiding judge, who will deliver to you the charge of the court. At his request, I state my individual opinion, though I do not always deem it necessary, when there is a unanimity of sentiment in the court.

1. It is treason "in levying war against the United States" for persons who have none but a common interest with their fellow-citizens, to oppose or prevent, by force, numbers or intimidation, a public and general law of the United States, with intent to prevent its operation, or compel its repeal. Force is necessary to complete the crime; but the quantum of force is immaterial. This point was determined by this court on a former occasion, which was, though not in all circumstances, yet in principle and object, very analogous to the subject of our present inquiries. I hold myself bound by that decision, which, on due consideration, I think legal and sound. I do not conceive it to be overshadowed, or rendered null, by any legislative construction contained in any subsequent act of congress. The law, though established by legislative acts, or settled by judicial decisions, may be altered by congress, by express words, in laws consistent with the constitution. But a mere legislative construction, drawn from any act by intendment, ought not to repeal positive laws, or annul judicial decisions. The judiciary have the duty assigned to them of interpreting, declaring and explaining—the legislature that of making, or altering, or repealing laws. But the decision of a question on the constitutionality of a law is vested in the judiciary department. I consider the decisions in the cases of Vigol [Case No. 16,621] and Mitchell [Id. 15,788] in full force, and founded on true principles of law. The authorities from British precedents and adjudications are used as guides in our decisions. I will not enter into a discussion whether we are bound to follow them; because they are precedents,—or because we think them reasonable and just. If numbers and force can render one law ineffectual, which is tantamount to its repeal, the whole system of laws may be destroyed in detail. All laws will at last yield to the violence of the seditious and discontented. Although but one law be immediately assailed, yet the treasonable design is completed, and the generality of intent designated, by a part assuming the government of the whole. And thus, by trampling on the legal powers of the constituted authorities, the rights of all are invaded by the force and violence of a few. In this case, too, there is a direct outrage on the judiciary act, with intent to defeat, by force and intimidation, the execution of a revenue law, enacted under clear and express constitutional authority. A deadly blow is aimed at the government, when its fiscal arrangements are forcibly destroyed, distracted and impeded; for on its revenues its very existence depends.

2. Though punishments are designated, by particular laws, for certain inferior crimes, which, if prosecuted as substantive offences, and the sole object of the prosecution, are exclusively liable to the penalties directed by those laws, yet, when committed with trea-

sonable ingredients, these crimes become only circumstances or overt acts. The intent is the gist of the inquiry in a charge of treason; and is the great and leading object in trials for this crime. The description of crimes, contained in the act commonly called the sedition act [1 Stat. 596], lose their character, and become but component parts of the greater crime, or evidences of treason, when the treasonable intent and overt act are proved. So it is with rescue of prisoners; which, in the present case, was not an independent offence, but an overt act of the treason. These were crimes—misdemeanours—at common law; and might have been punished by fine and imprisonment when substantive independent offences. But, when committed with treasonable intent, they are merged in the treason, of which sedition, conspiracy and combination are always the harbingers. I do not think that the acts relating either to sedition or rescue have altered the principle, though they have defined and bounded the punishments. The law, as to treason, is the same now as if those offences were still punishable at common law. The sedition act cannot constitutionally alter the description or the crime of treason, to which the combination and conspiracy to perpetrate this offence, with force and numbers, are essential attributes. Numbers must combine and conspire to levy war. But if these indispensable qualities of the crime are, by the legislature, declared only misdemeanours, and separated from the treasonable act, the legislature nullify the description of treason contained in the constitution; and so indirectly alter and destroy, or make inefficient, this part of that instrument. The congress neither possess, nor did they intend to exercise, any such power. They could not (nor did they so intend) place the crime declared in the constitution to be treason, among the inferior class of offences, by describing some of its essential qualities in the sedition act, and prescribing punishments, when they solely constitute substantive and independent offences. Congress can only (as they have done) prescribe the punishment for treason, regulate the trial, and direct the mode in which that punishment is to be executed.

3. However indisputably requisite it may be to prove, by two witnesses, the overt act for which the prisoner at the bar stands indicted, yet evidence may be given of other circumstances, or even of other overt acts, connected with that on which the indictment is grounded, and occurring or committed in any other part of the district than the place mentioned. Although the prisoner be not on his trial, nor is he now punishable, for any other than the overt act laid, other overt acts and other circumstances, parts of the general design, may nevertheless be proved, to show the quo animo—the intent—with which the act laid was committed. Indeed, the treason would be complete, by the conspiracy, in any part of the district, to commit the treasonable act at Bethlehem, if any had, in consequence of the conspiracy, marched or committed any overt act for the purpose, though the actual rescue had not taken place. So we thought in the Cases of the Western Insurgents, that the treason, concocted at Couche's Fort, would have been complete, if any had only marched to commit the crime; though the design had not arrived to the disgraceful catastrophe it finally attained. Indisputable authorities might be produced to support this position.

4. The confession of the prisoner may be given in evidence as corroboratory proof of the intent, or quo animo. But, although proved by two witnesses, being made out of court, it is not of itself sufficient to convict. Two witnesses are necessary to prove the overt act. But the intent may be proved by one witness, collected from circumstances, or even by a single fact.

5. The doctrine of constructive treason has produced much real mischief in another country; and it has been, for an age, the subject of discussions, among lawyers, other public speakers, and political writers. The greater part of the objections to it are totally irrelevant here.—The subject of them is unknown, and may it ever remain so, in this country. I mean the compassing the death of the king. It will be found that the British judges, since the days of political darkness and bigotry have passed away, are to be found among the most able and decided opposers of the abuses of this doctrine. They do not follow decisions and precedents rooted in bad times, because they find them in their law books. On the contrary, on a fair investigation, it will be proved, that those contrary to justice, reason, and law are rejected. It is not fair and sound reasoning to argue against the necessary and indispensable use of construction, from the abuses it has produced. What is there among the best of human (and I wish I could not add divine) systems which has not been perverted and abused? That there must be some defined sense and interpretative exposition made of the terms "levying war," and when, and in what circumstances, it is levied "against the United States," cannot be denied. The able counsel, in this case, who has said the most on this subject, and traveled the farthest into the gloomy, dark, and tyrannical periods of the British history and jurisprudence, for melancholy and disgusting proofs of atrocious abuses, and even crimes, committed under colour of law, has, unavoidably, himself furnished also proofs of the necessity we are under of some constructive or interpretative expositions. He, at first, confined these expositions to three cases. Now, if there is a necessity of one, it shows that, without supplementary interpretation, the law would be a mere dead letter. Aware of the dangerous lengths to which the abuses of construction have been carried, courts and juries should be cautious

in their decisions; but not so much alarmed about abuses as to restrain from the proper and necessary use of interpretation. I do not then hesitate to say, that the position we have found established, to wit, that opposition, by force and numbers, or intimidation with intent to defeat, delay, or prevent the execution of a general law of the United States, or to procure, or with a hope of procuring, by force and numbers, or intimidation, its repeal or new execution, is treason by levying war against the United States. And it does not appear to me to be what is commonly called constructive, but open and direct treason, in levying war against the United States, within the plain and evident meaning and intent of the constitution.

6. As to the objections, founded on want of proof of regular appointments under, and of the proper execution of the law called the house-tax law, I do not see that they apply. If the prosecution was definitely for opposing one or more officer or officers of this tax law, the proof might be more rigidly required. But, as all the necessary use made of these collateral and subordinate circumstances, relative to the tax law officers, is for the purpose of showing the quo animo or intent with which the treason alleged was committed, I consider them as not relevant in this cause. It is even enough in criminal prosecutions, more directly aimed at the specific offence of opposing an officer, that he was an officer de facto.

7. As to the disarming and confining the two videttes, or advance of the armed insurgents, by the marshal at Bethlehem, I think him legally as well as prudentially justified in his conduct. Even a constable has a right to restrain and confine, under strong circumstances of suspicion, persons whose conduct or appearance evidence an intention to commit illegal and violent acts. Much more so was the marshal (having notice of an intended rescue of his prisoners), justifiable in seizing and disarming two of the armed body, against whom existing circumstances raised strong and evident suspicion. But I think this has been made more important than it really is. Because the release of these men was not the object of, or even known to, the prisoner at the bar and his party, when they commenced their treasonable march for the release of the prisoners in the marshal's custody at Bethlehem.

8. The president's proclamation should have been pleaded as a pardon, if it was intended to be relied on as such. This not having been done, it is not legally before us. But, since it has been mentioned, I think it necessary to declare it as my opinion, that it does not operate as a pardon to precedent offences. It is directed by law as a step, preparatory to applying an armed force against those supposed to have committed crimes, and embodied for unlawful purposes. It is a humane warning, calculated to prevent the effusion of blood. Its allegations of facts, or its injunctions, have no operation in the trial of the prisoner at the bar. Whether the prisoner is or is not guilty of the treason laid in the indictment, in the manner and form therein set forth, it is your province to determine. It is the duty of the court to declare the law; though both facts and law, which, I fear, are too plain to admit a reasonable doubt, are subjects for your consideration. We must all obey our public duty, whatever may be our private feelings. Mercy is not deposited in our hands. It is entirely within the constitutional authority of another department.

IREDELL, Circuit Justice. Gentlemen of the Jury: I am persuaded that every person who has attended to the present very awful and important case upon which you are now called to decide, must be impressed with a just respect for the patience and attention you have shown, through the long period which unfortunately has been taken up; but this, though much personal inconvenience must have been experienced, not only by you, but by all concerned, is unavoidable; none of us can repent that, in a case of such moment as the present, the time which is absolutely necessary for a complete investigation has been employed. Gentlemen, it is with great satisfaction to me, on the present occasion, that my ideas on the points of law directing our conclusions, upon which it is the duty of the court to give opinion, absolutely coincide with that of the respectable judge with whom I have the honour to sit. Before I state to you any observation with regard to the facts which have appeared from the evidence, I shall previously deliver my opinion upon some points of law, so far as they are unconnected with the evidence; those which are, I shall speak to in their proper place.

This, gentlemen of the jury, is an indictment against the prisoner at the bar, for levying war against the United States; the first inquiry, therefore, is, what is meant by these words of our constitution—"Treason against the United States shall consist only in levying war against them," &c. These words are repeated verbatim, I believe, in an act of congress, called the judiciary act, defining the punishment of the crime of treason, pursuant to constitutional authority. This crime being defined in the constitution of our country, becomes the supreme law, and can only be altered by the means therein pointed out, and not by any act of the legislature; and, therefore, the repetition of the words of the constitution in the judiciary act is quite unnecessary, as the only power left to congress over this crime was, to describe the punishment: the same act, in another part, makes provision for the method of trial. Agreeably to their power, congress have described the punishment, and thereby declared the crime to be capital. It is clear, therefore, that, as the constitution

has defined the crime, the congress, drawing its sole authority from that constitution, cannot change it in any manner, particularly as it is so declared; yet the counsel for the prisoner say, that the legislature have given it a legislative interpretation, and that their interpretation is binding on this court. They say that congress did not mean to include the offence charged upon the prisoner at the bar, under the definition of levying war; because the sedition act describes a similar offence, and because a rescue is provided for in another act, the punishment extending no further than fine and imprisonment. Several answers may be given to remove these objections:

First, if congress had intended to interpret these words of the constitution by any subsequent act, they had no kind of authority so to do. The whole judicial power of the government is vested in the judges of the United States, in the manner the constitution describes; to them alone it belongs to explain the law and constitution; and congress have no more right nor authority over the judicial expositions of those acts, than this court has to make a law to bind them. If this was not an article of the constitution, but a mere act of congress, they could not interpret the meaning of that act while it was in force, but they may alter, amend, or introduce explanatory sections to it. In this we differ from the practice of England, from whence we received our jurisprudential system in general; for they having no constitution to bind them, the parliament have an unlimited power to pass any act of whatever nature they please; and they, consequently, cannot infringe upon the constitution. The very treason statute of Edward III. itself contains a provision giving parliament an authority to enact laws thereupon, in these words: "Because other like cases of treason may happen in time to come, which cannot be thought or declared at present, it is thought that, if any such does happen, the judges should not try them without first going to the king and parliament, where it ought to be judged treason, or otherwise felony." On this point, Sir Matthew Hale was very careful, lest constructive treason should be introduced. This gentlemen, you will observe, only relates to any case not specified in that act. But, on the occasion now before you, it is not attempted, by any construction or interpretation, that anything should be denominated treason, that is not precisely and plainly within the constitution. No treason can be committed except war has actually been levied against the United States. But farther, nothing is more clear to me than that congress did not intend, in any manner whatever, to innovate on the constitutional definition of treason, because they have repeated the words, I think, verbatim in their own act; with regard to the rescue and obstruction of process, which are mentioned in the act alluded to, it will not be pretended, by any man, that every rescue, or every obstruction of an officer in serving process, or even both together, amounts to high treason, or else to no crime at all: No; the crimes are differently specified, and rescue or obstruction of process may be committed without that high charge. This, I think, was sufficiently explained by the counsel for the United States. Suppose one thousand men rise in arms, avowedly to destroy the government, and in the execution of their design commit murder, burn houses, purloin property, &c., does it make the design less evident, because they committed other atrocious crimes in order to obtain their main views? No; it was to destroy the government, and that crime would be charged upon them, being the higher crime, which the concomitant ones only tended to aggravate, as they were committed, not for the purpose of committing murder, but to intimidate the government, and accelerate their object. With regard to what is stated in the sedition act, combinations and conspiracies to raise an insurrection—these, gentlemen, may be committed without the parties being guilty of treason: men may combine and conspire for a private purpose; possibly to injure an individual, merely to gratify some private motive: if so, they come within that act, and that only. It is only when they carry their projects farther; when they aim at the destruction of the government, that the nature of the offence attains the aspect of, and essentially becomes, treason; and, therefore, it is necessary to prove the intention; otherwise there can be no treason. There can be no levying war without a number of persons unite, and that number cannot levy war without some previous intention; and, therefore, under this law, there being no previous intention defined, but merely an unlawful combination, the act termed treason in the constitution, it is plain, is not intended, nor is it of the nature of treason.

With regard to the authority from which the opinion of this court is founded, and of which you have heard much already, I shall trouble you with a very few observations. When this constitution was made, it was in the power of those who formed it either to define treason or not, or, if they thought proper to do so, to do it in what manner they chose, in which they might have followed the example of the country whence their ancestors came, to which they were accustomed, and in which they were most experienced in their own several states, where the crime of levying war was denominated treason. I believe this has been generally followed through the states: in some I know it has. This term of levying war is an English expression, borrowed from the statute of Edward III.; but, notwithstanding this, the principal provisions respecting treason are taken from an act of the British parliament in the reign of Wil-

liam III., which is principally calculated to guard the independence of the court against the power of the crown, and the prisoner against his prosecutors. Now, I must confess, as these able and learned framers of our constitution borrowed the act, in terms, from the British statute alone, an authority with which they were familiar, that they certainly at least meant that the English authorities and definition of those terms should be much respected. Those gentlemen knew as well as any counsel at the bar, the danger of constructive treasons: they knew how to guard themselves against the bad times of English history, and were equally acquainted with the better and more modern decisions. Would it not have been natural for men so able, so wise, so cautious, of their liberties, had they entertained a doubt of their insufficiency, to have introduced some new guards, some new interpretations, and not to have left us in later times in the dark, exposed to so much danger as the gentlemen of the bar apprehend? Gentlemen who know anything of that country, know that arbitrary times have existed, and also that a number of decisions have taken place since that period. I do not believe that any judge since the revolution in England has ever considered that he was bound to follow every arbitrary example of the English courts, or the crown laws which had taken place in dark ages. Can any man suppose that, if a man was to be prosecuted for either of the crimes referred to by one gentleman (Mr. Lewis), so absurd a prosecution would be for a moment indulged by the judges of this age? No, they would highly resent such an insult offered to an enlightened court. Such instances have ever been reprobated as much by the courts, as by the gentleman who quoted them.

With respect to this doctrine of precedent, I will take the liberty of submitting to you a case of a civil nature; suppose it a case of great moment; suppose in this court, or any other from which an appeal could not be had, a solemn decision had been had respecting a title to a piece of land; upon this adjudication a gentleman wishes to purchase this land; taking this title to a lawyer, he is confirmed in the opinion that the title is good, and that he is safe because of the decision of the court. On the faith of this decision alone the man lays his money out, and therefore it must be important how precedents are formed. If precedent is so important in a civil case, how much more so must it be in one like the present. If a case is new altogether, and no precedent can be found, it ought to be much in favour of the prisoner, but if a solemn declaration has once been made that such and such facts constitute a certain crime, that declaration ought to be abode by, and for this plain reason; every man ought to have an opportunity to know the laws of his country (if he will take pains to inform himself) lest he should involve himself in guilt ignorantly. The propriety and necessity of this must be manifest, and if so, it is as necessary that the proceedings of our courts should be uniform, otherwise there can be no dependence upon their judgment. If, therefore, a point has been settled in a certain way, it is enough to direct any court to settle a future case of a similar kind in the same way, because nothing can be more unfortunate than when courts of justice deviate in decisions on the same evidence.

This leads me, gentlemen, to point out to you a consideration of great magnitude: this is not the first time, as I have been informed, that these questions have been discussed in the court. During the trials of the persons concerned in the Western insurrection, they were discussed, and I have no doubt with great ability on both sides. Judges Paterson and Peters were then on the bench, and after all the display of splendid talent used in argument on both sides, and all the authorities produced that men were capable of, from the best judgment that could be formed, the court, without hesitation, declared itself in favour of the prosecution. As I do not differ from that decision, my opinion is, that the same declaration ought to be made on the points of law at this time. Vide U. S. v. Mitchell [Case No. 15,788].

It is, however, objected, that after this solemn decision had taken place, the legislature, by the sedition act, settled the matter differently, and that we are bound by that act. This has been answered, so as to remove it beyond all doubt, and concessions were made at the bar sufficient to remove the seriousness of this objection out of the way. It was acknowledged that, if it had been an opposition to the militia act, then the crime would have been treason; or if it had been done to compel the repeal of an act, it would have been treason. For my part, I cannot perceive what kind of sanctity there is in the militia act more than any other, that should make my opposition to that act particularly serious: all the acts of congress flow from the same authority, and all tend to the same end, to wit, the happiness and security of the community: individuals may differ in their views of the magnitude of them; some may think the militia law, some the revenue law, some another, but the legislature have thought all these laws equally necessary, and they having thought so, it is our duty to obey them all alike. But, if the opposition to the militia law, by force of arms, is to have this extraordinary sanctity, because it strikes immediately at the existence of the government, then I should be glad to know what can be said about a revenue law? Government cannot exist a day without revenue to support it! Farther: opposition by force to one law, is of the same nature as opposition to all the laws; the offence is levying war against the government; opposing, by force of arms, an act of congress, with a view of defeating

its efficacy, and thus defying the authority of the government, is equally the same in principle, if done in one instance, as it could be in many. In monarchical governments it will sometimes happen that a rebellion breaks out in an endeavour to destroy one monarch, and set another on the throne: in such a case the treason plainly and unequivocally displays itself, and there can be no doubt about it; but this cannot occur in a republican form of government: men are seldom found who will be guilty of such open treason, as to come forward, in the face of day, and declare their design to destroy the constitution or all the laws. No, if men of sense go to promote insurrection, whether they mean to destroy the government or not, they must be wicked; they go about their design by more insidious means; art will be used, and pains taken to promote a dislike to a certain law; this evil prejudice is encouraged until it becomes general among the people, and they become as ripe for insurrection as in the present case. Nor would the evil cease with the destruction of one law: they may declare they mean to stop at that one act, but having destroyed it, and finding their power above that of the government, is it not to be apprehended that they would destroy another and another, and so on to any number they disapprove of? If they would not be particular in one case, they would not in another. During the Western insurrection, the excise law was unpopular: in this case it is the house tax act; and if this is permited, it will be impossible to know where we can rest secure, nor how soon the government itself will fall a prey. This reason may account for the introduction into the English statute book, and our constitution, with the determination of the courts in both countries, of the principle that an attempt by force and violence to impede the operation of a single act, shall be treason, and under the description of levying war, as much as what shall at first appear more dangerous, since the effect may be the same.

There is another preliminary point, meriting a few observations, that is, with respect to the proclamation of the president. It was contended that, because that proclamation required the people to disperse, and commit no more crimes, it amounted to a pardon of all they did before. It is sufficient to observe here, that, had this objection been seriously made, a plea of pardon upon the ground of that proclamation must have been preferred, or it could not have been admitted. But the plea was not made, nor if it had, would it have been effectual, because, if this did amount to a pardon, it did so only on certain conditions; the attorney of the United States and the party are both allowed to show whether or not the prisoner has complied with the conditions of the pardon. It is possible, also, that the pardon has not been offered in such a manner as the constitution permits, in which case the attorney must be permitted to put in a demurrer. Of the force of these objections the court are to decide, and of course the plea must be referred to them. Again, this pardon might have been pleaded in due season. Of this the counsel for the prisoner were informed, and had time to consider, but they did not choose to avail themselves of it. But if it had been proposed, nothing is more clear to me than its insufficiency; for in my view, the proclamation contained no pardon at all. The circumstances which gave rise to, and the nature of the proclamation, ran thus: Certain information was received by the government of a disturbance having broken out in that part of the country, which baffled the power of civil authority, but as it is necessary to prevent any insurrection with as little trouble as possible, after inferior means have failed, the law provides that the president shall make proclamation, inviting and commanding such disturbers of the public peace to disperse in quietness to their homes by a certain time; this must be done before the military can be ordered out against them. This is in order to prevent more people joining the standard of rebellion afterwards, and to admonish others not to commit farther crimes; but there is not a word in the proclamation implying an offer of pardon for anything committed before. The riot act of England was cited in support of this doctrine, but there is no similarity in the two cases: that act says, a magistrate shall go to the mob, and endeavour to prevail upon them to disperse. If he cannot do it, he reads the act, and if they still continue combined, they are guilty of felony, but then this felony is a crime created merely by that act, but even that act does not intimate that they should be pardoned for crimes committed before the magistrate came, even if they do disperse. Instances to the contrary might be cited.

Having now, gentlemen of the jury, stated my opinion in the best manner in my power on the law, independent of the facts, or the particular application of that law to the prisoner at the bar, I shall, agreeably to my duty, state to you in the best manner I am capable of, the nature of the issue which you are now called upon to determine. It is an issue of an aspect the most awful and important that any juror can ever be called upon to determine. It is your duty to divest yourselves of all manner of prejudice and partiality one way or the other. Dismiss from your minds, as much as you can, all which you might have heard or thought on this case before you came into this court, and confine your opinions merely to the evidence which has been produced. No extraneous circumstances whatever ought to have the least weight with you in giving your verdict: you ought not, and I hope you will not, take into your consideration at all whether the safety of the United States re-

quires that the prisoner should suffer, on the one hand, or whether, on the other, it may be more agreeable to your feelings that he should be acquitted. It is solely your duty to say whether he is guilty of the crime charged to him or not. No man can conceive that the interest of any government can possibly make it requisite to sacrifice any innocent man; and I can rest perfectly satisfied, which I have no doubt you also are, that this government will not, and God forbid any considerations whatever should ever influence such an action. I do not think it necessary to go into a minute detail of all the evidence which has been produced; it would be only misspending time. The general scenes which passed at Bethlehem must be fully in your mind; these scenes are supported upon the evidence of twelve witnesses. But I think it my particular duty to bring to your recollection those parts of that transaction in which the prisoner at the bar was concerned, leaving the rest as much as possible out of view. On this occasion I must request the gentlemen of the bar, if in any instance I should err in stating the evidence, that they will correct me; but I shall endeavour to be accurate. (The judge here stated the prominent features of the evidence given by Messrs. Henry, John Barnet, William Barnet, Winters, Col. Nichols, Schlaugh, Horsefield, Eyerly, Toon and Mitchel, so far as related to the conduct of the prisoner at Bethlehem, which, he said, he thought proper to state first, because the offense charged in the indictment was said to have been committed at Bethlehem. Gentlemen, he continued, if you are not well satisfied that the overt act of treason was committed at Bethlehem, and that that overt act is supported by the evidence of two witnesses at least, you will not find the prisoner guilty.)

Now, gentlemen, is the proper time for me to state one or two points concerning the law of evidence, of which you have heard much from the bar. As I observed, there must be two at least to prove that the act of treason was committed at Bethlehem. It is the opinion of the counsel for the prisoner that you must be convinced, not only of the fact by two witnesses; not only that he was concerned in a certain act; but that you must have the evidence of two witnesses, at least, by evidence drawn from the same place, that it was done with a treasonable intention, before you can pay any attention to any other evidence whatever. The fact is that, when the overt act is proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went with a treasonable design, then the act of treason is conclusive. In this I am supported by a very respectable authority on crown law, Foster, in the Case of Deacon [Fost. Cr. Law, 246], from which it appears that it is enough, to prove that a rebellious assembly of armed men were there, and that the prisoner joined them. In order to prove to you fully the design with which the prisoner went to Bethlehem and joined in this great outrage, I shall select some of the evidence respecting those previous transactions; it is not necessary to state the whole. (The judge here read the evidence of James Chapman, John Rodrick, Cephas Childs, and William Thomas, respecting the conduct of Jacob Fries on the 5th of March, and respecting the meeting with Foulke and Rodrick near Singmaster's; and also the transactions of the 6th, at Quaker Town, which evidence, he said, so confirmed each other, that no doubt could be entertained.)

We now come to the confession of the prisoner, voluntarily made on his examination before Judge PETERS. Here is a point of law relied on by the prisoner's counsel—that no man should be convicted of treason but on the evidence of two witnesses, or upon confession in open court. This is the provision in England as well as here, and the meaning is, that no confession of the prisoner, independent of two witnesses, or without the facts have been established by two witnesses, should be sufficient to convict him: but if two witnesses have proved a fact, the confession of the party may be received by way of confirmation of what has before been sworn to. In former days in England, it was allowed that confession out of court, and the proof of the witnesses, should be sufficient to warrant a conviction; but happily our constitution would not admit it, if a hundred would swear to it: that danger is wisely avoided. Instances enough are in the recollection of the court, of a civil and criminal nature, where confessions have been received; but the jury are to judge from other evidence how far that is to be regarded. Evidence may sometimes be given which may be doubtful, and wants corroboration; you will judge whether that is or is not the case at present. But if the confession of the prisoner should go to confirm the evidence, if sworn to by two witnesses at least, it may be received, but unless it does go to corroborate other testimony, I do not think it admissible. You will consider whether any part of this confession has not before been proved by two witnesses: if it has, it goes to corroborate what they say; if it has not, you are to disregard it. I think there ought to be great caution in receiving, as evidence, a confession which any man makes himself, because it possibly might be obtained from him by artifice or intimidation: with respect to this confession, you have the testimony of my honourable colleague, Judge PETERS, that he gave the prisoner deliberate warning that he was not bound to convict himself, and that no intimidation was used. Whatever objections, then, there may be as to confession in general, it does not apply in this case, because it was

voluntarily given. The prisoner on his part introduced some witnesses, thinking they would be favourable to him: one of them appeared to be so in his testimony, which I shall endeavour to relate; the other three did not answer his expectation. (The judge related the evidence of John Jamieson.)

With regard to the point of law stated respecting the sufficiency of the warrants, the evidence to this fact shows the general disposition of that part of the country to resist the execution of the law, and prevent it by force or intimidation; our means of showing that, is their conduct towards the assessors. Those who were appointed to that office, so far as they had it in their power, showed a disposition to act as such. It is contended that their warrant ought to have been produced. With respect to the blank commission, which there was a suspicion was unlawfully filled up, there ought to have been the books produced; but it was not material. This indictment, it will be observed, is not for any resistance to the assessors, or obstruction of them in the discharge of their duty. I suppose it is not necessary to show that these officers were de facto engaged in the execution of the law; that they were considered as assessors; and that no doubt ever was entertained that they were properly authorized to be assessors. This doubt, if there was any, could be removed by reference to a very respectable authority. It was sufficient if the warrants, given under the seal of the commissioner, were produced to the court.

The honourable judge entered pretty largely into the examination of the objection respecting Mr. Foulke's appointment in the place of Mr. Clarke, which, he contended, was not material, since the warrant was filled and he acted under it.

With respect to another point of objection stated at the bar, that the marshal, in detaining the two men at Bethlehem, was liable to an action, he said that, under the circumstances of that period, he could not, because, under certain circumstances, he was warranted to call out the posse comitatus, i. e. the power of the county, to assist him, if he was likely to be overpowered: it could not be presumed that the circumstance did not empower and warrant him to call them out, and therefore we may conclude that danger was really to be apprehended, and those apprehensions must be heightened by the arrival of those two men in arms. In the opinion of Judge Henry, who was present, the danger was such as to justify the act of detention of those two men. Was it with a view of depriving these men of their liberty? No; but supposing them to have come with intent to assist in the rescue which they acknowledged they had heard was contemplated. Gentlemen, in looking to the law on this point, I do not think it is encroaching at all upon the liberty of any man to take him in custody. An officer in such an action must be at his peril, and could only be justified on the exigency of the circumstance: if he did it unnecessarily, a jury would teach him to take care how he sported with the liberties of his fellow-citizens; but supposing, from good evidence, that he was in danger of assault, if he waited the united force of the assailants, shall it be contended as unreasonable, that the marshal should take measures of self-defence while it was in his power, and detain what he might reasonably suppose a part of them? He surely acted the part of a prudent man, and was justifiable in the act. Before I dismiss this general subject, I think it an indispensable duty which I owe, to declare that, excepting the single instance, wherein I do perceive some impropriety of conduct, in the filling up the blank commission, what has been disclosed in the course of this examination of the conduct of the commissioners or assessors, has reflected on those officers the greatest honour: at the same time they acted with industry, fidelity, and firmness, in the discharge of that duty, they did all in their power to make it easy to the people, accommodating themselves to endeavour to give full satisfaction, undeceiving the deluded, and removing the errors which the people had fallen into. If the people still continued in ignorance and opposition, those gentlemen acquitted themselves of blame, and their conduct merited high praise.

As to the plea of ignorance, the law says ignorance shall excuse no man; otherwise, how could it be possible to prove whether a person knew the law or not? If ignorance could excuse a man for crimes, no crime would be brought to justice, or there must be, what is not to be expected, some self-evident proof of the guilt. A complete knowledge of the laws cannot be expected in every corner of our country; but thus much we may say, to remove this kind of excuse. If a man does not know when a law is passed, he knows how to obtain that information, and the law itself; for if he cannot come to Philadelphia, or some other town where they may be purchased by himself, he has opportunity of sending from time to time. But in the present case, any doubt could have been removed by application to the assessors, who were ever ready and willing to show the law, and therefore no plea of ignorance can possibly be set up.

Having spoken in commendation of the conduct of the commissioners and assessors, perhaps it is also my duty to say that the conduct of the marshal has been equally exemplary: he did everything in his power, by fair and honourable means, to avoid going to extremity, and as long as he had a hope of retaining his prisoners, he displayed a degree of courage which few men would do. He even offered to expose his life to this armed mob, by proceeding with the prisoners to Philadelphia, which he would have done but for the advice of three or four gen-

tlemen with him, who thought it madness to proceed. He accordingly desisted, and in the event delivered up the prisoners.

This trial has lasted so many days, that we must be all very much fatigued; and I declare, gentlemen, I have scarce had power to examine the various points with minute attention, much less to prepare so proper a statement of them as I intended to have done. The fatigue I have felt many nights at going out of this court has prevented me doing it. Under these circumstances, I have no doubt of your excuse, which I shall the more readily meet, since your fatigue must also be very great.

Gentlemen of the Jury:—The occasion is undoubtedly the most awful and important that ever could arise in any country whatever: the great question for you to decide is, whether the prisoner has been guilty of levying war against the United States at Bethlehem, in the county of Northampton, as charged in the indictment, or not. In order to discover the nature of his conduct, you must examine into the motive with which he went to Bethlehem: it is necessary for you to examine the whole of his previous actions relating thereto: if it should appear to you that the prisoner formed a scheme, either on the way or at Bethlehem, by any kind of force, to obtain this object, then, in my opinion, you ought to declare him guilty of the charge laid in the indictment. On the contrary, if you think he had no public and evil motive in view, he is not guilty of the crime. Before I dismiss you, gentlemen, I would remind you of one consideration which must impress your minds. A great and important end of bringing persons guilty of public crimes to justice is to preserve inviolate the laws of our country. Men who commit crimes ought to be punished; otherwise no safety or security can be had. On the other hand, it is of consequence that no man's life shall be taken away unjustly. If a man is not guilty of a crime, he ought not to be punished for it; and it cannot be for the interest of the country to put a man to death for what he has not committed: therefore you are not to regard the consequences, but determine merely by the facts in a manner for which you will be answerable at a future day, as well as myself, for all the conduct of our lives, as well as for the verdict you now give.

Mr. Lewis stated a question to the court, whether the overt act laid in the indictment in a certain county, must not be proved to the satisfaction of the jury, both as to fact and intention, in the same county, or whether the overt act did not include both fact and intention. To which Judge Iredell replied, that he considered Foster's crown law as settling that point. When two witnesses are produced, which proves the overt act laid in the indictment, there might be then evidence drawn from other counties respecting the intention: this is the opinion of Judge Foster, and it is my opinion. But there is another thing: it goes to a point which is inadmissible; it is not for the court to say whether there was a treasonable intention or act as charged in the indictment; that is for the jury to determine; we have only to state the law—we therefore should have no right to give our opinion upon it. Again, if no evidence could regularly be admitted out of the county until both the fact and intention were established where the crime is laid, the consequence would be, that there ought to be some way of taking the opinion of the jury, whether they believed that the crime was committed at Bethlehem, before the court could proceed to extraneous testimony! This cannot be done; a jury must give verdict upon all the evidence collectively; if the evidence is admitted, then the jury is bound to respect the weight of it: the competency of that evidence is for the court to decide, but the jury must estimate its weight. The question for you to decide at this time, gentlemen of the jury, is, whether, upon the testimony of two witnesses, there is ground to believe the act was committed; and whether, from the prisoner's conduct at Bethlehem or elsewhere, it is proved to be with a treasonable intention.

Judge PETERS.—I think the overt act and the intention constitute the treason; for without the intention the treason is not complete. If a man goes for a private purpose, to gratify a private revenge, and not with a public or general view, it differs materially. The intention may possibly be gathered at the place where the act was committed, or it may not; if not, evidence is admissible to prove it elsewhere.

The jury then withdrew, and the court adjourned for about three hours, when they returned with the verdict guilty.[10]

Motion for a new trial of John Fries, for treason.

May 14.—Mr. Lewis informed the court that, the other day, in coming into court, he received a slight information, which he thought it his duty, as advocate for the prisoner, to make further inquiries into; but it was not till this morning that he had been able to procure the depositions of witnesses to prove a fact, on which he meant to ground a motion. He read the depositions to the court, which imported that John Rhoad, one of the jurymen on the trial of John Fries, had declared a prejudice against the prisoner after he was summoned as a juror on the trial. He now found that he could procure other affidavits to the same fact, on the ground of which he "moved a rule to show

[10] "This trial," says the reporter, "occupied the unremitted attention of the court and jury from April 30 until May 9, inclusive (nine days), during which time the jury never separated."

cause why there ought not to be a new trial." [11] He expressed himself aware of the lateness of the period, verdict having been given, but the impossibility of proving the fact earlier was a sufficient apology. He should forbear to enter into the merits of the motion at present. Rule was granted, and made returnable to-morrow morning.

Wednesday, May 15.—Mr. Dallas said it became his duty, as advocate for the prisoner, to lay before their honours the grounds on which they had moved for a new trial in the case of their unfortunate client, in which he was sensible some little violence must be offered to his feelings in whose behalf it was made, and particularly if judgment should at last be pronounced upon him: but whatever the event, it became their duty to prefer it; and he was certain that, upon examination into the facts, they must be justified in producing them, as the event must alter the decision which had taken place. He was satisfied that the court, without direct reference to authorities, would be inclined to listen to anything that could be offered upon good grounds in favour of life, or the chance of life. With this confidence, he relied on the favourable attention which would be paid by the court, and that the intervention of any trifling error in the proceeding, may not expose the defendant to the danger of an unfavourable decision. In making the motion, Mr. Lewis had laid before the court some affidavits in order to prove that one of the jurors, after he had been summoned to attend the trial, did declare that the man should be convicted: in addition to that circumstance, the following reasons should have been assigned in favour of the motion: First, that the marshal has, without any order or direction from the court or judges for that purpose, returned a greater number of jurors than he was by law authorized to do. Secondly, that he returned them from such parts of the district as he thought proper, and without the direction of the court or judges. Thirdly, that the trial ought to have been held in the county where the offence was committed, except manifest inconvenience should appear; and it does not appear from any part of the record of the court that any inconvenience did prevent it, for whatever were the acts of the court, they ought to have been placed on the record, which, not being done, is good ground for a motion.

Judge IREDELL did not think that the court were bound to assign a reason for their judgment on the record of their proceedings; besides, it was a high contempt at this time to call for the renewal of an argument whereon a solemn decisive opinion was delivered: he asked what part of the law required it: if it was at that time omitted, it was not in the power of the court to order it now; or if they did not order the reasons to be inserted, the mere decision on the face of the record was enough to make it authoritative.

Mr. Dallas then addressed the court in an argument of great length on the questions submitted by Mr. Lewis, protesting at the outset that there was no intention of offering a contempt to the court; and if the court would attend, they would be convinced there was not. He next made a few observations on the conduct of the juror, which, he said, was not merely an expression of opinion, but a previous determination, and an expression of fear that the prisoner should be acquitted, so that it was impossible to doubt that, if this was true, the juror did not give verdict upon evidence, but was influenced by a previous bias, and prejudiced determination; his going into the box with this partial mind, deprived the prisoner of that chance which the law determines he shall have. It is necessary that every jury should enter this box free from malice; but it was not so: this juror laboured under particular impressions, unfavourable to John Fries, because he conceived he had been the leader of, and brought on this disturbance, and therefore ought to be hung: this will be proved to have been more than once the language of the juror, and that he indulged himself in those expressions. After running from place to place, influenced by a vindictive spirit of prejudice, to express his desires, can it be contended that he was capable of deciding on the guilt or innocence of the prisoner, by the weight of the testimony only? There cannot be found a stronger case in the books. It is not necessary or right to go into the testimony, or any of the circumstances of the crime of the prisoner, to see whether the verdict was right or wrong; but it is necessary to view the determination of this juror, who wished them all hanged, and particularized Fries. First, his words were, "We will hang them all;" then he said, "I myself shall be in danger, unles we do hang them all." This is not merely an opinion generally expressed, but the language of design to convict at all events. If eleven out of twelve jurors had been of opinion that an acquittal should take place, and this individual, supposing he was in danger, had declared this opinion, and pointed out his view of the probable consequences, would not the voice of the eleven be changed to guard against this danger? 4 Hawk. P. C. c. 43, § 28, p. 399, supports the doctrine generally, that if a juror has declared his opinions beforehand, that the party is guilty, or will be hanged, or the like, it is good cause of challenge: but if from his knowledge of the case, and not from ill-will to the party, he has only declared his opinion, it is no cause of challenge. But even resentment has not the influence

[11] "The prisoner," says the reporter, "had been brought into court in order to receive sentence of death, but on Mr. Lewis' motion for a rule to show cause, judgment was suspended, and he was remanded back to prison."

upon a man's conduct which self-preservation has: ill-will is not the only ground of challenge; interest is as much so: if a man had laid a wager another would be hung, this is not ill-will, but would vitiate the juror. Therefore we must conclude that "ill-will," in the above authority, is put merely as an instance. Whether these words were spoken in warmth or not, is immaterial, for it would be no alleviation; it is impossible that they should have been expressed without ill-will; and therefore the man is not impartially qualified to pass upon the life or death of the prisoner. Salk. 645; 11 Mod. 118. Upon the general ground of what could be with propriety called misconduct in the person summoned to discharge the duty of a juror with impartiality, he observed there could be no doubt upon the propriety of their asking a new trial, nor upon the justice of one being granted.

Mr. Lewis mentioned 5 Bac. Abr. (Old Ed.) 251, 252, and 4 Bl. Comm. 354, 355, in order to show, that in criminal cases there should be no new trial, unless it should appear that the former trial had been attended with fraud, &c., and that a new trial in those cases might be granted after conviction. 11 Mod. 119; 5 Bac. Abr. 243; and 3 Bac. Abr. (Old Ed.) 258. If he has declared his will touching the matter, it shall be cause. 4 Bl. Comm. (Old Ed.) 346. The direction respecting the venire, he said, was entrusted to the law, and not to the marshal; and by that direction was exercised by the judges in 1795; and if that was neglected, it was not legally executed. The court could, as then, order the jury to be called from all parts of the state, and not to be left to the marshal. 5 Bac. Abr. 242, is an instance in which a son was sworn into the jury, (being the same name of John Pierce,) instead of the father, who was the person summoned to attend, whereupon a new trial was granted, because the trial was held by only eleven qualified persons as jurors. If the sheriff did not follow the direction of the law in respect to the venire, it was good cause for new trial.

Mr. Sitgreaves, in replying to Mr. Lewis and Mr. Dallas, first doubted the power of the court to give a new trial in criminal cases, upon which,

Judge IREDELL said, he had not discovered any dictum which distinguished civil from criminal causes, so that equal justice ought not to be administered; but if either, surely a criminal case called most strongly for justice: it would never do to apply cases so far, as to say that, if one man upon a jury was discovered not to be fully impartial, a new trial should not be granted, when a man's life was at stake.

Judge PETERS said he always understood, that the power of granting a new trial was in the discretion of the court; and that its opinion ought not to be turned by any vagaries which should be presented, but be governed by a reference to legal discretion; but at the same time, he could not say that the court ought to throw entirely out of their view all the evidence which had been given in the trial and everything that had been done. If, in the scale of justice, there should appear to be any error, and the case is any way doubtful, then the court will take advantage of a trifle, in order to grant a new trial; but where the court has been fully convinced that the verdict is right, then the evidence ought to have some weight, as well as the law.

Mr. Dallas observed, that the motion was not in any regard to evidence; if so, the weight of evidence must be considered; but it was alone on the point of law, totally independent of evidence.

After Mr. Sitgreaves and Mr. Rawle had replied, it was agreed by counsel, and ordered by the court, that the deponents should give testimony, and be cross-examined in court, on each side; and also that the witnesses should be examined separately, and kept out of the court, so as not to hear the evidence given by each other. Five witnesses were then produced, who testified that John Rhoad, one of the jurors who sat on the case, had declared, at two separate occasions, after his being summoned on the jury, but before the trial, that Fries, the prisoner, "ought to be hung;" "that it would not be safe at home unless they hung them all;" &c. Rhoad himself was afterward called by the district attorney, and denied under oath that he had made use of the expressions imputed to him, or any other of a similar character. Some testimony, also, was produced for the purpose of showing his veracity and general good character.

Mr. Lewis then mentioned the grounds upon which the rule to show cause had been granted; whether either or all the grounds had weight in them, he would not undertake to assert; but certain it was that it was the duty of the prisoner's counsel to lay them before the court and wait the event, which, if favourable, would cause a new trial; if not, they should be satisfied with having discharged their duty; in either case they should cheerfully submit to the opinion of the court; and he was sorry to see that the last question, to wit, that the trial ought to have been held in the proper county, had given any discomposure to the court. He then explained the reason, to show the court that it was not agitated out of any disrespect to their former decision, which was that "manifest inconvenience" did prevent the trial being held there, but this did not appear on the record. In criminal prosecutions, and especially capital cases, it was usual for the prisoner's counsel to avail themselves of every slip and inaccuracy, and therefore he was excusable in the present objection. 4 Burrows, 252. It was common to the court to err, and in such a case he considered himself in duty bound to point it out to them; and he was satisfied,

if that error was of consequence enough, the court would grant a rule thereupon, and thus retract from their former opinions, which they were fully authorized to do. 3 Bl. Comm. 391; 1 Burrows, 393. Mr. Lewis then went on to point out the propriety of granting a new trial in criminal as well as civil cases, although the prosecuting counsel had enforced the want of precedent as a reason against it; indeed, he said, it was evidently of more consequence, and therefore he supposed it had been the more strongly opposed; a man's life and his fame were of more value than a part of his property, and he had no doubt that whatever might have been the verdict, the court would go as far in granting it. It was admitted that the court had the power; if it had the power, there was no doubt but the honourable judges would exercise it according to their conviction. Mr. Lewis said the counsel for the prisoner did not come forward to prove that the verdict was given against evidence, but to insist that the prisoner had been tried by eleven jurors only, for the other stood indifferent as he stood unsworn; they went further—they went to prove that there was an essential error in the panel, and thus the prisoner was bereft of those benefits to which the law entitled him. If we prove this, said he, we do not address ourselves to the discretion of your honours; it is not a matter of will; it is a matter of justice to which we are entitled. As it respects the evidence, you are not at all to consider its weight; the evidence may be clear, and yet the verdict may be wrongly given, because of the incompetency of the jurors. The gentlemen have said the period of application is past—it is too late; but with all their talents and industrious researches, those learned gentlemen have not been able to produce a single authority to support the doctrine that it is too late; after conviction, or even after condemnation, the court have authority to order a new trial; no time is specified to limit the discretion, if the reasons are good. If the law has not distinguished the period, those gentlemen are certainly unwarranted in saying it is too late. In 2 Strange, 968, is a case where an argument was held on a plea for a new trial; but not a single argument is used, that a new trial could not be held on capital cases; that seems to be taken for granted.

It was argued against a new trial, in capital cases, that the court proceeded more deliberately, and more cautiously, and because the prisoner was allowed a challenge of his jury. The argument amounts to this: because the law requires more caution, and gives the prisoner more advantages where his life is at stake, for that reason he should have less advantage and less indulgence; or, in other words, because the benignity of the law allowed more benefits in the awful event of life or death, therefore in another point essential to the prisoner, he should be bereft of an advantage enjoyed by one indicted for an assault, or in a common civil cause. It may be argued, that the benevolence of the executive may extend mercy to the prisoner, because of any irregularity in evidence or proceeding; but this will not satisfy the law; it is a hazard at best, while the law gives him the certain advantage of a new trial The power and right of granting a new trial in some cases, are admitted; now, if any of the witnesses or jurors could be proved to have perjured themselves, the evidence being first given, and the verdict pronounced, this, it will be allowed, would have weight to grant a new trial; but the case before the court goes as far, if not farther; and if there should appear an extreme error in summoning the jury, or that one of the jurors had disqualified himself from wearing the characteristics of an unbiassed man, then it must equally appear that there has been an infringement of a legal right, sufficient to lay the foundation of a second hearing. Another doctrine that was insisted on was, that it was discretionary in the court; that, where they were satisfied with a verdict, although against evidence, no new trial ought to be granted. There may be instances of a civil nature in which that doctrine will be allowable; but they differ materially from the one now before the court, and therefore will not apply. That application may go to the favour of the court, where they see the evidence strong; but no favour can be exercised, nor is any asked in this case; we only appeal to the justice of the case.

It was said by one of the gentlemen, that this juror's declaring his sentiments was only cause of challenge to the favour, for which triers ought to have been appointed, and the qualification or disqualification of the juror been determined by them, but for which it was now too late. Mr. Lewis denied the position. He had already proved, both on his own declaration, and by the evidence, that it did not come to their knowledge until after the verdict was given, and therefore they came forward as soon as they were obliged: this was allowed a sufficient excuse in Salk. 645, and 11 Mod. 119, and therefore the objection was unimportant. The witnesses could not inform John Fries, for he was in jail; he could not know it until yesterday morning, when the motion was made in court, for the witnesses had no knowledge of each other, so as to be able to communicate it. 3 Bac. Abr. 258, 259, says: "It is particular cause of challenge, if a juror has declared his opinion touching the matter." In causes of particular challenge, the court is to inquire into the truth of the fact, and no triers are to be called: if they find the cause a true one, they are not to judge, nor to be left to discretion, but, they must try the issue again. This is the doctrine of ancient law and usage. Bac. Abr. 266. Then, all the argument about triers is out of the question; the question is, whether the juror stood indifferent, or whether he was under the influence of bias, and a prejudiced

mind: the law compels the issue to steer clear of friends or enemies: no partiality whatever is to predominate: but can any man in the world say that Rhoad's mind was free from prejudice when he took opportunities to make such declarations?

Mr. Lewis then went into an examination of the evidence and depositions. Now suppose the court to believe the fact nearly as stated by the evidence, Mr. L. asked, whether it was possible, consistent with law or justice, to believe that a just verdict was given, or that any man ought to suffer under such a verdict? Suppose the whole twelve to have made similar declarations; it would require no argument to convince the unbiassed, that the consequence must be fatal. It has been attempted to be proved that even such a declaration was no ground of challenge, if it was not made from malice; but what is the meaning of an independent man? It means a man who stands on the high ground of justice and impartiality, and is not warped by prejudice nor warmed by resentment, quite free from interest in the issue; also, a man whose judgment has not been made up in favour of either the one party or the other; for, if it has, though he may be an honest and well meaning man, it is not likely that his mind would be freely given according to evidence. Without he is free from these entanglements upon his mind, he will, he must err. Now, it appears by the evidence of even Mr. Rhoad himself, that he was warm, and might have forgotten the expressions, and nothing can be shown but that Mayer, the witness, who has lived in this country, is a man of good character; however, he must be supposed so, until he can be proved otherwise. Mr. Lewis remarked, that the witnesses spoke of different conversations; Mayer of one, when Rhoad came first to town; the others, of two afterwards, in the room where they were sitting, and in the bed-room. He contended that no material, although a verbal, difference did exist; but the testimony of Rhoad differed materially from them all; his verbal testimony and deposition were also different, as might be seen. But, Mr. Lewis said, he doubted whether the testimony of Rhoad in this matter was legal evidence or not, because it was a matter in which he was materially concerned; however, they had not much objected, as there was a considerable difference in evidence going to a court, and to a jury; he had no doubt their honours would make the necessary allowance. Although Rhoad was not sworn at the time he used these expressions, he was summoned on this trial, and it was a high misdemeanor—whether it was indictable or not, he would not say—but it was a very imprudent disposition to encourage or even suffer. In Cooke's Case, Salk. 153, Chief Justice Holt holds, that if a man ought not to be compelled to prove that he is a party, neither should he be allowed to prove that he is not a party, by his own evidence. This applies to Rhoad giving evidence, in which his character is concerned. 15 State. Tr. 547, 548, the case appears more fully; such conduct is here declared to be scandalous, a misdemeanor, and the man ought not to be on any jury. By four witnesses, neither inconsistent with themselves, nor with each other, Mr. Lewis said this fact was clearly proved, and he thought incontrovertibly so; of the respectability of those witnesses he knew nothing; but nothing disrespectful had been proved, and, consequently, not their incompetency.

Judge PETERS said that he did not know about their swearing falsely, nor could he say anything about Mayer; but of the others, he well knew that one was extremely stupid, and the others deeply prejudiced, on which account, their evidence should be carefully scrutinized, and carefully received.

The necessity of great precaution and care, Mr. Lewis was willing to admit; but this stupidity was a good apology for their not revealing the fact until it was drawn from them. Their ignorance, indeed, was deducible from the whole of their conduct, and the opposition they made to the government, but it did not strike at their credibility; uninformed and misinformed as they were, their verity might be good. They were under indictments, and therefore perhaps afraid to speak; besides, coming from different parts of the country, they knew not John Fries; but let their offence or situation be what it may, they may be honest men, and men of truth and integrity, and, therefore, they must stand upon as good a footing as witnesses could stand. We must take it for granted, then, said Mr. Lewis, that the juror made these declarations; and if so, according to the law of England and of the United States, he is disqualified from the office; otherwise that most invaluable right, trial by jury, would be eminently impaired.

Mr. Lewis then examined some authorities which had been quoted by the prosecuting counsel, some of which were irrelevant, and some he thought not at all applicable. With respect to the Case of Ann Clifton, as quoted from the Pennsylvania Practices, the juror declared that "he did not know how anybody could do otherwise than bring her in guilty, but he did not speak as a juryman." The court were of opinion, it was not sufficient to grant a new trial. The objection of the court was, not because it was a capital case, but they gave as a reason, that these words were not sufficient to vitiate a juror; his mind as a juror, he declared, was still open to conviction.

It was stated that the application ought not to be listened to, because the prisoner had the challenge of sixty-eight in effect out of the whole panel; how this was meant to be applied he could not discover, but one fact was plain, that the smaller number there were summoned above thirty-five, the better choice there was for the prisoner, and there-

fore the whole number cannot be made to exceed sixty, agreeably to common law. Mr. Lewis then observed, that one remark of Mr. Rawle, that Mr. Rhoad was the last they could challenge, but they would rather have him than trust to the next, was a plain implication that they were ignorant of the fact, instead of militating against the motion. In order to remove every suspicion of inaccuracy from the former testimony, he said, he had happily been able to procure one whose respectability could not be questioned, and which he should now introduce to the court.

Here, an additional witness was introduced, to sustain the facts already sworn to on the part of the prisoner.

Mr. Lewis resumed his argument in favour of the evidence, which, he said, had not the last witness come forward, the others being suspected, would have been a question, whether the negative testimony of Mr. Rhoad, in which he was a party, or the positive testimony of four others who were not concerned, had the most weight. But now, taking it for granted that Rhoad is mistaken, it can be only accounted for in two ways: First, that his memory failed him; or secondly, that he was extremely prejudiced. Imputing nothing corrupt to him, still we cannot allow him to be less so than any one of the five witnesses we have brought to controvert his assertions; allowing him not to be free from prejudice, he cannot be supposed to be capable of judging for himself. Mr. Lewis concluded by examining at great length the other reasons submitted on the motion for a new trial.

After some aditional evidence had been introduced of the same nature as that already noticed:

Judge PETERS observed, that the opinion of Lord Chief Justice Trevy, in 15 State Tr. was much to the point; but that question was not determined by the court. In a question of so much national importance as the present, Judge PETERS thought it his duty to give an opinion. When a man lives in the county where insurrection has happened, his impressions of injury from the repetitions of such scenes will be stronger than might be expected in other men, and, therefore, all that Rhoad said about it being unsafe for the friends of the government to live there, is accounted for, and no way improper for him to speak. I think Rhoad an honest man, and do not think he had any malice against Fries more than any of the rest; but I think he must have forgotten. That which appeared to strike Mr. Lewis with such force does not appear to me important. I think the proceedings might have been more regular, but yet I think they were regular enough to stamp the event with a sufficient sanction. The proceedings were much the same as the court of oyer and terminer, when the sheriff summons a number more than is wanted, in order to have them ready, and when twelve are wanted they are taken out of that number. This venire issued by the same course as all others do, perhaps not knowing the offences would be capital, but it appearing otherwise afterwards, agreeably to act of congress some were summoned from the proper counties. The venire says the number is not to exceed sixty, yet these words do not designate more than those in the practice of England which directs twelve, but twenty-four is generally returned. To be sure the court might have given the order, but I do not see how this could be done without the defendant lying in jail, or a special court being held. There is some weight, to be sure, in the arguments on that point, but they are not so important as they were held up to be. The marshal having ready a certain number, when the issue was joined, then, and not before, was the number who did appear made to appear in court. The panel was returned, and furnished to Fries, on which the trial was suffered to proceed, and on that account I think it appears it was approved of by the court, which is a sufficient designation.

Judge IREDELL.—The question which the court have now to decide is certainly as important a one as ever was before a court. With regard to any interest the government could be supposed to have in the event, or the feelings of private humanity or compassion as men, for the very unhappy situation of the prisoner—these must both be sacrificed to that impartial justice which our duty peremptorily commands us to exercise according to the best of our capacities. Sure I am that it is always my disposition so to be influenced, as I am convinced it is also of the judge with whom I have the honor to sit on the bench. It is admitted, I believe, on both sides, that it is in the power of the court in criminal cases to grant a new trial in favor of the prisoner, though they cannot to his prejudice, and it must be readily admitted that it must be the most obvious considerations, which could possibly render it the duty of the court, lest they too readily grant a new trial: for if the power is placed in a court, it is proof that it must, or might be sometimes exercised, and if ever proper occasion arise for the exercise of it, it must depend on some particular, strikingly applicable circumstances. With regard to the particular circumstance now brought forward, that one of the jurymen made certain declarations unfavorable to the justice a prisoner has a right to expect, I must confess that until the evidence yesterday given by Mr. Yohe, I was not satisfied that he had said any such thing which could give the court full ground to believe him improperly biassed, so as to admit just cause for a new trial; but that testimony corroborating the testimony of those before given on which, independently, we could place but little dependence, strikes me with great force, otherwise I should have entertained some doubt, owing to their different relations of apparently the same event.

This caution was invigorated by the very excellent character which the juror had borne. From this I have every reason to believe that he has not wilfully done anything wrong, nor sworn to anything which he does not believe to be true. From the relation, it was difficult to arrange the particular parts of the conversation, so as to make it accord at any interval of time, on which account I was extremely desirous that Mr. Rhoad and Mr. Yohe should be confronted, and questions put to remind each other of the facts, so as both might accord; but it does appear that Mr. Rhoad's memory is extremely defective in some material points, and, therefore, without any impeachment, we may presume it was a gross mistake It is the clear opinion of the court in 15 State Tr. that if a juryman, not out of particular malice against the individual, but from any other cause, appears to have formed a predetermined opinion, he was not fit to be a juryman, and it was, therefore, good cause of challenge. In that case the expressions used were much similar to the present case: that opinion appears to be grounded upon the supposition that where a man, from any ill motives, or otherwise, forms an opinion strongly on his mind, an improper bias is extremely difficult to get clear of, and will influence an honest man unwarily to give a wrong verdict, and to these circumstances every man is liable. It is impossible for me to resist the impression, from the number of depositions produced, that Mr. Rhoad must, at different times, have used expressions similar to those related by Mr. Yohe, but I can readily conceive that such expressions were used with an innocent intention, and without meaning to prejudice himself from afterwards serving as an honest juryman; yet I cannot be certain but it might originate from a predisposed opinion of the guilt of the man, and, therefore, it must render him less able to discriminate facts; but if no such idea of guilt did exist, according to the authority stated, it would be good cause of challenge, if known, but if not known until after verdict is given, it would then be sufficient time, for what is good cause of challenge previous to trial, is good ground for a motion after verdict. It is very much to be regretted that the witnesses who heard these declarations did none of them communicate it to the counsel or the prisoner before the jury were sworn, because he might have been set aside, and much unnecessary public expense and distress to the unfortunate man, besides delay of the execution of justice, in this particular case, been prevented. It being admitted that the court may grant a new trial in criminal cases upon sufficient cause to show, and it following that they ought to do it if shown, I further think that if there is cause of challenge before, there is equal cause, if it is proved that the juror was biassed, to order it, after verdict is pronounced, whatever delay or inconvenience may result therefrom; for that can be no reason to withhold a privilege to which a prisoner is entitled. From these views, I think it my duty to vote for a new trial in the present case, as the fact appears too clear to be controverted. In this event, there will be still an opportunity for the prisoner to be freed, and justice be done between himself and his country.

With regard to the point of law, if my mind had not been clear on the evidence respecting the juror, I should have been decidedly against a new trial, and accordingly should have taken the trouble more fully to have delivered my sentiments; it being so. I shall now make but a few general remarks. As to the point, that the record should evince the proceedings of the court, otherwise they are invalid, with reasons why trial could not be held in the county, I think there is no necessity of the reasons appearing on the record of court. If the question had stood simply upon this ground, it would have been immaterial; but it did not. Application was made to this court, after several indictments were found, alleging that the trials ought to be held in the county, whereupon the court declared its opinion, that "great inconvenience" prevented a compliance with the motion: but further it appeared to be gone out of the power of the court, because the indictment had been found in this court, which must be considered a part of the trial; and the law means the whole proceeding shall be in one place, so that the indictment must have been found in that county, otherwise the trial by jury could not be held there. These were the reasons which operated to influence the court to refuse the application. In this dilemma, it was impossible for the court to say the trial should not proceed here; and, had it been removed, a new indictment could not have been found; if it had, the trial could not proceed upon two indictments. The only time for considering this question, I believe, was, when this man was charged with the offence, before he was committed, or even after the court sat, and before the indictment was brought into court. If it had been the opinion of the judge who committed him, that the trial could be held there, then it could have been referred to the supreme court, who, if they had been of the same opinion, would have ordered a special court. But from the state of that county, no one can believe that a trial could have been held therein any way conducive to justice, or so as to make the proceedings of the court such as they ought to be, because the president has declared, by proclamation, that the law could not be executed without military assistance, which I never wish to see guard a court of justice as matter of choice, though unavoidable necessity may sometimes make it prudent.

With regard to the summoning the jury, it is to be observed, that the practice now used, was an established usage of this court for many years past, which is a sanction suffi-

cient, if no positive law nullifies it. The venire, issued in this form, in my opinion, did issue with the sanction of the court, and had the same effect as though the express order of the court had been annexed. It appears that it was not known, at the time the venire issued, that any cases were punishable with death, and of course not necessary to include a special provision for twelve to come from the county. Mr. Lewis made a concession, which, if right, did away the whole of this objection; he said, that upon the marshal's receiving information (whether it came from the judge or not) that a case punishable with death had occurred, he had a right, without any order from the court, written or verbal, to summon a greater number of men than in other cases: the words of the law are, not that he should summon twelve, but twelve at least; but he observed that this should not exceed, but be included in the number sixty. I do not know what authority he had to limit the number to sixty, in this or any other case. The law intends that a prisoner shall have a chance of men from his own neighbourhood; certainly then the greater the number which comes from it, his chance is proportionably increased; therefore it can never prejudice the prisoner. I think that if the marshal should extend the discretion given to him to an unnecessary number, it would operate to the vexation of the persons summoned, and they alone would have cause to complain. Formerly, by law, a sheriff was directed to summon twelve, but, by usage, he actually did summon twenty-four, yet all above the twelve appeared to acquiesce, and it could not be of disadvantage; so in the grand-jury for twenty-four, forty-eight were summoned; the power was assumed, and not complained of. I presume that if the marshal had authority to return that number, without a venire or precept, he was not limited as to number; and that when they came here, they formed the jury attending court. I am further of opinion, that when the panel was presented to the prisoner, that panel contained the full sanction of the court, as much as though they had given the order.

So far as to substance. With respect to form, the words are, after joining the issue, "let the jury come." That is a direction given by the court to the marshal to summon the jury; but as it would be inconvenient for him to summon the jury after this order, which is for him to do it without delay, those jurors already summoned appear in court, so that if it was entered upon record, it would appear that, after the prisoner was arraigned, and issue joined, the marshal had directed these men to come, and they had come. It appears to me that, whether the marshal summoned the jurors of his own accord, or whether they were summoned under the express order of the court after issue was joined, in substance and in form the law is so far complied with as to do perfect justice. Though I am not certain that my opinion on these points of law is right, not having had much time to examine, yet I am strongly of that opinion at present; however, I have thought less and said less upon them than if the main object of the motion rested on it.

Sensible of the importance of the question, and that if life is once lost, it can never be recovered; leaving aside the question which involves doubt, and resting on the facts which have appeared before the court, I deem it my duty to say that a new trial ought to be granted.

Judge PETERS then said: Although I am not perfectly satisfied with the testimony, which is contradicted by the juror on his oath, I will allow it to be taken for granted, and meet the question on principle. I am in sentiment against granting the motion for a new trial. Because, 1. The juror said no more than all friends to the laws and the government were warranted in thinking and saying as the facts appeared then to the public. Fries being generally alleged to be the most prominent character, it was on this account, and not with special or particular malice, that Rhoad's declaration was made. 2. If a juror was rejected on account of such declarations, trials, where the community at large are intimately affected by crimes of such general importance and public notoriety, must be had, in all probability, by those who only openly or secretly approved of the conduct of criminals. This would be unjust and improper, as it affects the government in its public prosecutions Little success could be expected from proceedings against the most atrocious offenders, if great multitudes were implicated in their delusions or guilt. 3. It is natural for all good citizens, when atrocious crimes, of a public nature, are known to have been committed, to express their abhorrence and disapprobation both of the offenses and the perpetrators. It is their duty so to express themselves. This is not like the case of murder, or any offence against an individual, or where several are charged, and none remarkably prominent. In this latter case, selecting one out of the mass might evince particular malice. 4. I have no doubt that declarations of an opposite complexion could be proved; and yet the jurors were unanimous in their verdict. The defendant has had a fair, and I think an impartial trial. But as a division in the court might lessen the weight of the judgment if finally pronounced, and the great end of the law in punishments being example, I, with some reluctance, yield to the opinion of Judge IREDELL. Although justice may be delayed, yet it will not fail either as it respects the United States or the prisoner.

[NOTE. For report of the second trial, see Case No. 5,127, following.]

Case No. 5,127.

*Case of FRIES.

[Whart. St. Tr. 610.]

Circuit Court, D. Pennsylvania. April 29, 1800.

TREASON AGAINST UNITED STATES DEFINED — INSURRECTION TO RESIST EXECUTION OF A LAW — INTENT — NUMBERS ENGAGED — PRINCIPAL AND ACCESSORY.

[1. An insurrection or rising of any body of the people to resist, or to prevent by force or violence, the execution of any statute of the United States for levying or collecting taxes, duties, imposts, or excises, or for calling forth the militia to execute the laws of the Union, or for any other object of a general nature or national concern, under any pretence, as that the statute is unjust, burthensome, oppressive, or unconstitutional, is "levying war" against the United States within the contemplation and construction of the constitution.]

[2. The assembling of bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges or other peace officers should be insulted or resisted, or even great outrages committed to the persons or property of citizens.]

[3. The true criterion is the intention with which the people assembled. When the intention is universal or general, as to effect some object of a general public nature, it will be treason, and cannot be considered, construed, or reduced to riot. On the other hand, the commission of any number of felonies, riots, or misdemeanors cannot alter their nature so as to make them amount to treason.]

[4. If a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war, and the quantum of force employed neither lessens nor increases the crime; whether by 100 or 1,000 persons is wholly immaterial.]

[5. There are no accessories to the crime of treason; but all the particeps criminis are principals. All persons present, aiding, assisting, or abetting any treasonable act, or who are present, countenancing, and are ready to afford assistance, if necessary, to those committing a treasonable act, are principals.]

[6. If a man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law judges of the intent by the fact.]

[This was an indictment against John Fries for treason, in levying war against the United States. For a trial on a former indictment, see Case No. 5,126.]

The prisoner was arraigned, and pleaded not guilty to the following indictment (the first having been withdrawn by the district attorney): "The grand inquest of the United States of America, in and for the Pennsylvania district, upon their respective oaths and affirmations, do present, that John Fries, late of the county of Bucks, in the state and district of Pennsylvania, yeoman, owing allegiance to the United States of America, wickedly devising, and intending the peace and tranquillity of the said United States to disturb and to prevent the execution of the laws thereof within the same, to wit, a law of the said United States, entitled, 'An act to provide for the valuation of lands and dwelling houses, and the enumeration of slaves within the United States,' and also a law of the said United States, entitled 'An act to lay and collect a direct tax within the United States,' on the 7th day of March, in the year of our Lord one thousand seven hundred and ninety-nine, in the county of Northampton, in the state and district aforesaid, and within the jurisdiction of this court, wickedly and traitorously intend to levy war against the said United States, within the same, and to fulfil and bring to effect the said traitorous intention of him, the said John Fries, he, the said John Fries, afterwards, that is to say, on the said seventh day of March, in the said year of our Lord one thousand seven hundred and ninety-nine, in the said state, district and county aforesaid, and within the jurisdiction of this court, with a great multitude of persons, whose names are to the said grand inquest unknown, to a great number, to wit, to the number of one hundred persons, and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and other warlike weapons as well offensive and defensive, being then and there unlawfully and traitorously assembled, did traitorously assemble and combine against the said United States, and then and there with force and arms, wickedly and traitorously, and with the wicked and traitorous intention to oppose and prevent, by means of intimidation and violence, the execution of the said laws of the said United States, within the same, did array and dispose themselves in a warlike and hostile manner against the said United States, and then and there, with force and arms, in pursuance of such their traitorous intention, he, the said John Fries, with the said persons so as aforesaid, traitorously assembled, armed and arrayed in manner aforesaid, wickedly and traitorously did levy war against the said United States. And further to fulfil and bring to effect the said traitorous intention of him, the said John Fries, and in pursuance and in execution of the said wicked and traitorous combination to oppose, resist and prevent the said laws of the United States from being carried into execution, in the state and district aforesaid, he, the said John Fries, afterwards, to wit: on the said seventh day of March, in the said year of our Lord one thousand seven hundred and ninety-nine, in the state, district and county aforesaid, and within the jurisdiction of this court, with the said persons, whose names to the grand inquest aforesaid are unknown, did wickedly and traitorously assemble against the said United States, with the avowed intention by force of arms and intimidation, to prevent the execution of the said laws of the said United States, within the same; and in pursuance and execution of such their wicked and traitorous combination and intention, he, the said John Fries,

then and there, with force and arms, with the said persons to a great number, to wit, the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and other warlike weapons, as well offensive as defensive, being then and there unlawfully and traitorously assembled, did wickedly and traitorously resist and oppose the marshal of the said United States, in and for the said Pennsylvania district, in the execution of the duty of his office of marshal aforesaid, and then and there, with force and arms, with the said great multitude of persons, so as aforesaid unlawfully and traitorously assembled, and armed and arrayed in manner aforesaid, he, the said John Fries, wickedly and traitorously did oppose and resist, and prevent, the said marshal of the said United States from executing the lawful process to him directed and delivered against sundry persons, inhabitants of the county aforesaid and district aforesaid, and charged upon oath before the judge of the district court of the said United States, for the said district, with having entered into a conspiracy to prevent the execution of the said law of the United States, entitled 'An act to lay and collect a direct tax within the United States,' which process duly issued by the said judge of the said district court of the district aforesaid, the said marshal of the said United States, then and there had in his possession, and was then and there proceeding to execute as by law he was bound to do; and so the said grand inquest, upon their respective oaths and affirmations aforesaid, do say, that the said John Fries, in manner aforesaid as much as in him lay, wickedly and traitorously did prevent, by means of force and intimidation, the execution of the said laws of the said United States, in the said state and district of Pennsylvania. And further to fulfil and bring to effect the said traitorous intention of him the said John Fries, and in pursuance and in execution of the said wicked and traitorous combination to oppose, resist and prevent the execution of the said laws of the said United States, in the state and district aforesaid, he, the said John Fries, afterwards, to wit, on the said seventh day of March, in the said year of our Lord one thousand seven hundred and ninety-nine, in the state, district and county aforesaid, and within the jurisdiction of this court, with the said persons whose names to the grand inquest aforesaid are unknown, did wickedly and traitorously assemble against the said United States with the avowed intention, by means of force and intimidation, to prevent the execution of the said laws of the said United States, in the state and district aforesaid, and in pursuance and in execution of such their wicked and traitorous combination and intention, then and there in the state, district and county aforesaid, and within the jurisdiction of this court, with force and arms, with a great multitude of persons, to wit, the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and other warlike weapons, as well offensive as defensive, being then and there unlawfully and traitorously assembled, he, the said John Fries, did traitorously, with force and arms and against the will of the said marshal of the said United States, in and for the district aforesaid, liberate and take out of his custody sundry persons by him before that time arrested, and in his lawful custody then and there being, by virtue of lawful process against them issued by the said judge of the district court of the said United States, for the said Pennsylvania district, on a charge upon oath of a conspiracy to prevent the execution of the said law of the said United States, entitled 'An act to lay and collect a direct tax within the United States;' and so the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, do say, that the said John Fries, as much as in him lay, did then and there, in pursuance and in execution of the said wicked and traitorous combination and intention, wickedly and traitorously, by means of force and intimidation, prevent the execution of the said law of the said United States, entitled 'An act to provide for the valuation of lands and dwelling houses, and the enumeration of slaves, within the United States,' and the said law of the said United States, entitled 'An act to lay and collect a direct tax within the United States,' in the state and district aforesaid, contrary to the duty of his said allegiance, against the constitution, peace and dignity of the said United States, and also against the form of the act of the congress of the said United States, in such case made and provided. William Rawle, Attorney of the United States for the Pennsylvania District."

Mr. Lewis and Mr. Dallas, before engaged to act for the prisoner, on account of the conduct directed by the court to be observed by the counsel, withdrew their assistance; so that the prisoner was left without counsel; and on being asked by the court if he would wish to have some assigned, he did not accept the offer.[1]

Thursday, April 24. Before the jurors were sworn in, they were individually asked (upon oath) these questions: "Are you any way related to the prisoner?" They all answered, "No." "Have you ever formed or delivered an opinion as to the guilt or innocence of the prisoner, or that he ought to be punished?" The answer generally was, "Not to my knowledge." Some of the jurors said they had given their sentiments generally, disapprobatory of the transaction, but not as to the prisoner particularly. These were admitted. One of the jurors (Mr. Taggert), after he was sworn, expressed himself to the court to be very uneasy un-

[1] [See note 1 at end of case.]

der his oath; he then meant that he never had made up his mind that the prisoner should be hung, but very often had spoken his opinion that he was very culpable; he did not, when he took the oath, conceive it so strict, and therefore wished, if possible, to be excused. The court informed the juror it was impossible to excuse him, now he was sworn. The court informed the prisoner that he had a right to challenge thirty-five without showing cause, and as many more as he could show cause for. Thirty-four were challenged, and the following admitted and sworn on the jury: Samuel Wheeler, foreman; Henry Pepper, John Taggert, Cornelius Comegys, Ephraim Clark, Thomas Baily, Lawrence Cauffman, John Edge, Charles Deshler, Henry Dubois, Isaac Dehaven, John Balliot.

Mr. Rawle and Mr. Ingersol, for the prosecution.

Mr. Rawle then opened the charge exhibited in the indictment. He observed that the jury must be aware of the very unpleasant duty he had to perform; he felt an extreme difficulty of situation,—called forth by his duty to exhibit a charge against the prisoner at the bar of the highest magnitude, who now stood to answer, unattended by any legal advice, he felt impressed with the necessity of sticking more than usually close to the line of his duty, which he should endeavor to discharge as faithfully as possible. And he trusted that, while the jury felt their relation to their unfortunate fellow-citizen at the bar, they would, at the same time, make all suitable allowance for any errors which might appear on his (Mr. Rawle's) part, though it was sincerely his desire to avoid any, either in laying down the facts or the law, which he should do under the direction of the court; and he hoped that the jury would carefully sift and examine the law and testimony which his duty called upon him to advance, in order to substantiate the charge. Mr. Rawle then proceeded to open the charge. He said, he should be able to prove, that John Fries, the prisoner at the bar, did oppose the execution of two laws of the United States, to effectuate which he was provided with men, who, as well as himself, were armed with guns, swords, and other warlike weapons, which, by their numbers and military appearance, were sufficient to accomplish their purpose, which was, not only to intimidate the officers of the government appointed to execute the above laws themselves, but to release from the custody of the marshal of Pennsylvania a number of persons who were held in prison by the said marshal, and to prevent him executing process upon others. All this was done, as stated in the indictment, by a combination and conspiracy to oppose those laws, by a large body of armed men, of whom the prisoner at the bar was the chief, and commander.

Mr. Rawle then proceeded, under the direction of the court, to state the law. The treason whereof the prisoner was charged was, "levying war against the United States." Const. U. S. art. 3, § 3. What, he asked, was levying war against the United States? He conceived himself authorized, upon good authority, to say, levying war did not only consist in open, manifest, and avowed rebellion against the government, with a design of overthrowing the constitution; but it may consist in assembling together in numbers, and by actual force, or by terror, opposing any particular law or laws. Again, there can be no distinction as to the kind or nature of the law, or the particular object for which the law was passed, since all are alike the acts of the legislature, who are sent by the people at large to express their will. Force need not be used to manifest this spirit of rebellion, nor is it necessary that the attempts should have been successful to constitute the crime. The endeavour, by intimidation, to do the act, whether it be accomplished or not, amounts to treason, provided the object of those concerned in the transaction, is of a general nature, and not applied to a special or private purpose. In order to effect the object of those embarked in crimes of this high nature, it is well known that various means are necessarily employed; various acts may be perpetrated to accomplish the main end: they may proceed by the execution of some enormous crimes, as burglary, arson, robbery, or murder, either, or all of them; but even if one or all of these crimes were committed, except the purpose should be of a general nature, they may form distinct and heinous offences; but the perpetrators may not be guilty of treason. If a particular friend of the party had been in the custody of the marshal; if even a number sufficient for the purpose should step forward and rescue such a person, if it was not with a view to rescue prisoners generally, it would amount to no more than a rescue; but, if general, it is treason. The views of the party fix the crime, and therefore only the design is necessary to be known.

To prove that this doctrine was well established in the United States, Mr. Rawle turned to 2 Dall. [2 U. S.] 346, 355, stating the opinions of the court in the cases of Vigol and Mitchell,[2] charged with, and convicted for, treason. The attack on Gen. Neville's house was of this general nature, because he was an officer appointed to execute the obnoxious law; and being to the officer and not to the man that they objected, it was thought to be treason, and that decision was well grounded. He observed, that the clause in our constitution was founded on a statute which was passed in England, to prevent the ever-increasing and ever-varying number of treasons, upon the general and undefined opposition to royal prerogative: the situation of things was such, previous to that period, as to call forth from the statesman,

[2] [Cases Nos. 16,621 and 15,788.]

from the philosopher, and from the divine, even in those dark ages, the most vehement complaints: in attendance to these reasonable and just murmurs, the statute was passed.

Mr. Rawle was then producing an authority, when Judge CHASE said, the court would admit, as a general rule, of quotations which referred to what constituted actual or constructive levying war against the king of Great Britain, in his regal capacity; or, in other words, of levying war against his government, but not against his person, because it was of the same nature as levying war against the United States would be applied here: so was that part called adhering to the king's enemies:—they may, any of them, be read to the jury, and the decisions thereupon—not as authorities whereby we are bound, but as the opinions and decisions of men of great legal learning and ability. But even then, the court would attend carefully to the time of the decisions, and in no case must it be binding upon our juries.

Mr. Rawle quoted Hawkins (book 1, c. 17, § 23) as an authority of authenticity to prove, that not only those who rebelled against the king, by taking up arms with the avowed design of dethroning him, but those who withstood his lawful authority, and who endeavoured to oppose his government; who withstood the king's forces, or attacked any of his fortresses—those, in fine, whose avowed object was of a public and general, and not of a private and personal nature, were guilty of high treason. He also read Sir John Friend's Case from Holt, 681, and Dammaree and Purchases' Case, 15 State Tr. 589.

CHASE, Circuit Justice, begged the counsel to read only those parts of the cases which referred to what could be treason in the United States, and nothing which related to compassing the king's death. It would be found, he observed, by an attention to the last case, that because the intention was a rising to demolish all meeting-houses, generally, it was considered to be an insurrection against the toleration act, by numbers and open force, setting the law at defiance. This would be found to be the opinion in Foster, 213.

Mr. Rawle said, that he conceived that, even if the matter made a grievance of, was illegal, the demolition of it in this way was, nevertheless, high treason, because of the people so assembled taking the law into their own hands; thus, in Foster, it would be seen that demolishing all bawdy-houses, as such, was high treason, as much as demolishing all meeting-houses, being equally an usurped authority. He also read Doug. 590, Lord George Gordon's Case, when it was Lord Mansfield's opinion that any attempt, by violence, to force the repeal of a law, or to prevent its execution, is levying war, and treason. He considered, from those few authorities, that he was justifiable in saying that a rising, with intent by force to prevent the execution of a law, as well as laws in general, preventing the marshal executing his warrants, and preventing the other officers charged with the execution of the laws in question, amounted to levying war, agreeably to the constitution of the United States. Mr. Rawle then proceeded to state the most prominent facts which could be produced in the course of the evidence, in which it would fully appear, he presumed, that John Fries, the prisoner, was the most active in his opposition to those laws and to every attempt to carry them into effect; that he in every instance showed his aversion of, and opposition to, the assessors, and determination by threats and menaces to prevent them doing their duty, and that whenever any force was used, or terrific appearances held up, he was the commander, and gave the orders to his men, who, at times in great numbers, joined him: and that finally, by threats and intimidation, equally the same in the eyes of the law as force, he, the prisoner, did attain his object, to wit, the release of a number of prisoners who were confined for opposing the execution of the law, and were actually in custody of the marshal in a house at Bethlehem, which, by reason of his having prisoners there, and his having an armed posse to protect his lawful authority, was to all intents a fortress of the United States; and further, that he did, completely for a time, prevent the execution of the laws intended, in those parts, and thus did bid defiance to all lawful authority.

Judge CHASE then said to the prisoner: "John Fries, you will attend to all the evidence that will be brought against you; will attend to their examination, and ask any questions you please of the several witnesses, or of the court; but be careful to ask no questions wherein you may possibly criminate yourself, for remember, whatever you say to your own crimination, is evidence with the jury; but if you say anything to your justification, it is not evidence. The court will be watchful of you; they will check anything that may injure yourself: they will be your counsel, and give you every assistance and indulgence in their power."

(The evidence adduced on this trial is of so similar a character to that reported on the former occasion, as to render a report of it unnecessary. The defendant produced no testimony.)

Mr. Rawle said he felt himself so very peculiarly situated in this case, that he would wish the opinion of the court. The unfortunate prisoner at the bar appeared to answer to a charge, the greatest that could be brought against him, without the assistance of counsel, or any friend to advise with. To me, said Mr. R., the evidence against the prisoner is extremely strong. It will be recollected, that, in opening the evidence, I informed the jury what points I shall prove: I opened my ideas of constructive law, and

produced a few authorities in support of my opinions. I believe it will be found, that in no material point have I failed to substantiate what I first gave notice that I could prove. I therefore conceive the charges are fully confirmed. But although, if this trial was conducted in the usual way, and counsel were ready to advocate the cause of the prisoner, it would now be proper, on my part, to sum up the evidence as produced to the jury, and apply it to the law, in order to see whether the crime was fixed or not. Under the present circumstances, I feel very great reluctance to fulfil what would, in other circumstances, be my bounden duty, lest it should appear to be going further than the rigid requisition of my office compels me to. I therefore shall rest the evidence and the law here, unless the court think that my office as public prosecutor, demands of me to do it, or that I should not fulfil my duty without doing it.

Judge CHASE: It is not unfrequent for a prisoner to appear in a court of justice without counsel, but it is uncommon for a prisoner not to accept of legal assistance. It is the peculiar lenity of our laws that makes it the duty of a court to assign counsel to the person accused. With respect to your situation, sir, it is a matter entirely discretionary with you whether you will state the evidence and apply it to the law or not. There is great justice due to a prisoner arraigned on a charge so important as the present: there is great justice also due to the government. On the one hand, an innocent person shall not be made to suffer for want of legal assistance; on the other, a guilty person shall not escape through an undue indulgence, or the failure of the accuser in a duty his office may require of him. If you do not please to proceed, I shall consider it my duty to apply the law tc the facts. The prisoner may therefore offer what he pleases to the jury.

Prisoner: I submit to the court to do me that justice which is right.

Judge CHASE: That I will, by the blessing of God, do you every justice.

PETERS, District Judge: Mr. Attorney, while you are justifiable in considering the situation of the prisoner, that he might not suffer by any partial impressions you may make on the jury, there is another consideration deserving attention—there is justice due to the United States. Though I see no difficulty in resting it here, yet, possibly, persons who may have come into court since the trial commenced, may expect something of a narrative of the transactions, and such a narrative may be of great help to the jury. I wish it to be done for the due execution of public justice, and, God knows, I do it not with a desire to injure the prisoner, for I wish not the conviction of any man. It is a painful task, but we must do our duty. Still I think you are at liberty to fulfil your own pleasure.

Mr. Rawle would, then, under a solemn impression that it was his duty, take up some part of the time of the court and jury in relation to the prisoner at the bar, a task rendered far more painful on his part, from the circumstance of the prisoner's appearing there (unexpectedly) without counsel to plead his cause. In as few words as possible, he would endeavour to collect the most prominent features of the testimony which had been produced, and to apply it to the law. As he stated before, Mr. Rawle said, levying war in the United States against the United States, was a crime defined by the constitution; in relation to the republican form of government existing among us, it could only consist in an opposition to the will of the society, of which we all are members, declared and established by a majority; in short, an opposition to the acts of congress, in whole or in part, so as to prevent their execution, either by collecting numbers, by a display of force, or by exhibiting that degree of intimidation which should operate, in either way, upon those charged with the execution of the law, either throughout the United States or in any part thereof, to procure a repeal or a suspension of the law, by rendering it impracticable to carry such law or laws into effect in the place so opposing, or in any other part. This offence he considered to be strictly treason against the United States.

The question, then, is, how far the case of the prisoner and his conduct merit this definition. In order to be informed of that, it was necessary to call to recollection the evidence, so collected, as to display the train and progress which marked its footsteps from its first dawning till its arrival at the fatal deed denominated treason. It will first be observed by the testimony of several respectable witnesses (Messrs. Heckavelter, Ramich, Schymer, Ormond, and Williamson), that attempts were made and executed, by a combination, in which, unfortunately for him, the prisoner at the bar was very active, to prevent the assessors from doing the duty required of them when they accepted their office, and that this combination existed both in Northampton and Bucks counties, and to such a degree that it was impossible to carry the law into effect. In Lower Milford, more particularly, we have the evidence of four respectable gentlemen (Mr. Chapman, a principal assessor, and Mr. Rodrick, Mr. Foulke, and Mr. Childs, three assessors), who were employed in the execution of those laws. These gentlemen say that they met with such opposition at an early period of the insurrection, as deterred Samuel Clarke from undertaking the business at all, although he had taken upon him the office. From this difficulty, Messrs. Foulke, Rodrick and Childs determined that they would proceed to assess Lower Milford township together, which they attempted, and did not desist until compelled by the extreme opposition which

their respective testimony relates to have happened on the 5th and 6th of March, in their progress to, and at Quakertown, which ill usage is all corroborated by other witnesses. This spirit of opposition to the laws, as exhibited generally, is also related by Mr. Henry and Col. Nichols, the marshal, wherein it appears that process could not be served, and that witnesses could not be subpoenaed, being deterred from the threats made to them by this extensive combination; and that, in the serving of process, personal abuse was given, as well as to the assessors who attempted to execute the law. In short the law was prostrate at the feet of a powerful combination.

Mr. Rawle here called to view the occurrences in Bucks county, as deposed by Messrs. Foulke, Rodrick, Chapman, Thomas, Mitchel, and Wiedner, exhibiting a disposition to insurrection by a great number of persons, and who engaged in its acts; he referred to the meeting at Jacob Fries', where John Fries, the prisoner at the bar, expressed himself as determining to oppose and continue hostile to the laws; also to the circumstance afterwards near Singmaster's, where Mr. Rodrick made his escape, and where, as well as at other times, the prisoner forbade those officers to proceed, under threats of personal danger. It appeared Mr. Rodrick had given offence, not by his conduct, but because he came from a distance of ten or twelve miles into that township to prosecute his duty. However, the assessors met the next day, but were stopped at Quakertown, where they were extremely abused. To be sure, while the prisoner at the bar was in the room, and whenever he was present, their abuse was suspended; when he absented himself, it was renewed. The papers were taken from Mr. Childs, and also from Mr. Foulke, but returned, because they were not the identical papers. Here it must be observed, in justice to the prisoner, that one more of his few good actions appeared, which Mr. Rawle wished in his heart had been more numerous. Fries assisted Mr. Foulke to get out of the house the back way, and advised him to keep out of the way of the men. On the evening of that day they went up to Millerstown: here Mr. Rawle called to mind the message delivered by John Dillinger for convening the meeting the next day; this message was the fruits of a consultation held at the house of Jacob Fries, after they left Quakertown, when they determined to proceed to Millerstown the next morning. The next morning they met and went on as far as Ritters, where it appeared they were stopped for a short period by young Marks, who had been sent forward, with information that the prisoners were gone on to Bethlehem: a doubt being started whether they would not be too late, it was debated, and at last determined to go forward: of this latter opinion was the prisoner at the bar. It was in evidence that none of those people knew the prisoners whom they were going to release: this, Mitchel and others swore.

Here, Mr. Rawle thought, commenced the overt act in the indictment. Hitherto only the general opposition to the law, and the intention with which the after conduct was perpetrated, appeared. They proceeded to Bethlehem, and here the officer of militia, the man who derived his power from the people, the prisoner, Captain John Fries, whose duty it was to support the law and constitution of the United States, made a most distinguished figure. At Bethlehem it appeared that the prisoner was to step forward to effect the surrender of the prisoners, and of course to lay prostrate the legal arm of the United States. These prisoners were in the lawful custody of the marshal; he had lawful process against them from the district judge; they were in the house appointed for their safe keeping until they should be removed; he kept guard over them, and in order to execute his office, he had provided, by virtue of the powers given to the sheriff in the several counties agreeable to law, an armed force called a posse comitatus, or the power of the county. This force (about sixteen or seventeen) he supposed sufficiently great to prevent the prisoners in his charge being liberated; it appeared, however, in the sequel that they were not sufficient for that purpose. The prisoner with an armed force arrived at Bethlehem, and proceeded on his mission to the marshal: he had a sword when he marched his men into the town; but it appeared that he left it when he entered on his other business, to wit, demanding the surrender of the prisoners; the marshal answered, that he could not deliver them up. John Fries then returned to his men; and from the testimony of Mitchel, Barnet, and Schlaugh, (this was an important part of his conduct,) he said, "They must be taken by force; the marshal says he cannot deliver them up; if you are willing, we will take them by force: I will go foremost; if I drop, then take your own command." Words were followed by actions; they went into the house, and the prisoners were given up. This, Mr. Rawle thought, was an unquestionable, full and complete proof of the commission of the overt act; and that overt act is high treason, as laid in the third and fourth counts of the indictment, to wit, that they did by force prevent the marshal from executing lawful process to him directed; and, secondly, that they did deliver, and take from him certain persons, whom he had in lawful custody; and, further, this was done by force and arms, by men arrayed in a warlike manner, and by a number exceeding one hundred persons. This the indictment justly calls levying war, and treason. To him, Mr. Rawle said, there was no doubt but the act of levying war was completed in the county of Bucks, independently of all those actions

at Bethlehem; for there the prisoner and others were armed, and arrayed with all the appearances of war—with drums and fifes, and at times firing their pieces; and this to oppose the laws and prevent their execution; and there, by this force, they executed one, and the main part of their plan; they there did set the law at defiance. That was part of their grand object, and was done with a general, and not with a particular view, an essential ingredient in treason. Whether these actions were to be considered as a separate act of treason, or whether they were to evince the intentions of the party, it certainly must be considered as testimony, and such as must have an important weight towards the verdict.

Gentlemen, said Mr. Attorney, you will consider how far the individual witnesses are deserving your credit. If you consider them worthy of being believed, and if the facts related apply to the law which I submitted to your consideration, and which, from the silence of the court, I think you must consider as accurate—if not, I shall stand corrected by the court—there can be but little doubt upon your minds, that the prisoner is guilty: if it be not so, in your opinion, you must find him otherwise. I have endeavoured to do my duty with integrity. I have advanced nothing but what appears to me to be clearly substantiated; but with you, gentlemen, and with the court, I leave the truth of the opinion.

Court: John Fries, you are at liberty to say anything you please to the jury.

Prisoner: It was mentioned, that I collected a parcel of people to follow up the assessors; but I did not collect them. They came and fetched me out from my house to go with them. I have nothing to say, but leave it to the court.

CHASE, Circuit Justice (charging jury):—Gentlemen of the Jury: John Fries, the prisoner at the bar, stands indicted for the crime of treason, of levying war against the United States, contrary to the constitution. By the constitution of the United States (article 3, § 3) it is declared, "that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." By the same section it is further declared, "that no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court;" and that "the congress shall have power to declare the punishment of treason." Too much praise cannot be given to this constitutional definition of treason, and the requiring such full proof for conviction; and declaring, that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. This constitutional definition of treason is a question of law. Every proposition in any statute (whether more or less distinct, whether easy or difficult to comprehend) is always a question of law. What is the true meaning and true import of any statute, and whether the case stated comes within it, is a q estion of law, and not of fact. The question in an indictment for levying war against (or adhering to the enemies of) the United States, is, whether the facts stated do, or do not amount to levying war, within the contemplation and construction of the constitution. It is the duty of the court in this case, and in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide on the present, and in all criminal cases, both the law and the facts, on their consideration of the whole case. It is the opinion of the court, that any insurrection or rising of any body of the people, within the United States, to attain or effect by force or violence any object of a great public nature, or of public and general (or national) concern, is a levying of war against the United States, within the contemplation and construction of the constitution. On this general position the court are of opinion, that any such insurrection or rising to resist, or to prevent by force or violence, the execution of any statute of the United States, for levying or collecting taxes, duties, imposts, or excises; or for calling forth the militia to execute the laws of the Union, or for any other object of a general nature or national concern, under any pretence, as that the statute was unjust, burthensome, oppressive, or unconstitutional, is a levying was against the United States, within the contemplation and construction of the constitution. The reason for this opinion is, that an insurrection to resist or prevent, by force, the execution of any statute of the United States, has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States. The court are of opinion, that military weapons (as guns and swords, mentioned in the indictment) are not necessary to make such insurrection or rising amount to a levying war, because numbers may supply the want of military weapons, and other instruments may effect the intended mischief. The legal guilt of levying war may be incurred without the use of military weapons or military array. The court are of opinion that the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges, or other peace officers, should be insulted or resisted, or even great outrages committed to the persons or property of our citizens.

The true criterion to determine whether acts committed are treason, or a less offence (as a riot), is the quo animo, or the intention, with which the people did assemble. When the intention is universal or general, as to effect some object of a general public nature, it will be treason, and cannot be considered, construed, or reduced to a riot. The commission of any number of felonies, riots, or other

misdemeanours, cannot alter their nature, so as to make them amount to treason; and, on the other hand, if the intention and acts combined amount to treason, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of property, or the like) are done, will show to what class of crimes the case belongs. The court are of opinion, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, that they are only guilty of a high misdemeanour; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war, and the quantum of the force employed neither lessens nor increases the crime—whether by one hundred or one thousand persons, is wholly immaterial. The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used, in pursuance of such design to levy war; but that it is altogether immaterial whether the force used is sufficient to effectuate the object—any force connected with the intention will constitute the crime of levying war. This opinion of the court is founded on the same principles, and is, in substance, the same as the opinion of the circuit court for this district, on the trials (in April, 1795) of Vigol and Mitchell, who were both found guilty by the jury, and afterwards pardoned by the late president.

At the circuit court for the district (April term, 1799), on the trial of the prisoner at the bar, Judge Iredell delivered the same opinion, and Fries was convicted by the jury. [Case No. 5,126.]

To support the present indictment against the prisoner at the bar, two facts must be proved to your satisfaction: First. That some time before the finding of the indictment, there was an insurrection (or rising) of a body of people in the county of Northampton, in this state, with intent to oppose and prevent, by means of intimidation and violence, the execution of a law of the United States, entitled, "An act to provide for the valuation of lands and dwelling houses, the enumeration of slaves within the United States;" or, of another law of the United States, entitled, "An act to lay and collect a direct tax within the United States;" and that some acts of violence were committed by some of the people so assembled, with intent to oppose and prevent, by means of intimidation and violence, the execution of both, or of one of the said laws of congress. In the consideration of this fact, you are to consider and determine with what intent the people assembled at Bethlehem, whether to effect, by force, a public or a private measure. The intent with which the people assembled at Bethlehem, in Northampton, is a necessary ingredient to the fact of assembling, and to be proved like any other fact, by the declarations of those who assembled, or by acts done by them. When the question is, "What is a man's intent?" it may be proved by a number of connected circumstances, or by a single fact. If, from a careful examination of the evidence, you shall be convinced that the real object and intent of the people assembled at Bethlehem was of a public nature (which it certainly was, if they assembled with intent to prevent the execution of both of the above-mentioned laws of congress, or either of them), it must then be proved to your satisfaction, that the prisoner at the bar incited, encouraged, promoted, or assisted in the insurrection, or rising of the people, at Bethlehem, and the terror they carried with them, with intent to oppose and prevent, by means of intimidation and violence, the execution of both the abovementioned laws of congress, or either of them; and that some force was used by some of the people assembled at Bethlehem. In the consideration of this fact, the court think proper to assist your inquiry by giving you their opinion.

In treason, all the participes criminis are principals; there are no accessaries to this crime. Every act, which, in the case of felony, would render a man an accessary, will, in the case of treason, make him a principal. To render any person an accomplice and principal in felony, he must be aiding and abetting at the fact; or ready to afford assistance, if necessary. If a person be present at a felony, aiding and assisting, he is a principal. It is always material to consider whether the persons charged are of the same party, upon the same pursuit, and under the expectation of mutual defence and support. All persons present, aiding, assisting, or abetting any treasonable act, are principals. All persons, who are present and countenancing, and are ready to afford assistance, if necessary, to those who actually commit any treasonable act, are also principals. If a number of persons assemble and set out upon a common design, as to resist and prevent, by force, the execution of any law, and some of them commit acts of force and violence, with intent to oppose the execution of any law, and others are present to aid and assist, if necessary, they are all principals. If any man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law, in this case, judgeth of the intent by the fact. If a number of persons combine or conspire to effect a certain purpose, as to oppose, by force, the execution of a law, any act of violence done by any one of them, in pursuance of such combination, and with intent to effect such object, is, in consideration of law, the act of all who are present when such act of violence is committed. If persons collect together to act for one and the same common end, any act done by any one of them, with intent to effectuate such common end, is a fact that may be given in evi-

dence against all of them; the act of each is evidence against all concerned. I shall not detain you at this late hour to recapitulate the facts:—you have taken notes, and they have been stated with accuracy and great candor by Mr. Attorney. I will only remark, that all the evidence relative to transactions before the assembling of the armed force at Bethlehem, are only to satisfy you of the intent with which the body of the people assembled there. If either of the three overt acts (or open deeds) stated in the indictment, is proved to your satisfaction, THE COURT are of opinion, that it is sufficient to maintain the indictment; for THE COURT are of opinion that every overt act is treasonable. As to accomplices—they are legal witnesses, and entitled to credit, unless destroyed by testimony in court. If, upon consideration of the whole matter (law as well as fact), you are not fully satisfied, without any doubt, that the prisoner is guilty of the treason charged in the indictment, you will find him not guilty; but if, upon consideration of the whole matter (law as well as fact), you are convinced that the prisoner is guilty of the treason charged in the indictment, you will find him guilty.

The jury retired for the space of two hours, and brought in their verdict, "Guilty."

After the verdict was given, Judge CHASE, with great feeling and sensibility, addressed the prisoner, observing that, as he had no counsel on the trial, if he, or any person for him, could point out any flaw in the indictment, or legal ground for arrest of judgment, ample time would be allowed for that purpose.

Friday, May 2. THE COURT this morning called before them Charles Deshler, a juror on the above trial of John Fries, who, on the first evening of the said trial, on the adjournment of the court, separated from the jury and retired to his lodgings. Mr. Hopkinson, on behalf of Mr. Deshler, produced his own affidavit, and that of two others, which proved that, on the said evening, Charles Deshler was inadvertently separated from his brethren by the crowd, in going out of the jury box; that he did not know to what place the jury had adjourned: that he then proceeded to his lodgings, where he cautiously avoided all conversation respecting the trial depending. THE COURT, satisfied by this representation of the innocence of Mr. Deshler, ordered that he be discharged, and that the beforementioned affidavit be entered on the record of the court.

The prisoner being set at the bar, Judge CHASE, after observing to the other defendants that what he had to say to Fries would apply generally to them, proceeded:—

John Fries, you have been already informed, that you stood convicted of the treason, charged upon you by the indictment on which you have been arraigned, of levying war against the United States. You have had a legal, fair, and impartial trial, with every indulgence that the law would permit. Of the whole panel, you peremptorily challenged thirty-four, and with truth I may say, that the jury who tried you were of your own selection and choice. Not one of them before had ever formed and delivered any opinion respecting your guilt or innocence. The verdict of the jury against you was founded on the testimony of many creditable and unexceptionable witnesses. It was apparent from the conduct of the jury, when they delivered their verdict, that if innocent, they would have acquitted you with pleasure; and that they pronounced their verdict against you with great concern and reluctance, from a sense of duty to their country, and a full conviction of your guilt. The crime of which you have been found guilty is treason; a crime considered, in the most civilized and the most free countries in the world, as the greatest that any man can commit. It is a crime of so deep a dye, and attended with such a train of fatal consequences, that it can receive no aggravation; yet the duty of my station requires that I should explain to you the nature of the crime of which you are convicted; to show the necessity of that justice which is this day to be administered, and to awaken your mind to proper reflections and a due sense of your own condition, which, I imagine, you must have reflected upon during your long confinement. You are a native of this country—you live under a constitution (or form of government) framed by the people themselves; and under laws made by your representatives, faithfully executed by independent and impartial judges. Your government secures to every member of the community equal liberty and equal rights; by which equality of liberty and rights, I mean, that every person, without any regard to wealth, rank, or station, may enjoy an equal share of civil liberty, and equal protection of law, and an equal security for his person and property. You enjoyed, in common with your fellow-citizens, all those rights. If experience should prove that the constitution is defective, it provides a mode to change or amend it, without any danger to public order, or any injury to social rights. If congress, from inattention, error in judgment, or want of information, should pass any law in violation of the constitution, or burdensome or oppressive to the people, a peaceable, safe and ample remedy is provided by the constitution. The people themselves have established the mode by which such grievances are to be redressed; and no other mode can be adopted without a violation of the constitution and of the laws. If congress should pass a law contrary to the constitution, such law would be void, and the courts of the United States possess complete authority, and are the only tribunal to decide, whether any law

is contrary to the constitution. If congress should pass burdensome or oppressive laws, the remedy is with their constituents, from whom they derive their existence and authority. If any law is made repugnant to the voice of a majority of their constituents, it is in their power to make choice of persons to repeal it; but until it is repealed, it is the duty of every citizen to submit to it, and to give up his private sentiments to the public will. If a law which is burdensome, or even oppressive in its nature or execution, is to be opposed by force; and obedience cannot be compelled, there must soon be an end to all government in this country. It cannot be credited by dispassionate men, of any information, that congress will intentionally make laws in violation of the constitution, contrary to their sacred trust, and solemn obligation to support it. None can believe that congress will wilfully or intentionally impose unreasonable and unjust burdens on their constituents, in which they must participate. The most ignorant man must know, that congress can make no law that will not affect them equally, in every respect, with their constituents. Every law that is detrimental to their constituents must prove hurtful to themselves. From these considerations, every one may see, that congress can have no interest in oppressing their fellow-citizens. It is almost incredible, that a people living under the best and mildest government in the whole world, should not only be dissatisfied and discontented, but should break out into open resistance and opposition to its laws.

The insurrection in 1794, in the four western counties of this state (particularly in Washington), to oppose the execution of the laws of the United States, which laid duties on stills, and spirits distilled, within the United States, is still fresh in memory: it originated from prejudices and misrepresentations industriously disseminated and diffused against those laws. Either persons disaffected to our government, or wishing to aggrandize themselves, deceived and misled the ignorant and uninformed class of the people. The opposition commenced in meetings of the people, with threats against the officers, which ripened into acts of outrage against them, and were extended to private citizens. Committees were formed to systematize and inflame the spirit of opposition. Violence succeeded to violence, and the collector of Fayette county was compelled to surrender his commission and official books; the dwelling house of the inspector (in the vicinity of Pittsburgh) was attacked and burnt; and the marshal was seized, and obtained his liberty on a promise to serve no other process on the west side of the Alleghany mountains. To compel submission to the laws, the government were obliged to march an army against the insurgents, and the expense was above one million one hundred thousand dollars. Of the whole number of insurgents (many hundreds) only a few were brought to trial; and of them only two were sentenced to die (Vigol and Mitchell), and they were pardoned by the late president. Although the insurgents made no resistance to the army sent against them, yet not a few of our troops lost their lives, in consequence of their great fatigue, and exposure to the severity of the season. This great and remarkable clemency of the government had no effect upon you, and the deluded people in your neighbourhood. The rise, progress, and termination of the late insurrection bear a strong and striking analogy to the former; and it may be remembered that it has cost the United States 80,000 dollars. It cannot escape observation, that the ignorant and uninformed are taught to complain of taxes, which are necessary for the support of government, and yet they permit themselves to be seduced into insurrections which have so enormously increased the public burthens, of which their contributions can scarcely be calculated. When citizens combine and assemble with intent to prevent by threats, intimidation and violence, the execution of the laws, and they actually carry such traitorous designs into execution, they reduce the government to the alternative of prostrating the laws before the insurgents, or of taking necessary measures to compel submission. No government can hesitate. The expense, and all the consequences, therefore, are not imputable to the government, but to the insurgents. The mildness and lenity of our government are as striking on the late as on the former insurrection. Of nearly one hundred and thirty persons who might have been put on their trial for treason, only five have been prosecuted and tried for that crime.

In the late insurrection, you, John Fries, bore a conspicuous and leading part. If you had reflected, you would have seen that your attempt was as weak as it was wicked. It was the height of folly in you to suppose that the great body of our citizens, blessed in the enjoyment of a free republican government of their own choice, and of all rights civil and religious; secure in their persons and property; and conscious that the laws are the only security for their preservation from violence, would not rise up as one man to oppose and crush so ill-founded, so unprovoked an attempt to disturb the public peace and tranquillity. If you could see in a proper light your own folly and wickedness, you ought now to bless God that your insurrection was so happily and speedily quelled by the vigilance and energy of our government, aided by the patriotism and activity of your fellow-citizens, who left their homes and business and embodied themselves in the support of its laws. The annual, necessary expenditures for the support of any extensive government like ours must be great; and the sum required can only be obtained by taxes, or loans. In all countries the levy-

ing taxes is unpopular, and a subject of complaint. It appears to me that there was not the least pretence of complaint against, much less of opposition and violence to, the law for levying taxes on dwelling-houses; and it becomes you to reflect that the time you chose to rise up in arms to oppose the laws of your country, was when it stood in a very critical situation with regard to France, and on the eve of a rupture with that country. I cannot omit to remind you of another matter, worthy of your consideration. If the marshal, or any of the posse, or any of the four friends of government who were with him, had been killed by you, or any of your deluded followers, the crime of murder would have been added to the crime of treason. In your serious hours of reflection, you ought to consider the consequences that would have flowed from the insurrection, which you incited, encouraged, and promoted, in the character of a captain of militia, whose incumbent duty it is to stand ready (whenever required), to assist and defend the government and its laws, if it had not been immediately quelled. Violence, oppression and rapine, destruction, waste, and murder, always attend the progress of insurrection and rebellion; the arm of the father would have been raised against the son; that of the son against the father; a brother's hand would have been stained with brother's blood; the sacred bands of friendship would have been broken, and all the ties of natural affection would have been dissolved.

The end of all punishment is example; and the enormity of your crime requires that a severe example should be made to deter others from the commission of like crimes in future. You have forfeited your life to justice. Let me, therefore, earnestly recommend to you most seriously to consider your situation—to take a review of your past life, and to employ the very little time you are to continue in this world in endeavors to make your peace with that God whose mercy is equal to his justice. I suppose that you are a Christian; and as such I address you. Be assured, my guilty and unhappy fellow-citizen, that without serious repentance of all your sins, you cannot expect happiness in the world to come; and to your repentance you must add faith and hope in the merits and mediation of Jesus Christ. These are the only terms on which pardon and forgiveness are promised to those who profess the Christian religion. Let me, therefore, again entreat you to apply every moment you have left in contrition, sorrow and repentance. Your day of life is almost spent; and the night of death fast approaches. Look up to the Father of Mercies, and God of Comfort. You have a great and immense work to perform, and but little time in which you must finish it. There is no repentance in the grave, for after death comes judgment; and as you die, so you must be judged. By repentance and faith, you are the object of God's mercy; but if you will not repent, and have faith and dependence upon the merits of the death of Christ, but die a hardened and impenitent sinner, you will be the object of God's justice and vengeance. If you will sincerely repent and believe, God has pronounced his forgiveness; and there is no crime too great for his mercy and pardon. Although you must be strictly confined for the very short remainder of your life, yet the mild government and laws which you have endeavoured to destroy permit you (if you please) to converse and commune with ministers of the gospel; to whose pious care and consolation, in fervent prayers and devotion, I most cordially recommend you. What remains for me is a very painful, but a very necessary part of my duty. It is to pronounce that judgment which the law has appointed for crimes of this magnitude. The judgment of the law is, and this court doth award, "that you be hanged by the neck until dead;" and I pray God Almighty to be merciful to your soul!

NOTE 1.

The "conduct directed by the court," which led to the withdrawal of Mr. Dallas and Mr. Lewis, afterwards became the subject of the first of the articles of impeachment on which Judge Chase was tried before the senate of the United States, in February, 1805. A fair view of the transaction may be gathered from the answer of Judge Chase, and the testimony of Mr. Dallas and Mr. Rawle.

Judge Chase's Answer.—The first articles relate to his supposed misconduct in the trial of John Fries, for treason, before the circuit court of the United States, at Philadelphia, in April and May, 1800; and alleges that he presided at that trial, and that, "unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them, faithfully and impartially, and without respect to persons," he did then, "in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust." This general accusation, too vague in itself for reply, is supported by three specific charges of misconduct: 1st. In delivering an opinion, in writing, on the question of law, on the construction of which the defence of the accused materially depended; which opinion, it is alleged, tended "to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his favor. 2d. "In restricting the counsel for the said John Fries, from recurring to such English authorities as they believed apposite; or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defence of their client." 3d. "In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavouring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give." This first article then concludes, that in consequence of this irregular conduct of this respondent, "the said John Fries was deprived of the right secured to him by the eighth article amendatory of the constitution; and was condemned to death, without having been heard by counsel, in his defence." By the eighth article amendatory to the constitution, this respondent supposes is meant the sixth amend-

ment to the constitution of the United States; which secures to the accused, in all criminal prosecutions, the right to have the assistance of counsel for his defence.

In answer to these three charges, the respondent admits that the circuit court of the United States, for the district of Pennsylvania, was held at Philadelphia, in that district, in the months of April and May, in the year of our Lord one thousand eight hundred; at which court John Fries, the person named in the said first article, was brought to trial, on an indictment for treason against the United States; and that this respondent then held a commission as one of the associate justices of the supreme court of the United States; by virtue of which office he did, pursuant to the laws of the United States, preside at the above mentioned trial, and was assisted therein by Richard Peters, Esq., then and still district judge of the United States, for the district of Pennsylvania; who, as directed by the laws of the United States, sat as assistant judge at the said trial. With respect to the opinion which is alleged to have been delivered by this respondent at the above mentioned trial, he begs leave to lay before this honourable court the true state of that transaction, and to call its attention to some facts and considerations, by which his conduct on that subject will, he presumes, be fully justified. The constitution of the United States, in the third section of the third article, declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." By two acts of congress, the first passed on the 3d day of March, 1791 [1 Stat. 199], and the second on the 8th day of May, 1792 [1 Stat. 267], a duty was imposed on spirits distilled within the United States, and on stills, and various provisions were made for its collection. In the year 1794, an insurrection took place in four of the western counties of Pennsylvania, with a view of resisting and preventing by force the execution of these two statutes; and at a circuit court of the United States, held at Philadelphia, for the district of Pennsylvania, in the month of April, in the year 1795, by William Patterson, Esq., then one of the associate justices of the supreme court of the United States, and the above mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania, two persons, who had been concerned in the above named insurrections, namely, Philip Vigol and John Mitchell were indicted for treason of levying war against the United States, by resisting and preventing by force the execution of the two last-mentioned acts of congress; and were, after a full and very solemn trial, convicted on the indictments, and sentenced to death. They were afterwards pardoned by George Washington, then president of the United States. In the first of these trials, that of Vigol [Case No. 16,621], the defence of the prisoner was conducted by very able counsel, one of whom, William Lewis, Esq., is the same person who appeared as counsel for John Fries, in the trial now under consideration. Neither that learned gentleman nor his able colleague then thought proper to raise the question of law, whether resisting and preventing by armed force the execution of a particular law of the United States be a "levying of war against the United States," according to the true meaning of the constitution; although a decision of this question in the negative must have acquitted the prisoner. But in the next trial, that of Mitchell [Cases Nos. 15,788 and 15,789], this question was raised on the part of the prisoner, and was very fully and ably discussed by his counsel; and it was solemnly determined by the court, both the judges concurring, "that to resist or prevent by armed force, the execution of a particular law of the United States, is a levying of war against the United States, and consequently is treason, within the true meaning of the constitution." The decision, according to the best established principles of our jurisprudence, became a precedent for all courts of equal or inferior jurisdiction; a precedent which, although not absolutely obligatory, ought to be viewed with very great respect, especially by the court in which it was made, and ought never to be departed from, but on the fullest and clearest conviction of its incorrectness.

On the 9th of July, 1798 [1 Stat. 580], an act of congress was passed, providing for a valuation of lands and dwelling houses, and an enumeration of slaves throughout the United States; and directing the appointment of commissioners and assessors for carrying it into execution: and on the 14th day of July [1 Stat. 597] in the same year, a direct tax was laid by another act of congress of that date, on the lands, dwelling houses, and slaves, so to be valued and enumerated. In the months of February and March, A. D. 1799, an insurrection took place in the counties of Bucks and Northampton, in the state of Pennsylvania, for the purpose of resisting and preventing by force, the execution of the two last-mentioned acts of congress, and particularly that for the valuation of lands and dwelling houses. John Fries, the person mentioned in the article of impeachment now under consideration, was apprehended and committed to prison, as one of the ringleaders of this insurrection; and at a circuit court of the United States, held at Philadelphia, in and for the district of Pennsylvania, in the month of April A. D. 1799, he was brought to trial for this offence, on an indictment for treason, by levying war against the United States, before James Iredell, Esq., then one of the associate justices of the supreme court of the United States, who presided in the said court, according to law, and the above mentioned Richard Peters, then district judge of the United States, for the district of Pennsylvania, who sat in the said circuit court as assistant judge. In this trial, which was conducted with great solemnity, and occupied nine days, the prisoner was assisted by William Lewis and Alexander James Dallas, Esqrs., two very able and eminent counsellors; the former of whom, William Lewis, is the person who assisted as above mentioned, in conducting the defence of Vigol, on a similar indictment. These gentlemen, finding that the facts alleged were fully and undeniably proved, by a very minute and elaborate examination of witnesses, thought proper to rest the case of the prisoner on the question of law, which had been determined in the cases of Vigol and Mitchell above mentioned, and had then been acquiesced in, but which they thought proper again to raise. They contended "that to resist by force of arms a particular law of the United States does not amount to levying war against the United States, within the true meaning of the constitution, and therefore it is not treason, but a riot only." This question they argued at great length, and with all the force of their learning and genius; and after a very full discussion at the bar, and the most mature deliberation by the court, the learned and excellent judge who then presided, and who was no less distinguished by his humanity and tenderness towards persons tried before him, than by his extensive knowledge and great talents as a lawyer, pronounced the opinion of himself and his colleague, "that to resist or prevent by force the execution of a particular law of the United States, does not amount to levying war against them, within the true meaning of the constitution, and does not therefore constitute the crime of treason," thereby adding the weight of another and more solemn decision to the precedent which had been established in the above-mentioned Cases of Vigol and Mitchell. Under this opinion of the court on the question of law, the jury, having no doubt as to the facts, found the said John Fries guilty of treason, on the above-mentioned indictment. But a new trial was granted by the court, not by

reason of any doubt as to the correctness of the decision on the question of law, but solely on the ground, as this respondent hath understood and believes, that one of the jurors of the petit jury, after he was summoned, but before he was sworn on the trial, had made some declaration unfavourable to the prisoner. The yellow fever having appeared in Philadelphia in the summer of the year 1799, the above mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania, did, according to law, appoint the next circuit court of that district, to be held at Norristown therein: pursuant to which appointment, a circuit court was held at Norristown aforesaid, in and for the said district, on the 11th day of October, in the last-mentioned year, before Bushrod Washington, Esq., then one of the associate justices of the supreme court of the United States, and the above-mentioned Richard Peters; at which court no proceedings were had on the aforesaid indictment against John Fries, because, as this respondent hath been informed and believes, the commission of the marshal of the said district had expired, before he summoned the jurors to attend at the said court, and had not been renewed; by reason of which no legal panel of jurors could be formed.

On the 11th day of April, A. D. 1800, and from that day until the 2d day of May in the same year, a circuit court of the United States was held at Philadelphia, in and for the district of Pennsylvania, before this respondent, then one of the associate justices of the supreme court of the United States, and the above-mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania. At this court, the indictment on which the said John Fries had been convicted as above mentioned, was quashed ex-officio by William Rawle, Esq., then attorney of the United States for the district of Pennsylvania, and a new indictment was by him preferred against the said John Fries, for treason of levying war against the United States, by resisting and preventing by force, in the manner above set forth, the execution of the above-mentioned acts of congress, for the valuation of lands and dwelling houses and the enumeration of slaves, and for levying and collecting a direct tax. This indictment, of which a true copy, marked "Exhibit No. 1," is herewith exhibited by this respondent, who prays that it may be taken as a part of this his answer, being found by the grand jury on the 16th day of April, 1800, the said John Fries was on the same day arraigned thereon, and plead not guilty. William Lewis and Alexander James Dallas, Esqrs., the same persons who had conducted his defence at his former trial, were again at his request assigned by the court as his counsel: and his trial was appointed to be had on Tuesday, the 22d day of the last-mentioned month of April. After this indictment was found by the grand jury, this respondent considered it with great care and deliberation, and finding, from the three overt acts of treason which it charged, that the question of law arising upon it, was the same question which had already been decided twice in the same court, on solemn argument and deliberation, and one in that very case, he considered the law as settled by those decisions, with the correctness of which on full consideration he was entirely satisfied; and by the authority of which he should have deemed himself bound, even had he regarded the question as doubtful in itself. They are moreover, in perfect conformity with the uniform tenor of decisions in the courts of England and Great Britain, from the revolution in 1688, to the present time, which, in his opinion, added greatly to their weight and authority. And surely we need not urge to this honourable court the correctness, the importance, and the absolute necessity of adhering to principles of law once established, and of considering the law as finally settled, after repeated and solemn decisions by courts of competent jurisdiction. A contrary principle would unsettle the basis of our whole system of jurisprudence, hitherto our safeguard and our boast; would reduce the law of the land, and subject the rights of the citizen, to the arbitrary will, the passions, or the caprice of the judge in each particuar case; and would substitute the varying opinions of various men, instead of that fixed, permanent rule in which the very essence of the law consists. If this respondent erred in regarding this point as settled, by the repeated and solemn adjudications of his predecessors, in the same court and in the same case; if he erred in supposing that a principle, established by two solemn decisions, was obligatory upon him, sitting in the same court where those decisions had been made; if he erred in believing that it would be the highest presumption in him to see up his opinion and judgment over that of his colleague, who had twice decided the same question, and of two of his predecessors, who justly rank among the ablest judges that have ever adorned a court; if in all this he erred, it is an error of which he cannot be ashamed, and which he trusts will not be deemed criminal in the eyes of this honourable court, of his country, or of that posterity by which he, his accusers, and his judges, must one day be judged. Under the influence of these considerations, this respondent drew up an opinion on the law arising from the overt acts stated in the said indictment, which was conformable to the decisions before given as above mentioned, and which he sent to his colleague, the said Richard Peters, for his consideration. That gentleman returned it to this respondent, with some amendments affecting the form only, but not in any manner touching the substance. The opinion thus agreed to, this respondent thought it proper to communicate to the prisoner's counsel; several reasons concurred in favour of this communication.

In the first place, this respondent considered himself and the court as bound by the authority of the former decisions; especially the last of them, which was on the same case. He considered the law as settled, and had every reason to believe that his colleague viewed it in the same light. It was not suggested or understood that any new evidence was to be offered; and he knew that if any should be offered, which could vary the case, it would render wholly inapplicable both the opinion and the former decisions on which it was founded. And he could not and did not suppose, that the prisoner's counsel would be desirous of wasting very precious time in addressing to the court a useless argument on a point which that court held itself precluded from deciding in their favour. He therefore conceived that it would be rendering the counsel a service and a favour, to apprise them beforehand of the view which the court had taken of the subject; so as to let them see in time the necessity of endeavouring to produce new testimony, which might vary the case, and take it out of the authority of former decisions. Secondly. There were more than one hundred civil causes then depending in the said court, as appears by the exhibit marked "No. 1," which this respondent prays may be taken as part of this, his answer. Many of those causes had already been subjected to great delay, and it was the peculiar duty of this respondent, as presiding judge, to take care that as little time as possible should be unnecessarily consumed, and that every convenient and proper dispatch should be given to the business of the citizens. He did believe that an early communication of the court's opinion might tend to the saving of time, and, consequently, to the dispatch of business. Thirdly. As the court held itself bound by the former decisions, and could not therefore alter its opinion in consequence of any argument; and as it was the duty of the court to charge the jury on the law, in all cases submitted to their consideration; he knew that this opinion must not only be made known at some period

or other of the trial, but must, at the end of the trial, be expressly delivered to the jury by him, in a charge from the bench. And, he could not suppose and cannot yet imagine, that an opinion, which was to be thus solemnly given in charge to the jury, at the close of the trial, could make any additional impression on their minds, from the circumstance of its being intimated to the counsel before the trial began, in the hearing of those who might be afterwards sworn on the jury. And, lastly, it was then his opinion, and still is, that it is the duty of every court of this country, and was his duty on the trial now under consideration, to guard the jury against erroneous impressions respecting the laws of the land. He well knows that it is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and that hence results the power of juries to decide on the laws as well as on the facts, in all criminal cases. This power he holds to be a sacred part of our legal privileges, which he never has attempted, and never will attempt, to abridge or to obstruct. But he also knows that, in the exercise of this power, it is the duty of the jury to govern themselves by the laws of the land, over which they have no dispensing power; and their right to expect and receive from our court all the assistance which it can give, for rightly understanding the law. To withhold this assistance, in any manner whatever; to forbear to give it in that way which may be most effectual for preserving the jury from error and mistake, would be an abandonment or forgetfulness of duty, which no judge could justify to his conscience or to the laws. In this case, therefore, where the question of law arising on the indictment had been finally settled by authoritative decisions, it was the duty of the court, and especially of this respondent as presiding judge, early to apprise the counsel and the jury of these decisions, and their effect, so as to save the former from the danger of making an improper attempt to mislead the jury in a matter of law, and the jury from having their minds pre-occupied by erroneous impressions.

It was for these reasons that, on the 22d day of April, 1800, when the said John Fries was brought into court, and placed in the prisoner's box for trial, but before the petit jury was impaneled to try him, this respondent informed the above-mentioned William Lewis, one of his counsel, the aforesaid Alexander James Dallas not being then in court, "that the court had deliberately considered the indictment against John Fries for treason, and the three several overt acts of treason stated therein. That the crime of treason was defined by the constitution of the United States; that, as the federal legislature had the power to make, alter, or repeal laws, so the judiciary only had the power, and it was their duty, to declare, expound, and interpret, the constitution and laws of the United States. That it was the duty of the court, in all criminal cases, to state to the petit jury their opinion of the law arising on the facts; but the jury, in all criminal cases, were to decide both the law and the facts, on a consideration of the whole case. That there must be some constructive exposition of the terms used in the constitution, 'levying war against the United States.' That the question, what acts amounted to levying war against the United States, or the government thereof, was a question of law, and had been decided by Judges Patterson and Peters, in the Cases of Vigol and Mitchell [supra], and by Judges Iredell and Peters, in the case of John Fries, prisoner at the bar, in April, 1799 [Case No. 5,126]. That Judge Peters remained of the same opinion, which he had twice before delivered, and he, this respondent, on long and great consideration, concurred in the opinion of Judges Patterson, Iredell, and Peters. That to prevent unnecessary delay, and to save time on the trial of John Fries, and to prevent a delay of justice in the great number of civil causes depending for trial at that term, the court had drawn up in writing their opinion of the law, arising on the overt acts, stated in the indictment against John Fries; and had directed David Caldwell, their clerk, to make out three copies of their opinion, one to be delivered to the attorney of the district, one to the counsel for the prisoner, and one to the petit jury, after they should have been impaneled and heard the indictment read to them by the clerk, and after the district attorney should have stated to them the law on the overt acts alleged in the indictment, as it appeared to him." After these observations, this respondent delivered one of the above-mentioned copies to the aforesaid William Lewis, then attending as one of the prisoner's counsel, who read part of it, and then laid it down on the table before him. Some observations were then made on the subject by him and the above-mentioned Alexander James Dallas, who had then come into court; but this respondent doth not now recollect those observations, and cannot undertake to state them accurately. And this respondent further saith, that the paper marked "Exhibit No. 2," and herewith exhibited, which he prays leave to make part of this his answer, is a true copy of the original opinion, drawn up by him and concurred in by the said Richard Peters, as above set forth, which original opinion is now in the possession of this respondent, ready to be produced to this honourable court. He may have erred in forming this opinion, and in the time and manner of making it known to the counsel for the prisoner. If he erred in forming it, he erred in common with his colleague and with two of his predecessors; and he presumes to hope that an error which has never been deemed criminal in them, will not be imputed as a crime to him, who was led into it by their example and their authority. If he erred in the time and manner of making known this opinion, he feels a just confidence that when the reasons which he has alleged for his conduct, and by which it seemed to him to be fully justified, shall come to be carefully weighed, they will be sufficient to prove, if not that this conduct was perfectly regular and correct, yet that he might sincerely have considered it as right; and that in a case where so much doubt may exist, to have committed a mistake is not to have committed a crime. And this respondent further answering, insists, that the opinion thus delivered to the prisoner's counsel, viz: that "any insurrection or rising of any body of people within the United States, for the purpose of resisting or preventing by force or violence, under any pretence whatever, the execution of any statute of the United States, for levying or collecting taxes, or for any other object of a general or national concern, is levying war against the United States, within the contemplation and true meaning of the constitution of the United States," is a legal and correct opinion, supported not only by the two previous decisions above mentioned, but also by the plainest principles of law and reason, and by the uniform tenor of legal adjudications in England and Great Britain, from the revolution in 1688 to this time. It ever was, and now is his opinion, that the peace and safety of the national federal government must be endangered by any other construction of the terms "levying war against the United States," used by the federal constitution; and he is confident that no judge of the federal government, no judge of a superior state court, nor any gentleman of established reputation for legal knowledge, would or could deliberately give a contrary opinion. If, however, this opinion were erroneous, this respondent would be far less censurable than his predecessors, by whose example he was led astray, and by whose authority he considered himself bound. Was it an error to consider himself bound by the authority of their previous decisions? If it were, he was led into the error by the uniform course

of judicial proceedings in this country and England, and is supported in it by one of the fundamental principles of our jurisprudence. Can such an error be a crime or misdemeanour? If, on the other hand, the opinion be in itself correct, as he believes and insists that it is, could the expression of a correct opinion on the law, whenever and however made, mislead the jury, infringe their rights, or give an improper bias to their judgment? Could truth excite improper prejudice? Could the jury be less prepared to hear the law discussed, and to decide on it correctly, because it was correctly stated to them by the court? And is not that a new kind of offence, in this country at least, which consists in telling the truth, and giving a correct exposition of the laws?

As to the second specific charge adduced in support of the first article of impeachment, which accuses this respondent "of restricting the counsel for the said Fries, from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defence of their client," this respondent admits that he did, on the above-mentioned trial, express it as his opinion to the aforesaid counsel for the prisoner, "that the decisions in England, in cases of indictments for treason at common law, against the person of the king, ought not to be read to the jury, on trials for treason under the constitution and statutes of the United States; because such decisions could not inform, but might mislead and deceive the jury; that any decisions on cases of treason, in the courts of England, before the revolution of 1688, ought to have very little influence in the courts of the United States; that he would permit decisions in the courts of England or of Great Britain, since the said revolution, to be read to the court or jury for the purpose of showing what acts have been considered by those courts as a constructive levying of war against the king of that country, in his legal capacity, but not against his person; because levying war against his government was of the same nature as levying war against the government of the United States; but that such decisions, nevertheless, were not to be considered as authorities binding on the courts and juries of this country, but merely in the light of opinions entitled to great respect as having been delivered, after full consideration, by men of great legal learning and ability." These are the opinions which he did on that occasion deliver to the counsel for the prisoner, and which he then thought, and still thinks, it was his duty to deliver. The counsellors admitted to practice in any court of justice, are, in his opinion, and according to universal practice, to be considered as officers of such courts and ministers of justice therein, and as such, subject to the direction and control of the court, as to their conduct in its presence, and in conducting the defence and criminals on trial before it. As counsel, they owe to the person accused, diligence, fidelity and secrecy, and to the court and jury, due and correct information, according to the best of their knowledge and ability, on every matter of law which they attempt to adduce in argument. The court, on the other hand, hath power, and is bound in duty, to decide and direct what evidence, whether by records or by precedents of decisions in courts of justice, is proper to be admitted for the establishment of any matter of law or fact. Consequently, should counsel attempt to read to the jury, as a law still in force, a statute which had been repealed, or a decision which had been reversed, or the judgments of courts in countries whose laws have no connection with ours, it would be the duty of the court to interpose, and prevent such an imposition from being practiced on the jury. For these reasons this respondent thinks that his conduct was correct in expressing to the counsel for Fries the opinions stated above. He is not bound to answer here for the correctness of those principles, though he thinks them incontestable; but merely for the correctness of his motives in delivering them. A contrary opinion would convert this honourable court from a court of impeachment into a court of appeals; and would lead directly to the strange absurdity, that, whenever the judgment of an inferior court should be reversed on appeal or writ of error, the judges of that court must be convicted of high crimes and misdemeanours, and turned out of office; that error in judgment is a punishable offence, and that crimes may be committed without any criminal intention. Against a doctrine so absurd and mischievous, so contrary to every notion of justice hitherto entertained, so utterly subversive of all that part of our system of jurisprudence which has been wisely and humanely established for the protection of innocence, this respondent deems it his duty now, and on every fit occasion, to enter his protest and lift up his voice; and he trusts that, in the discharge of this duty, infinitely more important to his country than to himself, he shall find approbation and support in the heart of every American, of every man throughout the world, who knows the blessings of civil liberty, or respects the principles of universal justice. It is only, then, for the correctness of his motives in delivering these opinions, that he can now be called to answer; and this correctness ought to be presumed, unless the contrary appear by some direct proof, or by some violent presumption arising from his general conduct on the trial, or from the glaring impropriety of the opinion itself. For he admits that cases may be supposed of an opinion delivered by a judge so palpably erroneous, unjust and oppressive, as to preclude the possibility of its having proceeded from ignorance or mistake.

Do the opinions now under consideration bear any of these marks? This honourable court need not be informed that there has existed in England no such thing as treason at common law, since the year 1350, when the statute of the 25 Edw. III. c. 2, declaring what alone should in future be judged treason, was passed. Is it perfectly clear that decisions made before that statute, 450 years ago, when England, together with the rest of Europe, was still wrapped in the deepest gloom of ignorance and barbarism; when the system of English jurisprudence was still in its infancy; when law, justice and reason, were perpetually trampled under foot by feudal oppression and feudal anarchy; when, under an able and vigorous monarch, everything was adjudged to be treason which he thought fit to call so, and under a weak one nothing was considered as treason which turbulent, powerful, and rebellious nobles thought fit to perpetrate—is it perfectly clear that decisions made at such a time, and under such circumstances, ought to be received by the courts of this country as authorities to govern their decisions, or lights to guide the understanding of juries? It is perfectly clear that decisions made in England, on the subject of treason, before the revolution of 1688, by which alone the balance of the English constitution was adjusted, and the English liberties were fixed on a firm basis; decisions made either during the furious civil wars, in which two rival families contended for the crown; when, in the vicissitudes of war, death and confiscation in the forms of law, continually walked in the train of the victors, and actions were treasonable or praise-worthy, according to the preponderance of the party by whose adherents they were perpetrated; during the reigns of three able and arbitrary monarchs who succeeded this dreadful conflict, and relaxed or invigorated the law of treason, according to their anger, their policy, or their caprice; or during those terrible struggles between the principles of liberty, not yet well defined or understood on one hand, and arbitrary power insinuating itself under the forms of the constitution on the other; struggles which presented at some

times the wildest anarchy, at others the extremes of servile submission, and after having brought one king to the scaffold, ended in the expulsion of another from his throne? Is it clear that decisions on the law of treason, made in times like these, ought not only to be received as authorities in the courts of this country, but also to have great influence on their decisions? Is it clear that decisions made in England, as to what acts will amount to levying war against the king, personally, and not against his government, are applicable to the constitution and laws of this country? Is it clear that such English decisions on the subject of treason, as are applicable to our constitution and laws, are to be received in our courts, not merely as the opinions of learned and able men, which may enlighten their judgment, but as authorities which ought to govern absolutely their decisions? Is all this so clear, that a judge could not honestly and sincerely have thought the contrary? That he could not have expressed an opinion to the contrary, without corrupt or improper motives? If it be not thus clear, then must it be admitted that this respondent, sincerely and honestly, and in the best of his judgment, considered these decisions as wholly inadmissible, or admissible only for the purposes and to the extent which he pointed out. And if he did so consider them, was it not his duty to prevent them from being read to the jury, except under those restrictions, and for those purposes? Would his duty permit him to sit silently, and see the jury imposed on and misled? To sit silently and hear a book read to them as containing the law, which he knew did not contain the law? Such silence would have rendered him a party to the deception, and would have justly subjected him to all the contumely which a conscientious and courageous discharge of his duty has so unmeritedly brought on his name.

With respect to the statutes of the United States, which he is charged with having prevented the prisoner's counsel from citing on the aforesaid trial, he denies that he prevented any act of congress from being cited, either to the court or jury, on the said trial; or declared at any time, that he would not permit the prisoner's counsel to read to the jury, or to the court, any act of congress whatever. Nor does he remember or believe, that he expressed on the said trial any disapprobation of the conduct of the circuit court before whom the said case was first tried, in permitting the act of congress relating to crimes less than treason, commonly called the "Sedition Act," to be read to the jury. He admits, indeed, that he was then and still is of opinion, that the said act of congress wholly was irrelevant to the issue, in the trial of John Fries, and, therefore, ought not to have been read to the jury, or regarded by them. This opinion may be erroneous, but he trusts that the following reasons on which it was founded, will be considered by this honourable court, as sufficiently strong to render it possible, and even probable, that such an opinion might be sincerely held and honestly expressed: 1st. That congress did not intend by the sedition law to define the crime of treason by "levying war." Treason and sedition are crimes very distinct in their natures, and subject to very different punishments; the former by death, and the latter by fine and imprisonment. 2dly. The sedition law makes a combination or conspiracy, with intent to impede the operation of any law of the United States, or the advising or attempting to procure any insurrection or riot, a high misdemeanour, punishable by fine and imprisonment; but a combination or conspiracy with intent to prevent the execution of a law, or with intent to raise an insurrection for that purpose, or even with intent to commit treason, is not treason by "levying war" against the United States, unless it be followed by an attempt to carry such combination or conspiracy into effect, by actual force or violence. 3dly. The constitution of the United States is the fundamental and supreme law, and having defined the crime of treason, congress could not give any legislative interpretation or exposition of that crime, or of the part of the constitution by which it is defined. 4thly. The judicial authority of the United States is alone vested with power to expound their constitution and laws.

And this respondent, further answering, saith, that after the above mentioned proceedings had taken place in the said trial, it was postponed until the next day, Wednesday, April 23d, 1800; when, at the meeting of the court, this respondent told both the above-mentioned counsel for the prisoner, "that to prevent any misunderstanding of anything that had passed the day before, he would inform them that, although the court retained the same opinion of the law, arising on the overt acts charged in the indictment against Fries, yet the counsel would be permitted to offer arguments to the court, for the purpose of showing them that they were mistaken in the law; and that the court, if satisfied that they had erred in opinion, would correct it; and, also, that the counsel would be permitted to argue before the petit jury, that the court were mistaken in the law." And this respondent added, that the court had given no opinion as to the facts in the case, about which both the counsel had declared that there would be no controversy. After some observations by the said William Lewis and Alexander James Dallas, they both declared to the court, "that they did not any longer consider themselves as the counsel for John Fries, the prisoner." This respondent then asked the said John Fries, whether he wished the court to appoint other counsel for his defence? He refused to have other counsel assigned; in which he acted, as this respondent believes and avers, by the advice of the said William Lewis and Alexander James Dallas: whereupon the court ordered the said trial to be had on the next day, Thursday, the 24th of April, 1800. On that day the trial was proceeded in; and before the jurors were sworn, they were, by the direction of the court, severally asked on oath, whether they were in any way related to the prisoner, and whether they had ever formed or delivered any opinion as to his guilt or innocence, or that he ought to be punished? Three of them answering in the affirmative, were withdrawn from the panel. The said John Fries was then informed by the court, that he had a right to challenge thirty-five of the jury, without showing any cause, or challenge against them, and as many more as he could show cause of challenge against. He did accordingly challenge peremptorily thirty-four of the jury, and the trial proceeded. In the evening, the court adjourned till the next day, Friday, the 25th of April; when, after the district attorney had stated the principal facts proved by the witnesses, and had applied the law to those facts, this respondent, with the concurrence of his colleague, the said Richard Peters, delivered to the jury the charge contained and expressed in exhibit marked "No. 3," and herewith filed, which he prays may be taken as part of this his answer. Immediately after the petit jury had delivered their verdict, this respondent informed the said Fries, from the bench, that if he, or any person for him, could show any legal ground, or sufficient cause to arrest the judgment, ample time would be allowed him for that purpose. But no cause being shown, sentence of death was passed on the said Fries on the 2d day of May, 1800, the last day of the term; and he was afterwards pardoned by John Adams, then president of the United States.

And this respondent, further answering, saith, that if the two instances of misconduct, first stated in support of the general charge contained in the first article of impeachment, were true as alleged, yet the inference drawn from them, viz. "that the said Fries was hereby deprived of the benefit of counsel for his defence," is not true. He insists that the said Fries was

deprived of the benefit of counsel, not by any misconduct of this respondent, but by the conduct and advice of the above-mentioned William Lewis and Alexander James Dallas, who, having been, with their own consent, assigned by the court as counsel for the prisoner, withdrew from his defence, and advised him to refuse other counsel when offered to him by the court, under pretence that the law had been prejudged, and their liberty of conducting the defence, accor ng to their own judgment, improperly restricted by this respondent; but in reality because they knew the law and the facts to be against them, and the case to be desperate, and supposed that their withdrawing themselves under this pretence, might excite odium against the court; might give rise to an opinion that the prisoner had not been fairly tried; and in the event of a conviction, which, from their knowledge of the law and the facts, they knew to be almost certain, might aid the prisoner in an application to the president for a pardon. That such was the real motive of the said prisoner's counsel, for depriving their client of legal assistance on this trial, this respondent is fully persuaded, and expects to make appear, not only from the circumstances of the case, but from their own frequent and public declarations. As little can this respondent be justly charged with having, by any conduct of his, endeavoured to "wrest from the jury their indisputable right to hear argument, and determine upon the question of law as well as the question of fact involved in the verdict which they were required to give." He denies that he did at any time declare that the aforesaid counsel should not at any time address the jury, or did in any manner hinder them from addressing the jury on the law as well as on the facts arising in the case. It was expressly stated, in the copy of his opinion delivered as above set forth to William Lewis, that the jury had a right to determine the law as well as the fact: and the said William Lewis and Alexander James Dallas were expressly informed, before they declared their resolution to abandon the defence, that they were at liberty to argue the law to the jury. This respondent believes that the said William Lewis did not read the opinion delivered to him as aforesaid, except a very small part at the beginning of it, and of course, acted upon it without knowing its contents: and that the said Alexander James Dallas read no part of the said opinion until about a year ago, when he saw a very imperfect copy, made in court by a certain W. S. Biddle.

And this respondent, further answering, saith, that, according to the constitution of the United States, civil officers thereof, and no other persons, are subject to impeachment; and they only for treason, bribery, corruption or other high crime or misdemeanour, consisting in some act done or committed, in violation of some law forbidding or commanding it; on conviction of which act, they must be removed from office; and may, after conviction, be indicted and punished therefor, according to law. Hence, it clearly results, that no civil officer of the United States can be impeached, except for some offence for which he may be indicted at law; and that no evidence can be received on an impeachment except such as, on an indictment at law, for the same offence, would be admissible. That a judge cannot be indicted or punished according to law, for any act whatever done by him in his judicial capacity, and in a matter of which he has jurisdiction, through error of judgment merely, without corrupt motives, however manifest his error may be, is a principle resting on the plainest maxims of reason and justice, supported by the highest legal authority, and sanctioned by the universal sense of mankind. He hath already endeavoured to show, and he hopes with success, that all the opinions delivered by him in the course of the trials now under consideration, were correct in themselves, and in the time and manner of expressing them; and that even admitting them to have been incorrect, there was such strong reason in their favour, as to remove from his conduct every suspicion of improper motives. If these opinions were incorrect, his mistake in adopting them, or in the time or manner of expressing them, cannot be imputed to him as an offence of any kind, much less as a high crime and misdemeanour, for which he ought to be removed from office; unless it can be shown by clear and legal evidence, that he acted from corrupt motives. Should it be considered that some impropriety is attached to his conduct, in the time and mode of expressing any of these opinions, still he apprehends, that a very wide difference exists between such impropriety, the casual effects of human infirmity, and a high crime and misdemeanour for which he may be impeached, and must on conviction be removed from office.

Finally, this respondent, having thus laid before this honourable court a true state of his case, so far as respects the first article of impeachment, declares, upon the strictest review of his conduct during the whole trial of John Fries for treason, that he was not on that occasion unmindful of the solemn duties of his office as a judge;—that he faithfully, and impartially, and according to the best of his ability and understanding, discharged those duties towards the said John Fries; and that he did not in any manner, during the said trial, conduct himself arbitrarily, unjustly, or oppressively, as he is accused by the honourable the house of representatives. And the said Samuel Chase, for plea to the said first article of impeachment, saith, that he is not guilty of any high crime or misdemeanour, as in and by the said first article is alleged; and this he prays may be inquired of by this honourable court, in such manner as law and justice shall seem to them to require.

Evidence on the part of the United States.

Alexander James Dallas sworn.

Mr. Nicholson: Please to state your knowledge relative to the trial of Fries.

Mr. Dallas: I will endeavour to be as correct as I can in stating the facts relative to the trial, and also the order in which they took place, as well as the language used; but from the length of time which has elapsed since the trial, it is probable I may be mistaken in some part of my relation, as to the language and the order in which the facts took place.—When the prisoners who were charged with having committed an insurrection in the counties of Bucks and Northampton, were brought to Philadelphia, Mr. Ingersoll and myself were applied to by some gentlemen in Philadelphia, to undertake their defence. Mr. Ingersoll being at the time attorney-general of the state of Pennsylvania, determined not to defend them. About this time Mr. Lewis was also spoken to, and engaged in their defence. This produced a meeting at the jail where the prisoners were, and we gave the necessary information relative to a preparation for trial. A Mr. Ewing, a gentleman of the bar, had been employed to defend some of the prisoners, and undertook the defence of Fries with us. This was the first trial, the circumstances of which have been related. On the morning of the second trial, I did not enter the court until some time after it was called. Fries was then in the box assigned for the prisoners. I pressed towards the bar, when my attention was attracted by an animated conversation which was taking place between Mr. Lewis and Mr. Edward Tilghman.—When Mr. Lewis observed me, he met me, and related what he has stated here; he said that Judge Chase had declared that the court had made up their minds with respect to the law relative to treason, and had ordered three copies of the opinion to be made out; one for the attorney of the district; one for the prisoner's counsel; and a third for the jury to take

out with them. After having exchanged our sentiments, we entered the bar together; something fell from the court, which caused a reply from Mr. Lewis. I believe the question was, whether we were ready to proceed with the defence? Mr. Lewis observed that there were no doubts as to the facts, and as the court had made up their minds as to the law, he did not expect that he should be able to change them; and that he should decline acting as counsel for Fries. I at this time addressed the court, and recapitulated what had been told me by Mr. Lewis, thinking that there might be some mistake, for although I was certain that Mr. Lewis would not have related anything that was not true, yet I deemed it probable that I might have misunderstood him. After a moment's pause, in order that I might be corrected if in an error, I proceeded, and delivered some general remarks as to the powers of the court and jury in criminal cases; and concluded by stating to the court my determination not to consider myself as counsel for the prisoner any longer, under the opinion which the court had given. I remember to have heard Judge Peters say to Judge Chase, "I told you so; I knew they would take the stud." Judge Peters also on the same day expressed a wish that we would proceed with the defence, and to take any range we pleased. The bar and the audience appeared extremely surprised at the transactions of the day. On the second day, it became the subject of altercation whether we had a right to address the jury upon the law. Judge Chase then said, that, although he had before stated that we must not, yet that we might address the jury on the law, but it would be at the hazard of our reputation. This had the contrary effect rather than to induce me to proceed. In the evening of that day, Mr. Lewis and myself visited Fries at the prison. We stated to him that we had two objects in view; the first was that of saving his life, and the second to maintain our privileges as members of the bar. We told him that under the then existing circumstances, we had no hopes of an acquittal, as there were no doubts as to the facts, and the court having made up their opinion as to the law, and the jury having heard the declaration of the court, which would influence their verdict. And we told him that if he would consent to our withdrawing from his defence, and refuse to accept other counsel, it would be a strong recommendation to the president for a pardon. He appeared at first extremely alarmed, but after some time he agreed to our proposition. We told him, at the same time, that if he insisted on it, we would proceed to defend him at every hazard. On the next day, we both stated to the court that we were no longer his counsel, upon which both Judge Peters and Judge Chase spoke in the manner in which Mr. Lewis has stated it. We determined to adhere to our determination of withdrawing. Judge Chase then said that we might think to embarrass the court, but we should find ourselves mistaken. He then asked Fries if he wished other counsel assigned him. The prisoner replied that he did not know what was best for him to do, but would leave it entirely to the court. Judge Chase then observed, that, by the blessing of God, they would do him as much justice as the counsel who had been assigned him. I then left the court, and I believe Mr. Lewis did also. On the first trial of Fries, we were allowed to address the jury both on the law and on the fact—to read what authorities we pleased, both before and after the revolution in England, and also the statutes of congress, in order to show that Fries had only been guilty of a riot. Our law points were, that the constitution had defined the law concerning treason, and that the legislature nor the judges had the power of defining it. We argued that the judges before the revolution in England, held their office at the pleasure of the crown, and, therefore, would make anything treason. We took up the common law decisions to show, not what was the law, but what had been their decisions. We cited the case of the man whose stag the king killed, and who wished the horns of the stag in the king's belly, and also that of the innkeeper who kept the sign of the crown, and who said he would make his son heir to the crown, in order to show the great lengths to which the doctrine of constructive treason was carried. We then contended that, although the judges since the revolution in England, had become independent of the crown, yet they considered themselves as bound by these decisions of their predecessors, and, therefore, ought not to be considered as authorities to govern our courts on the subject of treason. We also read the statutes of congress, particularly the first section of the act called the "Sedition Law," in order to show that the legislature of the United States had declared the offence of which Fries was charged to have committed to have been only a riot, and punishable with fine and imprisonment. We attempted to show a difference between the case of Fries and the Western insurrection, and I was surprised that the cases should have been decided to be similar. After a new trial was granted, my attention was almost entirely directed to the object of showing a difference between the two cases at the second trial. This is all that I recollect of the circumstances; but whatever might have been my conduct in order to save the life of the prisoner, yet I never had the least intention of bringing the court into odium.

Mr. Nicholson: Was the jury present at the time that Judge Chase declared that the counsel on the question of law must address themselves to the court?

Mr. Dallas: I know not whether he made this declaration on the first day, as I before stated that I was not in court at the time, and it was related to me by Mr. Lewis.

Mr. Nicholson: When the judge observed that you might proceed at the hazard of your reputation, were the papers withdrawn?

Mr. Dallas: I know not; but I think the judge observed that they were.

William Rawle, affirmed.—Ques. Were you present at the trial of Fries? Ans. I was. Ques. What took place on that occasion? Ans. The circuit court of the United States for the district of Pennsylvania, met on the 11th of April, 1800. As the proceedings against John Fries were considered as not to be revived, without the interposition of an act of congress, it appeared best to me to move the court, on the first day of their session, to quash the indictment against him. This I accordingly did, and the court granted my motion. Upon the same day the court charged the grand jury, and I sent up to them, among others, an indictment against John Fries, which was returned a true bill. On the 16th of April, John Fries was brought to the bar, arraigned, and plead not guilty. I can't say whether Messrs. Lewis and Dallas were on that day assigned him by the court as counsel, or whether they continued to act, having been his counsel on the first trial. Copies of the indictment were furnished to Fries and his counsel. The trial was then postponed, on account of the absence of a material witness, and it was not assigned for the day which Messrs. Lewis and Dallas have given testimony of, and which has been called the first day of the trial. Fries might have been in the box, through mistake, because, that I had on a certain day directed the marshal to bring up a number of persons, charged with seditious practices, and Fries might have been brought with them. Shortly after, the court met. Judge Chase observed, that the court had made up their minds as to the law of treason, and to avoid being misunderstood, they had reduced their opinion to writing, and that they had directed three copies of the opinion to be made out; one for the district attorney, another for the counsel for the prisoner, and a third for the

jury, to be delivered to them after the case had gone through, on the part of the prosecution. As these words were pronounced, several papers were thrown, I know not whether by the court or the clerk. I took up one of them and began to read; but casting my eyes up, I saw Mr. Lewis on the opposite side of the table, with one of the papers in his hand, which he looked at with apparent indignation, and then threw it on the table. I cannot call to my recollection anything further that passed between the counsel and the court on that day. I perceived much agitation among the gentlemen of the bar; but having a great burthen of criminal prosecutions on my hands, I could hear nothing until the court rose. In the course of that morning, twenty-one persons were brought to the bar for seditious combinations, and submitted to the court. The court rose early in the day, and requested me not to examine the witnesses on those cases of sedition. After the court rose, I understood that the counsel for Fries meant to decline acting in his defence. I have an indistinct recollection of hearing this from Mr. Dallas. Soon after I got home on that day, Judge Chase and Judge Peters came to my house. We went into another room from that in which I was sitting, when Judge Peters began by expressing an apprehension that the counsel for Fries would decline acting for him. Judge Chase observed that he could not suppose that that would be the case. I supported the opinion of Judge Peters, and stated that the gentlemen of the bar of Philadelphia were very independent, and that in my opinion the counsel for Fries would not proceed, unless the papers were withdrawn, and they were permitted to go on in their usual way. Judge Chase observed that he was sorry that the opinion had been considered in the light it was, and that it was not intended to preclude the counsel from going on in the usual manner, provided they thought proper. Both the judges then requested me to obtain all the copies of the opinion which had been taken, which I readily promised to comply with. I recollected to have seen Messrs. Tilghman and Ross taking copies of the opinion. I went to their houses and requested them, which they gave to me immediately, and I took them to Mr. Caldwell, the clerk of the court. I asked him whether he knew of any other persons taking a copy, and he answered that he believed that Mr. William Meredith had; upon which I requested him to go to Mr. Meredith, and try to obtain it. I did not at that time know that Mr. Biddle, who was then a student of mine, had taken a copy; nor did I then recollect that I had one of them myself. I, therefore, did not hand it to the clerk, but have it now in my possession. The papers which were thrown down did not appear to me to be read by any persons but those who copied them; and I entertained an anxious hope, on the next day, that the gentlemen who were concerned as counsel for Fries would proceed in his defence, and be satisfied.

I will now, with the permission of the court, refer to some original notes which I took upon the remaining part of the transaction. On the 23d day of April, John Fries was brought to the bar. The court then, addressing themselves first to me, and then to the counsel for Fries, asked if we were ready to proceed with the trial? to which I answered affirmatively. Mr. Lewis then observed, that if he had been employed by the prisoner, he would think himself bound to proceed; but having been assigned as his counsel—(He was here interrupted by Judge Chase, who said "You are not bound by the opinion delivered yesterday, but are at liberty to contest it on both sides.") Mr. Lewis answered, that he had understood that the court had made up their minds as to the law, and as the prisoner's counsel had a right to address the jury both on the law and the fact, it would place him in too degrading a situation to argue the case after what had passed, and, therefore, he would not proceed with the defence. Judge Chase answered with impatience, "You are at liberty to proceed as you think proper. Address the jury and lay down the law as you think proper." Mr. Lewis answered, with considerable warmth, "I will never address myself to the court upon the question of law in a criminal case." He then went into a lengthy argument upon the law of high treason in England, previous to their resolution, and contended that the courts, since that period, had considered themselves as bound by those decisions which were made prior to it. Judge Chase observed, that the counsel must do as they please. Mr. Dallas then rose, and went into a general view of the ground, which had been taken by Mr. Lewis, and concluded with his determination not to proceed as counsel for Fries. Judge Chase observed, "No opinion has been given as to the facts of the case. I would not suffer the witnesses against those persons charged with seditious combinations, to be examined before the trial of Fries came on, lest their evidence might have been heard by some of the jury. As to the law, I know that the trial before took a considerable time, and that cases at common law, and decisions in England before the revolution on the law of treason, such as the case of the man whose stag the king killed, and wished the horns of the stag in the king's belly, and the case of the innkeeper, who kept the sign of the crown, and who said he would make his son heir to the crown. These cases ought not, and shall not go to the jury. There is no case which can come before me on which I have not a decided opinion as to the law; otherwise I should not be fit to preside here. I have always conducted myself with candour, gentlemen, and meant to have saved you trouble by what I did. Is it not respectable for counsel to say that they have a right to offer what they please to the jury? What! would you cite decisions in Rome, in Turkey, or in France? You will now proceed, and stand acquitted or condemned in your own consciences as you conduct the defence, and go on in your own way. The case will be opened by the attorney—the manner must be regulated by the court." Judge Peters added, that the papers were all withdrawn. Mr. Lewis said, the paper was withdrawn, but the impressions remained with the jury; he, therefore, should not act. A pause then ensued for a few moments, when Judge Chase said: "You can't bring the court into difficulties, gentlemen; you do not know me if you think so." He then caused the avenue to the prisoner's bar to be cleared, and asked Fries whether he was ready for his trial, or whether he wished other counsel assigned him. Fries appeared very much alarmed, and replied, that he did not know what to do. I then informed the court that, as this was a remarkable case, I hoped the trial would be postponed until the next day, which was readily acquiesced in by the court, and Fries was remanded to prison. On the next day he was again brought to the bar, and asked whether he would have counsel assigned him; he replied with much firmness that he would look to the court to be his counsel. Judge Chase then answered: "Then by the blessing of God, the court will be your counsel, and will do you as much justice as those who were your counsel." The jury were then called, and Judge Chase took particular pains to inform Fries of his right to challenge, and that he might challenge thirty-five without showing any cause, and as many more as he could show cause against. After the jurors had been passed by Fries, Judge Chase, after asking them whether they were related to the prisoner, asked, "whether they had delivered an opinion as to the guilt of Fries, or that he ought to be punished." The first juror answered in the negative, and was sworn on the jury. The second observed, that in a conversation which he lately had, he had declared that Fries ought to be punished—he was directed by the court to be set aside. The question was

then directed to be put by the clerk to each juror in this manner: "Have you formed or delivered an opinion relative to the guilt of the prisoner?" This was put to three jurors; when, by the direction of the court, it was changed, and put as follows: "Have you formed and delivered an opinion relative to the guilt of the prisoner?" Three persons answered affirmatively, and were set aside. The prisoner challenged thirty-four. Twelve jurors having been passed, were sworn. John Fries called no witnesses, but at the end of the examination of every one on the part of the prosecution, Judge Chase reminded him of his right to put questions to them; but charged him not to put any one which might criminate himself. After the evidence closed, I addressed the jury in as brief a manner as I could, consistent with my duty. The court then charged the jury, and they retired to their room, and in about half an hour returned with a verdict of "Guilty." These are the general facts which took place. If I am asked any question, I will endeavour to answer it.

Questions by Mr. Randolph: Ques. Did you hear Mr. Lewis, when he threw down the paper which was handed him, declare that his hand should not be polluted by a prejudicated opinion? Ans. I have no recollection of hearing Mr. Lewis say anything at the time. Ques. Mr. Lewis declared that he would not address the court on a question of law in a criminal case. Did you hear any opinion given by the court, which warranted Mr. Lewis in the opinion that he was to be precluded from addressing the jury on the law? Ans. The court said that they would not suffer such cases as I have mentioned to be read to the jury, to mislead them, but I did not hear the court say that the counsel should not address the jury on the law. Ques. You have stated that both the judges came to your house, soon after you returned from court the first day. Was that their place of abode? Ans. It was not. Ques. You have stated that Judge Peters declared his apprehensions that the counsel for Fries would not proceed in his defence, and that you concurred in opinion with him. Had you any reason for apprehending it but your knowledge of the independence of the bar of Philadelphia? Ans. I think I understood, from some of the gentlemen of the bar, that the counsel for Fries meant to decline acting, and I have an impression on my mind that I heard something of that kind fall from Mr. Dallas. Ques. Did you you express to the judges this knowledge? Ans. I believe I did not. Ques. Did you ever know an opinion to be given in a criminal case before counsel were heard? Ans. I never have, except so far as charges to grand juries may be termed opinions on the law. Ques. Did much conversation take place on the subject of this opinion? Ans. Situated as I was, I can't undertake to say that I had any conversation on the subject, until the court rose. Ques. Do you suppose that the conduct of the court and counsel attracted the notice of the jury? Ans. From the number of persons summoned, I conceive that a number of them knew not what was going on. Ques. From what did you infer the indignation of Mr. Lewis, if you did not hear any expressions that he used? Ans. From his countenance. Ques. Did that attract the attention of the court at the time? Ans. If they were looking at him, it must have attracted their attention. Ques. Did you hear Judge Chase say that the counsel must address themselves to the court on the questions of law? Ans. I have no recollection of hearing anything of that kind fall from Judge Chase. In criminal cases, however, there are a number of motions which must be made, exclusively to the court; such as a motion to quash an indictment.

Questions by Mr. Nicholson: Were your notes of the conversations which took place, made in the order of time in which they took place? Ans. Precisely so. Ques. What was there in Judge Chase's conversation that induced Mr. Lewis to think that he should be precluded from reading the statutes of the United States to the jury? Ans. I know not why Mr. Lewis thought so, unless from the strenuous opposition which was made to them, on the first trial of Fries, on the part of the United States. Judge Chase said, that no case could come before him on which he had not an opinion on the law. Ques. Was there anything in the conduct of the court which induced Mr. Lewis to believe that he was to be precluded from arguing the law to the jury, and caused him so often to declare, that he would not address himself to the court in a criminal case? Ans. It appeared to me to be a misapprehension of Mr. Lewis. He supposed that it was intended to withdraw the question of law from the jury, and I thought the court did not set him right as explicitly as they might have done.

Questions by Mr. Randolph: You say, Mr. Rawle, that, after the papers were called in, you entertained an anxious hope, that the counsel would be induced to proceed with the defence of the prisoner. I wish to know your reasons for having such a hope, and why you became the agent of the court? Ans. My reasons were, that I did not wish to be put in the situation in which I was afterwards placed, and in which I never wish my greatest enemy to experience the pain which I felt, that of being obliged to prosecute a man arraigned for a capital offence, and who was without the assistance of professional gentlemen. I therefore was anxious that the counsel for Fries should proceed in his defence, and save me from so painful a situation. Ques. Did you take any notes of the transactions which took place on the first day of the trial? Ans. I did not.

William Rawle cross-examined by Mr. Harper: Ques. Did Judge Chase say anything to restrict the counsel from citing any statutes of the United States? Ans. He did not, in my hearing. Ques. Did he say that he disapproved of the conduct of the court in the first trial of Fries? Ans. He did not. Ques. Have you the paper now which Judge Chase threw down? Ans. I have. (He here produced the opinion, and Mr. Harper read it to the court.) Ques. Did not the court, after the jury had returned a verdict of guilty against Fries, inform him that, if he had anything to say in arrest of judgment, he would be heard? Ans. They did, and the answer of Fries was, that he had nothing to say.

The paper containing the opinion of the court, as handed to the counsel for the defence, and referred to in the above testimony, is as follows:

The prisoner, John Fries, stands indicted for levying war against the United States. The constitutional definition of treason is a question of law. Every proposition in any statute (whether more or less distinct—whether easy or difficult to comprehend), is always a question of law. What is the true meaning and true import of the statute, and whether the case stated comes within the statute, is a question of law, and not of fact. The question on an indictment for levying war against (or adhering to the enemies of), the United States, is "whether the facts stated do not amount to levying war." It is the duty of the court in this, and in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide on the present, and in all cases, both the law and the facts, on their consideration of the whole case. The court heard the indictment read on the arraignment of the prisoner, some days past, and just now on his trial, and they attended to the overt acts stated in the indictment. It is the opinion of the court that any insurrection or rising of any body of people, within the United States, to attain or effect, by force or violence, any object of a great public nature, or of public and general (or national) concern, is a levying war against the

United States, within the contemplation and constitution of the United States. On this general position, the court are of opinion that any such insurrection or rising to resist or to prevent by force or violence, the execution of any statute of the United States for levying or collecting taxes, duties, imposts or excises; or for any other purpose (under any pretence, as that the statute was unequal, burthensome, oppressive, or unconstitutional), is a levying war against the United States within the constitution. The reason for this opinion is, that an insurrection to resist or prevent by force the execution of any statute, has a direct tendency to dissolve all the bonds of society, to destroy all order and all laws, and also all security for the lives, liberties, and property of the citizens of the United States. The court are of opinion that military weapons (as guns and swords, mentioned in the indictment), are not necessary to make such insurrection or rising amount to levying war, because numbers may supply the want of military weapons; and other instruments may effect the intended mischief. The legal guilt of levying war may be incurred without the use of military weapons, or military array. The court are of opinion that the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges and peace officers should be insulted or resisted, or even great outrage committed to the persons and property of our citizens. The true criterion to determine whether acts committed are a treason or a less offence (as a riot) is quo animo the people did assemble. When the intention is universal or general, as to effect some object of a general public nature, it will be treason, and cannot be considered or construed or reduced to a riot. The commission of any number of felonies, riots or other misdemeanors, cannot alter their nature, so as to make them amount to treason; and, on the other hand, if the intention and acts combined amount to treason, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of houses or the like) are done, will show to what class of crimes the case belongs. The court are of opinion that, if a body of people conspire and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanour; but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war; and the quantum of the force employed neither lessens nor increases the crime—whether by one hundred or one thousand persons, is wholly immaterial. The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war, but that it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war.

NOTE 2.

Proclamation.

By John Adams, President of the United States of America.

Philadelphia, May 23.

Whereas, the late wicked and treasonable insurrection against the just authority of the United States, of sundry persons in the counties of Northampton, Montgomery, and Bucks, in the state of Pennsylvania, in the year one thousand seven hundred and ninety-nine, having been speedily suppressed, without any of the calamities usually attending rebellion; whereupon peace, order, and submission to the laws of the United States were restored in the aforesaid counties, and the ignorant, misguided, and misinformed in the counties, have returned to a proper sense of their duty; whereby it is become unnecessary for the public good that any future prosecutions should be commenced or carried on against any person or persons, by reason of their being concerned in the said insurrection:—wherefore be it known, that I, John Adams, president of the United States of America, have granted, and by these presents do grant, a full, free, and absolute pardon, to all and every person or persons concerned in the said insurrection, excepting as hereinafter excepted, of all treasons, misprisions of treason, felonies, misdemeanours, and other crimes by them respectively done or committed against the United States; in either of the said counties, before the twelfth day of March, in the year 1799; excepting and excluding therefrom every person who now standeth indicted or convicted of any treason, misprision of treason, or other offence against the United States; whereby remedying and releasing unto all persons, except as before excepted, all pains and penalties incurred or supposed to be incurred for or on account of the promises. Given under my hand, and the seal of the United States of America, at the city of Philadelphia, this twenty-first day of May, in the year of our Lord eighteen hundred, and of the independence of the said States the twenty-fourth.

John Adams.

This paper, which was followed by the pardon of Fries himself, was the cause of much dissension in Mr. Adams' cabinet, and among his immediate supporters. The petitions on which it rested are as follows:

Petition of John Fries.

To the President of the United States:

The petition of John Fries respectfully showeth:—That your prisoner is one of those deluded and unfortunate men, who at the circuit court of this district, have been convicted of treason against the United States, for which offence he is now under sentence of death. In this awful situation, impressed with a just sense of the crime which he has committed, and with the sincerity of a penitent offender, he entreats mercy and pardon from him on whose determination rests the fate of an unfortunate man. He solicits the interference of the president to save him from an ignominious death, and to rescue a large and hitherto happy family, from future misery and ruin. If the prayer of his petition should be granted, he will show by a future course of good conduct, his gratitude to his offended country, by a steady and active support of that excellent constitution and laws which it has been his misfortune to violate and oppose.

John Fries.

Philadelphia Prison, May, 1800.

The subscribers most respectfully recommend the petitioner to the president of the United States. They are warmly attached to the constitution and laws of their country, which they will, on every occasion, and at every hazard, manifest their zeal to defend and support. But when they reflect on the ignorance, the delusion, and the penitence of the persons involved in the late insurrection, their pity supersedes every vindictive sentiment, and they sincerely think that an exercise of mercy will have a more salutary effect than the punishment of the convicts. It is on this ground that the subscribers, knowing the humanity as well as the fortitude of the president, venture to claim his attention on the present awful occasion, in favour of the wretched father of a numerous family.

The views of Mr. Adams at the outset may be gathered from the following letters:

Mr. Adams to Mr. Wolcott.

(Gibbs' Adm. of Wash. and Ad., 233.)

Quincy, April 26, 1799.

If a real reformation should take place in Northampton county, in consequence of a con-

scientious conviction of their error and crime, it would be happy; but a cessation of opposition from fear only, may last no longer than the terror.

I am, sir, your most obedient, John Adams.

Mr. Wolcott to Mr. Adams.

[2 Gibbs' Adm. of Wash. and Ad., 240.)

Phila., May 11th, 1799.

After a very laboured trial, Fries, who led the armed party at Bethlehem, has been convicted of treason. He continued tranquil until the verdict of the jury was returned, when and since he has been much affected. His composure during trial was not owing to stupidity, for though an illiterate man, he is not deficient in sagacity. He confidently expected to be acquitted, and his hopes are supposed to have been founded on the opinion of Mr. Lewis, who, on all occasions, since the commencement of the trial, has declared that the offence did not amount to treason. Both of the judges were decided in their definitions of the crime, and the evidence was complete, both as to the acts done, and of the intention to prevent the execution of the law. It is admitted on all hands, that the trial has been fair and impartial; the jury was respectable, and two of them were persons, upon the bias of whose political sentiments, calculations favourable to the prisoners were made. The jury received the charge at about six o'clock in the evening, when the court adjourned till ten. At the time appointed the verdict was returned—guilty. I am told this morning of a circumstance which proves that the jury were governed by humane, delicate, and honorable sentiments. When they retired, it was agreed that without previous argument among themselves, the opinion of each person should be given by ballot. By this trial it was found that the jury were unanimous.

Mr. Adams to Mr. Wolcott.

(2 Gibbs' Adm. of Wash. and Ad., 266.)

Quincy, May 17, 1799.

I thank you, sir, for the favour of the 11th, which I received last night. The termination of the trial of Fries, is an important, an interesting, and an affecting event. I am unable to conjecture the grounds of Mr. Lewis' opinion, and wish I had a sketch of them. Is Fries a native or a foreigner? Is he a man of property and independent, or is he in debt? What has been his previous life? industrious or idle, sober or intemperate? It is of importance to discover, if possible, the great men alluded to by Fries in his observation to Mr. Wood, as at the bottom of the business, and the evidence of any agitator among the insurgents ought to be collected. It is of moment, also, to ascertain whether the insurgents had any general views, or extensive communications with others of similar dispositions in other counties, or correspondences with other states. We ought also to inquire whether Fries is the most culpable among the guilty, if that can be known. It highly concerns the people of the United States and especially the Federal government, that in the whole progress and ultimate conclusion of this affair, neither humanity be unnecessarily afflicted, nor public justice essentially violated, nor the public safety endangered.

I have the honour to be, sir, your most obedient and humble servant, John Adams.

Mr. Hamilton, in his letter on the public conduct of Mr. Adams, p. 41, in treating of the pardon, says:—

"The last material occurrence in the administration of Mr. Adams of which I shall take notice, is the pardon of Fries, and other principals in the late insurrection in Pennsylvania. It is a fact, that a very refractory spirit has long existed in the western counties of that state. Repeatedly, have its own laws been opposed with violence, and as often, according to my information, with impunity. It is also a fact which everybody knows, that the laws of the Union, in the vital article of revenue, have been twice resisted in the same state, by combinations so extensive and under circumstances so violent, as to have called for the employment of military force, once under the former president, and once under the actual president; which, together, cost the United States nearly a million and a half of dollars. In the first instance it happened, that by the early submission of most of the leaders upon an invitation of the government, few offenders of any consequence remained subject to prosecution. Of these, either from the humanity of the jurors or some deficiency in the evidence, not one was capitally convicted. Two poor wretches only were sentenced to die, one of them little short of an idiot, the other, a miserable fellow in the hindmost train of rebellion; both, being so insignificant in all respects, that after the lenity shown to the chiefs, justice would have worn the mien of ferocity, if she had raised her arm against them. The sentiment that their punishment ought to be remitted was universal; and the president, yielding to the special considerations, granted them pardons. In the last instance, some of the most important of the offenders were capitally convicted, one of them, by the verdict of two successive juries. The general opinion of the friends of the government demanded an example, as indispensable to its security. The opinion was well founded. Two insurrections in the same state, the one upon the heels of the other, demonstrated a spirit of insubordination or disaffection which required a strong corrective. It is a disagreeable fact, forming a weighty argument in the question, that a large part of the population of Pennsylvania, is of a composition which peculiarly fits it for the intrigues of factious men, who may desire to disturb or overthrow the government. And it is an equally disagreeable fact, that disaffection to the national government is in no other state more general, more deeply rooted, or more envenomed. The late Governor Mifflin himself informed me that, in the first case, insurrection had been organized, down to the very liberties of Philadelphia, and that, had not the governor anticipated it, a general explosion would speedily have ensued. It ought to be added, that the impunity so often experienced, had made it an article in the creed of those, who were actuated by the insurgent spirit, that neither the general not the state government dared to inflict capital punishment. To destroy this persuasion, to repress this dangerous spirit, it was essential that a salutary rigour should have been exerted, and that those who were under the influence of the one and the other, should be taught that they were the dupes of a fatal illusion. Of this Mr. Adams appeared so sensible, that while the trials were pending, he more than once imprudently threw out, that the accused must found their hopes of escape, either in their innocence, or in the lenity of the juries; since from him, in case of conviction, they would have nothing to expect. And, a very short time before he pardoned them, he declared (of these two facts, my evidence is inferior to that which supports the other allegation of this letter, yet it is so strong that I feel myself warranted to state them), with no small ostentation, that the mistaken clemency of Washington on the former occasion, had been the cause of the second insurrection, and that he would take care there should not be a third, by giving the laws their full course against the convicted offenders. Yet he thought proper, as if distrusting the courts and officers of the United States, to resort, through the attorney general, to the counsel of the culprits, for a statement of their cases; in which was found, besides some objections of form, the novel doctrine, disavowed by every page of our law books, that treason does no consist of resistance by force to a public law, unless it be an act relative to the militia, or other military force. And

upon this, or some other ground not easy to be comprehended, he of a sudden departed from all his former declarations, and against the unanimous advice of his ministers, with the attorney general, came to the resolution, which he executed, of pardoning all those which had received sentence of death. No wonder that the public was thunder-struck at such a result, that the friends of government regarded it as a virtual dereliction; it was impossible to commit a greater error. The particular situation of Pennsylvania, the singular posture of human affairs, in which there is so strong a tendency to the disorganization of the government, the turbulent and malignant humours which exist, and are so industriously nourished throughout the United States; everything loudly demanded that the executive should have acted with exemplary vigour, and should have given a striking demonstration, that condign punishment would be the lot of the violent opposers of the laws. The contrary course, which was pursued, is the most inexplicable part of Mr. Adams' conduct. It shows him so much at variance with himself, as well as with sound policy, that we are driven to seek a solution for it in some system of concession to his political enemies; a system the most fatal for himself and for the cause of public order, of any that he could possibly devise. It is by temporizings like these, that men at the head of affairs, lose the respect both of friends and foes; it is by temporizings like these, that in times of fermentation and commotion, governments are prostrated, which might easily have been upheld by an erect and imposing attitude."

"The conduct of the president," (in reply to this it is urged in an answer to Mr. Hamilton's letter by "A Citizen of New York," p. 25,) "in the pardoning of Fries and others, is truly meritorious. Notwithstanding the censure that his enemies have issued against him, he exercised a prerogative of mercy, and restored a number of unfortunate victims to their families, their friends, and the world. Public indignation would have been aroused by their execution, and consequences of an alarming nature would have ensued, in which even government itself would have received a wound. The genius of a republic is mildness; the wheel, the gibbet, the guillotine, may answer an advantage under the reign of terror; but with freemen they are objects of horror and detestation. They suit the calamitous reign of a Caligula, and not the enlightened period in which you demand their exercise. Recollect, sir, that this manly resistance to these laws, originated in a persuasion that they operated unequally, and plundered the public indirectly; that excisemen and public officers consumed the greatest portion of a tax that was collected by threats, by insults, and oppression; a tax that exposed the circumstances of men by daily visitations and nocturnal searches: a tax that has emanated from the criminal sentiment, that there is a swinish multitude who must be governed by deception; and who would raise up their heads against direct application. The public mind, at the time of resistance to the tax, was extremely agitated: it was penetrated with a sense of its injustice and the extent of its oppression. The military that was raised on that occasion, was in tenfold adequate to suppress the insurrection. On their approach to East Town disaffection was gone, and only a few scattered individuals could be seized as the violaters of the laws. The return of the military was attended with circumstances of disgrace, that will only be recorded in the pages of infamy and crimes. Every place they halted at some act of madness, licentiousness, or folly was perpetrated, to the lasting dishonour of the citizen soldier. Did the pardon of Mr. Adams, under the considerations that have been mentioned, seem like a concession to his political enemies? Can that be deemed a temporizing spirit which is regulated by justice and tempered by an amiable clemency? Could he lose any respect as executive magistrate, with discerning friends or the warmest enemies, by one of the most agreeable features of the administration? That he was at variance with himself as well as with sound policy, is, perhaps, no more than the vagrant sentiment of a sanguinary bosom and a disappointed enemy. Cruel measures are often ruinous, and a government is never better established, than when supported by the enlightened will of a country. Barbarity awakens enemies, mercy inspires friendship and ameliorates the heart. That insurrection has been organized down to the very liberties of Philadelphia, is the suggestion of guilty apprehension, or the extravagant sentiment of a disordered imagination. That Mifflin could have advanced such an opinion, will not, cannot be credited; but the dead can be quoted to justify a falsehood, whilst the living, to answer certain purposes, may injure their memory."

Mr. Pickering, in his review of the Cunningham Correspondence, p. 95, adds:—

"I have one more case to mention, on which I shall be sparing of comments, and content myself with a brief statement of facts: it is the case of Fries of Pennsylvania, while convicted of treason, the second time, on a new trial, ordered on a supposed incorrectness discovered after the first conviction, and allowed by the court, though not affecting the facts on which the prosecution had taken place, nor the construction of the law applied to the facts; in other words, not affecting the merits of the case. Judge Iredell, of the supreme court of the United States, presided on the first trial, and was assisted by Judge Peters, the district judge of Pennsylvania. On the second trial Judge Chase presided, and Judge Peters sat with him. The first trial had occupied nine days. Judge Chase considered, that much irrelevant matter had been suffered to be introduced in the first trial, in respect to cases in English books, occurring in times and under circumstances which rendered them inadmissible on trials for treason under the constitution of the United States; and made known this opinion in writing, that such cases would not be permitted to be introduced in the trial of Fries. Upon this, William Lewis and A. J. Dallas, of counsel for Fries, refused to act; and advised Fries not to accept of any other counsel, should the court offer to assign any; which advice Fries accepted. On the 24th of April, 1800, the trial commenced. On the evening of the second day, the evidence was closed; and the court charged the jury; who, retiring for two hours, brought in a verdict of guilty. On the second day of May, (the last day of the session,) Fries was brought into court and received sentence of death. Mr. Lewis, in his deposition (to be used on the impeachment of Judge Chase), states, that, soon after sentence of death had been pronounced on Fries, Thomas Adams, son of the president, told him, that 'his father wished to know the points and authorities which Mr. Dallas and he had intended to rely on, in favour of Fries, if they had defended him on the trial. The attorney-general of the United States, Charles Lee, made the like request to Mr. Lewis and Mr. Dallas. These gentlemen made their statement accordingly, and sent it to Mr. Lee; who, on the 19th of May, acknowledged the receipt of it, and informed them that he had immediately laid the same before the president, who directed him to return to them his thanks for the trouble they had so obligingly taken.' It would not have been difficult to anticipate the consequence of consulting, in this case, only the counsel of the convict: Fries was pardoned. It was a popular act in Pennsylvania. My removal from office was on the 12th of the same month of May, as I have already stated, with its motives. I content myself with just remarking, that Mr. Adams sought not any information in this case from

the persons best qualified to give it impartially—the judges of the court; especially when the presiding judge was Samuel Chase, his old congressional friend, of whom he gives this honourable character: 'I have long wished for a fair opportunity of transmitting to posterity my humble testimony to the virtues and talents of that able and upright magistrate and stateman.' Nor would it have been amiss to have applied to William Rawle, district attorney of Pennsylvania, who had conducted both the trials, and from whose fair mind might have been expected information quite as correct as that which could be derived from the counsel of the convict. But if to pardon was the object, it was expedient to consult the counsel only. Mr. Dallas in his deposition (also taken in the case of the impeachment of Judge Chase) avowed the leading motive with him and Mr. Lewis, in eventually refusing to act as counsel for Fries. He says, 'I may be permitted, likewise, to discharge a duty to the counsel, as well as to all the parties interested, in observing, that Mr. Lewis and myself were greatly influenced, in the conduct which we pursued, by our opinion of the means most likely to save the life of Fries, under all the circumstances of the case.' Judge Chase says, they refused to appear for Fries, 'because they knew the law and the fact to be against them, and the case to be desperate: and supposed that their withdrawing themselves, (under the circumstances above intimated,) in the event of a conviction, which from their knowledge of the law and the facts they knew to be almost certain, might aid the prisoner in an application to the president for a pardon.' General Hamilton (in the letter of 1800, on the conduct and character of Mr. Adams), noticing this case of Fries, and the extraordinary step of consulting only the culprit's counsel, makes this reflection on the pardon: 'We are driven to seek a solution for it in some system of concession to his political enemies; a system the most fatal for himself, and for the cause of public order, of any that he could possibly devise. It is by temporizings like these, that in times of fermentation and commotion, governments are prostrated, which might easily have been upheld by an erect and imposing attitude.' The reflections of Mr. Adams are of quite a different complexion. In his tenth letter in the Boston Patriot (May 17, 1809), remarking on his responsibility for all his executive acts, and, therefore, that it was his right and duty to be governed by his own mature and unbiased judgment, though unfortunately it may be in direct contradiction to the advice of all his ministers, he says, 'This was my situation in more than one instance. It had been so in the nomination of Mr. Gerry; it was afterwards so in the pardon of Fries; two measures that I recollect with infinite satisfaction, and which will console me in my last hour.' How much cause for satisfaction and consolation in the case of Mr. Gerry, the reader will be able to judge, from the proceedings exhibited in this review of that gentlemen as Mr. Adams's minister to the French republic. As to Fries, he having been at the head of a second insurrection in Pennsylvania, to prevent, by force, the execution of the laws enacted by congress for levying taxes laid in pursuance of the express provisions of the constitution, and, in 1798, of the most pressing necessity, for the common defence of the country, and the protection of its great and essential commercial interests, against the hostilities of the French republic; under these circumstances, the public welfare appeared to demand a signal example of inflexible justice. We see, however, that in various acts of President Adams, combined with their apparent motives, he can glory, and draw consolation, where other men would find cause only for profound regret."

The letter from Mr. Lewis and Mr. Dallas, on the grounds on which a new trial was asked for, I have obtained in manuscript from the papers of the late Mr. Rawle:

Sir: In compliance with your request, we shall now proceed, briefly, to communicate the points and authorities, which we intended to urge in the case of the United States against Fries, if the conduct of the court had not, unexpectedly, deprived us of every hope of success from these means of defence. It may be proper to premise that on the morning appointed for the trial, the presiding judge, in the presence of the prisoner, the jury, and a numerous audience, delivered to the clerk a paper which, he said, contained the opinions of the court, formed, after mature deliberation, upon the law of treason: directed copies of the paper to be given to the attorney of the district and the prisoner's counsel; and declared his intention to present a copy of it to the jury, as soon as the case was opened on the part of the United States. He referred, likewise, in terms of disapprobation, to the arguments which (as he was informed) had been used in favour of the prisoner on the former trial, and announced a determination to prevent his counsel from citing any authorities at common law, or, indeed, any authorities prior to the English revolution. The cause thus prejudged; the province of the advocate thus circumscribed; and the minds of the jury thus prejudiced; we deemed it a duty we owed to the prisoner, to the public, and to ourselves, to surrender the task, which the court had previously assigned to us; for, as there existed no controversy in relation to the facts, and as the jury would naturally rely on the judgment of the court in relation to the law, we had not the vanity to suppose, that any effort, on our part, could do more than give to the trial the form and ceremony of defence; while our acquiescence might afford some sanction to the establishment of a precedent, hostile to the rights of the citizens, ruinous to the trial by jury, and degrading to the character of the profession. The candour and humanity which have induced you to interpose in the present mode, have also, however, influenced our decision; and if you will allow for the different effect of arguments publicly delivered before a jury entitled, in a capital case, to decide both on the law and the fact (with whom even a doubt would lead to an acquittal), we confidently offer for your consideration the following general positions: I. That there has been a mis-trial. II. That offence charged is not treason. III. That a new trial ought to have been awarded.

I. That there has been a mis-trial:—1. By the judiciary act it is declared "that in all cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence." 1 Stat. (Swift's Ed.) p. 67, § 29. 2. The offence was committed by Fries in the county of Northampton, but his trial was in the county of Philadelphia. 3. The language of the act is mandatory "the trial shall be had in the county where the offence was committed;" and some "great inconvenience" must appear judicially to the court, before they can exercise a discretion of ordering a trial in any other county. No such inconvenience was suggested on the record or even stated at the bar; if it existed in the present instance, it must forever exist in all future cases and the law be rendered altogether void. 4. It is true that an ineffectual motion was made on the first trial to change the place of trial; but it was overruled on grounds which have no application to the second trial: For—1st. There was no inconvenience owing to the riotous state of the county of Northampton, at the time of the second trial. U. S. v. Insurgents [Case No. 15,442]. 2d. And the court (being bound to notice everything that was essential to an exercise of jurisdiction) might have ordered the trial in the proper county before it was commenced in Philadelphia, by the finding of a new indictment, a nol. pros. having been entered on the old one. 5. For any mis-trial, on account of

jury process, or on any other account, the verdict must be set aside. 6 Coke, 146; Hawk, P. C., bk. 2, c. 47, § 11; Id. bk. 2, c. 27, § 108.

II. That the offence charged is not treason. 1. The constitution defines treason to be "levying war against the United States," &c., and the act of congress inflicts the punishment of death on the person convicted of the crime. 1 Stat. p. 16; Const. art. 3, § 3; Id. 100, § 1. 2. As the spirit of the constitution is opposed to implied powers, and constructive expositions, we are bound to take the plain manifest meaning of the words of the definition, independent of any glossary which the English courts, or writers, may have affixed to the words of the English statute. 3. The plain, manifest meaning then, is "A forcible opposition to the powers of the government, with the intent to subdue and overthrow it." 4. This meaning may embrace a forcible attack upon the legislature (or perhaps any other principal department) to compel the repeal of a law. 5. But it does not embrace the case of an opposition to the execution of a particular law. 6. It seems, indeed, upon principle, to be a confusion of crimes to include in the same class, a forcible attempt to subvert and overthrow the power of government, and a mere resistance of subordinate agents, in carrying a particular law or regulation into effect. 1 Hale, P. C. 146; Fost. 219. 7. If Fries and his companions had opposed in arms, the troops that were sent against them, it would clearly have been an act of treason: but in the conduct which they pursued, we can only perceive sedition, riot and rescue. 8. Such, likewise, has been the legislative construction and discrimination between the cases; for, unquestionably, the penal law and sedition act, define and punish the offences committed by Fries and his companions, as distinct from the offence of treason; and when an offence is classed under a particular head in the penal code, it is inconsistent to search for it, and furnish it under another head. 1 Hale, P. C. 146; Fost. 200, 201; Keilw. 75. 9. But even if the English decisions, and writers, are considered as giving a construction for our use, to the same words employed in the statute of Edward III. they do not extend so far as to pronounce an opposition to the execution of a particular law to be treason, by levying war. 10. At common law there is not a single case, or dictum to support such a doctrine; though, indeed, in the reign of Henry VIII. rescue was made treason by a statute, which was afterwards repealed. 11. Under the statute of Edward III. there have been many wild constructive treasons by levying war; of which Coke, Hale and Blackstone solemnly complain; but none, even in the bad times of judicial history of England, have gone so far as the present case. 4 Bl. Comm. 69, 75, 88. 12. We cannot trace a single instance of a riot in opposition to the execution of a particular law, being prosecuted as treason in England, though the history of that nation abounds with such insurrections. 1 Hale, P. C. 132; Id. 133, 134; Fost. 254-258; 3 Inst. 22, 23. 13. The constructive cases in England, turn upon universality of object, in opposition to the power of the government. The case of ——— v. ———, 4 State Tr. 844, 900, was decided on that ground; for, if the rising had been to suppress all bawdy houses, it would have been equally with the principle, as the rising to suppress all meeting houses. So, a rising to alter or reform religion, which can only be done by force or the legislature, is treason. But Lord George Gordon's trial and acquittal, established the doctrine for which we contend. It is true, Lord Mansfield there declares an opposition to militia law to be treason. But we apprehend the reason of this is, because, in effect it is the same to oppose the militia, or the execution of the militia law, as to oppose the regular forces, which has always been held to be treason, and the expression used by Lord Mansfield is confined to an opposition to the execution of this particular kind of law, and does not extend to any other, as would, we think, have been the case, had the rule been the same in other cases. 4 Bl. Comm. 81; 1 Hawk. P. C. c. 17, § 28.

III. That a new trial ought to have been awarded. 1. After the jury were sworn, and the evidence partly given, one of the jury separated from his brethren, and slept at his own lodgings. Affidavit of Mr. Barnet. 2. During this separation, he conversed with one person on the subject of the trial, "declaring that the evidence of a certain witness went hard against the prisoner;" and being told by another person, that "he supposed the evidence would go hard against Fries." Affidavit of Isaac Roush. 3. Hence, in the contemplation of the law, he was committed by an expression of his own opinion, and influenced by the expression of the opinion of another. 4. The law and practice of Pennsylvania, (in the federal as well as the state courts,) have uniformly opposed the separation of the jury in a capital case, though necessity has compelled an adjournment of the court. 5. The law of England is peremptory, that a jury in a capital case cannot be discharged without giving a verdict, and that they cannot give a privy verdict. From Fost. 25, § 28, it appears that the meaning of the expression "can't be discharged" is, that the jury can't be permitted to separate, and the reason why a privy verdict cannot be received in a capital case, is for fear of tampering, and corruption, which is much stronger than the case of separating before they have agreed. Co. Litt. 227; Hawk. bk. 2, c. 47, §§ 1, 2; 4 Bl. Comm. 360; 2 Strange, 984. 6. It is true, that in civil cases, a separating works only a punishment of the delinquent juror; and in misdemeanors, the rule is not strictly enforced, though an able counsel has given a formal opinion, that the separation would be a mis-trial even in a misdemeanour. Barnes Notes Cas. 441; Canning's Case, 10 State Tr. (Harg. Ed.) 407 (n). 7. The cases put by Hale, will be found to admit of a clear explanation, consistent with present position. 1st. The first case is not stated to have been a capital one, and if it was a capital one, the jury was discharged in consequence of the separation and a new jury sworn. 2 Hale, 295. 2d. The second is either a case of misdemeanour or a trespass; and the whole proceeding was matter of consent. Id. 296. 8. But the law has been adjudged. On the question, "whether after a prisoner is upon his trial, and the evidence of the prosecution is given, the jury may separate for a time, which is the consequence of an adjournment to another day," the judges of England were decidedly in the negative. Lord Delamere's Case, 4 State Tr. (Harg. Ed.) 232; 3 Inst. 30. 9. And on the principle of this decision, the lord high steward declared that a verdict and judgment given after such separation would be erroneous, and liable to be reversed. 10. This remained the law of the land, so that there could be neither an adjournment of the court, nor a separation of the jury, in a capital case, till the late trials of Hardy, Tooke, &c. But the alteration then introduced was limited by the necessity that called for it—to an adjournment of the court, not extended to a separation of the jury. Accordingly, in none of the instances did the jury separate.

We are, sir, your most obedient humble servants.

[Signed,] Wm. Lewis.
A. J. Dallas.

The reception by the president of this memorial, is thus treated by Mr. Pickering in a letter to Mr. Wolcott, dated,

Philadelphia, June 24, 1800.

In conversation, lately, with Mr. Liston, the pardoning of the three persons, Fries, Gettman and Hainey, Northampton insurgents, convicted of treason, and sentenced to be hanged, was mentioned, and the extraordinary measure of the president, in consulting Mr. Lewis and Mr.

Dallas, the prisoner's counsel, instead of the judges, to get information, either as to the law or the facts in the case; and, that Lewis and Dallas gave their statement and opinion in writing, expressing it to be done at the request of the president. "Yes," said Mr. Liston, "Mr. Dallas showed me their letter to the president;" and then spoke of its contents, mentioning the opinion of those gentlemen to the best of my recollection, that the acts of those insurgents amounted to sedition, but not to treason. But the fact of Mr. Dallas' showing the letter to Mr. Liston, was the principal and only thing you desired me to state, and of that I am certain.

With sincere respect and esteem, &c.,
T. Pickering.

In connection with Fries, a series of parties, supposed to be his confederates, were indicted, several for treason, and the remainder for misdemeanours in obstructing the course of justice. All were ultimately pardoned.

Fries, it is said, opened a tin-ware store in Phidadelphia, where, profiting by the custom his notoriety drew to him, he acquired a respectable fortune, and a respectable character. See Sawyer's Life of Randolph, 19.

FRIES (UNITED STATES v.). See Case No. 5,126.

Case No. 5,128.

FRINK v. PETRY et al.

[11 Blatchf. 422; 1 Ban. and A. 1. 5 O. G. 201; Merw. Pat. Inv. 142.][1]

Circuit Court, S. D. New York. Jan. 27, 1874.

PATENTS—REFLECTOR FOR GAS-LIGHTS—INFRINGEMENT—CONSTRUCTION OF CLAIM—NOVELTY.

1. The first claim of reissued letters patent, No. 3826, granted to Isaac P. Frink, February 8th, 1870, the original letters patent having been granted to him, as inventor, April 17th, 1860, for an "improved reflector for gas-lights," namely, "In a reflector in which the illuminating rays are thrown down below the source from which they proceed, a reflecting surface, or series of reflecting surfaces, as set forth, lined, covered, coated or plated with either plain, corrugated or figured glass, in combination with another reflecting surface placed above or over the first surface, when suitable space is provided between the upper and lower surfaces for the passage of air and for ventilation, substantially as described," is infringed by a reflector in which the upper reflecting surface is of a black color and which has all the features of said claim.

2. The second claim of reissued letters patent, No. 3827, granted to Isaac P. Frink, February 8th, 1870, on the surrender of the before named original letters patent, namely, "The combination with the metallic body of a reflector, of a glass covering or lining therefor, applied in sections or panels, substantially as and for the purposes described," is infringed by a reflector in which there is a silvery coating on the outer surface of the glass, the inner surface of such coating acting as a reflecting surface, and the inner surface of the metallic body of the reflector having no capacity as a reflecting surface, and large parts of the metallic body of the reflector exterior to the glass being cut away, and the exterior surface of such silvery coating being covered with paint.

3. The said second claim of No. 3827 does not claim the use of glass in sections, in any and all reflectors, but claims a glass covering or lining for the metallic body of a reflector, applied in sections or panels, and combined with such metallic body, substantially as and for the purposes described. This means, the metallic body of such a reflector as is described and shown in the drawings—a reflector in which the illuminating rays are thrown down beneath the flame or source from which they proceed, and which has a metallic body, and in which such metallic body is lined or covered on the inside with glass, so that there is no intercepting of any of the rays of light by any part of the metallic body, in contradistinction to having part of the metallic body inside of the glass, so that such intercepting of rays of light is produced, and which is capable of having the glass lining to the metallic body applied by moulding or blowing the glass, if it be not attached in sections or panels, and which is manipulated and handled as a unit, and is supported and kept in position from above and not from below.

4. Although a reflector may have existed before, embodying all the features specified in the first claim of No. 3826, except the one of a glass lining to the reflecting surface or surfaces, yet, the employment of the glass, in the entire arrangement, being new, and being useful both in increasing the reflection of the light and in preventing the reflecting surface behind the glass from being scratched or tarnished, the entire arrangement in such first claim is patentable, all the features embodied in it having a mutual relation and interdependence, which make them patentable, as a whole. The claims above mentioned are new and valid.

5. Circumstances considered as bearing on the question of the prior existence of an alleged prior invention, such as, the failure of the alleged prior inventor to apply for a patent for it, when he was applying for a patent for kindred inventions.

[This was a bill in equity by Isaac P. Frink against George Petry and others, and is heard on motion for the dissolution of an injunction.]

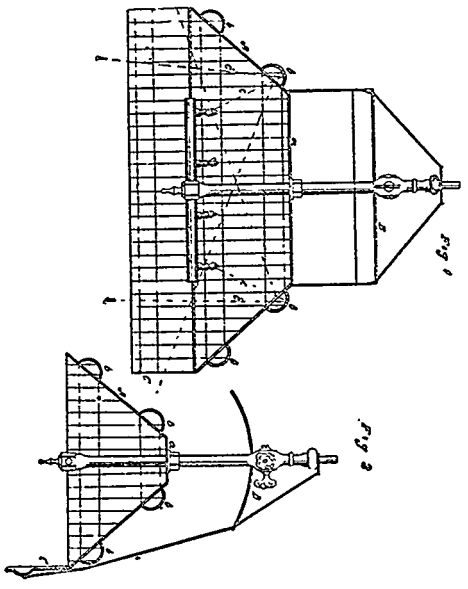
Edwin W. Stoughton and Miles B. Andrus, for plaintiff.

Samuel S. Fisher, Samuel A. Duncan, Frederic H. Betts, Solomon J. Gordon, and Daniel S. Riddle, for defendants.

BLATCHFORD, District Judge. In August, 1873, a preliminary injunction was granted in this case, restraining the defendants from making, using or selling any reflectors containing the improvement claimed in the first claim of reissued letters patent granted to the plaintiff February 8th, 1870, and numbered 3826, or the improvement claimed in the second claim of reissued letters patent granted to the plaintiff February 8th, 1870, and numbered 3827. The original letters patent were granted to the plaintiff, as inventor, April 17th, 1860, for an "improved reflector for gas-lights." They were reissued to him December 24th, 1861, and again reissued to him, in two divisions, February 8th, 1870, Division A being numbered 3826, and Division B being numbered 3827.

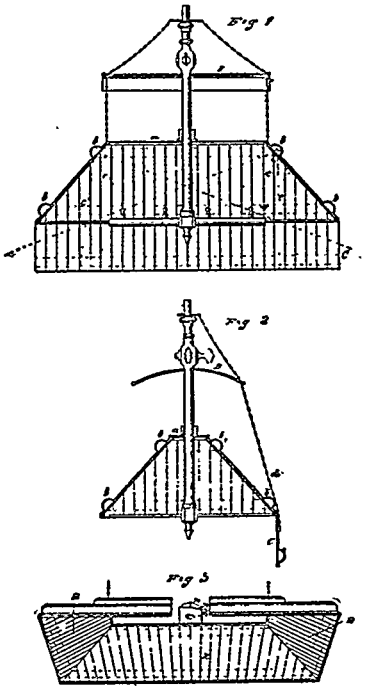
[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 1; and here republished by permission. Merw. Pat. Inv. 142, contains only a partial report.]

[Drawings of patent No. 3826, published from the records of the United States patent office.]



No. 3826 contains a drawing of two figures. Figure 1 is a longitudinal vertical section of one of the improved reflectors, showing a gas-pipe and burners in elevation. Figure 2 is an end or side transverse section of the same reflector, taken at right angles to figure 1. The specification says: "This improved reflector is designed for use in store windows, public buildings, halls, railroad- and ferry- or steamboat-stations, churches, theatres, and all other places in which the space to be lighted is large, and in which the light is required to be thrown down below the burner or burners whence it proceeds, and to be widely diffused in all directions. To this end my invention consists in the employment, in reflectors in which the illuminating rays are thrown down below the source from whence they proceed, of a reflecting surface, or series of reflecting surfaces, arranged as hereinafter described, lined, covered, coated or plated, with either plain, corrugated or figured glass, in combination with another reflecting surface placed above or over the first surface, with suitable space for the passage of air, and for ventilation, between the surfaces. In the example of my improvement illustrated in the drawing, A represents the body of the reflector, which may be made of tinned sheet iron, or of any other suitable material. It is lined or covered on the inside with glass, which may be either corrugated, or plain, or figured, on its surface. In the reflector represented it is corrugated, which is the mode in which I prefer to construct it, for the reason that the corrugations, especially when they run up and down the glass, as shown, instead of horizontally on it, enable the illuminating rays to be very widely and abundantly diffused, so that a reflector provided with glass having such a surface will light up a much larger space than when the corrugations are not employed. This glass lining or covering constitutes the lower or first reflecting surface of my improvement, and it may be composed of a series of surfaces, as x, x, x, Fig. 2, extending horizontally around the inside of the body of the reflector. It will be seen that the body of the reflector shown in the drawing is that of a rectangular truncated pyramid. This form is especially intended for use in store windows, and constitutes the subject of separate letters patent issued to me, of even date herewith; but, any desired contour, whether circular, conical or polygonal, may be given to the reflector, as its shape, as it is here described and claimed, is not material, and is designed to be varied to suit the particular situation in which it is placed, or the special purpose for which it is employed. In the upper part of the body of the reflector, an aperture or opening, a, is made, which serves to provide the necessary passage for air through the reflector; but, as some of the rays of light pass through this opening, I combine with the body, A, which constitutes the first surface or series of surfaces of the reflector, a second reflecting surface, shown at B, which is placed above the body, and intercepts and throws down nearly all the rays which would otherwise escape being reflected by the body, A, and would thereby fail of producing the best effect. This second reflecting surface may be secured in position in any desired way, but it will be found convenient to suspend it by chains, wires or cords from a support attached to the gas tube, as shown in the drawing. The distance at which it should be located above the body or lower reflecting surface, A, will depend upon the dimensions of the opening, a, and upon the effect which it is desired the light shall produce. The relative distance illustrated in the drawing will, however, be found to answer well in practice. The outline of this upper reflecting surface is not material, as it may be flat or curved. It is represented in the drawing as curved, and I prefer that it should be so, because, when it is, it will better reflect the rays of light through the opening, a, thereby increasing the illumination below the reflector." The first claim is in these words: "1. In a reflector in which the illuminating rays are thrown down below the source from which they proceed, a reflecting surface, or series of reflecting surfaces, as set forth, lined, covered, coated or plated with either plain, corrugated or figured glass, in combination with another reflecting surface placed above or over the first surface, when suitable space is provided between the upper and lower surfaces for the passage of air and for ventilation, substantially as described."

[Drawings of patent No. 3827, published from the records of the United States patent office.]



No. 3827 contains a drawing of three figures, figures 1 and 2 being severally the same as figures 1 and 2 in the drawing of No. 3826. The specification says: "In reissued letters patent bearing even date herewith, I have described and claimed several improvements made by me in reflectors of that class in which the illuminating rays are thrown down beneath the flame or source from which they proceed; and the invention here patented consists of a special form and mode of construction of reflectors of this class, which are designed for certain particular uses, such, for example, as the windows of stores, or for picture galleries and other situations in which the reflector is required to be of considerable length. In the drawing, A represents the body of the reflector, which may be made of tinned sheet iron, or of any other suitable substance. It should be lined or covered on the inside with glass or other diaphanous material, which may be either corrugated, or plain, or figured on its surface, though it is represented in the drawing as corrugated, which is the mode in which I prefer to construct it. The form of the body of the reflector is that of an oblong truncated pyramid, the sides of which should preferably incline in an angle of about forty-five degrees, and an aperture or open space, a, is provided in the top, to furnish the requisite draft to the flame and to permit of ventilation. The sides of the reflector may be perfect planes, or they may be concave on their inner surface, if desired. * * * The object of the lining of glass or other equivalent material is to increase the reflection of the light, and to prevent the metallic surface of the reflector from becoming scratched or tarnished, which would greatly impair, if not destroy, its reflecting power. It will be observed, by inspecting the drawing, Fig. 3, that the glass which constitutes the lining or covering of the reflector is made and attached in several strips, sections or panels, x, x, x, throughout the area of the inner surface of the reflector, instead of being applied by moulding or blowing the glass to correspond in figure with that of the reflector. This method of construction answers a very important purpose, inasmuch as, if the glass lining was put on in a single piece, by being moulded or blown to fit the reflector, great difficulty would be found in fitting it with sufficient accuracy and tightness, especially if the reflector be large, and skilful and expensive labor would be required for the work; and, when fitted, the glass would not have proper freedom to expand and contract without danger of breaking it, which would make the reflector nearly or quite worthless; and it would render the reflector, especially if it be large, so stiff and rigid that it could not be handled or transported without great liability to break or crack the glass. But, by my mode of inserting the glass in sections or panels, these evils are avoided, the different sections or panels can be rapidly put in place and secured, the requisite expansion and contraction provided for, and, if any of the sections or panels break, they can at once be easily and cheaply replaced by others, while the reflector is rendered so yielding, and so free from undue rigidity, that it can be moved or handled without any danger of cracking the glass." The second claim is in these words: "2. The combination with the metallic body of a reflector, of a glass covering or lining therefor, applied in sections or panels, substantially as and for the purposes described."

The defendants now move for the dissolution of the injunction.

Reissued patent No. 3826 first came before me in September, 1870, in a suit in equity brought thereon by the plaintiff against Charles F. Jacobsen and Charles E. Mabie, on a motion for a preliminary injunction. The decision I arrived at was, that the case on the part of the plaintiff was not so entirely free from doubt as to warrant the granting of the injunction, but that it was so strong as to require the entry of an order directing the defendants to file periodical accounts, under oath, of their sales or deliveries of the articles alleged to infringe the plaintiff's patent, and also to file a bond with sureties to respond for a recovery in the suit. An order to that effect was entered, and it directed that an injunction should issue on the first claim of No. 3826, unless the terms of the order should be complied with. The bond prescribed was not filed, and the injunction was issued. Neither of the reissued patents

had been sustained in a suit. Various reflectors alleged to anticipate the invention of Frink were adduced on the motion—such as, some used in the store of one McKenzie, in Second street, New York, some used in a store in Main street, Poughkeepsie, and some used in churches in Williamsburg and Astoria. But, the principal reliance was on the alleged prior invention of one John Wyberd, in New York.

At the same time that the suit in equity against Jacobsen and Mabie was pending, a suit at law on both of the reissued patents, against them, in this court, brought by the plaintiff, was also pending. The two suits were commenced in May, 1870. The injunction continued in force, and, in November, 1872, the suit at law was tried. On that trial, on the question of novelty, patents granted in the United States to John C. Fletcher, March 30th, 1836, and July 12th, 1838, and a patent granted in England to Thomas Boyle, December 27th, 1854, and evidence as to the reflectors in McKenzie's store and as to Wyberd's alleged prior invention, were introduced by the defendants. Rebutting evidence was introduced by the plaintiff, and the jury found a verdict for the plaintiff, for nominal damages, on which a judgment was entered, December 20th, 1872, for $435 56, which was costs. It is alleged that this was not a real trial, and that the verdict was the result of a submission by the defendants, not to the force of the plaintiff's proved case, but to considerations aside therefrom.

The bill in the present case was filed in July, 1873. It is founded on both of the reissued patents. It sets up the recovery in the suit at law against Jacobsen and Mabie. Shortly before this bill was filed, I had granted preliminary injunctions in suits against other parties on the same patents, who resisted the applications very strenuously, and set up, on the question of novelty, alleged prior invention and use by Francis P. Doyle, John Cook, and William and Donald McKenzie, in New York. In opposition to the granting of the injunction in the present case, the defendants set up the English patent to Thomas Boyle, of December 27th, 1854. Prior to the granting of the injunction the defendants had been making and selling reflectors constructed precisely in accordance with the descriptions and drawings and model of the plaintiff's patents. After the injunction was granted, they varied the construction, by making the upper reflecting surface of a black color, still retaining all the features of the first claim of No. 3826. They made, also, another variation, whereby they sought to maintain that they no longer had a reflecting surface lined with glass, in the sense of the first claim of No. 3826, and that they no longer had combined with the metallic body of a reflector a glass lining therefor, applied in sections or panels, in the sense of the second claim of No. 3827. This variation consisted in putting a silvery coating on the outer surface of the glass, and making the inner surface of such coating act as a reflecting surface, and depriving the inner surface of the metallic body of the reflector of its capacity as a reflecting surface, and also, in cutting away large parts of the metallic body of the reflector exterior to the glass, and covering the exterior surface of the silvery coating with paint. On a motion for an attachment for violating the injunction by making reflectors with these changes, I held such reflectors to be covered by the two claims in question, and granted the motion.

On the present motion to dissolve the injunction, the defendants rely, in the first place, on the alleged prior invention of John Wyberd. Wyberd, on the 20th of December, 1859, made an application for a patent for an "improved night-light reflector." Although the petition, specification, drawing and model were filed on that day, the oath to the specification purports to have been made on the 21st of December, 1858. The application was rejected on the 31st of December, 1859. The claim was amended, and the amendment, and a new oath, made January 31st, 1860, were filed March 8th, 1860. The case was examined again March 22d, 1860, a patent was ordered to issue March 24th, 1860, and it was issued April 10th, 1860. The specification states that the improvement is called "the argento-crystal dioptric illuminator," and says: "The nature of my invention consists in suspending over the burner a reflector of octagonal shape, composed of series of inclined metallic plates, each series decreasing in circumference and placed above each other, and connected by standards of wire or iron, leaving the space between them open for ventilation. The surfaces of the plates are also corrugated, so as to assist in diffusing the light." The claim, as originally applied for, was in these words. "I claim the construction of the reflector with ventilating spaces between the plates, substantially as and for the purposes set forth." The amendment referred to consisted in erasing this claim and substituting the following, which is contained in the patent, as issued: "I disclaim the arrangement of surfaces as described, considered as mere ventilators, but claim, as new, the dome-like arrangement of a system of corrugated reflectors, with alternate ventilating spaces, as set forth." A certified duplicate of the model filed by Wyberd, on such applicaion, is part of the present case.

The application of the plaintiff was filed on the 6th of March, 1860, on a specification sworn to on the 3d of March, 1860. On suggestions made by the patent office, March 12th, 1860, amendments of the specification and drawings were filed on the 15th of March, 1860. On further suggestions made by the patent office, March 24th, 1860, amendments of the specification and claims were filed March 27th, 1860. The case was examined again March 30th, 1860, by the same examiner who, on the 22d of March, 1860, had ex-

amined and passed for issue the application of Wyberd. A patent was ordered to issue to the plaintiff April 4th, 1860, and it was issued April 17th, 1860. A certified copy of the model filed by the plaintiff on such application, is part of the present case. This model exhibits and contains everything that is presented in the descriptions and claims of the reissues Nos. 3826 and 3827.

Although neither the papers filed in Wyberd's application, nor his patent, nor his filed model, represent or indicate the use of glass in his night-light reflector, yet the attempt is made to show that, in fact, he made, before the plaintiff did, reflectors substantially like the plaintiff's reflector. Wyberd's story is, that he began making daylight reflectors, lined with glass, in 1856, under a patent granted to Bernard Goetz, October 2d, 1855, for an "improvement in corrugated reflectors." The specification of this patent states, that the object of the invention is to supply dark rooms with sufficient daylight, by means of a silvered metallic reflector, with an undulated or grooved surface, placed outside of a window, at such an angle to the plane thereof, as to reflect light into the room; and that the patentee takes the metallic substance commonly used in silver plating, and known in the arts as composition, and coats or plates it with silver, and then grooves the surface of the prepared sheet, and covers it with a sheet of plain or fluted glass. Wybred states, that, in the middle of 1856, he became associated in business with one Suter, now residing in Baltimore, and continued the reflector business at 68 Maiden Lane, New York; that their principal business was making daylight reflectors; that, shortly after, he having invented a night-light reflector, lined with glass, and having an aperture at the top, with a metal plate over it, he commenced to manufacture them in 1857; that some of those he made were circular and lined with glass, and others were oblong, four sided, and lined with glass in separate pieces; that, over the aperture in the top, especially of the large ones, he generally placed a metal plate of tin; that Suter left him early in 1857, and he continued the business alone until August 1st, 1859, making all the time such night-light reflectors as above, though, until 1859, his principal manufacture was that of daylight reflectors; that, in the latter part of 1858, he devised the improvement embraced in the patent granted to him April 10th, 1860; and that he continued to make and sell reflectors lined with glass in sections, until the latter part of 1861, part of the time in partnership with one Green, and part of the time associated with one Lauter, at which time he sold his patent.

An attempt is then made to show the use in Baltimore, prior to the plaintiff's invention, of reflectors like the plaintiff's. Robert Q. Taylor, of Baltimore, testifies, that he purchased and put up two (one of which is produced as an exhibit) in his hat store at No. 5 North Calvert street, Baltimore, prior to, or early in, 1857, which are still in use there. He fixes the time, by saying that one Hindes, now dead, went into business with Suter, in Baltimore, in 1857, in making reflectors, and that the two reflectors were put up before that. Suter testifies, that he went into business with Hindes, in Baltimore, in 1857, to make daylight reflectors under the Goetz patent; and that the firm was dissolved before the close of 1857. John L. Armiger, of Baltimore, testifies, that Hindes, who had a hat store at 100 North Gay street, Baltimore, put into that store, before 1858, two reflectors (one of which is produced as an exhibit) like those of Taylor, which are still in use there; and that such reflectors were there during the copartnership between Hindes and Suter. The son of Hindes testifies, that the reflectors were in the shop windows of his father in 1857, because they were there during his father's partnership with Suter. These affidavits do not, nor do any others produced by the defendants, undertake to show where these Baltimore reflectors were purchased, or from whom, or what was their history, or who devised them. No suggestion is made by the defendants that they are traceable to Wyberd.

In reply, the plaintiff produces a later affidavit from the same Robert Q. Taylor, in which he says that the statement he made in his former affidavit as to the time when he obtained the two reflectors, was based on his memory alone, and on certain statements made to him in reference to a business connection between Suter and Hindes; that he has now found, from an entry in his cash book, that he paid for the reflector December 6th, 1859, and has also found the bill therefor, which he produces, and which is dated New York, December 5th, 1859, and is made out as "bought of John Wyberd, agent for manufacturer of Wyberd's patent day and night light reflectors, 455 Broome street," and is receipted, for $35 00, by the signature of John Wyberd; and that he was induced to purchase the reflectors by seeing others in the store of Kirk. The same son of Hindes, at the request of the plaintiff, testifies, that his father's two reflectors were sent from New York or Philadelphia. One McKewen, who put up, as a gas fitter, the two reflectors in Hindes' store, testifies, that he understood, at the time, that they were sent from New York. Fischer Grossman testifies, that, in July or August, 1858, he entered into the employment of Wyberd, as a glazier, at 68 Maiden Lane, New York, and continued to work for him there until some time in the spring of 1859; that then Wyberd removed to Greene street, near Broome street, and carried on the business there for two or three months, and then removed to 455 Broome street; that about that time one Green became connected with Wyberd in the reflector business, and afterwards one Lauter was associated in it with Wyberd at

455 Broome street; that he, Grossman, continued in the employ of Wyberd, and his associates or successors, until 1861 or 1862; that he has examined the Taylor and the Hindes Exhibits, and knows that neither Wyberd nor his associates made or sold any such reflectors prior to some time in the spring of 1859, a few weeks prior to the removal from Maiden Lane; that only a very few of such reflectors were made in Maiden Lane; that no reflectors were made or sold by Wyberd, or under his direction, prior to the spring of 1859, which were lined with glass on the inside, so far as he knows or believes; that he did all the work for glass on reflectors after he went there in the summer of 1858, and knows that no reflectors, of the description above mentioned, were made or sold at Wyberd's place prior to the spring of 1859; that, when he so went into Wyberd's employ, Richard M. Eames was in Wyberd's employ at Maiden Lane; and that, some few months after that, Charles J. Eames went into Wyberd's employ at the same place. Charles J. Eames testifies, that, from in or about December, 1858, until the fall or winter of 1860, he was connected with Wyberd in the manufacture of reflectors at 68 Maiden Lane, 59 Greene street, and 455 Broome street, in New York; that he had charge of every form of day and night light reflectors made by Wyberd; that Wyberd first commenced making night light reflectors lined with glass in panels or sections, and having an upper reflecting surface, at 68 Maiden Lane, about February or March, 1859; that Wyberd did not, until February or March, 1859, make any night light reflectors which had glass connected with them, except locomotive head light and certain concave side light reflectors; that he has examined the Hindes and Taylor Exhibits, and finds the frames or bodies of them to be constructed of sheet zinc; that he recognizes them as reflectors made by Wyberd after February or March, 1859, as he, Eames, suggested making the bodies of sheet zinc; that some few of said reflectors had been made of sheet tin as early as February or March, 1859, but not earlier; that Wyberd moved from 68 Maiden Lane to Greene street near Broome street about the 1st of May, 1859, and remained there two or three months, and then removed to 455 Broome street, when one Green became associated with him in business; that he, Eames, remained in the employment of Wyberd and Green for a few months; that, some time afterwards, one Lauter became associated in business with Wyberd at 455 Broome street; that Marvin S. Buttles solicited orders for the sale of reflectors in Baltimore and Washington in the fall of 1859, and a number of said reflectors were sent to said cities to be put up for use therein; that said exhibits appear to be some of the reflectors which were so sent to Baltimore in 1859; and that said reflectors were numbered consecutively. Marvin S. Buttles testifies, that, in the fall of 1859, Wyberd and Green, or one of them, were engaged in making and selling reflectors at 455 Broome street, and he, Buttles, made an arrangement with one or both of them, to act as agent in soliciting orders and procuring sales of said reflectors for them in Baltimore and Washington, in the fall of 1859; that, during September and October, 1859, he was engaged in soliciting orders and making sales of said reflectors in Baltimore and Washington; that he remained in Baltimore several weeks canvassing to make sales, and visited every place making any pretension of show in the windows, where such reflectors could be advantageously used; that Kirk had two, and Robert Q. Taylor, 5 North Calvert street, had two, and other persons, on his, Buttles', solicitation, procured said reflector in the fall of 1859; and that he remembers calling on a hatter who had a store at 100 North Gay street and trying to sell him some, he then having none in his store. Walter D. Burnett testifies, that he is a brother-in-law of the plaintiff, who has been in California since July, 1873, on account of ill health; that, for the last 12 or 14 years, he has been well acquainted with the plaintiff's business; that he remembers certain suits brought by Wyberd, in this court, in 1861, on his reflector patent; that one was an action at law against the plaintiff, which was tried before Mr. Justice Nelson and a jury, in the fall of 1863; that the charge was that reflectors made in accordance with the plaintiff's patent infringed Wyberd's patent; that the jury found a verdict for the defendant on that issue; that, in 1861, Wyberd brought four suits in equity, in this court, on his reflector patent, one against the plaintiff, and the other three against persons who had used reflectors made by the plaintiff; that an application for an injunction in the suit against the plaintiff, made in the fall of 1861, was denied, on the ground, mainly, of of non-infringement, and none of the suits in equity were proceeded with after the verdict in the suit at law; that he, Burnett, has known Wyberd since 1861, and was acquainted with the plaintiff in 1858, and before that time, and was familiar with his operations in getting up his improvements in reflectors, which he afterwards patented; and that the plaintiff completed his invention substantially as patented, prior to December, 1858, and, prior to that time, made one or more reflectors containing said improvements, and made several more of them for sale in 1859 by the spring, and has ever since continued to make and sell them.

The affidavits on file in this court, in the suit in equity against Jacobsen and Mabie, are invoked by the defendants as papers to be used on this motion. Among those affidavits, produced on the motion for an injunction, before me, in that suit, are affidavits made by the plaintiff, and by said

Burnett, and by several other persons, clearly establishing the making of his invention by the plaintiff as early as the first half of November, 1858. But, on that motion, the affidavits presented on the part of the defendants in that suit, in regard to the time that Wyberd first made reflectors in substance like the plaintiff's, went to show, that Wyberd made such reflectors in 1857. The affidavits, hereinbefore recited, which overthrow this claim on the part of Wyberd, and show that he made no such reflectors until February or March, 1859, were not presented in the case against Jacobsen and Mabie. Hence, at that time, I could not but regard the plaintiff's case, in respect to Wyberd's claim of prior invention, as not free from doubt. But, on the case, as now presented, I can entertain no such doubt.

There are various considerations which lead to this conclusion. Wyberd never attempted to obtain a patent for a night light reflector having glass. He contented himself with applying for a patent for what he had devised, in the way of a night light reflector, by December, 1858. Night light reflectors, with glass, like the plaintiff's, were a very valuable thing, and soon made their way into use, to the exclusion of other kinds. If Wyberd was engaged, from February or March, 1859, until the latter part of 1861, in making and selling reflectors in substance like the plaintiff's, and the plaintiff was engaged during the same period, in the same city, in making and selling his reflectors, it is not to be believed that Wyberd was ignorant of that fact; or that, after April, 1860, he was ignorant of the fact that the plaintiff was making such reflectors under his patent of April 17th, 1860. If Wyberd devised the reflector in February or March, 1859, the fact that he did not, within two years thereafter, apply for a patent for it, and have his application put into interference with the plaintiff's patent, indicates that he was satisfied that the plaintiff was the prior inventor. If he himself adopted the arrangement from the plaintiff's reflectors, and began to employ it in February or March, 1859, it is a matter of course that he could not obtain a patent for it. If he devised, in 1857, a reflector like the plaintiff's, it is hardly credible that he should, in the latter part of 1858, have devised what is shown in his patent of April 10th, 1860, and have applied for a patent for that, and not have applied for a patent for what he so devised in 1857. All the circumstances of the case point to the conclusion, that, when, on the 21st of December, 1858, he swore to his specification, he had not devised any arrangement such as that covered by the plaintiff's patents. In addition to this, the plaintiff has the patent, and there is the direct evidence showing priority in the plaintiff.

The English patent of Thomas Boyle, of December 27th, 1854, specification filed June 27th, 1855, is adduced to affect the novelty of the second claim of No. 3827, and to show that the arrangement, before referred to, resorted to by the defendants after the injunction was granted, of using glass with a silvery coating, covered with paint, and cutting away large parts of the metallic body of the reflector, is, in substance, to be found in the Boyle patent. The specification of that patent says: "My improved reflectors consist of pieces of sheet or crown glass, made reflective by deposits of silver leaf on the back, and protected from air and damp by waterproof paint or pigment. This material, when properly prepared, possesses the brilliancy of glass itself, and can never tarnish. The surface of the glass may be either corrugated, figured, or plain. I apply this silvered glass to the construction of reflectors in movable pieces, of any required shape or size, and the pieces may be each framed separately or not, according to circumstances. Thus, for the ordinary street lamps, I use four sheets of reflecting glass, each sheet being framed and made to the shape and size, and fitting either over or in place of, the four top panes in the present lamps. Each sheet is fixed in such manner as to admit of its being readily removed for the purpose of cleaning. The employment of such reflectors in the street lamps would greatly increase the light, to the convenience of the public, and effect an important saving in the consumption of gas. For the ordinary internal gas burners or oil lamps, I use a suitably constructed wire or metal frame, similar to those generally used for supporting the paper reflecting shades. The outer circumference of this frame, instead of being circular in shape, is many sided, to accommodate any number of pieces of flat, reflecting glass arranged around it. The pieces of glass are cut of a triangular shape, in order to fit, without overlapping, around the frame, at the proper angle of reflection, and they may be made to fit quite close to each other, side by side, or be set apart, so as to leave a space between each two pieces, through which a portion of the light passes upwards and around the room, relieving the body of the apartment from the comparative darkness in which it is placed by the operation of the ordinary reflecting shades, while concentrating a strong light on the table or desk underneath the lamp or burner. The frame is so made that the pieces of glass may be fastened or unfastened at pleasure by a simple manipulation, such as turning a screw or pressing a spring. Thus the operation of cleaning is facilitated; and, if one glass be broken, the remainder of the reflector being still as good as ever, it only requires another glass to render it as perfect as before. * * * Figure 1 shows an elevation of a street lamp, having reflectors applied thereto, according to my invention; figure 2 is a plan thereof. The pieces of

glass used for the reflectors may be silvered or rendered reflectors by any convenient means, coating the back with water-proof paint or pigment, to which I make no claim, my invention consisting of combining several separate and independent pieces of glass to act as a reflector, each piece of glass being so arranged, and connected or combined with the others and with a frame, that it may be separated from them and cleaned (or replaced, if broken,) separately. In street lamps, I prefer the reflectors to be exterior of the ordinary glass at top; but this is not essential. a, a, are the four pieces of glass which cover in the top of the lamp, and they may be each retained in position by any convenient means, so long as the arrangement admits of the parts, a, a, being taken out separately to be cleaned. For this purpose, the drawing shows ledges, b, b, and springs, c; but these may be varied. Figure 3 shows a section, and figure 4 a plan, of a shade for a lamp or burner, constructed with several separate pieces of glass, a, a, made reflectors by silver, and painted at back. The frame, in this arrangement, consists of two rings, c, d, with as many sides as there are pieces of glass. These rings, c, d, are connected together by rods, e, e. In the arrangement shown there are four such rods, e. The upper part of the upper ring, d, is made cylindrical, and it has a screw thread formed on the outside, to receive a ring, f, with a screw formed on the inside, by which, when the screw ring, f, is in its place, it will retain the ring, g, and thus clip the upper ends of the glass reflectors between the ring, g, and the inner ring, d, as shown, whilst the lower ends of the reflectors, a, a, will be supported by the lip or turned-up edge of the lower ring. c. * * * What I claim is, the manufacture of reflectors for artificial light, by combining in suitable frames separate pieces of glass readily capable of being separated from each other and from the frames, as described."

It is quite apparent that the Boyle patent does not contain what is covered by the first claim of No. 3826, for there is, in the Boyle patent, no upper reflecting surface.

The second claim of No. 3827 claims "the combination with the metallic body of a reflector, of a glass covering or lining therefor, applied in sections or panels, substantially as and for the purposes described." It does not claim the use of glass in sections, in any and all reflectors. Boyle's patent shows glass in sections, in a reflector. But the plaintiff claims a glass covering or lining for the metallic body of a reflector, applied in sections or panels, and combined with such metallic body, substantially as and for the purposes described. This means, the metallic body of such a reflector as he describes and shows in his drawings—a reflector in which the illuminating rays are thrown down beneath the flame or source from which they proceed; and which has a metallic body; and in which such metallic body is lined or covered on the inside with glass, so that there is no intercepting of any of the rays of light by any part of the metallic body, in contradistinction to having part of the metallic body inside of the glass, so that such intercepting of rays of light is produced; and which is capable of having the glass lining to the metallic body applied by moulding or blowing the glass, if it be not attached in sections or panels; and which is manipulated and handled as a unit, and is supported and kept in position from above, and not from below.

Neither one of the two arrangements suggested by Boyle has a metallic body to the reflector as the plaintiff's reflector has, or as the defendants' form of reflector had, even after the defendants had cut away large parts of the metallic body; nor is either one of them a reflector which is kept in position from above, and not from below. As neither one of them has a metallic body, so it has not a metallic body lined or covered with glass, or capable of being lined or covered with glass. The arrangement, suggested by Boyle, of what he calls a shade, in addition to not having the plaintiff's metallic body to the reflector, has the rods which connect its two rings inside of the glass, in a position to intercept the rays of light. Moreover, the street-lamp arrangement of Boyle cannot, as a reflector, be manipulated and handled as a unit. As a four-sided whole, it is rigidly fixed to the top of the lamp. It is entirely clear, I think, that nothing in Boyle's patent anticipates the second claim of No. 3827.

The defendants also bring up against the novelty of both of the claims in question a patent granted to John C. Fletcher, March 30th, 1836, and a patent granted to the same person July 12th, 1838.

Fletcher's patent of 1836 is for an "improvement in the double-reflecting lamp." It says: "The receptacle for the oil is made in the usual manner, of a spherical or polygonal concave figure, having any convenient number of burners placed in an inclined position, bringing the light to the apex, with chains for suspending it, and a glass tube or chimney, in the manner of Argand's lamp. My improvement consists in providing a receiver or trough for catching the overflowing oil, which, in the common lamp, usually falls on the floor or on the clothing of the company. This receiver is of the same figure as the lower edge of the lamp, and the lamp is suspended in it. The suspending chains are attached to the trough by brackets. Another improvement consists in arranging two sets of trapezoidal reflectors in a spherical or polygonal concave shape, one placed above the light, for reflecting it over the room, the other below it, for concentrating the light. The reflectors above the light are placed in a metallic frame, having an opening in the centre for the chimney, and suspended in the chains with the apex inverted or towards

the light. The reflectors below the light are placed in the concave or inner side of the lamp." In this patent of Fletcher's, the illuminating rays are not thrown down below the source from which they proceed, in the sense of the first claim of No. 3826. The source of the rays is not below the lower reflecting surface, as in the plaintiff's reflector. The rays are not returned downward from the lower reflecting surface to their source, then passing on still further downward beyond such source, as in the plaintiff's reflector. This is an essential point in such first claim. In this patent of Fletcher's, no space is provided between the upper and lower reflecting surfaces for the passage of air and for ventilation. No air that passes upward through the interior of the lower reflecting surface and in contact with the flame, passes out under the upper reflecting surface. It is all carried upward in the glass chimney which passes into the opening in the centre of the upper reflecting surface. This feature of a glass chimney in this Fletcher patent makes it impossible for it to anticipate the first claim of No. 3826.

Under the construction hereinbefore defined as the proper one to be given to the second claim of No. 3827, that claim is not found in Fletcher's patent of 1836, because, in that patent the source of the rays is not below the lower reflecting surface.

Fletcher's patent of 1838 is for an "improvement in lamps." It describes a lamp which, it says, is arranged in every respect, like the one in his patent of 1836, except that it has an oil fountain on the top of the lamp, above the upper reflecting surface, with conductors passing from it to a receptacle at the bottom of the lamp, and that the conductors enable the chains extending from the bottom of the lamp to the frame of the upper reflecting surface to be dispensed with. Therefore, nothing more need be said in regard to this patent of 1838.

It is urged for the defendants, that, on the assumption that a reflector existed before, embodying all the features specified in the first claim of No. 3826, except the one of a glass lining to the reflecting surface or surfaces, such first claim presents no patentable feature of novelty. This position cannot be admitted, for, the employment of the glass, in the entire arrangement, being new, is certainly useful, both in increasing the reflection of the light and in preventing the reflecting surface behind the glass from being scratched or tarnished. Being new and useful, the entire arrangement in the first claim is patentable. All the features embodied in it have a mutual relation and interdependence which make them patentable, as a whole.

Much criticism is made on the alleged fact that Jacobsen and Mabie, on the trial of the suit at law, after the evidence was in, substantially ceased their resistance. They might well have done so, with no defence on the question of infringement, and with no more available materials on the question of novelty than the Fletcher patents, and the Boyle patent, and Wyberd's alleged prior invention, and the McKenzie reflector, which latter I have had before me in several of the cases, and which amounted to nothing.

The plaintiff commenced making daylight reflectors in March, 1857. He first gave his attention in May, 1858, to the idea of improvements in night light reflectors, which should include a glass lining, and the use of gas, and embody the other principal features now found in his patents. He embodied those improvements and features in a practical working reflector in the first half of November, 1858. He began immediately to make and sell to the public like reflectors. Following the granting of his patent, he went largely into the business, and has, in the succeeding years, carried it on successfully, so far as introducing his reflectors into general use is concerned, and has made it his only business. He has asserted his exclusive right in every reasonable method, and, since the reissues of his patent were granted, he has given no rest to those who were infringing his rights. It is not until since the reissues that any infringements seem to have seriously interfered with his business. The improvements embodied in his patents enable the brilliant light of gas to be used in its most effective way to illuminate objects underneath the source of light. The practical results of those improvements are familiar to every one, and, on the evidence before me, are due to the inventive genius and energy and perseverance of the plaintiff. The defendants have infringed with full knowledge of the plaintiff's patents, and of the claims asserted by him thereunder, and he is entitled to be protected by an injunction. The changes he made from previous arrangements may have been small to appearance, but they were such changes as produced practical success in what was before substantially useless. The Fletcher arrangement was worthless until the source of the rays of light was placed below the lower reflecting surface. The Boyle arrangements amounted to nothing, as a practical accomplishment of the purposes set forth by the plaintiff in his patents. The defendants accomplish the purposes so set forth in respect to the first claim of No. 3826, and in the way specified in said claim, no less by modifying, as they have done, the color of the upper reflecting surface, than if they had not so modified it. So, too, they accomplish the purposes so set forth in respect to that claim, and in respect to the second claim of No. 3827, and in the way specified in said claims, notwithstanding the modifications they have made in regard to the reflecting surface and the metallic body. Notwithstanding such modifications, the metallic

body encloses, supports and protects the internal glass lining which is applied to such metallic body, and the source of the rays is below the lower reflecting surface, and no part of the metallic body intercepts any of such rays, and the reflector is handled as a unit, and is supported wholly from above, and the glass lining is applied in sections. It makes no difference, in regard to these particulars, whether the reflecting surface behind the glass is made a thin reflecting film applied to the back of the glass, so as to make it possible, in places, to remove the metal of the metallic body, or whether such reflecting surface is the inner surface of the metallic body. In each case the glass performs the offices of increasing the reflection and protecting the reflecting surface from being scratched or tarnished. In each case the metallic body, aside from reflecting, performs the same functions of enclosing, supporting and protecting, in the same way, the internal glass lining. A silvery coating, applied to glass, as a reflecting surface, was a known equivalent for the bright surface of a metallic body behind glass, as a reflecting surface, the reflection in each case being made through the glass; and there is nothing in the plaintiff's patents which restricts him to the use of the latter, as distinguished from the former.

I have attentively considered all the questions involved in this motion. In doing this, I have examined all the papers now to be found on the files of this court, in all the suits brought therein on the plaintiff's patents, for the purpose of satisfying myself that I have allowed no point to escape my notice. As against the prior patents referred to, the strength imparted to the plaintiff's patents, by the fact that his reissues of 1870 were granted, notwithstanding the existence of such prior patents, is sustained by a review of the questions involved, on principle. As against Wyberd's alleged prior invention, the result, as to the Baltimore matter, shows how little to be relied on is ex parte testimony which is brought as to such invention. I have said nothing more as to the alleged prior invention of Doyle, because, although it was referred to, it was not pressed on this motion, and I now allude to it only as a part of the history of the litigation on the plaintiff's patents, for the purpose of saying, that, although, heretofore, in some of the cases, it occupied a large share of my time and attention, and although Doyle may have come to believe in the existence of the alleged facts to which he testified, and although others may honestly have been induced to sustain him, I came to the undoubting conclusion, on the evidence, that such alleged facts had no foundation in truth.

My observations have been extended to great length, but I deemed nothing less to be properly commensurate with the importance to the parties, of the questions involved, and the earnestness and ability with which the views on the part of the defendants were urged.

The motion to dissolve the injunction is denied.

FRINK (UNITED STATES v.). See Case No. 15,171.

Case No. 5,129.

In re FRISBEE et al.

[14 Blatchf. 185;[1] 15 N. B. R. 522.]

Circuit Court, S. D. New York. April 5, 1877.

ACT OF BANKRUPTCY—ASSIGNMENT—INVOLUNTARY PROCEEDINGS—NUMBER OF CREDITORS JOINING IN PETITION—DISMISSAL.

1. A general assignment for the benefit of creditors, without preferences, is an act of bankruptcy.

2. Under section 5021 of the Revised Statutes, as amended by section 12 of the act of June 22, 1874 (18 Stat. 180), the limiting by the bankruptcy court of the time to be allowed for the requisite number and amount of creditors to join in a petition in involuntary bankruptcy, and the peremptory provision for the dismissal of the petition, are consequent on the judicial ascertainment by the court that the requisite number and amount of creditors have not petitioned, and such ascertainment is to be made on reasonable notice to the creditors, and, until such ascertainment has taken place, further creditors may at any time unite in the proceedings.

[Cited in Re Rebmeister, Case No. 11,623.]

[In bankruptcy. In the matter of Frank Frisbee and John McHugh.]

Hatch & Van Allen, for bankrupts.

Thomas M. North and Henry A. Root, for creditors.

JOHNSON, Circuit Judge. The substantive grounds upon which the reversal of the adjudication is sought have been already disposed of by the court in Re Beisenthal [Case No. 1,236]. It was there held, that a general assignment for the benefit of creditors, without preferences, was voidable by the bankrupt's assignee within the time limited by statute. Upon the same grounds such an assignment is an act of bankruptcy, as has been frequently held in the courts of the United States in this circuit.

The remaining question depends upon section 5021 of the Revised Statutes of the United States, as amended by section 12 of the act of June 22, 1874 (18 Stat. 180). By the provisions of that section, if the allegation of the petition as to the number or amount of the petitioning creditors is denied by the debtor, by a statement in writing to that effect, the court is to require the debtor to file a full list of the creditors, with the particulars pointed out by the statute, and

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

is also to ascertain, upon reasonable notice to the creditors, whether one-fourth in number of the creditors, and one-third in amount of those having provable debts, have petitioned. If it appears that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding ten days, within which other creditors may join in such petition, and thus make up the number and amount required by the statute. The statute contains a very peremptory provision, that if, at the expiration of the limited time, the number and amount of creditors applying shall not answer the requirements of the section, the proceedings shall be dismissed. This limitation of time and this peremptory provision for dismissal, are consequent upon the judicial ascertainment by the court that the requisite number and amount of creditors have not petitioned. This ascertainment is to be made upon reasonable notice to the creditors, in order that they may take part, if they see fit, in the inquiry that the judge is to make. Until that ascertainment has taken place, the matter remains at large, and further creditors may come forward and unite in the proceedings.

We can only ascertain what has taken place in a judicial proceeding by consulting the written record of the action of the court. Otherwise, no certainty could be arrived at in respect to such proceedings, and it might become necessary for judges to enter the field of affidavit making, and be subject to the criticism which such a position involves. In this case the papers show the written denial by the debtors that the requisite number and amount of creditors had united in the petition. This was presented to the court on the 20th of January last, in proper time, and raised a proper issue in the case. No order thereupon appears to have been entered in the clerk's office, nor any decision by the district court upon the sufficiency of the petition. Upon the minutes of the judge, kept by himself in court, an entry appears of the presentation of the denial and of an order of reference. The known practice of the court, as well as the necessary requirements of the law, make it plain that this was intended as the authority to the clerk to enter an order of reference upon the inquiry whether a sufficient number of creditors, and for a sufficient amount, had signed the petition; and to notice of this proceeding creditors were entitled. No reference appears to have taken place and no order seems to have been actually entered. The case, therefore, did not arise in which the judge is called upon by the statute to fix a time within which additional creditors may join in the petition. The petitioners are, therefore, necessarily in error in supposing that the supplemental petition was presented, asking for the adjudication, after the time when the court had power, under the statute, to entertain the same.

The supplemental petition for adjudication having been presented, the debtors, on the 3d of March, put in their answer, in which they did not set up the want of a sufficient number and amount of petitioning creditors, but only put in issue the alleged acts of bankruptcy. At the same time the debtors presented an application asking the dismissal of the original and supplemental petitions for adjudication of bankruptcy, upon the ground of the expiration of the time within which such supplemental petition could be filed according to law, and claiming that the court had lost jurisdiction of the cause. But, as we have already seen, the proper foundation of fact was wanting, by which to support such application.

Subsequently, and on the 10th of March, the debtors presented a petition, stating, among other things, that on the adjourned return day of the order upon the supplemental petition, by inadvertence, no allegation was made that the requisite number and amount had not joined in the supplemental petition, and it is averred that neither in number nor amount were the requisite creditors included in the supplemental petition; and it was thereupon prayed that the petition should be dismissed. It was not averred, that, taking both petitions together, creditors to the requisite number and amount had not joined. Upon this petition an order was made by the district court, refusing to dismiss the proceedings for adjudication, whether the petition was to be regarded as an application for the favor of the court or as matter of right, which was duly entered March 10th. An adjudication of bankruptcy followed in due course. The only objections to it are those which have been already considered, and those, I am of opinion, do not avail. The proceedings and adjudication of bankruptcy must be affirmed, and an order will be entered accordingly and transmitted to the district court.

Case No. 5,130.

In re FRISBEE.

[4 Law Rep. 483.]

District Court, S. D. New York. Feb., 1842.

BANKRUPTCY—INVENTORY—AMENDMENTS OF SCHEDULES.

1. *Held*, that the inventory of the petitioner in the present case was not sufficiently distinct.

2. Amendments of schedules will be allowed, in cases of bankruptcy, on payment of costs where there is proof that the errors arose from inadvertence.

[Cited in Reed v. Crowley, Case No. 11,644.]

This was a petition by Cassander Frisbee to be declared a bankrupt. Objections were made that his inventory was not sufficiently distinct.

BETTS, District Judge. In mere matters of form, where the court has discretionary power, the utmost possible indulgence will be given. But many of the objections to the

regularity of the proceedings are not matters of form, but of substance. They are, that the petitioners have not complied with the demands of the statute, which gives the bankrupt his discharge if he complies with them, but not otherwise. Petitioners come into court, some of whom apparently take a pleasure or pride in evading the law, by adopting what they think a better mode than that pointed out by the statute or the rules of court. But in doing so, they are irregular, for they are strictly bound to conform not only to the statute, but also to the rules as much as the statute, as the rules have been made to carry out in detail the requisites of the statute, and were not framed by the court with a view to its own convenience or that of the parties interested, but adopted under the express directions of congress, and therefore it is not optional with the parties to devise any better mode, if they could do so. And if they attempt it, they must run the hazard of throwing impediments in the way of their clients, and have to begin anew.

The objections in this case are, first, that the property is not properly described. The party should have seen what is required by the act and have complied with it. This is not mere matter of form, but is made by the law a condition that he should do so, and he can no more obtain his discharge without a proper inventory than he could without entering his petition. Counsel must thus see the importance attached to the inventory. By the act, the assignee must have such a description of the property as would fix its location and enable him to identify it.

This schedule is loosely drawn, and sets forth that the bankrupt is entitled to some real estate, one half of certain land, the whole of which is valued at $4000. "An interest in half a lot of ground in Buffalo, which your petitioner intends to assign to the assignee. The present value unknown, but which when purchased was estimated at $4000." This is no description at all. It only says that there is some ground at Buffalo which he had a claim to. The party had nothing to do but turn to the form of the act, which sets forth what was necessary to be done, when describing his real estate. If the ground is described as a lot in a certain part of Pearl street not now occupied, or a farm of land lying in such a state or territory and county, conveyed by such a person to the petitioner, so that the assignee can go and trace it out and see it, it would be then sufficient, but as it now stands, it is not. It is not optional with the parties not to comply with the law. There must be a compliance with it, and the court must insist that the parties shall do all that is required of them.

Another branch of this inventory which is objected to, is that of the household furniture. The petitioner merely says household furniture, but does not say where it is, or whether it is Buffalo, New Jersey, or Connecticut. With respect to this objection, similar objections have been raised in other cases before the court, and the parties are bound to set forth every part of their property, and the location of every part and portion of it, and furniture is not excepted. The law allows the assignee to set apart a certain portion for them, but it must be put in the description for the assignee; although the parties by doing so might subject it to an execution, that does not exempt them. The petitioner does his duty when he describes the property, and if the assignee cannot bring it into the general fund for all the creditors, it is not the bankrupt's fault, he does his duty. It is a matter of regret that delays in the proceedings should thus occur; but a rule having been laid down, it must be observed. In this case, the property is of small amount, but if the court let two or three hundred dollars pass, it might do so in a case which involved thousands. The inventory must, therefore, in all cases, designate the property so that the assignee can find it out, and identify it.

Counsel for the petitioner. Every article of the furniture is set forth in the inventory. The petitioner is now in New York, is it necessary to state the house in which the furniture is?

BETTS, J. I think it is.

Counsel. In regard to the description of the property. He never derived any interest from that property. It was conveyed to him on condition of his paying 8000 dollars, and he never paid it. And there is a penalty of 800 dollars incurred by his not paying, and therefore it is not a property but only a debt.

BETTS, J. Your observations are seemingly made in order to convince me that he had no interest in it, and if he had no interest in it, he should not come here and tell his creditors that he had such an interest. In his schedule he says, "interest in half a lot of ground in Buffalo, which your petitioner intends to assign to the assignee." If he had said he had but a verbal contract, it might do; but what he tells is a very different thing. He does not speak of a deed, but of an interest of which he has a deed.

Counsel. Can the petition be amended, if the commissioners say there is no fraud in it?

BETTS, J. You may make a subsequent motion in relation to it, but at present I deny the motion for a decree.

Counsel. I would then move to amend the description, if it is deemed insufficient, without going through the process of two publications.

BETTS, J. There is a deeper difficulty still to be considered. It is questionable whether the court can allow the amendment.

At a subsequent day BETTS, District Judge, referred to the question as to the competency of the court to allow amendments.

He thought that the United States courts, sitting in bankruptcy, had power to regulate and modify the proceedings, but the great difficulty would be to arrive at that point where the court could interfere. When does the court take cognizance of the matter? Not till the petition is presented and the order made. But whether, during the running of the first notice, the court could allow the petition to be varied does not arise here. Every power that the court can justly exercise over a suitor, it can exercise over a bankrupt. In this state, the court thought that the bankrupt might have the privilege of amending his schedule or inventory; but it was a privilege which would be granted with great caution. The court would not permit papers to be prepared loosely and carelessly, and then allow the petitioner to come in and ask for a remedy. The court must be satisfied that everything had been done in good faith, that the errors had occurred through inattention or inadvertence, that it was not an omission studied with a view to the privilege of amending. Proof must be exhibited to the court that it was an error of inadvertence. If there was any design, or symptom of it, the matter will be referred over. As a general rule, the court has power to authorize an amendment to the schedule, but only on very convincing proof that the error was unintentional; nor would it then be allowed, without payment of costs. In this case of Frisbee, the court said no amendments could be allowed, as that question had not been argued, nor was there any of that proof required before an amendment would be authorized. The court only relieved the bar from the difficulty as to the power of the court to allow amendments, but they would not be allowed on a bare motion, or on the statement of counsel.

Case No. 5,131.

In re FRISBIE.

[13 N. B. R. (1876) 349.] [1]

District Court, E. D. Michigan.

BANKRUPTCY — RIGHT OF CREDITOR TO FULL DISCLOSURE — EXAMINATION OF BANKRUPT — PROTECTION AGAINST UNREASONABLE DEMANDS.

1. It is the right of a creditor to have a full disclosure, on oath, by the bankrupt of everything relating to his estate, and with such detail as will be necessary, or may be useful to the assignee in the discharge of his duties; and it is the duty of the bankrupt to submit to such examination promptly, on reasonable application.

2. A bankrupt who has fully submitted to examination, has a right to be protected against unreasonable demands upon his time for further examination; and where ample opportunity has been afforded, and an examination already had is apparently full, unless it is made to appear that such examination was collusive, or in some material and specified particulars deficient, an application for further examination may properly be refused.

Pending proceedings before the register for the bankrupt's discharge an ex parte order had been made by the register for the examination of the bankrupt [James W. Frisbie] on the application of creditors who had appeared to oppose his discharge. The bankrupt appeared, but objected to the examination, and his objections were certified into court for determination. The court referred the question back to the register for his opinion thereon. From the statement of the register it appears:

First. That the proceedings for the adjudication of said bankrupt were commenced on the 7th day of January, 1874, by his creditors; that the first meeting of creditors was held and an assignee elected on the 17th day of February, 1874; the whole number of creditors who, in the course of the proceedings, proved claims against said bankrupt's estate was sixty-six, amounting, as computed to the date of the bankruptcy, to the sum of one hundred and thirty-eight thousand and seventy dollars and twenty-one cents. Of these, fifty-seven in number, whose claims amounted, as computed, to the sum of one hundred and one thousand three hundred and seventy-four dollars and eighty-seven cents, were proved at or before the first meeting of creditors; an unusually large number of claims in this case (including those of E. S. Jaffray & Co. and D. Valentine & Co., amounting together to the sum of seventeen thousand eight hundred and twenty-six dollars and thirty cents), was proved so as to enable the creditors to participate in the election of the assignee. Only eight creditors whose claims amounted to four thousand five hundred and thirty-five dollars and twenty-four cents (excluding from the enumeration the claim of Mrs. Frisbie), proved their claims after the first meeting. On the 13th of July, 1874, the second meeting of creditors was held, and after due notice that the assignee had filed his final account, and would at that meeting apply for its allowance and his discharge, the final order of distribution was entered.

Second. On the day of the second meeting, Oberholser & Keefer filed objections to the discharge of the assignee; on the 16th of July they filed a petition for the examination of the bankrupt, and on the 18th of July, a petition to expunge the claim of Mrs. Frisbie, the bankrupt's wife. No application for the examination of the bankrupt was ever filed by the assignee, nor any application for such examination by any other creditor, until that filed by E. S. Jaffray & Co. and David Valentine & Co. on the 15th day of June, 1875. The examination of the bankrupt on the application of Oberholser & Keefer, was commenced on the 23d of September, 1874, continued on the 25th and 29th, and was read to the bankrupt, and subscribed by him on the 19th of October, 1874. Mrs. Frisbie was examined on the 29th of September, and the bookkeeper of the

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bankrupt, Frank B. Webster, was examined on the 22d, 28th, and 30th of September. The examinations of the bankrupt and his bookkeeper, the books of the bankrupt being present, were conducted mainly by an expert accountant employed by the creditors for that purpose. On the 3d of October, an order was entered, fixing the 9th day of October for the hearing of the petition of Oberholser & Keefer, for the re-examination of the claim of Mary B. Frisbie. This hearing was continued from time to time until the 23d day of October, and from that day remained pending and undetermined until the 11th of March, 1875, when the proceedings for the re-examination of the claim of Mary B. Frisbie were formally discontinued by the parties who commenced them.

Third. On the 24th of April, 1875, the bankrupt filed his petition for a discharge. An order was entered on the 29th of April, fixing the 25th day of May to show cause against said petition; notice of which was first published on the 30th day of April in two papers in the city of Detroit; and notice was given to the creditors, including E. S. Jaffray & Co. and D. Valentine & Co., by mail, the notices being deposited in the post-office in Detroit on or before the 13th day of May. On the 25th day of May, the appearances of Jaffray & Co. and Valentine & Co. were entered to oppose the bankrupt's discharge; and on the 15th of June, an application was filed for an order for the examination of the bankrupt and witnesses. An order for their examination was entered, the proceedings under which were arrested by the objections of the bankrupt to any further examination, on which the questions arose which were certified to the court, and are now submitted to the register for his opinion.

The points made by Mr. D. M. Dickinson on behalf of the bankrupt, in support of his objections to any further examination are the following: He objects—

First. Because the application for such examination does not show any ground for such examination at this time.

Second. Because nearly two and one half years have elapsed since the commencement of these proceedings to the time of this application, and the bankrupt has submitted to all orders of the court, and has appeared, from time to time, for examination as required, and has submitted to a full, thorough, and exhaustive examination under said section, which was not abated or interfered with, prevented or stopped by any solicitation, payment, or other influence of this bankrupt, or in his behalf.

Third. Because the creditors applying for such examination have, by laches, forfeited all legal rights to any further or other examination, and the application now is made only after an application for a discharge has been made, and is oppressive and harassing to the bankrupt and his family.

Fourth. Because the estate is closed, and its assignee has received his final discharge from office, so that the result of such examination cannot benefit this estate.

By Hovey K. Clarke, Register:

The first three points submitted on behalf of the bankrupt turn mainly upon the question, whether the creditors, by laches, have lost the right to require the bankrupt to submit to a further examination. The fourth point,—that "the estate has been closed"—as a general rule does not appear to me to be conclusive, though perhaps it may be so in the case presented by these papers; because, if a creditor has a reasonable ground to believe that a further examination would disclose other property, the application for such examination ought to be entertained at any stage of the proceedings, upon a proper cause being shown for it. No such case, however, is made here, nor does this examination appear to be applied for with any such object.

In determining the question of laches, which the first three points made on behalf of the bankrupt present, it is important to consider the mutual rights and duties of creditors and bankrupts in bankruptcy cases. It is the right of the creditor to have a full disclosure, on oath, by the bankrupt, of everything relating to his estate, and with such detail as will furnish to the assignee all the information in his power to render, and which may be necessary or useful to the assignee in the discharge of his duties; and it is the duty of the bankrupt, promptly, on all reasonable applications, to submit to such examination. It is the right of the bankrupt, when he has submitted himself to such examination, that he should not be unnecessarily hindered in his business, or his efforts to support himself, or those dependent on him; and it is the duty of the creditor, when bankruptcy proceedings are commenced, to go forward with reasonable promptness with the prosecution of the case.

If these mutual rights and duties are here correctly stated, it will be seen that the right of a creditor to a disclosure from the bankrupt, is not an unlimited right to require the bankrupt to submit to an examination. If a full examination has been already had, either upon the application of the assignee, or of any other creditor, a subsequent application may be properly denied, unless it is made to appear that the first examination was either collusive, or deficient in some material and specified particulars. And the court, whenever such an application shall be made will exercise its discretion, whether, with proper regard to the rights of all parties and especially when a bankrupt objects that he has already fully answered, an order for such examination ought to be granted.

It may not be easy to prescribe definite rules for the exercise of this discretion; it may depend more, as I think it does, upon the facts of each particular case, than is usual in appeals to courts for the exercise of discre-

tionary powers. But where creditors have seasonable notice of the pendency of the proceedings; where a full and apparently thorough examination of the bankrupt has been had, and a final distribution made; a creditor's application for a further examination must be supported by a showing of some deficiency, stating it, in the former examination, which is now sought to be supplied, and the object for which it is sought; and in the absence of any such satisfactory showing, it will be presumed that the object of the application is not one which will be favorably entertained by the court. Creditors are, perhaps, a little slow to admit that there are any honest bankrupts—as bankrupts are hasty to assume that all creditors are oppressive. The courts cannot sympathize in these general conclusions. A bankrupt who has made a full surrender of all his property, and is starting in his business life anew, has many very obvious difficulties to encounter, and his circumstances ought to be considered in any demand made upon his time and means (for, when required, he must attend at his own expense), in aid of the bankruptcy proceedings. The right of a creditor to a full disclosure, at any cost to the bankrupt, must be conceded and enforced when demanded. But the court must determine in any given case, when this right has been exhausted.

In this case, the examination of the bankrupt and his bookkeeper, which was conducted with unusual ability, covering apparently every subject which might throw light upon the business transactions and property of the bankrupt, and making over three hundred folios of testimony, was on file in the register's office in October, 1874. In April, 1875, the bankrupt filed his petition for a discharge. Notice of this petition was first published on the 30th day of the same month, and on, or prior to the 13th of May, 1875, notice was forwarded by mail to the creditors who made the application now under consideration. They took no steps for any further examination of the bankrupt until the last day for filing specifications of the grounds of their opposition to his discharge. They do not in their application impeach the thoroughness or the good faith of the examination on file; they do not set forth, except in general and vague terms, any defect or ambiguity in it, or any lack of detail which needs explanation or amplification. They do not even specify any general ground of objection to the bankrupt's discharge, concerning which they need data to frame a sufficient specification, except the single one that Oberholser & Keefer were influenced by a pecuniary consideration to withdraw from and discontinue the examination. To this, it may be said that no offer was made to renew the examination after the 19th of October, and, so far as the files in my office shed any light on the transaction, the stipulation to discontinue related principally to the reexamination of the claim of Mrs. Frisbie, and only, as an incidental result, to the examination of the bankrupt. These creditors wait until the very last day when such an application as the one they made could be of any advantage to them; they are obliged to invoke, and they have received the favor of the court, to enable them to make it, and, owing to causes which cannot always be controlled, and for which no blame need be imputed to either party, these proceedings, on their motion, have now been pending nearly five months. The fact that such delays are, to a considerable extent, unavoidable in proceedings like these—the disadvantage of which, whoever may be the occasion of them—falls upon the bankrupt, is, as it appears to me, a sufficient reason why such applications as this, unless supported by positive and undeniable merits, ought to be denied.

I have not noticed the question, whether all that has been here said does not apply more properly to the issuing of the order on which the bankrupt and the witnesses were summoned rather than to the right of the bankrupt to refuse to be examined when actually before the register, in obedience to the order. The point was expressly waived by the parties when before me, but, as a question of practice, it may be thought worthy of the attention of the court. Such orders are always granted ex parte. Convenience in practice makes it necessary that applications for such orders should be so entertained and disposed of; and being granted ex parte, the bankrupt, when appearing in pursuance to the order, should be allowed to make any objection, or raise any question which would be proper, if an opportunity to be heard had been afforded him before the order was granted. This practice, I think, a convenient one; and with this construction of the effect of the order, no injustice can result from it.

I am therefore of opinion that the creditors are not entitled to the general order for the examination of the bankrupt they have obtained; and that the objection of the bankrupt to an examination under it, ought to be sustained.

John J. Speed, for creditors.
D. M. Dickinson, for bankrupt.

BROWN, District Judge. The court directed an order to be entered approving the register's opinion, and vacating the order for the examination of the bankrupt.

FRISBIE (VOORHEES v.). See Case No. 17,000

FRITCHERY (SHAFFER v.). See Case No. 12,697.

FRITH, The ELIZABETH. See Case No. 4,361.

Case No. 5,132.

In re FRIZELLE et al.

[5 N. B. R. 119.] [1]

District Court, E. D. Michigan. 1871.

BANKRUPTCY—HEARING ON SPECIFICATIONS IN OPPOSITION TO DISCHARGE.

On filing the specifications in opposition to a bankrupt's discharge, the hearing upon the petition is at once transferred into court by section 4 of the bankrupt act [of 1867 (14 Stat. 517)]; therefore there cannot be any examination of the bankrupt by the creditors before a register, on the application by the bankrupt for a discharge. If creditors desire a further examination of the bankrupt before the register, to be used by them in opposing his discharge, they must proceed under section 26 of said act.

I, Benjamin J. Brown, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in this matter before me, a question arose pertinent to the proceedings, which was stated and agreed to by the counsel for the opposing parties, to wit: J. M. Smith and George B. Brooks, who appeared for the assignee and sundry creditors, and John J. Wheeler, who appeared for said bankrupts [S. F. and C. S. Frizelle]. On the joint petition of said bankrupts, it was ordered that a hearing be had thereon on the thirty-first day of December, eighteen hundred and seventy. By consent the hearing was adjourned from time to time to the fourth day of March inst. On that day counsel for the assignee and creditors asked to examine Seymour F. Frizelle, one of said bankrupts, as to the disposition of his property, to which counsel for said bankrupt objected on the ground that he had already been examined by them upon the subject; which, as a matter of fact, is true, said bankrupt having been examined at great length in the month of April, in the year eighteen hundred and seventy, by the same counsel. The objection being made, I declined to proceed with the examination except on cause shown. Thereupon Mr. Smith made the subjoined affidavit, which, in the opinion of the register, did not show such cause. If the right to enter upon the examination had existed at the day fixed for the hearing, it could of course be exercised on any day to which it was adjourned—the hearing being continuous. The showing, therefore, as to the inadvertence was immaterial; and the fact of any examination having occurred at the hearing assumed in the affidavit was not well founded. There had been no "former examination" or any examination whatever at the hearing. The register is not only desirous, but even anxious, that the fullest opportunity should be allowed for the examination of a bankrupt, but he is constrained to follow a rule which he deems not only reasonable, but well established. In re Adams [Case No. 40]; In re Isidor [Id. 7-105]. The bankrupt took the oath prescribed by section 29 of the bankrupt act, and the hearing was adjourned to the eighteenth instant, at nine o'clock a. m., without prejudice.

"Irving M. Smith, being duly sworn, says that he is the attorney of Farrand, Sheley & Co., Dr. D. Jaynes & Sons, J. C. Ayer & Co., and other creditors of said bankrupts; that on the former examination of said bankrupt, upon his application for a discharge, he, deponent, inadvertently omitted to examine said Seymour F. Frizelle upon a material point bearing upon the question as to whether he is entitled to the discharge asked for, and that as the attorneys for said creditors, he now desires to proceed with said examination, and further says not. Irving M. Smith.

"Sworn and subscribed to before me, this fourth day of March, eighteen hundred and seventy one. Benj. J. Brown, Register."

LONGYEAR, District Judge. On the entry of appearance of creditors to oppose a discharge, all proceedings upon the petition for discharge are suspended until specifications shall be filed under section 31, and rule 24, except perhaps that the oath to be taken by the bankrupt to obtain his discharge as prescribed by section 29, may be administered. In re McVey [Case No. 8,932]. On filing the specifications, the hearing upon the petition is at once transferred into court by operation of section 4. It will be seen, therefore, that there could not be any examination of the bankrupts, or either of them, by creditors, on the application by the bankrupts for a discharge, before the register; because, if no specifications had been filed, and the time had not expired for filing the same, all proceedings upon the application were suspended. If the time for filing the specifications had expired, then the case stood as if no appearance to oppose had been entered, and of course no examination of the bankrupts by creditors could be called for by way of such opposition. If specifications had been filed, then the application was no longer before the register. So far, therefore, as the motion was for the examination of the bankrupts on their application for a discharge, the same was properly denied by the register. In re Mawson [Id. 9,317]; In re Puffer [Id. 11,459].

If the creditors desire a further examination of the bankrupts, or either of them, before the register, to be used by them in opposing a discharge, or for any other purpose, they must proceed under section 26. Such a proceeding may be entertained by the register, and any question arising thereon, proper to be certified, may be certified by him. The granting of such an application is, however, entirely in the discretion of the court, and I should be very much inclined to adopt the views and opinion of the register as to the justice and propriety of allowing

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such further examination, all previous examinations having been had before him, and the circumstances having a bearing upon the question being personally known to him.

Case No. 5,133.

In re FRIZELLE.

[5 N. B. R. 122.][1]

District Court, E. D. Michigan. 1871.

BANKRUPTCY — APPLICATION BY CREDITOR FOR LEAVE TO FORECLOSE HIS MORTGAGE —NOTICE TO THE ASSIGNEE.

A petition by a secured creditor for leave to foreclose his mortgage, will be dismissed where no notice is shown to the court to have been given to the assignee of such application, and no proof made of the existence of the debt nor the amount.

[Cited in Re Haskell, Case No. 6,191; Re Haake, Id. 5,883; Phelps v. Sellick, Id. 11,079; Re Hufnagel, Id. 6,837.]

Application of Helen L. Derby, a secured creditor, for leave to foreclose her mortgage. The petition states that the petitioner holds a mortgage on certain real estate of the bankrupt [S. F. Frizelle], given by him before his bankruptcy, for eight hundred and forty-nine dollars, purchase money, in part of the mortgaged property, and that the property is worth not to exceed nine hundred dollars, and that the debt for which the mortgage is so held has not been proven in the bankruptcy proceedings. No notice of the application is shown to the court to have been given to the assignee, and no proof is made of the existence of the debt, or of its amount. To grant permission for a sale without previous proof of the claim, would be to assume as proved the facts upon which the right to the order is dependent. The court, therefore, holds that the mortgage debt must be first proved in the usual manner before the register, in the bankruptcy proceedings. It must be so proved as a secured claim. No dividends of course can be made upon it until after the property mortgaged has been sold, and the proceeds deducted from the debt as proven, when dividends may be made upon the balance, if any. This is the true meaning of section 20 [Act 1867 (14 Stat. 526)], deduced by construing the second paragraph and the last clause of the last paragraph, and section 22 together. After the claim has been thus duly proven in the bankruptcy proceedings, the creditor may, on due notice to the assignee, apply to the court to have the mortgaged property sold. See, also, In re Bigelow [Case No. 1,396]; In re Davis [Id. 3,618]; In re Ruehle [Id. 12,113]; In re Smith [Id. 12,934]. For the reasons above set forth the petition is dismissed.

FROLIC, The (RISHER v.). See Case No. 11,856.

[1] [Reprinted by permission.]

Case No. 5,134.

In re FROST.

[6 Biss. 213;[1] 11 N. B. R. 69; 7 Chi. Leg. News, 42.]

District Court, N. D. Illinois. Oct., 1874.

BANKRUPTCY—QUORUM OF CREDITORS TO JOIN IN PETITION.

In determining whether the requisite number of creditors have joined in a petition under the amendment of June 22, 1874 [18 Stat. 178], only those are to be counted whose debts are unconditionally provable. Those claiming liens or holding security cannot be reckoned.

[Cited in Re California Pac. R. Co., Case No. 2,315; Re Green Pond R. Co., Id. 5,786; Re Broich, Id. 1,921; Re Western Sav. & T. Co., Id. 17,442. Approved in Re Scrafford, Id. 12,557.]

[In bankruptcy. In the matter of Jacob Frost.]

McClellan & Hodges, for petitioning creditors.

Grant & Swift, for respondent.

BLODGETT, District Judge. The petition in this case was filed by eight of the creditors of respondent, the aggregate of whose debts amount to $8,944. To this respondent filed an answer, duly verified, stating, in substance, that the requisite number of his creditors had not joined in said petition, and with his said answer filed what purported to be a schedule or list of his creditors with the amount due each, to which some amendments were afterward made. The petitioning creditors having suggested, by way of reply to this denial, that the list of creditors so filed by the debtor was in many respects untrue, both as to the nature and amount of his debts, a reference was made to H. N. Hibbard, Esq., one of the registers of the court, to take proof and report as to the correctness of said list, and the number and amount of the provable debts against said respondent.

The register has filed his report, to which no exception is taken, from which it appears that the total number of creditors to whom the respondent is indebted in sums over $250 each, is twenty-six, the aggregate of whose debts amounts to $48,141 excluding the demands against him for state, county and municipal taxes now due and unpaid for the past year. Of the creditors thus enumerated, four, the aggregate of whose debts amounts to $22,200, are secured by mortgages, which so far are in no way impeached or attacked by these proceedings. One of the creditors named in said bill had obtained a judgment for the amount of his debt $843, in due course of legal procedure, before the petition was filed, for which he claims a lien on lands owned by debtor, and since the petition was filed seven creditors, the aggregate of whose debts amounts to $9,120, have entered up judgments, upon warrants of attorney, against the respondent

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in the state courts of this county, where respondent resides and owns real estate, so that if these proceedings are defeated, said judgments will become a lien upon the property of the respondent and give said judgment creditors a preference over the remainder of respondent's creditors. This leaves fourteen creditors whose debts exceed $250 each and the aggregate of whose debts amounts to $14,782, who have no security and have taken no steps which may ripen into security or priority. There are in addition to these creditors twelve persons named in the list whose claims amount to less than $250 each, and the aggregate of whose claims is $1,150.

Do these facts show that the requisite number of the creditors of respondent have joined in this petition?

By the amendment of the 22d of June last, to the general bankrupt law, the petitioners must constitute one-fourth in number of the creditors of the debtor and the aggregate of their debts provable under the bankrupt law must amount to at least one-third of the debts provable against the estate of the debtor in bankruptcy. It is clear that if all the creditors of the debtor, secured and unsecured, are to be counted for the purpose of instituting proceedings under the law as it now stands the requisite quorum has not concurred in this petition. The total number of creditors over $250 each is twenty-six, and there are twelve holding smaller amounts, so that eight joining in this petition do not constitute a fourth of even the smaller number. The aggregate debts of the respondent amount to $48,141, excluding taxes; and the aggregate represented by petitioners is only $8,944, which is far short of one-third of the whole.

The question is, what is meant by the phrase "debts provable under this act," as used in the amended 39th section. If it is intended to describe all the creditors of a person, who under any circumstances may prove their debts against the estate of a debtor in bankruptcy, then this petition obviously falls far short of the requisite number, while if the four creditors, who hold security by mortgage for their debts and the one has obtained a judgment in time to entitle him to a priority are to be excluded from the reckoning, then the petitioners constitute over a fourth in number, and the debts, $8,944, are a third in amount of the aggregate of those remaining after deducting the four mortgage debts and one judgment debt.

As will be seen: Total debts.....		$48,141
Mortgage debts.....	$22,200	
Judgment	843	
		23,043
Balance unsecured.....		$25,098
One-third of which is.....		8,366
Amount represented in petition.....		8,944
Total number of unsecured creditors..		21
One-fourth of whom is.....		5¼

The amended act does not specifically define what is meant by the phrase, "debts provable under this act," and we are obliged to resort to the whole law as it now stands amended to ascertain its meaning.

The 19th section of the act of 1867 [14 Stat. 517] describes the various classes of creditors who are entitled to prove their debts.

By this, all debts due at the time of adjudication or at a future day, all contingent as well as absolute liabilities and certain unliquidated claims for damages are provable against the bankrupt's estate; and after enumerating all the various classes of debts so provable, it declares that "no debts other than those above specified shall be proved or allowed against the estate."

The 20th section provides that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee or by a sale thereof to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property and may be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption on receiving such excess; or he may sell the property subject to the claim of the creditor thereon, and in either case the assignee and creditor respectively shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

By the 21st section, it is provided: "That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all proceedings already commenced or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby."

Other clauses might be quoted, but it seems to me those cited are sufficient to show that any creditor holding a secured claim or demand against the bankrupt, cannot prove his claim without first exhausting or surrendering his security. His secured debt may be in one sense provable, but only on conditions. And those conditions can only be performed after there is an assignee to whom the surrender of security can be made, or by a sale of the property as the court shall direct, both of which contingencies can only occur after the debtor is adjudged bankrupt, or at least after the court has taken jurisdiction of the

subject matter. True, a secured or lien-holding creditor may be allowed to petition for adjudication against his debtor but only on condition of offering to surrender his security, while an unsecured creditor may proceed without any such condition to petition for adjudication and prove his debt.

It therefore seems evident to me that by the term "debts provable under act" congress meant debts unconditionally provable without any release or other preliminary action, either by the court or assignee, being necessary. Any other construction would make it practically impossible to put a very large proportion of debtors into bankruptcy, as it would leave unsecured creditors entirely at the mercy of those who had, by their diligence or otherwise, obtained security. A case may be readily supposed where a debtor has given enough of his creditors security under such circumstances as to amount to a fraudulent preference, to break the statutory quorum of one-fourth in number and one-third in amount of all his debts, and thereby prevent proceedings in bankruptcy from ever being maintained. A debtor might fully secure three fourths in number of his creditors holding two-thirds in amount of his debts in defiance of all the provisions of the bankrupt law for the prevention of fraud, and yet be secure from bankruptcy proceedings if secured creditors who, so far as known to the court, insist upon their security, are to be counted for the purpose of determining the requisite number of petitioning creditors.

As this petition, therefore, is signed by more than a fourth of the unsecured creditors of the debtor, whose claims in the aggregate amount to more than one third of the debts unconditionally provable against the respondent's estate in bankruptcy, I find upon the admitted facts in this case that the requisite number of creditors have joined in this petition.

I have not felt called upon to consider and determine the position occupied by those creditors who have entered judgment by confession since this petition was filed, as more than a fourth of the unsecured creditors, counting those judgment creditors as unsecured, have joined in this petition. The respondent is still at liberty to deny the acts of bankruptcy alleged in the petition, as this decision only determines that enough creditors have petitioned to put respondent on his defense upon the merits.

NOTE. This opinion was approved in Re Green Pond R. Co. [Case No. 5,786]. Where a question is made as to whether a sufficient number of creditors have joined in an involuntary petition, the case may be referred to a register or commissioner to examine the proofs and report thereon. In re Sargent [Id. 12 361]. A corporation, however, may be proceeded against in bankruptcy by any one or more creditors, irrespective of the amount of their claims; the provision as to number and amount of creditors required to join in petitions against a natural person does not apply. In Re Oregon Bulletin Printing & Pub. Co. [Id. 10,558].

Case No. 5,135.

In re FROST et al.

[3 N. B. R. 736 (Quarto, 180).] [1]

District Court, E. D. Michigan. May 12, 1870.

BANKRUPTCY—PROVABLE DEBTS.

Whether a married woman may prove against the estate of a bankrupt firm, of which her husband was a member, the amount of a promissory note given by the firm to him for his contribution to capital stock—the money having been furnished by her, and the note transferred to her soon after its execution: *Held*, the note was not an evidence of debt against the firm, but against her husband only. She may prove as against her husband and participate in the dividends of his individual estate, but not against the partnership estate.

Before Hovey K. Clarke, Register in Bankruptcy.

I, the said register, do hereby certify that in the course of proceedings before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by counsel for the opposing parties, to wit: Mr. Lothrop, who appeared for Mrs. Sarah A. Frost, a creditor, who has heretofore filed proof of her claim against said estate, and Mr. Dickinson, who appears for creditors who object to the allowance of said claim, and on whose petition an order has been made for the examination, to wit: Upon the facts shown by the proofs in this case, is the note presented by Mrs. Frost valid against the partnership in her hands, and entitled to be proven and allowed as a claim against the partnership assets? And the parties requested that the same should be certified to the judge for his opinion thereon.

Facts: On the 1st of March, 1864, the bankrupts entered into partnership under written articles of that date, which partnership by its terms was to continue to the 1st of March, 1869. The articles also provided, that "the capital stock of said concern is to be thirteen thousand dollars, and is to be contributed as follows, to wit: R. H. Frost is to put in ten thousand five hundred dollars, and Lewis Westfall is to put in two thousand five hundred dollars, and the firm is to issue notes to the parties for said capital, and pay annual interest on the same, at the rate of seven per cent. per annum; said capital stock is to be left in the concern until the expiration of the copartnership." The profits of the business were to be equally divided. A note was delivered to each partner in accordance with the articles—one to Frost for ten thousand five hundred dollars, and one to Westfall for two thousand five hundred dollars. The note given to Frost is the claim which Mrs. Frost seeks to prove against the estate of the bankrupts. The following is a copy of it: "$10,500. Jackson, March 1, 1864. One day after date we promise to pay to the order of R. H. Frost ten thousand five hundred dollars, with in-

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terest seven per cent., payable annually, value received. (Signed) Frost & Westfall. (Stamped.)" Copy indorsement: "Pay Sarah A. Frost or order. (Signed) R. H. Frost." The testimony taken on the re-examination of the claim of Mrs. Frost, shows that for several years before the formation of the firm of Frost & Westfall, Mr. Frost, her husband, had been a member of the firm of Frost & Crittenden, the capital stock of which was composed in part of a sum or sums of money which Mrs. Frost had furnished her husband to put into the business. At the dissolution of the firm of Frost & Crittenden, Mrs. Frost held the note of that firm for money advanced by her and put into the business, for about the sum of six thousand dollars, which was taken to be the value of the property of Frost & Crittenden, which was transferred to the new firm of Frost & Westfall; that Mrs. Frost, about a month before this time, put into the hands of her husband to put into the business of the new firm, the further sum of four thousand dollars, which, with the six thousand dollars already mentioned, and perhaps some other items not specified, constituted the sum of ten thousand five hundred dollars, which Frost, by his articles of partnership with Westfall was to contribute to the capital stock of the firm of Frost & Westfall, and for which the note presented in this case was given. The precise time when the note was delivered by Mr. Frost to his wife is not stated. Mrs. Frost says, it was "at the time or very soon after it was made." Mr. Frost says that he did not have the note "until the firm had been formed," and he thinks it "was written a few days after it was dated." The date was March 1, 1864—the date of the articles of copartnership.

Opinion of the Register.

It is contended on behalf of Mrs. Frost that the note appended to her deposition is evidence of an indebtedness which existed on the day of its date from the firm of Frost & Westfall to Richard H. Frost, one of its members, from whom she received it for an actual consideration paid to him equal to the full amount of the note, and it is claimed that a debt due by a firm to one of its members, when evidenced by a note and that note in the hands of a third person bona fide, may be proved against the firm in all respects like any other obligation of the firm.

The first inquiry is, was this in fact an indebtedness on the date of the note by the firm of Frost & Westfall to R. H. Frost? The articles of copartnership show that Frost & Westfall had agreed with each other to become partners, that Frost should pay into the common stock of the firm ten thousand five hundred dollars, and Westfall should pay two thousand five hundred dollars, and that these sums, when paid, should be "left in the concern until the expiration of the copartnership," which was to be five years thereafter. By this agreement Frost & Westfall were each the debtors of the firm until the sum to be contributed by each was paid. The payment of the sum, therefore, did not create a debt from Frost & Westfall to Frost; it simply discharged an obligation from Frost to Frost & Westfall, and the note which was given was simply the evidence of that fact, given in the form which the articles required. The note, construed with reference to these articles, had no other legal effect than a receipt or certificate that the payee, R. H. Frost, held of the capital stock of the firm of Frost & Westfall twenty-one twenty-sixths of the whole. Westfall held a similar note representing five twenty-sixths of the stock. These notes were made payable one day after date. They were dated on the 1st of March, 1864, though written within, as Mr. Frost thinks, "a few days after." It cannot be possible that either of the partners supposed that these notes could properly be passed into the hands of a third party, and thus at any time enforced against the firm as negotiable promissory notes. To suppose this is to suppose that after having mutually agreed that the capital stock contributed by each should be "left in the concern until the expiration of the partnership," they should give each other notes by which either partner could, through the intervention of a third party, compel the surrender of the capital contributed by him at any time after four days, when the one day notes would mature, from the commencement of the five years of its proposed duration. If Mr. Frost delivered his note to his wife in order to enable her at her option to exercise any such power as this, it was in fraud of the rights of his partner, as well as against the creditors of the firm. If, however, he delivered the note to her as an evidence of his debt to her for money borrowed to "put into the business," as Mrs. Frost testifies it was, the delivery would probably operate as an equitable assignment of his interest in the firm to the extent that would be due upon it at the expiration of the copartnership. This would be a proper and legitimate use of it, but it would be no evidence of a debt against Frost & Westfall, and the attempt to employ it as such in this case is clearly against the rights of Westfall, and especially of the creditors of the firm.

There is, however, another inquiry necessary to a full consideration of the case—the claim being in the form of a negotiable promissory note, whether Mrs. Frost can claim the rights of a holder acquiring the note before maturity, and without notice of the equities affecting it. The proof is not clear whether she actually received it before or after maturity. It had but four days to run, and it would seem probable from Mr. Frost's testimony, that it was past due before it was made and signed. The probability is therefore against her having received it before maturity. She testifies, however, to some knowledge as to the true character of the

transaction out of which the note grew. She had lent money before to her husband to put into the business of Frost & Crittenden, and she lends this for the same purpose. Just what this meant or what was the effect of lending this money to her husband for this purpose, as related to her husband's partner and the creditors of the firm, she may not have known herself. The whole affair was managed by her husband, to arrange when, and as he saw fit; and it becomes a very serious question, whether a married woman may employ her husband to manage her individual estate, and not charge herself with notice of all facts known to him, which may affect his transactions on her behalf. The power of a married woman to deal directly with her own personal property in the manner shown by this case, is of recent origin; and the books afford but little light upon the extent to which her husband may, by his acts, affect her rights when dealing with her property. But when the confidential relation of husband and wife is considered, and especially the extent to which wives confide to their husbands the management of their estates, it is easy to see that the grossest abuses may arise if a wife be allowed to assert her right against her husband's creditors, on the ground of ignorance of facts which were well-known to him. I strongly incline to the opinion, that in all such cases the knowledge of the husband of the facts affecting the wife's property, which he is managing by her consent, must be regarded as the knowledge of the wife. In this case, Mrs. Frost knew what her husband was going to do with her money. She knew he was going to put it into his business with Westfall. He put it in as capital contributed by him. So Westfall understood it. She, I think, must be charged with the knowledge of the disposition her husband made of it, and though she may not know the difference between lending money to a firm and contributing a partner's share to the capital stock of the firm, the law will determine her rights according to the facts, as they are shown to exist; and thus having knowledge, or being legally charged with the consequences of the knowledge, that the note she took was not evidence of a debt due from the firm of Frost & Westfall, she cannot be allowed to prove it against the partnership estate. As a debt against R. H. Frost, and entitled to participate in any dividend of the proceeds of his individual estate, I see no objection to its being allowed.

LONGYEAR, District Judge. I fully concur in and approve of the foregoing views and conclusions of the register.

FROST (ARNOLD v.). See Case No. 558.
FROST (BINGHAM v.). See Case No. 1,413.
FROST (BRADLEY v.). See Case No. 1,780.
FROST (FOOTE v.). See Case No. 4,910.
FROST (KITTLE v.). See Case No. 7,856.
FROST (PROVIDENCE COUNTY SAV. BANK v.). See Cases Nos. 11,453 and 11,454.
FROST (REDICK v.). See Case No. 11,630.

Case No. 5,136.

FROST v. UNION PAC. R. CO.

[The case reported under above title in 11 Am. Law Reg. (N. S.) 101, is the same as Case No. 4,952.]

Case No. 5,137.

FROST v. UNITED STATES.

[The case reported under this title in 9 Int. Rev. Rec. 41, is the same as Case No. 15,172.]

FROSTEL (KING v.). See Case No. 7,794.
FRY, Ex parte. See Case No. 5,143.

Case No. 5,138.

FRY v. COOK et al.

[See 14 Fed. 424.]

FRY (GREEN v.). See Case No. 5,758.

Case No. 5,139.

FRY v. GRIGG.

[1 Wkly. Notes Cas. 73.]

Circuit Court, E. D. Pennsylvania. Nov. 11, 1874.

CONTRACTS AGAINST PUBLIC POLICY—INDUCEMENT TO SEPARATION OF HUSBAND AND WIFE.

[A father, in consideration of love and affection, gave a bond to pay to his daughter and her husband, if they should become reunited, $6,000 annually, one-half to each, so long as they should live together as husband and wife, and in case they again be separated, for any cause save death, he should then pay $50,000 to the husband. *Held*, that the two obligations were separate, and that the latter was void, as against public policy, and that, even if they were considered as connected, the effect would be to render both void.]

Action of debt on a bond. The declaration set forth the bond, which recited the consideration of love and affection for the obligor's daughter, who was the wife of plaintiff, and bound the obligor to pay, "during the term of my life, the sum of six thousand dollars annually, * * * one-half each," to the plaintiff and his wife, "provided that said payments shall be made and commenced only at and from the time at which the said" plaintiff and his wife "shall be reunited and live together as husband and wife, which is understood to be the day of the date hereof, and said payments shall

continue only during my life, and the time during which the said" persons "shall live together as aforesaid, and, if at any time they shall, from any cause, or by the death of either of them, cease to live together as husband and wife, such payments * * * shall wholly cease and be at an end; and in the event of the ending of the conjugal relation as aforesaid between them from any cause whatever except by the death of either of them, I bind myself to pay to said" plaintiff "the sum of fifty thousand dollars"; it then alleged that after the execution of the bond, viz., in 1866, "the said plaintiff and his said wife did cease to live together as husband and wife, and the conjugal relation did end between them, and that without the death of either"; the death of the obligor in 1864, and administration of defendant, and the demand of and refusal to pay the said sum of fifty thousand dollars. To this declaration defendant demurred, and assigned for reasons: (1) For that said alleged agreement is illegal, against the policy of the law, and void; and (2) that the averment that said conjugal relation ended by the ceasing to live together of said plaintiff and his wife is not sufficiently made, and such ceasing to live together is not an ending of the conjugal relation.

Mr. Miller and Geo. W. Biddle, for demurrer, handed up brief, citing Jones v. Waite, 7 Scott, 317; Durant v. Titley, 7 Price, 577; Westmeath v. Salisbury, 5 Bligh (N. S.) 339; and Hitner's Appeal, 4 P. F. Smith [54 Pa. St.] 110,—but were not called on.

Mr. Sellers (with whom was Mr. Diehl), contra, argued: That the moving cause for giving the bond was evidently the "re-uniting" of the husband and wife; that it could not be said, as matter of law, that the receipt of the $50,000 was more advantageous to the plaintiff than the keeping up of the annuity; that unless the obligor intended to give an inducement to separation, the bond is good; and (in answer to a question by the court) that the $50,000 and the annuity should be taken together as an entire consideration.

THE COURT (CADWALADER, District Judge) entered judgment for defendant on the demurrer; being of opinion that, though the allegation that plaintiff and his wife "ceased to live together" was probably sufficient, as the instrument sued on seemed to define that as a "ceasing of the conjugal relation" by the words "as aforesaid," yet the demurrer must be sustained for the first reason assigned, the two obligations (viz., to pay the annuity and to pay the $50,000) being entirely distinct; and, even if they could be connected, the effect would only be to render both void.

FRY (HOLLINGSWORTH v.). See Case No. 6,619.

Case No. 5,140.

FRY v. QUINLAN.

[13 Blatchf. 205.] [1]

Circuit Court, S. D. New York. Dec. 6, 1875.

PATENTS — EFFECT OF SURRENDER AND REISSUE ON PENDING SUIT FOR INFRINGEMENT.

After a bill in equity had been filed for the infringement of a patent for an invention, the patent was surrendered, and a reissued patent was granted. The plaintiff then moved for leave to file a supplemental bill founded on the reissued patent and for an injunction: *Held*, that the motions must be denied, on the ground that, by the surrender and reissue, the suit was at an end, and that the plaintiff must proceed by original bill founded on the reissued patent.

[This was a bill for an injunction by William F. Fry against Jeremiah Quinlan.]

George H. Yeaman, for plaintiff.

Charles Goepp, for defendant.

JOHNSON, Circuit Judge. The original bill was filed under a patent which has been since surrendered under the statute (Rev. St. § 4914). Upon the surrender, a new patent was issued according to the same statute. Thereupon, the complainant applies for leave to file a supplemental bill founded upon the reissued patent, and asks for an injunction.

In the case of Moffitt v. Garr, 1 Black [66 U. S.] 273, Mr. Justice Nelson, giving the opinion of the supreme court upon the effect of section 13 of the act of congress of July 4, 1836 (5 Stat. 122), says: "The construction given to this section, * * * and the practice under it, in case of a surrender and reissue, are, that the pending suits fall with the surrender. A surrender of the patent to the commissioner, within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence can no more be the foundation for the assertion of a right after the surrender, than could an act of congress, which has been repealed. It has frequently been determined, that suits pending, which rest upon an act of congress, fall with the repeal of it. The reissue of the patent has no connection with, or bearing upon, antecedent suits; it has as to subsequent suits. The antecedent suits depend upon the patent existing at the time they were commenced, and, unless it exists and is in force at the time of trial and judgment, the suits fail." It is true that the point decided in that case was, that the surrender barred an action at law for a previous infringement; but the ground upon which the decision is put is equally applicable to a suit in equity. The right is the same in either case; the remedy only is different. It is not perceived how a surrendered patent can be the foundation of relief in equity any more than at law. The case of Dental Vulcanite Co. v. Weth-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

erbee [Case No. 3,810] is referred to in support of the complainant's motion; but the case only shows that, in the district of Massachusetts, it is in fact the usual practice to file a supplemental bill upon a reissued patent, in aid of a bill based upon the original patent before its surrender. It does not appear how, or upon what view of the rights of the parties, that practice was established. The statute only declares that the reissued patent, with the corrected specification, "shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form." Rev. St. § 4916. But this declaration gives no countenance to the idea, that the reissued patent can be availed of to sustain and render effectual a suit the basis of which is taken away by the act of the party in surrendering his patent. It is not in general the function of a supplemental bill to restore or renew a cause of action which has ceased to exist. Such a bill, on the contrary, rests on the equity of the original bill, and seeks to apply it under altered circumstances, but in the enforcement of the same right. Taking this view of the law, the complainant is not entitled to file the supplemental bill, and, of course, is not entitled to the preliminary injunction prayed for.

In order to avail himself of any rights he may have upon the facts stated in the supplemental bill, the complainant must proceed by original bill founded on the reissued patent, as was done in Orr v. Badger [Case No. 10,587].

The motions must be denied.

Case No. 5,141.

FRY v. ROUSSEAU.

[3 McLean, 106.] [1]

Circuit Court, D. Michigan. Oct. Term, 1842.

COURTS — JURISDICTION — SUIT BY ASSIGNEE OF PROMISSORY NOTE—NEGOTIABILITY OF NOTE.

1. Where an action is brought by the assignee of a promissory note or bill, the declaration must show that the assignor could have sued in this court.

[Cited in Chamberlain v. Eckert, Case No. 2,577.]

2. A note for a certain sum payable in current bank notes is not negotiable.

[This was an action at law by George Fry against H. Rousseau. Heard on demurrer to the declaration.]

Mr. Hand, for plaintiff.

Mr. Butler, for defendant.

OPINION OF THE COURT. This action was brought upon the following note: "Six months after date, I promise to pay to the order of W. T. Williard, at the Bank of Michigan, in Detroit, Michigan, six hundred and thirty-seven dollars and fifty-six cents, for value received in current bank notes, receivable at the counter of said bank."

To the first count in the declaration the defendant demurred specially. 1. Because the statement in the declaration does not show, that the court has jurisdiction of the cause. It contains no averment that the original promisee, W. T. Williard, through whom the plaintiff claims to recover, is an alien or citizen of another state. This is a fatal objection. "Where a suit is brought against a remote indorser, and the plaintiff in his declaration traces his title through an intermediate indorser, without showing that this intermediate indorser could have sustained his action in the courts of the United States, those courts have no jurisdiction." Mallen et al. v. Torrence, 9 Wheat. [22 U. S.] 537; Bank of Kentucky v. Wistar, 2 Pet. [27 U. S.] 320. These decisions are made under the 11th section of the judiciary act of 1789 [1 Stat. 78], which provides, that "no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

The other ground of demurrer is, whether a note to pay a sum of money in current bank paper, is negotiable. There is nothing in the Michigan statute which regulates the negotiability of promissory notes, variant from the English rule. A note to be negotiable must be payable in money. Chit. Bills (Ed. 1839) 152. This point was considered and decided in Hasbrook v. Palmer [Case No. 6,188].

The demurrer is sustained on both grounds.

[1] [Reported by Hon. John McLean, Circuit Justice.]

Case No. 5,142.

FRY v. YEATON.

[1 Cranch, C. C. 550.] [1]

Circuit Court, District of Columbia. July Term, 1809.

COSTS—MAGISTRATE'S FEES FOR TAKING DEPOSITION.

The fees of a magistrate in another state for taking a deposition under the act of congress of 1789 [1 Stat. 73] may be taxed in the bill of costs, in Virginia.

[Cited in Jerman v. Stewart, 12 Fed. 275.]

This was a motion by C. Lee, the plaintiff's counsel, to tax, in the bill of costs, the fee of W. Wetmore, C. J., of the common pleas in Boston, being seven dollars, for taking a deposition according to the act of congress (section 30 of the judiciary act; 1 Stat. 73).

Mr. Youngs, for defendant, contended that there was no law of Virginia, or of the United States, to authorize the charge.

[1] [Reported by Hon. William Cranch, Chief Judge.]

C. Lee, for plaintiff, cited the Virginia act of 29th November, 1792, § 13, p. 279.

THE COURT allowed the costs of taking the deposition to be taxed in the bill of costs.

FRY (ZAHM v.). See Case No. 18,198.

Case No. 5,143.

Ex parte FRY et al.

[3 App. Com'r Pat. 251.]

Circuit Court, District of Columbia. Dec. 15, 1859.

PATENTS—APPLICATION—FOREIGN USE.

[A statement by a person that he saw the process in question used in a foreign country before the date of plaintiff's application, and himself used it in this country subsequent thereto, is not proof that it had been patented, or described in any publication in this or any foreign country, within Act 1836, § 15 (5 Stat. 117), or had been in prior public use or sale with the applicant's allowance; and is not sufficient, as against the applicant's oath that he is the original discoverer, to justify the commissioner in refusing letters patent.]

Appeal [by Thomas Fry and Charles A. Seely] from the decision of the commissioner of patents, refusing to grant them a patent "for a mode of backing up photographic pictures on glass."

MORSELL, Circuit Judge. The appellants state their claim to be for the process of using wax, stearine, spermaceti or other substances or compositions substantially the same for the purpose of backing up, and as a medium of color for the chemitype, and other pictures or designs on glass. The application was filed Nov. 22, 1855. The acting commissioner adopts the report of the examiners of May 11, 1859, in his decision dated May 12, 1859. The report after stating the references says: "We ourselves think after a careful examination and comparison of the references that it must be admitted that the process claimed by the applicants in its minute details, and the relations of those details with each other is not indicated by any of the references in unmistakable and exact terms, whatever they may imply or suggest. We are therefore indisposed in the face of declarations made under oath, especially in the absence on our part of a practical knowledge of the act, to determine that this officer would be justified in view alone of the references in still refusing the letters, and thus deprive the parties of all opportunity of testing the question in the courts. We should accordingly have recommended an allowance of the patent, but for the fact that we are informed by Mr. Woodly, an English artist residing in this city on E street near Pennsylvania avenue, that of his personal knowledge, Walter P. Davis photographist, then residing at Chelsea, London, practiced the plan of coloring photographic pictures on glass by applying the colors to the varnish with which the impression had been previously covered, as early as the spring of 1855, and that he himself has been constantly practicing the same method for more than two years. A reference to the claim of the applicants will show their process to be substantially, if not identically, the same device, if the applicants still show their qualities of refracting and transmitting rays of light cannot be considered other than an equivalent of wax. We recommend a final refusal of the patent."

The following reasons of appeal were filed: —Firstly, because the mere ex parte statements of an individual, not under oath nor even in writing are not evidence, and can never be regarded as such. Secondly, because the mere prior use of an invention or discovery in a foreign country without its ever having been patented there or described in some printed publication, will not prevent the issuing of a patent to an original inventor in the United States. Thirdly, in the case now under investigation there is not even an allegation, much less proof, that this invention or discovery was ever known or used in the United States. Fourthly, and lastly, because the present applicants filed their application for a patent for the invention or discovery in question long prior to the time at which the informant Woodly alleges that he first commenced to use and practice a similar method.

On this state of the case, all the original papers and documents were duly laid before me, and with the argument in writing of the counsel for the appellant submitted for consideration. The matter involved in and covered by the reasons of appeal appears to be the objection to the facts related by Woodly to the commisioner in a conversation with him on the subject of the invention claimed in this case as stated by the commissioner. What ought to be the legal course of the commissioner in his official examination of his inventions under section 7 of the act of 1836, I shall refrain from saying, intending to confine my remarks to the point before me, and only so far as made necessary for my decision. Suppose then the commissioner has as stated by him, correctly obtained the information, what effect is to be given to it? It does not prove that prior to the alleged invention in this case by the applicant, it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent or allowance prior to his application. The application in this case was made years before the time when Woodly says he used it. The oath of the party himself, made according to the requirements of the law and with its sanction, is entitled to some weight in considering a question of this kind, and he swears that he verily believes that he is the original and first inventor or discoverer

of said invention set forth in his specification, and that he does not know or believe that the same was ever before known or used. The latter clause of section 15 of the same act, which of course must be taken together with section 7 just alluded to, is very explicit. It is in these words: "Whenever it shall satisfactorily appear that the patentee at the time of making his application for the patent believed himself to be the first inventor or discoverer of the thing patented, the same shall not be void on account of the invention or discovery or any part thereof having been before known or used in any foreign country, it not appearing that the same or any substantial part thereof had before been patented or described in any printed publication." These provisions of the statute seem to me to be directly applicable to the facts constituting the point, and are conclusive to show that the commissioner erred in refusing to grant the letters patent, and the said decision is accordingly reversed, annulled and set aside, and it is hereby ordered and directed that a patent be accordingly issued to said applicants for their invention as prayed.

FRYE (HASKILL v.). See Case No. 6,195.

FRYE (PATRIOTIC BANK v.). See Case No. 10,808.

Case No. 5,144.

FRYE v. SCOTT.

[3 Cranch, C. C. 294.] [1]

Circuit Court, District of Columbia. May Term, 1828.

CONDITION OF ARBITRATION-BOND—AWARD.

When the condition of an arbitration-bond is to abide by the award of J. P. and S. B. ("and a third person to be chosen by them in case they should not agree upon an award,") the award need not state why it is signed by the three arbitrators, nor that the third person was appointed in writing; nor that the two named had disagreed before they appointed the third.

[This was an action at law by Nathaniel Frye, Jr., against Jesse Scott.]

Debt for $200, the penalty of an arbitration-bond to abide by the award "of Jacob Paine and Samuel Boucher, and a third person to be chosen or agreed upon by them, in case they should not agree upon an award, or any two of them."

Mr. Worthington and R. P. Dunlop, objected that the award, which was signed and sealed by the three arbitrators, did not state why it was made by three when only two were named in the bond; and that there was no written evidence of the appointment of Frederick Perley, the third person who signed the award; and cited Caldw. Arb. 42, and Still v. Halford, 4 Camp. 17.

Mr. Hellen, contra. Perley was not an umpire, but an arbitrator with the others, and equally within the submission.

THE COURT (nem. con.) overruled the objections, saying that it was not necessary that the appointment of Perley, by the two other arbitrators should be in writing; nor that the award should state that the two had disagreed before they appointed Perley. These facts may be proved by parol. Verdict and judgment for the plaintiff.

[1] [Reported by Hon. William Cranch, Chief Judge.]

FRYE (SMITH v.). See Case No. 13,049.

FRYE (UNITED STATES v.). See Case No. 15,173.

Case No. 5,145.

FUENTES et al. v. GAINES.

[1 Woods, 112.] [1]

Circuit Court, D. Louisiana. April Term, 1871.

EQUITY—MOTION OR PETITION TO STAY PROCEEDINGS—WILLS—VALIDITY — CONCLUSIVENESS OF PROBATE — ADMINISTRATION OF STATE LAWS BY FEDERAL COURTS.

1. If, in a case in equity any circumstances exist which render it improper or inequitable to carry on proceedings in the court, they can always be brought to the notice of the court by motion or petition in the suit; or may be pleaded in bar or abatement. A formal bill for the purpose is needless litigation.

2. Under the law of Louisiana the probate of a will is not conclusive against parties in possession of property which is sought to be recovered from them by virtue of it, unless they were parties litigant in the probate proceedings.

3. When the validity of a will is brought in question incidentally on question of title to property, it is open for investigation in any court in which the title may be litigated, whether a state court or a court of the United States.

4. The United States courts in attempting to administer state laws must do so fairly, so as to secure to suitors all their just rights under those laws; otherwise, they may be the means of much injustice and oppression.

[See Bennett v. Boggs, Case No. 1,319.]

5. When, in a chancery suit in the United States courts, a question of title to property is involved in the validity of a will, parties to the suit who are not barred by prescription, waiver, estoppel or some other supervening cause, may contest its validity by answer, or by proceedings in the court of probate for a revocation of the probate, or in both methods.

Bills in equity, heard on motion for injunction.

E. T. Merrick and J. Q. A. Fellows, for complainant.

Miles Taylor and J. McConnell, for defendants.

BRADLEY, Circuit Justice. This is a bill for injunction to stay proceedings in this court.

I have been unable to find any precedent for such a bill; and I cannot see the necessity of it. If any circumstances exist which

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

render it improper or inequitable to carry on proceedings in this court, they can always be brought to the notice of the court by motion or petition in the suit, or may be pleaded in bar or abatement. A formal bill for such a purpose seems to me to be needless litigation, and I shall direct the bill as such to be dismissed, but allow it to stand as a petition in the several suits sought to be suspended, not requiring the complainant to file any formal answer or other pleading thereto.

Supposing the matter to be properly brought before the court on petition and motion thereon, the question arises whether the proceedings in this court ought be stayed, pending the suit brought in the Second district court of the parish of Orleans for the revocation of the will of Daniel Clark.

The solution of this question depends upon that of a prior one; whether the defendants in the cases pending in this court are entitled further to litigate the will of Daniel Clark on which the complainant's claim is based.

From an examination of the law of Louisiana, I am satisfied that the probate of a will is not conclusive against parties in possession of property which is sought to be recovered from them by virtue of it, unless they were parties litigant in the probate proceedings. It may be and probably is prima facie evidence of the validity of the will, but it does not prevent the defendants from showing the will to be invalid. Bouthemy v. Dreux, 10 Mart. [La.] 1; O'Donogan v. Knox, 11 La. 389; Robert v. Allier, 17 La. 5; Rachal v. Rachal, 1 Rob. [La.] 115; Duplessis v. Lombard, 10 Rob. [La.] 193; Sophie v. Duplessis, 2 La. Ann. 725; Succession of Dupuy, 4 La. Ann. 571; Abston v. Abston, 15 La. Ann. 137. This is analogous to the rule which prevails in England and in several states of this country as to wills of real estate. In this state it seems to apply to wills of all kinds of property.

While this is the general rule, I do not mean to decide any subsidiary question which may arise in these cases—such as whether the defendants are prescribed by lapse of time to contest the will or the probate thereof. Such questions will be properly decided when they arise in each case. But being satisfied that the general rights of the defendants are such as I have stated, the next inquiry is, In what manner shall they be allowed to raise the issue?

If it were a new question, I should unhesitatingly say that they could raise it in this court; and could either require a decision upon it from the court itself, as upon one of the necessary questions in the cause or upon a separate issue of devisavit vel non. If the defendants are not concluded by the probate, I see no reason why they cannot contest the validity of the will in these suits. It was never supposed that the validity of a will of real estate could not be questioned in a chancery suit, where it was set up as a ground of recovery or defense. It is true that the court has refused to entertain a suit for setting aside a will on the ground of its having been obtained by fraud. But in all other cases the well known issue of devisavit vel non shows that the court has entertained jurisdiction of the validity of wills of land from time immemorial, whenever the question has properly arisen in an equity suit. If it has not entertained like jurisdiction with regard to wills of personalty, it has been because the probate thereof, in the ecclesiastical courts of England, and in the probate courts of the other states, have always been deemed conclusive upon all persons.

In the case of Gaines v. Relf, 2 How. [43 U. S.] 650, the court seems to consider that there would be no difficulty in testing in this court the will of 1811 by an issue of devisavit vel non: and from a careful examination of the opinion of the supreme court in the case of Gaines v. Hennen, 24 How. [65 U. S.] 553, I am satisfied that the court regarded the validity of the will of 1813 as open to contestation in the circuit court. It was expressly conceded that the admission of the will to probate did not exclude any one who might desire to contest the will with Mrs. Gaines from doing it in a direct proceeding, or from using any means of defense by way of answer or exception, whenever she should use the probate as a muniment of title. The court moreover says: "And the probate does not conclude Relf and Chew, or any other parties having an interest to do so, to oppose the will when it shall be set up against them, by such defenses as the law will permit in like cases. It was with those qualifications of the probate of the will of 1813 that the case was tried in the court below, and they have been constantly in our minds in the trial of the appeal here." Page 558. The court then says: "It is due to the merits of the controversy to advert to the decisions of the probate court of the Second district of New Orleans and to that of the supreme court, reversing it, more minutely than has been done, especially, too, as they are coincident with our conclusions upon the testimony regarding the execution by Mr. Clark of his olographic will of 1813, and the concealment of destruction of it after his death." It thus appears that the court was prepared to examine the question of the validity of the will on its merits, had it been directly attacked, and had the question been directly raised in the pleadings. But it was not so raised in that case nor in the subsequent case of Gaines v. City of New Orleans, 6 Wall. [73 U. S.] 642. In these cases the defendants contented themselves with contending that the probate was null and void, because the probate of the prior will of 1811 had not been directly revoked. This point being ruled against them, the will of 1813 stood unassailed upon the probate awarded by the supreme court of Louisiana, which was

regarded as conclusive until the contrary should be shown. It is true that in the case of Gaines v. New Orleans, 6 Wall. [73 U. S.] 703, it is said: "When a will is duly probated by a state court of competent jurisdiction, that probate is conclusive of the validity and contents of the will in this court."

But it was not necessary to decide this point in that case, and whilst the remark is strictly true with regard to wills of personalty in nearly every state in the Union, it is not true with regard to wills of realty in many states; and I do not suppose it to be true with regard to wills of either realty or personalty in Louisiana. If the state courts are not bound by the probate, I do not see why the United States courts should be bound thereby. I am referred to the opinion of this court delivered in May term, 1870, upon an application of Mrs. Gaines to remove into this court proceedings instituted in the Second district of the parish of Orleans by Fuentes and others for the revocation of the probate of the will of 1813.

We then held that we had not probate jurisdiction and could not entertain the questions which were raised in that case. Such is still my opinion. But that is where the direct object of the proceeding is the granting or revocation of probate; not when the validity of the will comes up incidentally on a question of property. The probate of the will is granted for the purpose of administering the estate of the deceased, and confers authority upon the executor to do all things necessary to that end.

But if the executor of any other person claims, by virtue of the will, property in the possession of a third person, who was not a party to the probate proceedings, and who claimed by a title adverse to the will, such third person is not concluded as to its validity by the probate.

Such I understand to be the laws of Louisiana, and when the validity of the will is brought in question in this incidental way, it is open for investigation in any court in which the title of the property may be litigated, whether a state court or a court of the United States.

If, then, the defendants are not concluded by the probate of 1856, but have still the right, unless barred by prescription, waiver, estoppel, or some other supervening cause, to contest the will under which the complainant claims, they ought in some way to have the benefit of the right. The United States courts, in attempting to administer state laws, must do so fairly, so as to secure to suitors all their just rights under those laws, otherwise they might be the means of much injustice and oppression.

We, then, come back to the question whether proceedings ought to be stayed in this court in the several cases referred to, until the defendants can bring to a termination the proceedings instituted by them in the Second district court of New Orleans for a revocation of the probate granted in 1856—of course, the application cannot be entertained in reference to the cases that have gone to a decree. They must be regarded as concluded. It can only be entertained in reference to those cases which are still undetermined, none of which, as I understand it, are now at issue.

Answers are yet to be filed therein.

In view of the considerations which I have before stated, it is competent for the defendants to contest the validity of the will, either by answer in these cases, or by proceedings for a revocation of the probate in the parish court, or in both of the methods. Under these circumstances stay of proceedings in this court is a matter entirely in the discretion of the court. Had the defendants promptly resorted to the district court for redress, I should have felt it my duty to suspend proceedings here until they could have had a fair opportunity to get the decision of the parish court. But, as the supreme court remarks, in Gaines v. New Orleans, 6 Wall. [73 U. S.] 703, the probate has been allowed to rest now for twelve years (now fifteen years), and it seems to me unreasonable to tie the hands of the complainant. I think I am bound in all the causes to proceed if the complainant shall so elect; and if the defendants are successful in procuring a revocation of the probate in the parish court before the closing of testimony in this court, they will then have the benefit of it; otherwise they must depend on a contestation of the will in the causes pending here.

The application is refused.

[NOTE. For other cases involved in this litigation, see note to Gaines v. Sizardi, Case No. 5,175.]

FUENTES v. GAINES. See Cases Nos. 5,174 and 5,175.

FUERS (UNITED STATES v.). See Case No. 15,174.

Case No. 5,146.

FUGATE v. BRONAUGH.

[3 Cranch, C. C. 65.] [1]

Circuit Court, District of Columbia. Dec. Term, 1826.

SUIT BY ADMINISTRATOR—BOND TO HIS INTESTATE.

In a declaration by an administrator upon a bond to his intestate he must aver himself to be administrator, and make profert of his letters of administration.

Debt, on bond to Gerrard Fugate, by his administrator. The declaration commences thus: "Washington County, to wit: Jeremiah W. Bronaugh was attached to answer unto Joseph Fugate, administrator, &c., of Gerrard Fugate, deceased, of a plea that he

[1] [Reported by Hon. William Cranch, Chief Judge.]

render to the said Joseph $1000, whereupon the said Joseph, by C. C. Lee, his attorney, complains," &c. The declaration contains no averment that the plaintiff was administrator, nor a profert of the letters of administration. The defendant demurred specially for several assigned causes, but not for want of such an averment and profert.

But THE COURT, considering it a good cause of general demurrer, rendered judgment for the defendant, for want of an averment that the plaintiff was administrator, and for want of a profert of the letters of administration.

Case No. 5,147.

Ex parte FULLER.

[2 Story, 327;[1] 5 Law Rep. 210.]

Circuit Court, D. Massachusetts. May Term, 1842.

WILLS — DEVISE OF REAL PROPERTY — WHEN IT TAKES EFFECT—ACCEPTANCE—DISCLAIMER—BANKRUPTCY OF DEVISEE—PROBATE.

1. In a devise of real estate, the title passes to the devisee at the death of the testator, and the probate of the will relates back to that time.

[Cited in Burns v. Travis, 117 Ind. 49, 18 N. E. 45.]

2. A devise by will vests in the devisee only upon his consent thereto; but when the devise is plainly for his benefit, as if it be of an unconditional fee, without trust or incumbrance, his consent will be presumed, and some solemn act is required to constitute a disclaimer or renunciation thereof.

[Cited in Drury v. Natick, 10 Allen 182; Allison v. Smith, 16 Mich. 420.]

3. The provision in the Revised Statutes of Maine (chapter 92, § 25), in relation to the probate of wills, is merely affirmative of the law, as it antecedently stood.

[Approved in Adams v. De Cook, Case No. 51. Cited in Brooks v. McComb, 38 Fed. 320.]

[Followed in Bridge v. Ward, 35 Wis. 692.]

4. Where a devise has been made to a bankrupt, and accepted by him, it is a fraud upon his creditors for him to disclaim, or renounce it, and the court will compel him to do all acts necessary to perfect his title to the devised estate.

5. An estate was devised unconditionally to A. and his sister. Subsequently to this, but before the will had been admitted to probate, A. filed his petition to be declared a bankrupt. *Held*, that the estate, so devised, became the property of the assignee appointed in bankruptcy, so that he might sell and convey the same, as a part of the estate of A.

This case came up in the district court [case unreported] on a petition by the assignee [Henry W. Fuller] for leave to sell one undivided half part of certain real estate in Portland, Maine, which was devised to Andrew Ross, a bankrupt, and his sister; and which was referred to in the original petition of the bankrupt, as follows: "David Ross, of Portland, Maine, grand-father of your petitioner, died at Portland, Me., the latter part of December, 1841, and your petitioner has reason to believe he may, by his wife, have bequeathed to him and his sister, a certain piece of property in Portland. The instrument purporting to be his last will and testament has not been presented for probate, and of course has not been proved, approved and allowed." Andrew Ross filed his petition to be declared a bankrupt on February 8th, 1842, and was declared a bankrupt on March 22d, 1842. David Ross, the grand-father of Andrew, died December 29, 1841, testate. His will was presented and filed for probate at Portland, March 15, 1842, and was proved, approved, and allowed, April 19, 1842. Andrew Ross, who was named in the will as one of the executors, upon being informed of the fact, declined accepting that office, and David Ross, Jun., the other executor, was appointed and qualified as executor. By the will, the estate in question was devised unconditionally and in fee, to Andrew Ross and his sister. The will was not filed for probate until after the filing of Andrew Ross's petition to be declared a bankrupt; and was not proved and allowed, until after he was declared a bankrupt. Andrew Ross, living in Boston, had nothing to do with his grandfather's estate, and did no act accepting or declining the devise. Upon this statement of facts, the following question was ordered by the district court to be adjourned into this court, namely: "Whether, upon the foregoing facts, the said real estate, devised as aforesaid to Andrew Ross, is the property of the said assignee, so that he may sell and convey the same as a part of the estate of the said Ross."

H. W. Fuller, as assignee.
Mr. Rogers, for the bankrupt.

STORY, Circuit Justice. Two questions arising upon the statement of facts are submitted to this court for decision. 1. In the first place, when upon the principles of the common law, does a devise of real estate take effect in the state of Maine? 2. Is it from the date of the probate of the will, or from the death of the testator, and as connected with this, whether any assent to the devise is required before the estate vests in the devisee? Now, upon this question, I cannot say that I feel any doubt. The probate courts of Maine (like the probate courts of many other states in the Union) have original and exclusive jurisdiction over wills of real estate, as well as of personal estate; and the decision of the proper probate court, original or appellate, as to approval or disapproval of such wills, is final and conclusive as to the validity thereof, and cannot

[1] [Reported by William W. Story, Esq.]

be questioned or reëxamined in any other tribunal. In short, our probate courts generally possess the same exclusive jurisdiction over the probate of wills of real estate, that the ecclesiastical courts of England exercised over wills of personalty. This is admitted on all sides; and, indeed, is now too firmly established to admit of juridical controversy.

Now, as soon as a will of real estate, or personal estate, is admitted to probate, and approved, I take it to be clear, upon the principles of the common law, that the probate relates back to the death of the testator, and affirms and fixes the title of the devisee thereto, from that period. This would seem a necessary result; for no title can pass by descent or distribution to the heirs or next of kin of the testator, since the whole is disposed of by his will; and the title cannot be in abeyance, or in nubibus, at least, in contemplation of law. Thus, in every trial at the common law, involving a title by devise, if the devisee assents thereto, the title is in him from the death of the testator, by mere operation of law, if the will is established by the verdict of the jury; although the trial may not occur, until many years after the death of the testator. The like rule applies to the probate of wills of personalty in the ecclesiastical courts, where the title of the legatees, and of the executor, takes effect by relation from the death of the testator. It is wholly unnecessary to cite authorities upon such a point. But, if it were necessary, Co. Litt. 111b, is directly in point, where Lord Coke says, that, "In case of a devise by will of lands, whereof the devisor is seized in fee, the feehold, or interest in law, is in the devisee before he doth enter; and in that case, nothing, having regard to the estate or interest devised, descendeth to the heir." The same doctrine was firmly established in Massachusetts (from which Maine derives its jurisprudence) long before my time; and it is fully recognized in the case of Spring v. Parkman, 3 Fairf, [12 Me.] 127. The case of Shumway v. Holbrook, 1 Pick. 114, proceeds upon the admission of the like doctrine, and shows that no title can be proved to land by devise, in a court of common law, until the will has been proved in the proper court of probate.

As to the other point, there is no doubt that the devisee must consent, otherwise the title does not vest in him. But where the estate is devised absolutely, and without any trust or incumbrances, the law will presume it to be accepted by the devisee, because it is for his benefit; and some solemn, notorious act is required, to establish his renunciation or disclaimer of it. Until that is done, "Stabit presumptio pro veritate." That is sufficiently shown by the case of Townson v. Tickell, 3 Barn. & Ald. 31, cited at the bar, and the still later case of Doe d. Smyth v. Smyth, 6 Barn. & C. 112. Brown v. Wood, 17 Mass. 68, and Ward v. Fuller, 15 Pick. 185, manifestly proceeded upon the same foundation.

Now, in the present case, there is no pretence to say, that Ross has ever renounced or disclaimed the estate devised to him. The statement of facts is, that he has done no act accepting or declining the devise. If so, then the presumption of law is, that he has, by implication, accepted it, since it gives him an unconditional fee. But I think, that the very formulary, in which he has inserted a reference to it in the schedule of his estate is decisive to show that he intended to accept whatever estate should be devised to him by his grandfather's will. Until he filed his petition in bankruptcy, the presumption of his acceptance is irresistible; for it was clearly for his benefit; and after he had done so, I am of opinion, that he had no right to disclaim or renounce it. It would be a fraud upon his creditors; and a court of equity would compel him to do all acts necessary to perfect his title to the devised estate; and if he did not, no court of bankruptcy would decree him a certificate of discharge. The bankrupt act of 1841, c. 9, § 3 [5 Stat. 440], vests "all the property and rights of property, of every name and nature," of the bankrupt, by mere operation of law, in his assignee, upon the decree of bankruptcy. Nothing can be clearer, than that, at the time of his bankruptcy, the devise in the present case was a right of property vested in Ross. The law presumed his acceptance, until the contrary should be shown. His title could be devested only by his renunciation and disclaimer of the devise before that time; and the subsequent probate of the will, by relation, made the title complete in the assignee. If Ross's consent had been necessary to make it complete, he was bound formally to give it; and he may even be compelled to give it, by a court of equity. The right of property was inchoate, if it was not consummated, in the assignee from the moment of the decree in bankruptcy; and no subsequent act of the bankrupt could change it.

It has been suggested, that the devise was not beneficial to Ross, and therefore no presumption can arise of his acceptance of it. How that can be well made out, I do not perceive. Before his bankruptcy, it was clearly for his benefit; and that event has not changed the nature of the interest, but merely the mode of appropriating it. His own voluntary act has enabled his creditors to have the benefit of it. As an honest debtor, he must desire, that his creditors should derive as much benefit from all his "rights of property," as is possible. It would be a fraud on his part to withdraw any fund from their reach by a disclaimer or renunciation; and it ought to deprive him of a certificate of discharge. It is, therefore, clearly now for his benefit to presume his acceptance of the devise; rather than to presume him willing to aid in the perpetration of a fraud.

If this, be the true posture of the case, standing upon the general principles of the common law, the remaining question is, whether the Revised Statutes of Maine, of 1840, c. 92, § 25, have made any alteration in the operation of the common law, as to the probate of wills. The 25th section declares; "No will shall be effectual to pass real or personal estate, unless it shall have been duly proved and allowed in the probate court; and the probate of such will shall be conclusive as to the due execution thereof." The argument is, that under this clause, a will is a mere nullity before probate; that the probate gives it life and effect from that time, and not retroactively. It appears to me that this section is merely affirmative of the law, as it antecedently stood. The will before probate, is, in no just juridical sense, a nullity. The very language of the section prohibits such an interpretation. The will must still be the foundation of the whole title, inchoate and imperfect, if you please, until its validity is ascertained by the probate, but still a will, and not a nullity. It would be an anomaly in the use of language, to speak of the probate of a nullity. The probate ascertains nothing, but the original validity of the will as such. The fact of the testator gave it life; his death consummated the title, derivatively from himself; and the probate only ascertains that the instrument in fact is what it purports on its face to be. It might as well be said that a will of real estate, at the common law, is a nullity, until a jury has ascertained its validity; whereas the verdict ascertains only the fact that the title under the will is perfect, because it was duly executed by a competent testator, and therefore took effect by relation from the time of his death.

But if the argument itself were well founded, it would not warrant the inference attempted to be drawn from it. By the probate, when granted, the will, under the section, takes effect by relation back from the death of the testator. It recognises and vests the title in the devisee from that moment. It would otherwise happen, that if he should die before the probate, having accepted of the devise, no title could vest in him; but the bounty of the testator would be defeated. Such a construction of the section would be productive of the grossest mischiefs; and there is not a word in the section, which authorizes, or even countenances it. The section only provides, that no will shall be effectual to pass real estate, unless it shall have been duly proved; not, until it shall have been duly proved. When proved, it is to all intents and purposes a will; and it is to operate upon the interests of the testator, when he intended, that is, from the time of his death.

Upon the whole, my opinion is, that the question propounded by the district court, ought to be answered in the affirmative; and I shall direct a certificate accordingly.

Case No. 5,148.

In re FULLER.

[1 Sawy. 243;[1] 4 N. B. R. 115 (Quarto, 29), 18 Pittsb. Leg. J. 82; 2 Chi. Leg. News, 373; 2 Leg. Gaz. 293.]

District Court, D. Oregon. Aug. 1, 1870.

BANKRUPTCY—WHEN JUDGMENT VOID—CREDITORS OF BANKRUPT, WHEN NOT ENJOINED—STIPULATION IN JUDGMENT AS TO INTEREST.

1. A judgment taken contrary to the bankrupt act is not void unless a petition in bankruptcy is filed by or against the debtor within six months from the entry of the judgment.

[Cited in Re Brinkman, Case No. 1,884.]

2. A judgment by confession is not void under the Code for want of a sufficient statement of the facts out of which the indebtedness arose, except as to creditors who have acquired a lien upon the debtor's property before a sale upon the confessed judgment. Query, whether such judgment is even then void if it can be shown by evidence aliunde, that the judgment was in fact given in good faith and for an actual debt.

[Cited in Thames v. Miller, Case No. 13,860.]

3. The district court has jurisdiction to ascertain and liquidate all liens upon the bankrupt's property, and in the exercise of this jurisdiction may enjoin a creditor from enforcing a judgment in a state court against the property of the bankrupt, but after the process of the state court has been executed by a sale of property, the district court will not interfere.

[Cited in Re Mallory, Case No. 8,991; Re Moses, Id. 9,869.]

[See The Alexandria, Case No. 179.]

4. A stipulation in a judgment that the interest on it shall bear interest if not paid annually, is void and does not make such judgment usurious.

This was a motion to modify an injunction allowed on the petition of the bankrupt under section 40 of the bankrupt act [of 1867 (14 Stat. 517)].

Lansing Stout, for the motion.

M. W. Fechheimer, contra.

DEADY, District Judge. Price Fuller was adjudged a bankrupt in this court on December 20, 1869, upon his own petition therefor, filed on the 18th of the same month.

On March 27, 1869, the bankrupt confessed judgment without action in the circuit court for the county of Benton in favor of Green B. Smith for the sum of $2,665, with interest payable annually at one per centum per month, and if not so paid to be considered as principal and thereafter to draw the same rate of interest as the original principal.

The confession states the origin of the indebtedness for which the judgment was confessed as follows: "The facts out of which said indebtedness arose are these, for money, gold coin, borrowed of and in hand paid to me, the said defendant, by the said Green B. Smith."

At the date of this judgment the bankrupt owned two tracts of land in Benton county, one containing 640 and the other about 23

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

acres. The judgment was duly docketed on the day it was confessed and thereafter became a lien upon the real property aforesaid. On November 20, said Smith sued out execution upon said judgment, upon which the sheriff of the county aforesaid on December 2, 1869, sold of the personal property of the bankrupt what brought at such sale $50.50; and on December 24, 1869, said sheriff sold upon said execution the first mentioned tract of land aforesaid, to one Thomas Reed for the sum of $2,750; and on January 7, 1870, said sheriff levied upon the second mentioned tract of land aforesaid and was proceeding to sell the same on January 10 thereafter when he was enjoined by the process of this court.

On January 4, 1870, the bankrupt filed a petition in this court praying that the sheriff aforesaid be enjoined from paying over to said Smith any of the proceeds of the sale of the real property aforesaid, and from selling upon said execution any of the real property of the bankrupt. On reading and filing the petition, an order was made allowing the writ of injunction as prayed for.

In addition to other facts above stated, it was alleged in the petition, that the property aforesaid would not fetch so much at the sheriff's sale as upon a sale by the assignee, because of doubts existing as to the legality of a sale by the former, and that if the property already sold were resold by the assignee, it would, in the opinion of the petitioner, bring $3,000, and that said Smith at the time of accepting the confession of judgment aforesaid, "knew the petitioner to be insolvent." On July 11, Smith applied to the court for an order modifying the injunction so as to permit the sheriff to pay over the proceeds of the property sold before the service of the injunction.

By agreement between counsel for the application and the assignee (who had been appointed since the allowance of the injunction) the motion was heard on July 18. On the hearing, among other papers in the case, counsel for the assignee read a paper, verified by said Smith on January 27, setting forth the nature of his demand against the bankrupt, the consideration thereof, what security he had therefor, as above stated, and that the property aforesaid is not worth more than his claim, and "prays that the money in the hands of the sheriff and the property remaining unsold be released to him."

Upon these facts the reasonable inference is, that Smith took the judgment in violation of the bankrupt act. It was taken with a knowledge of Fuller's insolvency, and therefore must be presumed, in the absence of any evidence to the contrary, to have been taken with the belief that a fraud on the act was intended. But as the judgment was given more than six months before the filing of the pettion by the bankrupt, it is not void although taken contrary to the act. The bankrupt act does not avoid a judgment except as declared and provided in section 35 of the act. Section 39 declares what conduct of a debtor shall be deemed an act of bankruptcy. It also imposes a forfeiture of his debt upon the creditor who participates in the act of bankruptcy, and gives the assignee a right of action to recover the money or property paid or transferred contrary to the act, by means of an act of bankruptcy. But it does not declare that a judgment or other act which is to be deemed an act of bankruptcy on the part of the debtor, is also to be held void as a judgment. Sections 35 and 39 must be taken together. The one defines an act of bankruptcy, and the other declares when and under what circumstances acts done or suffered by the debtor shall be void.

So far, then, as the bankrupt act is concerned, this judgment is valid, because not given within six months before the filing of the petition by the bankrupt. In other words, neither Fuller nor any of his creditors having petitioned to have the debtor adjudged a bankrupt, within six months from the confession of this judgment, it is cured by lapse of time.

This injunction was allowed without argument, and at the time I had an impression that the judgment was void under the Code, because the confession did not sufficiently state the facts out of which the indebtedness arose. There can be no question of the insufficiency of the statement, but upon examination of the subject, I am satisfied that the judgment is not therefore void. In Miller v. Earle, 24 N. Y. 110, the question was as to the effect to be given to a judgment like this, and the court said: "As between the parties themselves, however, the judgment confessed should be held legal and valid; that being so, the levy and sale of property under it was good as against the defendant, and all the world, except judgment creditors existing and having a lien upon his property."

In Lee v. Figg, 37 Cal. 336, the same question arose in relation to a judgment confessed in 1851 upon a defective statement by Barton Lee in favor of Henley & Hastings. Sawyer J., delivering the opinion of the court, said: "The judgment is good as between Henley & Hastings and Barton Lee, and was only subject to be attacked for fraud by creditors of Lee, who were defrauded thereby, and that in some direct proceeding before a sale of the property under it to innocent parties."

It is shown by these authorities, that a judgment, though confessed upon a defective statement, is not absolutely void, but only so, as to creditors who have a lien upon the property sought to be affected by the judgment. Indeed, in Lee v. Figg, supra, the learned judge maintained, that even as against lien creditors, the insufficiency of statement is only prima facie evidence of

fraud, and that it was admissible to support the judgment by proof that the transaction was in good faith and the judgment confessed upon an actual existing debt.

At or before the filing of the petition it does not appear that any of the creditors of the bankrupt had a lien upon the property affected by this judgment, and therefore they were not then in a condition to question its validity. Nor does it appear that they have since obtained a specific lien thereon by judgment, or the like; but I think the act must be construed as giving the creditors who prove their debts, from and after the filing of the petition, such a direct interest in the property or assets of the bankrupt as to enable them, or the assignee for them, to attack such a judgment by suit as fraudulent in law or fact.

The judgment against the bankrupt having, by lapse of time, become valid, so far as the bankrupt act is concerned, Smith has acquired a lien thereby upon the real property in question. Upon the application of parties interested, this court has jurisdiction to ascertain and liquidate this lien (Bankrupt Act, § 1), and while so doing, to enjoin Smith from enforcing the same by execution out of the state court. But after the process of the state court has been executed, and the property sold thereon, it is too late for this court to interfere. The purchaser at such sale acquires a good title, and this is so, even if the judgment was fraudulent, provided the purchaser was an innocent one. For this reason, as well as upon general principles, this court could not set aside the sale upon the process of the state court and order the property re-sold, however apparent it may be that it was sold much below its real value. The remedy was in the state court, upon objections to the confirmation of the sale.

It is not necessary now to consider whether the assignee may maintain action to recover the proceeds of this property upon the ground that the judgment was void under the Code. This injunction is not ancillary to any suit for that or other purpose, but was allowed under section 40, to prevent "any person from making any transfer or disposition of the debtor's property" pending the petition to have the debtor adjudged a bankrupt. Here, however, there seems to be, at best, only a right of action in the assignee to recover these proceeds as money had and received to his use. It may also be questioned whether the injunction allowed by section 40, extends to a case of voluntary bankruptcy.

Objection is also made against this judgment that it is usurious. This objection is predicated upon the stipulation in the judgment that the accruing interest should bear interest if not paid annually. There can be no doubt but this provision shows that it was intended that this judgment should draw more than the legal rate of interest. But I do not think a judgment or decree can become usurious by any such means. The Code provides the rate of interest a judgment shall bear and the parties cannot change it by stipulations or terms inserted therein. Such stipulations are simply void—as, for instance, that the interest accruing on a judgment shall be paid annually, and if not shall bear interest as principal. The payment of a judgment confessed for a sum due may be enforced by execution, but if the creditor neglects or forbears to use this remedy he cannot recover interest on interest accruing in the meantime. Besides, in this case this stipulation never was attempted to be enforced, as the property was sold on the execution long before the expiration of the first year after the entry of judgment.

As to the money arising from the sale of the 640 acre tract, on December 24, I think the injunction was improperly allowed, and so far it must be dissolved and the assignee left to pursue such remedy in the premises, if any, as he may be advised that he has. As to the 23 acre tract a dissolution of the injunction is not asked for. There can be no doubt but that the court had power to enjoin the attempted sale of this property, but whether there is any sufficient reason for its continuance may be a question. This may depend upon whether the assignee may feel warranted in beginning a suit to set aside the judgment on the ground of fraud. If the judgment should be set aside on that ground, this tract of land would be discharged from the lien and become a part of the general assets of the bankrupt.

As to the $50.50 made on the execution on December 2, by the sale of personal property, it belongs to the estate of the bankrupt. The judgment gave Smith no lien upon the personal property of his debtor, and the filing of the petition in bankruptcy, on December 18, and the subsequent adjudication, avoided the lien of the levy made on November 20 previous.

Case No. 5,149.

FULLER v. COLBY et al.

[3 Woodb. & M. 1;[1] 9 Law Rep. 397.]

Circuit Court, D. Massachusetts. Oct. Term, 1846.[2]

SEAMEN—DEGREE OF PUNISHMENT ALLOWED—RETALIATION—USE OF WEAPONS.

1. A seaman stands in relation to the master of a vessel like a child to a parent, or an apprentice to a master, or a scholar to a teacher, so far as regards obedient and respectful deportment, and is punishable corporally for a deportment or language not obedient or respectful.

2. The punishment, however, must be not excessive, considering the nature of the offence,

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

[2] [Affirming Case No. 14,830.]

and a single blow with the hand, producing no wound, is not so.

3. A seaman on receiving such a blow for such an offence is not justified in drawing and brandishing a knife or an axe; nor is he justified in using them to prevent his arrest, whether for the original offence, or the use of the knife.

4. The master is authorized to order the mate to assist him to make such an arrest; and the mate and the master may seize deadly weapons in order to resist those of that character in the hands of the seaman, and to put down mutinous and insubordinate conduct in him and the rest of the crew, dangerous to the officers and the safety of the vessel, and to restore order and obedience on board; and if necessary may use them for this last purpose. A seaman has no right to refuse to lay down such deadly weapons, till the officers do theirs first, and is not protected from further violence in such case by law, if retreating to the prow of the vessel, or by any other course than obedience.

[Cited in The George Kingman, Case No. 5,335; U. S. v. Trice, 30 Fed. 492.]

[Cited in Gabrielson v. Waydell, 135 N. Y. 13, 31 N. E. 969.]

5. But if then punished improperly, or too severely for a past offence, he has full redress on his return; or if attacked, without provocation or disobedience on his part, he can defend himself; and under all excessive blows and punishment for disrespect or disobedience, he can justify as a child or apprentice or scholar resisting the excess.

6. In the present improved condition of seamen, it is best not to punish corporally any except minors for slight offences, and unless in case of mutiny and imminent peril, it is better to delay all punishment till the parties have full time to become cool and apologize.

[7. Cited in Folger v. The Robert G. Shaw, Case No. 4,899, to the point that where the merits have been fully examined in the court below on the evidence and law, the judgment there rendered though appealed from, is prima facie right until shown to be wrong.]

[8. Cited in The Guiding Star, 1 Fed. 349, to the point that actions for aggravated assaults upon seamen are in personam only.]

[Appeal from the district court of the United States for the district of Massachusetts.]

This was a libel filed before Judge Sprague, in the district court, against the defendant and Reuben Frye. There was no service on Frye. That court rendered judgment for the libellee [Case No. 14,830], and from that judgment the libellant appealed. The case came on for hearing at the last May term; and the substance of the libel appeared to be as follows: B. C. Fuller having been hired as a seaman on board the ship Clarissa Andrews, on the 13th March, 1845, while engaged at sea in mending some sails, alleged that the master [E. C. Colby] charged him with sewing uneven, and struck him, and swore at him, and went to his cabin for his pistols, and called for his mate, and, both followed him, one with pistols and the other with a belaying-pin. The libellant took up an axe to defend himself, and refusing to lay it down, unless the mate first laid down the pin, the master fired at him, and wounded his face with shot, and put out one of his eyes, and endangered the sight of the other; and afterwards on the voyage inhumanly placed him in irons, to his great damage, in the sum of $1999.

The answer of the captain admitted the shipping of the libellant as alleged, but averred that he did not perform his duty faithfully, or obey orders, but tried to excite mutiny, and to use his knife against the enforcement of orders. It further averred, that while the libellant was mending the sail, and was asked why he did not sew straight, he replied, that he sewed it as directed by the captain. The latter told him to give him none of his insolence, and the libellant replied, "I am no more insolent than you;" which, being language not proper to his commander, on board a vessel in presence of the rest of the crew, the libellee struck, or slapped his head with his open hand; whereupon the libellant drew his knife, and the libellee called on the mate to assist in securing him. It averred next, that when the mate came forward for this purpose, the libellant made two passes at him with his knife, and the libellee then ordered the mate to knock him over with the capstan bar, if not able otherwise to disarm him; that the libellant then seized an axe and threatened to cut down whomsoever approached him, and retreated under a boat, and refused absolutely and unconditionally to return to duty. It stated further that all the crew then left their stations, and two of them refused any assistance to the captain, and one encouraged the libellant,—whereupon the libellee deemed it necessary to procure arms and subdue the offenders, and ordered him to put down the axe or he should fire; and the libellant replying he should not, he took aim at his right arm, by which the axe was held, and with a pistol loaded only with shot and standing eleven feet from him; that his wounds were carefully dressed as soon as the ship, which was drifting without anybody at the helm, could be got under way, and the men recalled to duty. In respect to the confinement of the libellant in irons, it was averred not to have been until his conduct indicated there was danger in his being at large; and on reaching the port of Havre, he was placed in the hospital till the vessel sailed for this country, when he was brought home in a cabin, and allowed to come on deck at times, and in no way treated with harshness, nor essentially injured.

Leave was asked and given to amend the answer; but as the amendment was offered since the testimony was closed, the libellant was allowed time to take further evidence and ask further questions of his witnesses, to explain or rebut it, if by filing an affidavit he expected he should be able to rebut it. The testimony in the case was mostly in depositions; and the court requested the rest of it, after hearing two witnesses orally, to

be taken before a magistrate or commissioner, with notice to the opposite party.[3] The evidence will be stated in connection with the opinion of the court, and the conclusions formed from it, so far as they may seem to be material.

F. W. Sawyer, for libellant.
Bigelow & Clarke, for libellee.

WOODBURY, Circuit Justice. Most of the testimony in this case, as to the disputed points, comes, on the one side from seamen, and on the other from the mates, corroborated by two or three of the seamen. The former witnesses for the libellant give an aspect to the case more as set out in the libel; while the latter, for the libellee, tend strongly to sustain the averments in the answer. In relation to the points most material, the contradictions are not so strong as on some subordinate questions of very little moment in settling the rights of the parties. It must be admitted, from all the proof, that the libellant in the end suffered severely; was shot down, put in irons, and deprived for some time of his liberty. This was done by the respondent, and it is certain that he should be made to atone for it fully, unless showing a justification by the misconduct of the libellant, and the legal authority of the captain, either to punish him to such an extent, or to do the acts he did in the suppression of mutinous behavior by the libellant, and in the preservation of the vessel, crew, and cargo, under the captain's charge. The truth of the case can best be ascertained by examining the facts chronologically, and applying the law to them as we go along, after fixing what they are, as near as may be, amidst the conflicting testimony and circumstances with which the truth is surrounded. It is stated by both classes of witnesses, that the libellant first used language which, however usual in private life between persons in like stations, was, from a seaman to his commander, before the rest of the crew, and at sea, at least disrespectful if not insolent. It was of bad example to others, considering the relations which exist between officers and their men, and which relations demand towards the former a courtesy and obedience that are necessary, if not indispensable to preserve order and safety to both life and property on board.

The next material fact testified to on all sides, and admitted in the answer, is, that the captain returned or punished this language with a blow. Some of the witnesses say two blows; others speak of but one. The general character given of the captain is not that of harshness or quickness of temper and great severity, but rather the reverse; while that of Fuller, though not bad in the opinion of some of the witnesses, was such that, according to a part of the evidence, he had previously stated he would take no short answers from any of the officers. The voice of the captain on this occasion, is also sworn to have been mild; while that of Fuller was harsh and angry. I am inclined then to the conclusion, on all the evidence, that the blow struck by the captain was a single one, and not severe; nor was it cruel or unusual. He swears it was with the open hand. No one pretends it knocked the libellant over, or left any mark or bruise. It was not then a cruel punishment; and we all know it not to have been an unusual one. The conclusion is, that if not entirely justifiable, it was still not so much beyond what the disrespectful language of the libellant provoked for punishment, and excused, as to justify him in drawing a dangerous weapon, and making, as some of the witnesses testify, two passes with it at the mate when he came forward to secure the libellant, under the commands of his superior. At the time the captain called for the mate, according to some of the evidence, the libellant drew his knife, and said to the captain, "I will be damned if you flog me." And the truth probably is, from all the evidence as to this point, that he drew the knife rather to prevent further punishment anticipated than on account of the blow he had received, or in mere retaliation of it. Neither his life nor limbs were then in danger, and it was his duty to have obeyed the commands of the captain to lay down his weapon, and submit to the discipline of the ship; and if that had then been carried further, and into a severity not justified by the facts and the law, he would be entitled to, and would doubtless have received, ample redress on his return home. Thompson v. Busch [Case No. 13,944]; Thorne v. White [Id. 13,989]; Relf v. The Maria [Id. 11,692]. The acts of congress punish a captain for extreme severity and misconduct, as well as a seaman for disobedience. This court will always be quite as anxious to redress any wrongs inflicted on the less intelligent seaman, as on his more educated officer,—the law demanding a strict adherence to duty from both, proper language no less than proper acts, as the only means of protecting the rights of both, and rendering their situations respectable, and securing the interests and welfare of all concerned in the voyage. See U. S. v. Peterson [Id. 16,037].

So far, then, as this blow, standing alone and independent of the firing, and wounding afterwards, is now set up as a separate ground for recovering damage, it would seem, if technically unjustifiable, to warrant

[3] In admiralty cases, this court would have the testimony taken in writing, when convenient, if it is to go up to another court; otherwise oral. Dunl. Adm. Pr. 251, 252; 2 Br. Civ. Adm. Law, 428. In the supreme court it is heard only in writing. [The Samuel] 3 Wheat. [16 U. S.] 77.

no damages but nominal ones—no others from it having been proved or pretended to exist. But so slight a blow as a punishment for insolence seems to me not a crime in a captain. In common cases between individuals, it is true that words do never justify blows; but between officers and seamen all blows are proper for disobedience and insolence, which are justifiable by a parent to a child. See cases cited hereafter. It is the peculiar relation between the parties, which changes their rights and powers. A parent may strike a child for disrespectful words, and, on a like principle, may a captain strike a seaman, notwithstanding what is said in Cushman v. Ryan [Case No. 3,515]. It must be done, however, mildly, moderately, judiciously, but still it may be so done, and not going beyond that—for that alone damages ought not to be given, where the seaman who is struck, first forgot his duties and treated his superior with disrespect, and especially as here, where no actual damages were sustained by the blow. In the present instance, by this blow no wound was inflicted—no blood drawn—no weapon used—no flogging given, nor whipping with rope, stick or cane. And though under sudden impulse and disrespectful words, Colby may have struck a slight blow with his hand, which had better have been omitted, and confinement, or some other punishment substituted, yet I could not say that a parent so acting was liable to damages to a child so offending, and the law is the same on these subjects between masters and seamen. It is a little singular, that as long ago as by the laws of Oleron, it was provided, "if any of the mariners impudently contradict the master, he (the seaman) also ought to pay eight deniers, and if the master strike any of the mariners, he (the seaman) ought to bear with the first stroke, be it with the fist or open hand; but if the master strikes him more than one blow he may defend himself." Article 12, 1 Pet. Adm. 26 Append.

The first point made then, is, in my opinion, not sustained so as to show any right to damages for the blow then struck. The libellant, on the contrary, having committed the first offence by disrespect, and, not being punished for it with any severity or cruelty, or damage whatever. He was wrong in the second place, in drawing a dangerous weapon and brandishing it at his officers. Remembering this, we are prepared to proceed to the next ground set up in the libel and argument for recovering damages, in consequence of the subsequent firing of the pistol at the libellant by Colby. In deciding justly on this, it will be proper to examine the history and progress of the transaction after what has been already explained. Without discriminating as to these, with care, the facts existing at different times, and the rights existing under different states of things, and different powers and liabilities of the parties, will be in danger of confusion and of producing erroneous conclusions. It seems, that the master at once gave the mate orders to take Fuller into custody, and the next material evidence relates to the drawing of his knife by Fuller; to the seizure of the belaying pin by the mate; and then of the axe by the libellant; and his threats to use it against any one, including the captain or any officer who should approach to arrest or disarm him, and his refusal to lay the axe down, notwithstanding the repeated orders of the captain, unless the mate would first lay down the capstan bar, which he held in his hands. But the whole testimony shows that the mate had no orders or design to use the capstan bar unless it became necessary to disarm the libellant. His whole object with it was the arrest of Fuller. There was no danger, then, of great bodily injury from the mate or master using the bar, if Fuller had laid down the axe and knife and obeyed orders, whatever confinement or other and further punishment might be anticipated for his original offence. It was, therefore, his duty to lay down his weapons, as commanded; and he was in further wrong to stand out for conditions and terms with his officers before complying. His attitude in resisting them and disobeying them in this way, about which most or all of the witnesses agree in their evidence, was also of evil example on board. It led one of the crew to unite with him in disobedience. It induced another to cheer him on. It caused the man at the wheel to abandon his post—the last post to be left under any peril; and led to great disorder and danger in the whole vessel. Indeed, Fuller seems to have avowed principles as to subordination at different times after coming on board which compel the court, however unwillingly, to put an unfavorable construction on his acts, and often to credit the evidence for the captain when it conflicts with that of Fuller concerning his motives and conduct. Firstly, as testified, Fuller had expressed the determination to take "no short answers" from his officers; next, not to submit to any flogging; and finally, he would use and not lay down deadly weapons, and would disobey all orders to do it, until the officers should make terms with him and previously disarm themselves.

Such insubordinate resolutions naturally led to disorder and mutiny, and at last involved the whole crew in danger as well as the vessel and cargo. It is true, some cases say that the sailor may oppose a further infliction of personal chastisement by escaping and even by resistance, so far as to protect himself against injury. U. S. v. Smith [Case No. 16,345]. But this must mean resistance to protect himself against undeserved and great bodily injury, and not resistance to a moderate chastisement, to which he was legally liable for some offence. Because, if

legally liable to it, a corresponding duty is imposed on him to submit to it, and on the master to inflict it. Any other reasoning or conclusion would be involved in absurdity, and hence courts say other seamen "are bound to assist the master to constrain, imprison, and bring to justice any disobedient, mutinous and rebellious mariners." Relf v. The Maria [supra]. That the master, in the heat of the moment, may have contemplated putting Fuller under arrest, and inflicting some further chastisement, is probable from the evidence. But that this was likely to be severe if Fuller submitted and apologized, unless he provoked more by brandishing the knife and axe at his officers, and refused to obey them by laying the latter down, does not seem probable from the evidence, and did not, in my view, justify him in persisting not to obey till others of the crew thus became insubordinate with him—the helm abandoned and the vessel in danger. If yielding submission, and afterwards punished immoderately, ample redress would have been given to him on his return home. Relf v. The Maria [supra]. But not submitting, in that exigency the master having armed himself, as described in the answer, deemed it his duty to disable the libellant so as to make the arrest, and put down anything like mutiny on ship-board, and restore order and security. Accordingly the captain then fired at him, and thus caused the injuries most complained of. If his firing became necessary to regain his authority, when disregarded and trampled on, and was required in order to restore obedience and to secure the vessel, at that time become adrift, however severe the course, and however painful the consequences, it is not punishable by law. U. S. v. Peterson [supra]. Considerable latitude of judgment must be allowed in such exigencies to him who is responsible for all the lives and property on board.

But at the same time, on such occasions, officers must exercise due clemency and firmness of nerve. The peril must be manifest—the disobedience clear—and the step taken not unusual, not immoderate, and not apparently uncalled for, in order to accomplish a justifiable end with sufficient promptness and certainty. Though in some respects questioned and questionable, the position of the libellee was probably of this last character. So a grand jury of his country have once found, and so the district court has once decided in this prosecution. [Case No. 14,830.] Whatever of impressions to the contrary might, in some particulars, have made me hesitate, independent of these findings, these last weigh something in matters of doubt. They do not and should not induce me to form any conclusion as to facts, which were not sustained by testimony entitled to credit. But decisions below in admiralty are often to be presumed correct till an error or mistake is clearly shown, else litigation would be encouraged. Cushman v. Ryan [supra]. Appellate courts in admiralty do not in general receive facts critically—the presumption being in favor of them as found by the court below. Cox v. Palmer [3 Fed. 16]. Better means of judging by the district court exists than by the circuit court and by the circuit court than by the supreme court. The former often knows the usages and witnesses, and these are at times on the stand. The Apollon, 9 Wheat. [22 U. S.] 378. The conclusions in favor of the respondent are also strengthened by several other circumstances, such as the general considerations growing out of there being no proof of his having any previous hostility or grudge towards the libellant—of the mild and good character of Captain Colby generally—of his attention to Fuller's wounds subsequently, and placing him in a hospital while in port—of his keeping him in irons only while insubordinate—of his going before the American consul, at Havre, and exposing all the facts and courting an investigation—and of his not striking the libellant at all till disrespectfully treated, and of his not firing with balls instead of shot, nor so near to Fuller as likely to kill him,—nor at all, till every other mode had failed of producing obedience and restoring order, without making what he considered a derogatory compromise with an offender. I think the testimony competent, too, as a part of the res gestae, that Colby said at the time of the transaction, he meant not to fire at F.'s head, but the arm which held the axe, and that this goes far, with the other facts just named, to repel any idea of his intention to kill F., or to wound him so severely as he did.

If this was the first trial of this case, however, I should doubt whether the exigency was so very pressing and dangerous as to have required so strong a measure as using fire-arms without some longer delay, and some further attempts in the mean time to get the ship under her helm, and the rest of the crew on duty. I am also inclined to the conclusion, that, had he left the libellant till that was accomplished, and then returned and remonstrated against his dangerous course, after he had enjoyed time to become cooler, the firing would not have been necessary; nor would this have evinced any want of due firmness, but less of passion. Remembering, however, on such occasions, that in human bosoms passion must exist, more or less, on both sides—that men of different temperaments and habits will act differently in the same cases, and with equal honesty—and that obedience is often necessary to be prompt in order to command at all due respect and influence in captains of vessels (Thorne v. White [supra]), I yield something of my doubts on these matters to the latitude of judgment and differences of opinion incident to such positions—to the obvious fact that one present can judge of the dan-

ger better than the absent—and to the force of the two findings before referred to in his favor. In relation to the subsequent confinement and irons put on the libellant, they were natural and justifiable after the violence and disobedience he had been guilty of—the officers then justly believing him to be a dangerous man. Especially was it justifiable when the libellant, as is proved by some of the witnesses, still evinced an insubordinate disposition; and the irons were then continued on only till obedience was promised and confided in.

Many adjudged cases, which have not yet been cited, seem to lay down principles that fully sustain the views I have expressed as to the law on the facts, according to their aspect to my mind under the contradictions which exist. It may not be amiss to classify and present several of them. Thus, it is well settled that a master of a vessel may punish a seaman for disrespect, disobedience or disorder on board, as far as a parent may a child. U. S. v. Freeman [Case No. 15,162]; Bangs v. Little [Id. 839]; 3 Kent, Comm. 181; Thompson v. Busch [supra]. Other cases say as far as a master may an apprentice (Case of The Agincourt, 1 Hagg. Adm. 271), or a school master, a scholar (14 Johns. 123, by Thompson, J.). To stir up others to disobedience, or to refuse duty on ship-board, by a seaman, is, by express act of congress, made a crime. Act March 3, 1835 [4 Stat. 775]. The master has a right to respectful demeanor, as well as obedience. Thompson v. Busch [supra]; Butler v. McLellan [Case No. 2,242]; U. S. v. Smith [Id. 16,345]. But this right is of no use unless he is justified in reasonably enforcing it, when refused, by punishment inflicted by himself. U. S. v. Freeman [Id. 15,162]; Thorne v. White [Id. 13,989]. He may, therefore, chastise corporally, as well as confine, when treated impertinently or disobeyed. Michaelson v. Denison [Id. 9,523]; Thompson v. Busch [supra]. But he must not punish for mere immorality as a man, if conducting properly as a seaman. Bangs v. Little [Case No. 839]. Nor must he chastise for offenses as a seaman in a manner indecent. Cushman v. Ryan [Case No. 3,515]. All punishment, also, must be inflicted only to a reasonable extent, as well as in a reasonable and decent manner. Abb. Shipp. 176, note; Brown v. Howard, 14 Johns. 123; U. S. v. Freeman [Case No. 15,162]; Turner's Case [Id. 14,248]; Cushman v. Ryan [supra]; Lord Stowell in the case of The Lowther Castle, 1 Hagg. Adm. 384; U. S. v. Wickham [Case No. 16,689]. But when justifiable it may continue, with proper weapons, till submission or obedience is enforced, else the power becomes nugatory, abortive, and fails to produce the very object for which it was conferred. Michaelson v. Denison [supra]. As obedience should be prompt and uncomplaining (The Mentor [Case No. 9,427]), and the master sustained while enforcing obedience (Relf v. Maria [supra]), and as a master often has not physical power to enforce it, he may, if necessary, resort to weapons, and the law will protect him. But he must resort to proper weapons. Thorne v. White [supra]. And some cases limit the use of weapons, and especially deadly ones, to the prevention of mutiny or its suppression, and do not countenance it for merely punishing past offences. U. S. v. Smith [Case No. 16,345], and Hart v. Littlejohn [Id. 6,153]. But such weapons may be used as are necessary to effect the object (Abb. Shipp. 237, note), when it is to obtain obedience, and not to punish for a past offence (Curt. Adm. 89, 90; Jarvis v. The Claiborne [Case No. 7,225]; Roberts v. Dallas [Id. 11,898]). And much more may he do all this when the seaman resorts to violence—deadly weapons—himself; and the crew appear mutinous, and the vessel becomes in danger. U. S. v. Peterson [supra]; 1 Holt, Shipp. 430. If the captain was in such a case, to stop to consult others, or to argue the case long with the offender, or not use weapons when other means failed, the vessel might be lost. Butler v. McLellan [Case No. 2,242]. When punishment is merited, its extent cannot be weighed very nicely in the scale. It must be clearly excessive, or no damages are to be allowed. Thorne v. White [supra], and notes; Butler v. McLellan [supra]. In some cases the captain should take time and consult, when in others it is not safe. It is best to consult when he can, as it is more satisfactory to all parties, and allows reason, rather than passion, to speak and reign. Abb. Shipp. 136, 137; Whiteman v. The Neptune [Case No. 17,569]; Thorne v. White [Id. 13,989]; Jarvis v. The Claiborne [Id. 7,225]; Sampson v. Smith, 15 Mass. 365. See the rule in the marine ordinance of France (section 22). And the more especially was this consultation proper and necessary, in ancient times, when the crew and officers were often joint owners of ship and cargo, and all but nominally equal in education, and standing, and skill.

Here several appeals were made by the captain to Fuller for submission, and the mate was conferred with before firing; and time was again and again given to lay down the axe: and it was not till a crisis of disorder and disobedience, with others of the crew as well as him, and of peril to the vessel had arrived, that Fuller was disabled, and order restored. It will be seen, that the object of Colby, on this occasion, in firing, was not to punish for a past offence, where the instrument used should not be deadly, but was to make an arrest, procure submission and obedience, and defend himself and vessel against mutiny. Deadly weapons, thus used and thus necessary to accomplish a legal end, are not forbidden. They may be the only ones likely to accomplish it. Curt. Adm. 90; 15 Mass. 365; 14 Johns. 119.

Finally, it will be further seen, that though

Fuller retreated, and some ancient ordinances provide that the captain shall not follow a retreating mariner to the prow of the vessel, (Thorne v. White [supra]), yet I am not aware of any such distinction settled by principle or practice in modern times, when a seaman is pursued to arrest him for disobedience, and not in a mere unprovoked affray, and the more especially when, as in this case, the seaman is also pursued to disarm him while in a state of mutiny.

I have thus spoken of the law of this case, as it appears to me to be on the facts, impressing themeselves on my mind as the last do, amidst several contradictions, after much deliberation. What the law ought to be, and could be with safety and more advantage to the mercantile marine, is another question, and one which it does not belong to the judicial tribunals to decide, so as to make it a rule of action. A distrust of the necessity of flogging in the army and navy is certainly increasing elsewhere as well as in this country, and for punishment of crimes in the civil and municipal affairs of society has, by many states, been entirely abandoned in their penal codes. In the merchant service, if not in the navy, it would seem not very difficult or hazardous in the present improved and improving character of seamen in this country, for our legislatures to substitute other punishments for blows of any kind, especially on adults. And, considering this improved condition of morals and education among seamen, and especially American ones, considering also the greater privileges and rights conferred on all American citizens, however humble, and whether seamen or landsmen: considering further, that the authority to inflict personal chastisement in the case of parents or children, and masters or apprentices,—to which this has always been likened,—is to be exercised in most cases over minors only, it may well deserve legislative attention, whether the master of a vessel, except in the case of minors, should be allowed summarily and without any trial, to inflict corporeal punishment at all on his crew, or any beyond a very limited extent, unless it be necessary to repel personal assaults, or suppress a manifest mutiny or riot. For a time, as an experiment in other cases, a resort could be provided and limited to mere confinement—loss of wages, and prosecution in the courts on the return of the vessel. But my official duty requires me to say such is not the law now, and never has been the law in this country, or probably in any other; and it would be a usurped judicial legislation for any court to attempt to introduce it as law without a previous change and direction by another department of the government.

Let the judgment below be affirmed.

FULLER v. GOODRICH. See Case No. 5,151.

Case No. 5,150.

FULLER et al. v. IVES et al.

[6 McLean, 478.] [1]

Circuit Court, D. Michigan. June Term, 1855.

FRAUDULENT CONVEYANCES — ACTS INTENDED TO DEFRAUD CREDITORS—BONA FIDE CONVEYANCE IN TRUST FOR CREDITORS.

1. An individual may, bona fide, convey his property in trust for the benefit of his creditors.

2. But if previous to his assignment he has appropriated his funds, in the name of another, to delay and defraud his creditors, the court will set aside the assignment, and his previous conveyances or fraudulent investments, and make them answerable to his creditors.

[Cited in Danzig v. Saks, 20 D. C. 179.]

3. When an individual, having given acceptances to another with a view to his own indemnity, receives a large amount of property, which he applies to his own purposes, and leaves his acceptances unpaid, his acts are fraudulent.

Howard, Lockwood & Clark, for plaintiffs.

Mr. Walker, for defendants.

OPINION OF THE COURT. This is a creditor's bill, which was filed the 3d of July, 1854, and which represented, that plaintiffs had obtained a judgment against defend ants on which execution was issued and returned no property found. That Ives had fraudulently conveyed his property, so as to place it beyond the reach of his creditors. The assignment was made in the following terms—"Whereas, I, Stephen H. Ives, of Detroit, in the state of Michigan, being unable to pay my debts and liabilities, and being desirous of having all my property finally distributed among my creditors—Now, therefore, in consideration of one dollar to me in hand paid by Jno. S. Wright, of said Detroit, I do hereby transfer, assign and set over to said John S. Wright with all my property of every name and nature, real, personal and mixed, including bonds, notes and shares in actions of every kind, excepting only such property assigned as is by law expressly exempt from sale by execution, which property so assigned I shall hereafter more particularly describe in a schedule to be attached hereto, for the following purposes, viz: First, to pay all debts or demands due from me for personal and family expenses; all debts incurred by me since the 20th of February, 1854, including all fees and charges for services, retainers and expenses due or to become due to my counsel, and all expenses connected with my litigation with George W. Markham, and all debts due Cyrus W. Jackson, J. S. and N. H. Wright or either of them. Second, to pay all my other creditors share and share alike. Third, to pay over to me or my assigns any surplus; and the said John S. Wright is fully authorized to turn all of said property, as soon as it can reasonably be done; and is clothed with all necessary powers to effectuate and promptly to

[1] [Reported by Hon. John McLean, Circuit Justice.]

carry this trust into effect, and for this purpose to use my name or otherwise as may be most desirable."

It appears from the statement of Ives under oath, on his examination by the master in chancery, the 30th of August, 1854, that on the 1st July, 1854, he executed an assignment in the evening at Mr. Walker's office, in the presence only of Mr. Walker, his counsel, and he left the assignment with him and has not since seen it. That during the year previous to the assignment up to the 14th of February, 1854, he had been engaged in the banking and broker's business, under the firm of S. H. Ives & Co., and on that day the firm was dissolved. He received from that firm for his good will, five thousand dollars. On the 20th of February he received a sum in a check on the bank for five thousand three hundred and five dollars, and near the same time a check for three hundred dollars. These sums balanced his account with the bank. He received on the 20th February, not included in the above, the sum of four thousand seven hundred dollars. C. &. N. Ives gave defendant a draft or certificate for three thousand five hundred dollars; and a certificate of Indiana bank stock for fifteen hundred dollars. On the 1st of August, 1853, he received for his quarter profit in banking, nineteen hundred and sixty-three dollars—for the ensuing quarter six thousand two hundred and fifty-six dollars, and for the two succeeding quarters ten thousand seven hundred and eighty-seven dollars. And the defendant received from G. W. Markham some twenty-nine or thirty thousand dollars in merchandise. His acceptances for Markham amounted to about forty thousand dollars. These acceptances the defendant alleges were the cause of his failure, and compelled him to assign his property.

From the above exhibit of moneys and property received by the defendant, the necessity for his failure is not perceived. On account of Markham he could not have lost more than fifteen thousand dollars, in converting the merchandise he received from him into money and paying the full amount of his acceptances. This would allow five thousand dollars loss on the merchandise, which was estimated at the wholesale prices. And the moneys he received from other sources very much exceeded the sum of fifteen thousand dollars. But we do not rely on this estimate only, to show the fact and motive of his failure. It does not appear that any part of the acceptances of Markham have been paid. Ives has received about thirty thousand dollars of merchandise and in addition a considerable amount of debts, for his indemnity, but he seems to have made some other appropriation of the means thus received, than the payment of the debts for which he was security. He being a banker in good standing, it is not to be doubted that it was in his power to have paid his acceptances, on a reasonable indulgence being given. But it does not appear that he proposed any adjustment to his creditors, or asked for any indulgence. But it does appear that he purchased a valuable real estate in Detroit in the name of a near connexion—the deed being made to this person. A valuable block of expensive buildings was constructed, which required a very large expenditure. His father-in-law, who received the deed, was shown to have been in limited circumstances, and wholly unable to buy the ground or build the block of buildings. The evidence is clear to show that the means were furnished by Ives in purchasing the ground and making the improvements.

The facts in the case, without going further into a detail of them, show satisfactorily to the court, that the assignment of Ives was made to hinder and delay his creditors, and we feel bound to declare it to have been fraudulent under the statute. The court will direct a decree to this effect to be entered, and will refer the matter to a master, &c.

FULLER (MOODY v.). See Case No. 9,746.

FULLER (POTTER v.). See Case No. 11,327.

Case No. 5,151.

FULLER et al. v. YENTZER et al. SAME v. SAME. SAME v. GOODRICH.

[1 Ban. & A. 520;[1] 6 Biss. 203; 7 Chi. Leg. News, 25.]

Circuit Court, N. D. Illinois. Oct., 1874.[2]

PATENTS—SEWING MACHINE ATTACHMENTS—CONSTRUCTION OF CLAIM—INFRINGEMENT—NEW APPLICATION OF OLD PRINCIPLES — PATENTS CONSTRUED LIBERALLY.

1. The three suits were brought upon two patents, one granted to Henry W. Fuller, June 5, 1860, for an "improvement in mechanism for marking cloth in sewing machines," and the other, the reissued patent No. 3,218, granted to Israel M. Rose, December 1, 1868, for "tuck-creasing attachment for sewing machines." Upon the construction given to the patents by the court, the defendants were *held* not to have infringed.

2. The invention of Fuller was for a device for creasing and tucking cloth, by means of a notch and blade, constructed so as to be attached to the bed-plate of the sewing machine, and operated by means of the needle-bar. The notch could be above or below, and the device arranged in front of the needle or behind it, according to the function it was required to perform. The notch and blade were old: *Held*, that the invention of Fuller consisted in the application of the notch and blade, and the various other parts of the mechanism, to the sewing machine; that he could not claim the power of the needle bar in all its various applications, and that his invention must be limited to the particular device which he adapted, in its application to the bed-plate of the sewing machine and to the needle-bar, and that other

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[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

[2] [Affirmed in 94 U. S. 288, 299.]

devices, though with the notch and blade, could be made and applied to the bed-plate and needle-bar of a sewing machine, for the purpose of tucking and creasing, without infringing the Fuller patent.

3. No one can take something old, and apply it in a new way, or in a new form, so as to produce a particular result, and be protected by the patent law beyond the particular way, or form, or device and the application which he has made.

4. A patentee will be protected, when a device is subsequently used, which may be said fairly to come within the principle of the original invention, but an inventor cannot go beyond the legitimate bounds of his discovery, so as to exclude all other inventions within the same field of operations.

5. The claim of the Rose reissued patent, was for "a tuck-creasing mechanism, such as described, having its upper and lower parts connected, and together adjustable as to its relation to the needle of the sewing machine, and operated by the sewing machine, substantially as set forth:" *Held*, that this claim must be restricted to the unity of adjustment, in a tucker, of the mechanism described in the specification, and that it does not cover every kind of tuck-creasing mechanism, having its upper and lower parts connected and together adjustable, but only the particular kind of mechanism described, and that the words, substantially such as described, are material, and limit the claim to the particular form of mechanism described, or that which is substantially the same.

6. While patents should be construed liberally, a patentee must be limited within the claims of the patent, and the description of the particular mechanism, and the application he has made, by which the result is produced.

[These were bills in equity by Henry W. Fuller and others against Enoch S. Yentzer and others and against Herman B. Goodrich for the alleged infringement of two patents. The first, No. 28,633, was granted to H. W. Fuller, June 5, 1860; the other, No. 40,084, was granted to I. M. Rose, September 22, 1863; reissued, No. 3,218, December 1, 1868.]

S. S. Fisher, C. C. Bonney, and E. B. Barnum, for complainants.

Scates & Whitney, for defendants.

DRUMMOND, Circuit Judge. These three cases were argued upon the motion for a preliminary injunction, and I then declined to issue the injunction. They afterwards went to proofs and were argued upon final hearing, and having given them full consideration, I remain substantially of the same opinion as when the motion for an injunction was argued, having come to the conclusion that the plaintiffs are not entitled to the relief they ask. The cases are by no means free from difficulty, but I will state the reasons why I have come to this conclusion.

I have no doubt of the validity of the two patents under which the plaintiffs claim; the first, the patent of Fuller, issued in 1860, and the other, is called the Rose patent, issued in September, 1863, and re-issued in December, 1868, and of which Fuller is the assignee. The original patent of Fuller, so far as it is material to consider it in connection with the questions involved in this case, was for a device for creasing and tucking cloth by means of a notch and blade. The original device of Fuller was constructed in such a way as to be attached to the bed-plate of the sewing machine, and the special device by which the creasing was performed was operated by means of the needle-bar. The notch might be above or below. The result was, of course, substantially the same, and it could be arranged in front of the needle or behind it, according to the function that it was required to perform.

The first question to be determined is: What is the extent of the invention of Fuller? He did not invent the notch and blade: that was an old device; nor springs: they also were old. All that he invented was the application of the notch and blade, the springs, and the various other parts of the mechanism to the sewing machine. He certainly could not claim the power of the needle-bar in all its various applications.

All that he could claim, and, I think, all that his patent, properly construed, can be considered to cover, is the particular device which he adapted in its application to the bed-plate of the sewing machine and to the needle-bar. Otherwise we would have to hold that wherever springs or the notch and blade were applied to the needle-bar, or any other old appliance was taken, by which the power of the needle-bar was used in the construction and operation of a creaser, his device would cover it. That, certainly, cannot be the proper construction of his invention. It is only the special mechanism which he has devised, in its application to the needle-bar and the other parts of the sewing machine, by which the result was obtained. The difficulty arises in the application of the invention. It is natural always, where inventors have discovered some special device or mechanism by which a useful result is obtained, and in the progress of the art various modifications are made, or new ones are invented, which produce the same result in greater or less perfection, to attempt to bring all subsequent discoveries within the scope of their device. It is perfectly right, where any device is subsequently used which may be said fairly to come within the principle of the original invention, that the party should be protected, but it would be wrong to stretch an invention beyond the legitimate bounds of the discovery, so as to exclude all other inventions within the same field of operations. For instance, in this case, it would be obviously an unsound doctrine to hold that no one else could take the notch and blade, or springs, in whatsoever form they might be used, and apply them to the bed-plate and to the needle-bar of a sewing machine.

Wherever any other person subsequently takes what may be substantially the same device or the same mechanism, and attempts to apply it to the needle-bar and to a bed-plate of a sewing machine, he may be said

to be within the invention which Fuller first gave to the world.

As I understand the views of the plaintiffs, there is an effort in this case to bring within the scope of Fuller's device what is not legitimately within the true boundaries of that discovery, because we have to adopt substantially that rule in order to sustain the view of plaintiff's counsel, and to say that no one else could take the springs or apply the power of the needle-bar, or attach a form of notch and blade for creasing to the bed-plate without infringing Fuller's device.

So in relation to the Rose patent, of which Fuller is the assignee, and the validity of which, of course, he cannot question, and the value of which is not controverted.

It is admitted that Fuller's invention does not bring within its scope all forms of tuck-creasers when applied to the needle-bar and to the bed-plate of the sewing machine; otherwise Rose's invention must fall. But the ground upon which that can stand is, that it is substantially a different device. In Fuller's mechanism the act of creasing is performed as has been stated, and a model of which is before me. Under the Rose patent, and by the mechanism which he devised for creasing, there is a different arrangement of the various parts. There is no notch and blade as in the Fuller patent, but there are springs. The Rose device is attached to the bed-plate of the sewing machine. It is operated by the power of the needle-bar. There is a spring attached to a staff, and another, which together form the jaws which pinch the cloth as it passes through the sewing machine. A special contrivance presses the upper spring, brings the jaws together and the movement of the needle-bar down places the jaws upon the cloth which passes between them and an attachment of the bed-plate. It makes a crease upon the cloth; and it is said to have an advantage over Fuller's device, in that it does not perforate or destroy, or even impair, the texture of the cloth. Now the same principle I think, must be considered applicable to the device of Rose as to that of Fuller, namely: he must be confined to the special mechanism which he has invented and which he attaches to the sewing machine, and by means of which he performs a crease in the cloth, and thus enables the operator to make the tuck.

It will be observed that Rose attached his device to the bed-plate of the sewing machine, and operated it by means of the needle-bar as Fuller had done; and there was nothing in Fuller's to prevent the operation of the Rose device.

Now that being so, it simply become a question, when one uses any particular form of mechanism, whether or not, so far as these two patents are concerned, it comes within either of them. The theory is to bring all other forms of mechanism by which a crease is made and a tuck formed, within these two inventions of Fuller and Rose; and it is said these have been so far the only two known methods of forming the crease. Everything that is legitimately within them of course, includes the invention of these two patentees; but it cannot be said that because they form the crease by the notch and blade, and by the pincers, that no one else can form a crease by some other device different from that of Fuller or Rose; in other words, that they have patented a result or an effect, and not the particular form of mechanism which they have set forth in their specifications. If this is the true construction of these patents, then we shall not have so much difficulty in determining whether or not the defendants have infringed the two devices invented by Fuller and Rose.

To take the first case. The ground assumed by the plaintiffs is that the tuck creasers manufactured by Yentzer and Scates, infringe the first claim of Fuller.

The first claim of Fuller is: "The forming of one, two or more creases in cloth by means of markers on opposite sides of the cloth, which markers are the notch and blade or the notch and point, one connected with the bed of the machine, and the other operated simultaneously with the vibrations of the needle-bar in a sewing machine."

As I have said the notch and blade are old: the springs are old. It may be true—it is not necessary to controvert it in this case—that Fuller was the first person to apply the notch and blade and the springs to a sewing machine so as to form a crease, but I think that no one can take something old and apply it in a new way or in a new form so as to produce a particular result, and be protected beyond the particular way or form or device, and the application which he has made. Otherwise, as I have already said, any one could take an old device and make a new application of it, and prevent all other persons from taking the same, and making another and different application by which a like result is brought about. The question is whether Yentzer and Scates have done that. Let us look at one form of the Yentzer device and a tucker which they have manufactured. There is the spring and the power of the needle-bar applied to the spring. There is—if you choose to call it so—the notch and blade attached to the bed-plate. But the question is whether the springs and notch and blade are used in the same way as in the Fuller patent. Fuller covers by his own special mechanism anything that is fairly within it. He does not include other and different devices or mechanism by which the same result is reached; and I think there may be fairly said to be a difference—such a difference as does not bring it within the mechanism of Fuller; and so it may be said of other forms of manufacture by Yentzer and Scates.

In the second suit, which is also against Yentzer and Scates, the ground assumed by the plaintiffs is, that the creasers manufac-

tured by them, infringe the 6th claim of the Rose patent, which refers to what is called the "unity of adjustment."

The claim is for "a tuck-creasing mechanism such as described, having its upper and lower parts connected and together adjustable as to its relation to the needle of the sewing machine and operated by the sewing machine substantially as set forth."

If the view of the plaintiff's counsel as to the construction of the Rose patent is correct, then all these various devices would be infringements of that claim. If, in other words, Rose had patented every form of mechanism by which a creaser is attached or adjusted to the sewing machine, and by which unity of adjustment is brought about, then there could be no question but the defendants have all infringed, but I think that the view of the counsel of the extent of this claim is not correct. I think the claim is narrower.

It is insisted on the part of the plaintiffs that this patent cannot be restricted to a unity of adjustment in a tucker of the mechanism such as described in the Rose specifications. I think it is so restricted. Let us see. It is said that in the claim the words are used "a tuck-creasing mechanism" and that it means, therefore any tuck-creasing mechanism. "A tuck-creasing mechanism having its upper and lower parts connected and together adjustable." If that were the claim, and it could stand as the invention of Rose, then it might be the defendants would all infringe: but that is not the claim. It is qualified; it does not mean every kind of tuck-creasing mechanism having its upper and lower parts connected and together adjustable, but any tuck-creasing mechanism substantially such as described, which words are very important and essentially qualify the preceding words. It must therefore mean the kind of mechanism—mechanism such as here described, not any form of mechanism however different it might be, but this particular form of mechanism, or that which is substantially the same.

We cannot strike out material words from the claim itself and enlarge the meaning of the invention, but we must limit it fairly, I admit, within the language of the claim.

The third suit is by Fuller as the assignee of the Rose patent and against Goodrich, and it is alleged that Goodrich infringes the first, second, fifth, sixth and eighth claims in the Rose patent.

There seems to be in forming the claims under the Rose patent a disposition to expand them unnecessarily. For instance, the first and second claims are substantially the same; one, to be sure, speaks of the mechanism by which the crease is formed, and the other of the method of pinching the fabrics by which the crease is formed, but of course they resolve themselves into substantially the same thing. The claim is: "The mechanism substantially as herein described for forming a ridge or ridges on fabrics to be afterwards folded in the line of such ridges."

The second claim is the method of nipping or pinching the fabrics to form ridges or creases thereon, by means of jaws opened and closed at intervals to seize and pinch the fabric when at rest, and then release it as the same is moved along by the feed in the sewing machine. But still it means the method produced or seen in the form of mechanism which is referred to in the first claim, and the only difference, therefore, between the first and second claim is, the one speaks of the device as the mechanism, and the other the method by which that mechanism produces the crease.

The fifth claim is the combination of the creasing device or devices of the tuck-marker with the jointed lever substantially as and for the purposes set forth.

The sixth claim I have already referred to and considered. The eighth claim is the combination of the lever and spring with the tuck-marker, having upper and under parts connected together adjustable as specified, substantially and for the purposes set forth. Now it is claimed on the part of the plaintiffs that this form of device used by Goodrich is an infringement, because it is said it is substantially the device of Rose, and that the crease is formed in substantially the same way, and that the parts are adjustable in the same manner; that is to say, that the mechanism of the parts is the same, because, as I have said, I consider that an indispensable element in the true construction of the Rose patent. I do not so regard it. Limiting the Rose patent to a substantial form of mechanism which he has described and the manner in which it operates and is attached to the bedplate of the sewing machine and the needle-bar, I think there is a substantial difference, such a difference between these two devices as is within the true construction of the patent law, and to hold otherwise is to leave subsequent inventors within very narrow bounds in the same common field of discovery and would, therefore, be attended with very serious consequences. If in any part of the mechanism of Fuller or of Rose there was some great, novel principle or discovery, which no one else could use without infringing that part, then it might be said that these cases of the defendants were fairly within its operation, but that would bring it within the principle, for example, of Howe's discovery in relation to the operation of the needle, and of Wilson's feeding device. There is something connected with Howe's discovery which no one else can use without our saying at once that, no matter in how different a form we put it, still Howe's invention is there. So in relation to the feeding device of Wilson. No matter how much you may change it or modify it, still it is Wilson's feeding device.

If that principle were applicable to these cases, then I should have no hesitation in holding there was an infringement.

There are two modes of construing the patent law, and it may be said, perhaps, without any disrespect, that there are some judges who adopt one mode and some another. There are those who are inclined to expand, beyond legitimate boundaries, the invention of the patentee. There are others who restrict it within narrower bounds, holding that the invention of the patentee must be limited by the particular mechanism and the application by which the result is attained, thus leaving the field of discovery open to all persons to explore it beyond the range of that particular mechanism and its application. I confess the latter seems to me the more correct rule and therefore hold that parties should be limited rather closely within the claims of their patents and the description of the particular mechanism, and the application which they have made by which the result is produced. Of course a change of form will not change the principle. And I do not dispute the rule that the invention is to be construed liberally.

A mechanical change does not prevent an infringement. In looking at Goodrich's device as I have said, it seems to me to be essentially different from the Rose patent, and therefore I hold that in that case, as in the others, there is no infringement. In these cases all the defendants, or Yentzer and Goodrich under whom these defendants are manufacturing, claim to be protected by patents duly issued. Of course if those patents are for something which has been previously discovered and patented to other parties, the patent is no protection, but it is at least evidence of the view which the patent office has taken of the rights of the defendants.

The application for the injunction is therefore refused and the bills dismissed.

[NOTE. The decrees dismissing the bills in these three cases were affirmed in Fuller v. Yentzer, 94 U. S. 288, 299, Mr. Chief Justice Waite, Mr. Justice Strong, Mr. Justice Miller, and Mr. Justice Bradley, dissenting.]

FULLERTON (UNITED STATES v.). See Cases Nos. 15,175 and 15,176.

FULLERTON (WRIGHT v.). See Case No. 18,079.

Case No. 5,151a.

FULLINGS v. FULLINGS.

[3 N. J. Law J. 240.]

District Court, D. New Jersey. July 1, 1880.

BANKRUPTCY—FRAUD—LIMITATIONS.

1. A bankrupt, living in North Carolina, failed to include certain railroad bonds in his schedule. The petition in bankruptcy was filed May 28, 1868. Shortly afterward the bankrupt removed to New Jersey, and died there in 1877. His son, who was his executor, claimed these bonds as his own property, asserting that they had been transferred to him by his father in payment of advances. While this controversy was pending in the Essex Co. orphans' court, this suit was brought by the assignee claiming the bonds as the property of the bankrupt. It appeared that the bankrupt had delivered the bonds to C. in New York, some of them to be held subject to his order, others as collateral security for certain debts which were afterwards paid. The bonds were all delivered back to the bankrupt shortly after the petition was filed and he drew the dividends until his death. *Held*, that in the absence of all proof to the contrary, the deposit of the bonds with C. was a device to defraud creditors, and that the bonds belonged to the assignee.

2. There was no evidence of laches in the assignee, and the suit was not barred by lapse of time.

3. Where an action is brought to redress fraud concealed by the bankrupt, or fraud which by its nature remains secret, the statute of limitations does not begin to run until the fraud is discovered.

In equity.

Guild & Lum, for complainant.

Elwood C. Harris, for defendants.

NIXON, District Judge. The bill is filed in this case by Robert M. Martin, assignee in bankruptcy of Edward Fullings, deceased, to recover twelve several bonds of the Atlantic, Tennessee and Ohio Railroad Company of the par value of five hundred dollars each, numbered respectively 4, 5, 6, 7, 8, 9, 10, 55, 56, 57, 58, and 59, with coupons attached, from the 1st day of November, 1863, alleged to be the property of the late bankrupt and which he fraudulently omitted from his schedule and withheld from the hand of his assignee in bankruptcy. It appears that the said Edward Fullings, being a resident of the town of Charlotte, in the state of North Carolina, on the 28th of May, 1868, filed a voluntary petition in the district court of the United States for the district of North Carolina, to be adjudged a bankrupt, and that such proceedings were had thereon; that an adjudication took place on the 9th day of June following; that on the 22nd of July the creditors first chose his son, Edward B. Fullings, assignee, and that upon his resigning the office on the 6th day of August of the same year, a new meeting of creditors was called for the 8th of October, 1868, when the complainant was duly chosen assignee. Shortly after the commencement of the proceedings in bankruptcy the said Edward Fullings left the state of North Carolina and removed to Irvington in the state of New Jersey, where he continued to reside until the month of September, 1877, when he departed this life, leaving a last will and testament, in which letters testamentary were first granted to his son Edward B. Fullings, and afterwards, upon his removal, to the defendant Abby Fullings, the widow of the testator. Whilst the said Edward B. Fullings was administering the estate of his father as executor, a controversy arose in the orphans' court in the county of Essex, between him and some

of the representatives of the estate, in regard to the ownership of the twelve railroad bonds in suit. The executor claimed them as his individual property, asserting that they had been transferred to him by his father in his lifetime, in payment of certain advances made by him, while the opposing party contended that they should be accounted for as assets of the estate. The orphans' court decided that they belonged to the estate. Pending the litigation, the assignee in bankruptcy brought this suit claiming that they were the property of Edward Fullings at the time of the filing of his bankruptcy petition, and had been fraudulently omitted from his schedule and withheld from him as assignee. Two questions are thus presented. 1. As to the ownership of the bonds when the bankruptcy proceedings commenced. 2. Whether the assignee is barred from bringing suit by the statute of limitation.

1. As to the first, the evidence shows that the bankrupt obtained these bonds in the month of May, 1865, from one John M. Springs, in payment of moneys due him from a former partnership of Fullings, Springs & Co., of which he was a member and a large creditor. Previous to filing the petition in bankruptcy, to wit, on the 21st of December, 1867, Fullings left ten of the bonds in the hands of Emerson Coleman, in the city of New York, subject to his own order. Coleman says he knows of no purpose for which they were deposited with him, except to be afterwards called for by Fullings. The remaining two had been pledged by the bankrupt with two of his creditors in New York, as collateral security for the payment of debts due to them respectively. Through the instrumentality of Coleman these debts were subsequently paid by Fullings and the bonds surrendered by the creditors to Coleman. On the 25th of February, 1869, the whole twelve were delivered by Coleman to the bankrupt, who continued in the possession of them to the day of his death, receiving for several years the annual interest accruing upon them. In the absence of all contradictory proof, I have no hesitation in holding that the deposit of the bonds with Coleman was a device of the bankrupt to get the property out of the reach of his creditors, and that under the deed of assignment the bankrupt was entitled to have and receive the same as assets of the bankrupt estate.

2. I do not find evidence of laches on the part of the assignee in bringing the suit which should bar him from a recovery at this late date. The action was commenced within a few weeks after the assignee discovered the fraud. He had had some knowledge of the existence of the bonds, and none appearing upon the sworn schedule of the bankrupt, he made inquiry of him and was led to believe that they were not the property of the bankrupt, but belonged to his son. There is no proof that the assignee living in North Carolina had any information of the acts of ownership subsequently exercised by the bankrupt over the bonds in New Jersey. Nothing appears which ought to have put him on inquiry. The supreme court in Bailey v. Grover, 21 Wall. [88 U. S.] 342, held that where an action was intended to obtain redress against a fraud concealed by the party, or which from its nature remained secret, the bar of the statute of limitations did not commence to run until the fraud was discovered. Any other doctrine, said Mr. Justice Miller, speaking for the whole court, would make the law which was designed to prevent fraud the means by which it is made successful and secure. There must be a decree for the complainant, but as there is no evidence that the defendants, Abby Fullings, executrix, and George D. G. Moore, had any knowledge of the fraud, no costs are awarded against them.

Case No. 5,152.

FULMER v. PATTERSON et al.

[36 Leg. Int. 496; 14 Phila. 527; 26 Int. Rev. Rec. 6.]

District Court, E. D. Pennsylvania. Dec. 15, 1879.

SALVAGE—WHAT IS SALVAGE SERVICE—COMPENSATION.

[Towing oil barges, which have been cast loose from a burning wharf, and are still in danger, to a place of safety, is a salvage service, but, being rendered by a tug in the direct line of its business, and without danger to itself, is entitled to only a small compensation.]

In admiralty. From the libel, answer and depositions in this case the facts appear as follows: On the 12th of June, 1879, two barges were lying at a wharf on the Schuylkill taking in oil. A destructive fire had raged the day before among the neighboring wharves, sheds and shipping. On the 12th a vessel loaded with oil, which had been towed into the stream, burst, and burning oil floating from her on the water set fire to the wharf at which respondents' barges lay. The libellant's tug towed them out of danger, and now claims salvage $600. The respondents alleged that it was the farther end of the wharf that was on fire, and they left the wharf to drop down stream, being in no immediate danger, as a precautionary measure. That they could have readily effected escape by their own efforts; that they accepted libellant's offer "to throw them a line" simply as a "tow," and so considered the whole transaction, which only occupied a few moments. That they had offered and were still ready to pay libellant for towage service. And asked that the libellant be nonsuited as to salvage.

H. G. Ward and H. R. Edmunds, for libellant.

A. Sydney Biddle, for respondents.

BUTLER, District Judge. Although the vessels might possibly have escaped by the

use of their poles, and the aid of the tide, they were, nevertheless, in peril. Their situation demanded assistance; that those in charge believed so is shown by their call for help at the time, and their statements, as witnesses, since. The services rendered were, therefore, "salvage services," and must be compensated accordingly. The testimony respecting the value of the vessels is conflicting and irreconcilable.

The libellant incurred no risk, and was detained but a few minutes. What he did was in the direct line of his business, and subjected him to no inconvenience. In view of all the circumstances, I think sixty-five dollars a just allowance; and a decree for this sum, with costs, will be entered.

Case No. 5,153.

FULTON v. BLAKE et al.

[5 Biss. 371;[1] 2 Am. Law Reg. (N. S.) 779; 5 Chi. Leg. News, 527.]

District Court, N. D. Illinois. July, 1873.

DEMURRAGE—REASONABLE TIME—CUSTOM OF CHICAGO—DUTY OF CONSIGNEE—DOCK ROOM.

1. Damages in the nature of demurrage are recoverable from consignee without stipulation in bill of lading.

[Cited in Hawgood v. One Thousand Three Hundred and Ten Tons of Coal, 21 Fed. 685; The William Marshall, 29 Fed. 329.]

[Cited in Scholl v. Albany & R. I. & S. Co., 101 N. Y. 604, 5 N. E. 782.]

2. What shall be deemed a reasonable time must always be a question of fact, to be determined by the circumstances of each case. By the custom of the port of Chicago one day is allowed the consignee to provide a dock, and this custom, unless rendered unreasonable by controlling circumstances, should be considered a law.

[Cited in Lindsay, Gracie & Co. v. Cusimans, 12 Fed. 506; Bowen v. Decker, 18 Fed. 752; Houge v. Woodruff, 19 Fed. 138.]

3. A consignee is bound to give only such dispatch as is reasonable under the circumstances.

4. Consignees must provide such reasonable dock room as their business ordinarily requires.

5. A consignee who has provided sufficient dock room for vessels as they arrive is not at fault when from causes over which he has no control several arrive together. He is not obliged to procure other docks; vessels must await their turn at consignee's dock.

[Cited in The J. E. Owen, 54 Fed. 187.]

6. If a consignee had provided ample docks for the accommodation of vessels consigned to him, in their order, vessels arriving out of the time when they ought reasonably to have been expected must await their turn.

In admiralty. This was a libel in personam by N. C. Fulton, as owner of the schooner Kate Hinchman, against the respondents [C. A. Blake and others], as consignees, for damages in the nature of demurrage. The facts are stated in the opinion.

W. H. Condon, for libellant.

Mr. Judd and W. F. Whitehouse, for respondents.

As there was no charter party or express stipulation in the bill of lading for demurrage, this action cannot be maintained for demurrage as such, and the only obligation upon the consignees is upon their implied contract against an unreasonable detention. This detention must arise from the delinquency of the consignees. Wordin v. Bemis, 32 Conn. 268; Cross v. Beard, 26 N. Y. 85. If a vessel is unloaded in her regular turn, there cannot be any complaint for unreasonable detention. Robertson v. Jackson, 2 C. B. 412; Syers v. Jonas, 2 Exch. 111; Wordin v. Bemis, 32 Conn. 268. If the defendant had a right to require that the cargo should be delivered upon his own dock, he was guilty of no fault or breach of contract in delaying the plaintiff's vessel until she should come up to the dock by taking her turn. Cross v. Beard, 26 N. Y. 85. Consignees are not liable when vessel is loaded in her turn in a reasonable time. The vessel must be improperly detained to entitle owners to damages. Clendaniel v. Tuckerman, 17 Barb. 184. The question of reasonable time is to be determined on a consideration of all the circumstances. 1 Pars. Shipp. & Adm. 311. It is a uniform rule that where there is no express stipulation as to the time of unloading, a consignee is not liable for delays occurring without his fault, or a failure on his part to comply with some of the obligations imposed upon him by law or a custom of the port as to unloading. Weaver v. Walton [Case No. 17,312]. It must be averred in the libel and proved by the libellant that the delay was due to delinquency of respondents. The burden of showing that the detention was unnecessarily caused by the respondents, is on the libellant. It is a material fact to show that it was not libellant's mismanagement or that of his agents. Cross v. Beard, 26 N. Y. 85. Ship owner must perform the voyage in the shortest time consistent with safety. The Gentlemen [Cases No. 5,323 and 5,324].

BLODGETT, District Judge. The essential facts, as I find them from the pleadings and proofs, are: That in the latter part of September, 1871, the firm of C. A. Blake & Co., Buffalo, N. Y., loaded on board said schooner Kate Hinchman, 426 tons Lehigh coal, consigned to Blake, Whitehouse & Co., of Chicago, at a freight of fifty cents per ton.

The schooner sailed with her cargo on the 29th of September, and arrived in the port of Chicago on the evening of the 16th of October, with her cargo on board, and on

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

the morning of the 17th the consignees were notified of her arrival and readiness to discharge cargo. The bill of lading contained no stipulation in regard to demurrage. The consignees were engaged in the coal business in this city, occupying two docks—one on the north branch of Chicago river, near Indiana street, capable of accommodating two vessels at a time, and the other near Eighteenth street, on the south branch, capable of unloading only one vessel at a time. Their dock at Indiana street was injured by the great fire of October 9th, and nearly all the employés at that dock were burned out, and no efficient help to unload at said dock was obtainable for many days after the fire.

When the Hinchman arrived, the Indiana-street dock was occupied by other vessels unloading coal, and she was directed to proceed to the Eighteenth-street dock, her towage bill being paid by respondents. This dock was occupied by the schooner King, which had arrived two days before the Hinchman, although she had sailed from Buffalo eight days after, and the Hinchman did not get alongside the dock so as to commence unloading until the afternoon of the 21st, and completed unloading on the 23d of October.

The respondents' business was such that they expected to receive and unload at their docks during the months of September and October of that year about four cargoes per week, and they had ample facilities for unloading that number, The respondents unloaded vessels consigned to them in the order in which they arrived and reported themselves ready to unload. The great fire considerably deranged respondents' business, and deprived them of the use of their largest dock for several days. The usual time, at that season of the year, for a voyage from Buffalo to Chicago was twelve days. It was admitted that by a general usage and custom in Chicago the consignee of a vessel is allowed one day after notice of her arrival in which to provide a dock or place for unloading her. And it appears from the proof that the respondents had machinery at their docks, by which they were able to unload coal from a vessel at the rate of ten tons per hour from each hatch, which was much more rapidly than it could be done at any other dock.

The amount involved in this suit is not of much consequence to either party, but the principle is important to all freighters, consignees and vessel owners.

It is objected that a suit will not lie for damages against the consignee unless there is an express stipulation for demurrage in the charter party or bill of lading, and, technically speaking, the respondents' counsel may be correct; but when the consignee of goods is notified by the carrier of his readiness to deliver the goods, it is the duty of the consignee to either refuse to receive the goods, which under certain circumstances, not necessary now to mention, he may do, or to provide a place for the reception of the goods within a reasonable time, and what shall be deemed a reasonable time must always be a question of fact, to be determined by the circumstances of each case. By the usage of this port, one day is allowed the consignee of a vessel, after notice of her arrival, in which to provide a dock at which she can unload, and this usage, unless rendered unreasonable by controlling circumstances, should undoubtedly be considered as part of the contract.

It is also the duty of a person who is engaged in such business as to require him to expect or anticipate the arrival of vessels with cargoes consigned to him, to provide or arrange for sufficient dock-room to unload vessels as they arrive in port under ordinary circumstances within one day after arrival. That is to say, persons to whom vessels are consigned must provide such reasonable dock-room as their business ordinarily requires.

If a man's business is such that he would naturally receive two or three cargoes a week, he should provide dock-room for that number as they arrive in the order of sailing; but if, by reason of baffling winds or other delays, over which the consignee has no control, all of those vessels should arrive at once, instead of arriving in order of sailing, as he had reason to expect them, the consignee who has provided dock-room to accommodate three or four or a half-dozen vessels a week as they may successively arrive from day to day, is certainly not at fault if, from the poor sailing quality of some, or head-winds, or other causes over which he has no control, they all arrive on the same day, when he had a right to expect them on successive days in the order of sailing. And if, by reason of any such unexpected occurrence, several vessels arrive together, he is not obliged to procure other docks, but the vessels must respectively await their turns at the consignee's docks. This rule is more specially applicable to sailing vessels, which from their mode of propulsion are more uncertain in their times of arrival than vessels propelled by steam.

All persons engaged in dealing with ships, whether master, crew or consignee, are bound to give them dispatch, and whoever causes any unreasonable delay is answerable in damages.

A consignee to whom the cargo of a vessel is consigned should, within the time prescribed by the usage of the port after notice of the arrival of the vessel, furnish a suitable place for unloading, or he shall pay damages for detention, whether demurrage be noted on the bill of lading or not. It may not be what is technically called demurrage in the books, but it is damages for unreasonable detention, unless the vessel has arrived so far out of her expected time as to make such prompt dispatch unreasonable; in which case he must give her such dispatch as is reasonable under

the circumstances. And probably as safe a general rule as can be laid down is that if the consignee had provided ample docks for the accommodation of the vessels consigned to him in their order, vessels arriving out of the time when they ought reasonably to have been expected, must await their turn at the docks. Although this rule may have its exceptions, and should never be vexatiously or unnecessarily enforced to the delay and damage of a vessel, the interests of commerce—and that term as used by the courts means the interest of the public—require that ships should be kept moving. "Ships," says one author, "were made to plough the sea, and not to lie rotting at the wharves." Tested by these general principles, I am clearly of the opinion that the libellant has not made out a case entitling him to relief.

The respondents had provided ample dock-room for unloading the vessels consigned to them if they arrived in the order in which they might reasonably be expected. By reason of slow sailing qualities or bad management on the part of her master or crew, the Hinchman did not arrive till at least six days after she was reasonably due, and respondents were not bound to keep a dock waiting for her all that time, or have one ready just one day after her arrival. They are only bound to furnish her a dock in a reasonable time after her arrival, and under the evidence of this case, I do not think the delay from the 17th to the 21st unreasonable.

The city had, only seven days before the arrival of this vessel, been visited by one of the most destructive fires ever known, destroying nearly half of its docks, two-thirds of its stores and warehouses, and rendering one-third of its inhabitants homeless. I deem this alone such an intervention of unforeseen circumstances as excused the delay which occurred. Admitting that under ordinary circumstances the respondents would have been bound to furnish the vessel with a dock within one day after notice, there were extraordinary circumstances controlling all persons doing business in this city at that time, to such extent, at least, as absolve respondents from the consequences of the delay charged in this libel.

Libel dismissed at libellant's costs.

NOTE. In a recent case in the Northern district of Ohio, it was held that by the custom of lakes the consignee had twenty-four hours after the arrival of a vessel at the docks to provide a place for her and prepare for unloading, and that in unloading at an elevator each vessel should take her turn in the order of arrival; that demurrage might be recovered where there was a breach of an implied covenant or duty on the part of the consignee, even without any stipulation for demurrage in the bill of lading; that the consignee is not liable for delays occurring without his fault, or a failure on his part to comply with some of the obligations imposed upon him by law, or a custom of a port as to unloading; and that a master is bound to know the custom of a port to which he undertakes to transport freight. Weaver v. Walton [Case No. 17,312].

Case No. 5,154.

FULTON v. GILMORE.

[2 Flip. 260; 5 Reporter, 103; 10 Chi. Leg. News, 108; 2 Cin. Law Bul. 305; 24 Int. Rev. Rec. 108.] [1]

Circuit Court, N. D. Ohio. Oct., 1878.

MOTION TO DISCHARGE DEFENDANT FROM ARREST ON MESNE PROCESS—PRACTICE.

While the pleadings, practice, and forms in the circuit and district courts should conform as near as may be to the practice in the state courts, yet a commissioner of the United States may, as an officer under the state law, take the verification of all necessary papers in order to procure the arrest of the defendant.

[Cited in Sanford v. Portsmouth, Case No. 12,315.]

[This was an action at law by John A. Fulton against James J. Gilmore.]

Prentiss & Vorce, for plaintiff.

E. J. Estep, for defendant.

WELKER, District Judge. This action is founded upon a promissory note of the defendant for the sum of eight hundred dollars. With the petition the plaintiff filed an affidavit that the defendant had property, money and rights in action which he fraudulently concealed, and setting out particular facts as required in the Ohio Code, and asked an order of arrest, which was issued by the clerk of the court, and the defendant was arrested by the marshal. The affidavit was verified before George Wyman, a commissioner of this court.

The defendant moves a discharge from such arrest because the affidavit is not verified before an officer authorized to make the same. The authority of the commissioner to administer the necessary oath, presents the only question relied upon in the argument of the case.

The grounds for arrest of a defendant, and the mode of procuring it are provided in the Code of Civil Procedure of this state.

Section 146 of the Code provides that "an order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, made before any judge of any court of the state, or clerk thereof, or justice of the peace, stating the nature of the plaitiff's claim, etc., and establishing one or more of the following particulars: * * *

3. "That he has property or rights of action which he fraudulently conceals." The defendant claims that the affidavit must be made before one of the officers above named, and if not so done the order of arrest cannot be issued.

Section 914 of the Revised Statutes of the United States provides that "the practice,

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 5 Reporter, 103, and 24 Int. Rev. Rec. 108, contain only partial reports.]

pleadings and forms and modes of proceeding in civil causes * * * in the circuit and district courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like cases in the courts of record of the state within which such circuit or district courts are held."

Section 990 provides that "no person shall be imprisoned for debt in any state on process issuing from a court in the United States, where by the laws of such state imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state."

Rule 1st of this court provides that "actions shall be commenced and prosecuted, and process shall be issued, endorsed, made returnable and served in the manner provided in the Code of Civil Procedure of the state of Ohio, except as otherwise provided in these rules, or in the laws of the United States applicable to special cases."

It will be seen from the above references that the practice in this class of cases of the state courts has been adopted and recognized, not literally, but substantially, or "as near as may be," in like proceedings in this court.

The question then arises whether, in applying the state laws to cases in this court, the verification of the necessary papers required to be made, in order to procure an arrest of a defendant, must be strictly confined to the officers named in the section of the Code, that is, judge or clerk of a court of the state, or justice of the peace, or whether the officers of the court who are authorized to administer oaths and verify papers used in the court, may not take such verification?

Section 945 of the Revised Statutes provides that "bail and affidavits when required or allowed in any civil cause in any circuit or district court may be taken by a commissioner of the circuit court for the district." Under this section, the commissioner before whom the affidavit was made had complete authority to take affidavits to be used in this court in all civil cases. But it is claimed inasmuch as this proceeding restrained the defendant of his liberty by his arrest, the law must be strictly complied with, and the affidavit producing that restraint must be made before one of the officers named in the Code. This seems to me an exceedingly narrow construction of the United States statutes adopting the practice and mode of proceedings of the state courts.

It was only intended by them, in this class of cases, to require the same grounds for arrest of a defendant, and to be made appear by affidavit, as was required by the state law, leaving the verifications to be made before such officers as are authorized to take such affidavits or verifications in this court, as well as to use the officers of this court to serve and execute process, or, in other words, use the official machinery of this court instead of the state court.

Any other construction would require a plaintiff to find a state judge, clerk, or justice of the peace, who is unknown to this court, to take the verification, and also require the arrest to be made by a sheriff instead of the marshal, thus making it exceedingly inconvenient to use such state mode of procedure.

The motion to discharge is therefore overruled.

Case No. 5,155.

FULTON v. GOLDEN.

[36 Leg. Int. 366; 20 Alb. Law J. 229; 9 Cent. Law J. 286; 25 Int. Rev. Rec. 321; 8 Reporter, 517; 4 Cin. Law Bul. 758; 12 Chi. Leg. News, 9; 2 N. J. Law J. 298.] [1]

Circuit Court, D. New Jersey. Aug. 29, 1879.

REMOVAL OF CAUSES — ORDER BY STATE COURT — TIME OF REMOVAL.

[Where an equity case is pending in a state court for several years after issue joined, and has not been brought to hearing in consequence of the neglect of parties to enforce the rules of the court for the taking of testimony, *held*, that the petition for removal was filed too late when the case could have been first tried under the local laws and practice, at several terms before the filing of the petition.]

[Cited in McLean v. St. Paul & C. Ry. Co., Case No. 8,892; Forrest v. Keeler, 1 Fed. 463; Wheeler v. Liverpool, London & Globe Ins. Co., 8 Fed. 198; Deford v. Mehaffy, 13 Fed. 486.]

[Cited in Stebbins v. Lancashire Ins. Co., 59 N. H. 414; Wheeler v. Liverpool, L. & G. Ins. Co., 60 N. H. 457.]

[This was a suit brought by J. Alex. Fulton against Edward L. Golden.] On motion to remand cause to state court.

E. F. Green, for petitioner.

J. A. Fulton, for respondent.

NIXON, District Judge. This is a motion to remand the above stated cause to the court of chancery of the state of New Jersey, whence it was removed under the act of March 3, 1875 [18 Stat. 470]. Two grounds are assigned for the motion: (1) Because the record does not show that this court has jurisdiction of the case. (2) Because the application for removal comes too late.

1. With regard to the first it is sufficient to observe that the petition alleges that the amount in dispute between the parties, exclusive of costs, exceeds the sum or value of five hundred dollars outlay, and that the con-

[1] [Opinion reprinted from 36 Leg. Int. 366, by permission. 8 Reporter, 517, contains only a partial report.]

troversy in said suit is between citizens of different states—the petitioner, who is the sole party defendant, being a citizen of Pennsylvania, and the sole complainant, a citizen of the state of Delaware. A bond in the penal sum of two thousand dollars, with two sureties residing in this state, was filed with the petition, and as no question was raised in the state court or here as to its sufficiency, it must be assumed to have been in compliance with the requirements of the law.

It was suggested in the argument that the cause should be remanded, because it did not appear that the state court made an order of removal. There is nothing in the act of March 3, 1875, requiring such an order and none is necessary. The jurisdiction of the state court over the cause terminates with the filing of the petition and bond. Taylor v. Rockefeller [Case No. 13,802]; McMurdy v. Life Ins. Co. [Id. 8,903].

2. Whether the application for removal was made too late depends upon the construction of the last recited act, which materially changed the law in this respect. Under the 12th section of the judiciary act [1 Stat. 73] the application was required to be made by the defendant, "at the time of entering his appearance in the state court." He waived his right to remove the cause after he had in any manner submitted himself to the jurisdiction. The several acts of July 27, 1866 [14 Stat. 306], and March 2, 1867 [Id. 558], enlarge the time, and under them the petition for removal might be made "at any time before the trial or final hearing of the cause or suit" in the state court. But the 3d section of the act of March 3, 1875 [supra], again restricts the power of removal in reference to the time, and requires the petition in the state court to be made and filed "before or at the term at which such cause could be first tried and before the trial thereof."

What is the meaning of the expression "could be first tried?" Does it mean "could be first tried," by the legislation of the state and the rules and practice of the state court, when the parties have been diligent in preparing the case for trial or hearing? or does it mean "could be first tried" after the parties have put in their pleadings and got the case at issue, and have closed their testimony, years, it may be, after the suit was commenced? If the latter, then the right of removal would seem to depend upon the diligence or want of diligence of the litigants, rather than upon any designation of time in the law itself. It must be confessed that the section is very defective in precision of expression or obviousness of meaning; but the change in the phraseology shows, that congress meant to abridge the right of removal and to fix a definite time within which it was to be exercised. If the construction is adopted which the defendant urges, it would be in the power of the respective parties to keep a case pending through a series of years in the state court, by neglect to file the pleadings, or to conclude the taking of testimony, and then to procrastinate and still further delay the final hearing by removal to a federal tribunal.

The case under consideration affords abundant illustration of this. The bill of complaint was filed in the court of chancery of the state July 22, 1873, and the subpoena was returnable on the 5th of August following. The defendant put in the plea of the pendency of a suit between the same parties for the same cause of action in a court of law in the state of Pennsylvania, which the chancellor overruled, and the defendant was ordered to answer the bill within thirty days from the 9th of December, 1874. On the 13th of January, 1875, the answer was filed, and on the 16th of February following, the replication. The cause being thus at issue, February 16th, 1873, the rule of the court required that the complainant should begin to take testimony on his part within thirty days after issue joined, and conclude the same in thirty days (see 80th rule), within fifteen days thereafter, the defendant must commence taking testimony on his part and conclude the same in thirty days (rule 81). At the expiration of this time the complainant is required to proceed immediately, or by adjournment, not exceeding ten days, with testimony to rebut the testimony of the defendant, or to sustain testimony on his part impeached or contradicted by the defendant. The defendant may afterward produce counter-rebutting evidence on his part, but such evidence shall not be continued for more than five days on each side. Rule 83. By the 86th rule the time for taking testimony above limited shall not be extended except by written consent or by order of the court made upon notice. Under the provision of rule 15, if the complainant fails, within ten days after the expiration of the time to take the testimony, to notice the cause for argument, the defendant is entitled to an order, of course, directing the complainant to show cause why the defendant should not be permitted to notice the cause for argument and bring on the hearing thereof at the next stated term; and if cause be not shown to the contrary, the defendant is permitted to give the notice and bring on the hearing. The stated terms of the court are held on the first Tuesday of February, the third Tuesday of May, and the third Tuesday of October, annually. If the foregoing rules had been observed in taking the testimony the cause "could have been first tried" at the term of October, 1875. But it was not moved by either party, then, or afterward, although at least eight stated terms of the court intervened before the 31st day of May, 1878, when the petition for removal was filed. To hold that the application was in time would be to affirm that no term of the court of chancery had been reached during

these two and a half years, at which the cause could be tried under the legislation of the state and the rules of practice made pursuant thereto.

My attention has not been called to a case where the act has received construction, or where it has been necessary to give it a construction in this respect. But Judge Dillon, in his treatise on the Removal of Causes, p. 57, and more especially in Ames v. Colorado Cent. R. Co. [Case No. 325], strongly intimates that where under the local law and practice a case could have been finally heard at a stated term, a removal is not in time after the expiration of said term. Much support also is given to this view by the reasoning of Drummond, J., in Scott v. Clinton & S. R. Co. [Id. 12,527], in which the learned judge deplores the ambiguity of the language employed in the statute, but cites with approbation a decision of his own, that an application for removal comes too late where a term is suffered to elapse by consent of parties after the issue has been formed by the pleadings.

It is the judgment of the court that the petition for removal came too late, and the motion to remand the cause must prevail, and it is ordered accordingly.

FULTON (MARBLE v.). See Case No. 9,039.

FULTON (SCAIFE v.). See Case No. 12,426.

FULTON, The ROBERT. See Case No. 11,890.

Case No. 5,156.

In re FULTZ.

[1 MacA. Pat. Cas. 178.]

Circuit Court, District of Columbia. March, 1853.

APPEALS FROM COMMISSIONER OF PATENTS—REASONS OF APPEAL—EXCLUSION OF EVIDENCE—INVENTION.

[1. The provision in the act of 1839 (chapter 88, § 11, 5 Stat. 354), that appeals from the commissioner to the judge shall be heard "on the evidence produced before the commissioner," does not take away the appellant's right to assign, as a reason of appeal, that the commissioner refused to hear certain evidence offered; and the commissioner, in stating the grounds of his decision, is bound to answer such reason, and the judge to decide it. And the judge in so doing may order the taking of such evidence for the purpose of determining by examination its relevancy and materiality, and, if satisfied thereof, may order a new trial.]

[2. The unopposed oath of the inventor, though not of itself sufficient, is some evidence of the novelty, invention, and usefulness of the improvement. The rule of law is that a patent granted on such unopposed oath is prima facie evidence in an action for infringement.]

[3. But slight evidence of invention is required when it is shown in what the invention consists, and where proof is given of practical utility.]

[4. While a mere change in the relative size of parts in a machine is not invention, yet, if a new effect is shown to be produced by a change of proportion, this is more than a mere change, and may involve patentable invention.]

[This was an appeal by Hugh H. Fultz from the refusal of the commissioner of patents to grant him a patent for an alleged improvement in a horse-power for cotton gins and other agricultural appliances.]

Appeal from the decision of the commissioner finally rejecting the application for lack of patentable novelty. The purported invention related to horse-power for cotton gins and other agricultural appliances; and the question was presented whether a change in the form and proportions of a machine is the proper subject of a patent. Applicant's machine did not differ from existing machines in the nature, number, or arrangement of its parts, but it was contended that certain changes in the relative size of the various parts of the gearing tended to reduce the friction of the machine to an appreciable degree and thereby to increase its efficiency. A denial by the office that this result was in fact produced led to extended argument on both sides as to the mechanical principles involved. The applicant submitted a comparative statement of the amount of friction developed in the two machines, respectively, showing the advantages possessed by his own machine in that respect. The accuracy of the calculation was challenged, it being pointed out in particular that no account had been taken in the estimate, of the greater friction likely to be developed in applicant's machine owing to the increased rapidity of rotation. In effect, the office contended that the alleged invention was but a mere change in the form or proportion of the machine, not producing any new result further than is always produced when the proportions of gearing are adapted to the speed required for the particular mechanical operation. Pending the decision the applicant was permitted, on motion, to submit affidavits to show that his changes in the proportions of the machine in fact produced a useful result.

J. J. Greenough and M. Carlisle for appellant.

Examiners Renwick and Parker and Chief Clerk Weightman, for the Commissioner.

MORSELL, Circuit Judge. On the 1st of July, 1852, Hugh H. Fultz, of the state of Mississippi, applied to the commissioner of patents for letters-patent to be granted to him for a new and useful improvement in so proportioning the machinery as to produce the requisite speed and force concentrated upon the working-point to move a cotton gin, &c. On the 7th of July, 1852, the commissioner notified said Fultz that his said claim had been examined, and found to present nothing new and patentable, and referred him to several cases in which letters-patent for horse-powers had been granted having precisely the same arrangement of parts and from which

the machine under consideration differed only in the size and proportions of its wheels. The commissioner proceeds to state "that he was also referred to the fact, as established by the practice of the office and the decisions of the courts that a change in the relative size of the parts of an old machine for the purpose of obtaining a required velocity could not be made the subject of letters-patent." The specification was then withdrawn from the office, the claim was altered so as to read as it now stands in the specification, in which he states: "My improvement consists in so proportioning the machinery as to produce the requisite speed and force concentrated upon the working-point to move a cotton gin, &c., with the minimum power, by which I have been enabled to effect a saving of more than one-half of the power required for ordinary apparatus to gin cotton. By the construction, proportion, and arrangement I have a force equal to that expended upon the prime mover at the working-point, minus the friction, there being no loss of power by erroneous proportion of parts, as would be the case by any deviation from my formula." He then proceeds to give the particular construction of the machine, towards the end of which he says: "By this proportion of parts it will be found that one hundred pounds force upon the end of the lever will produce one hundred pounds force upon the pinion (L), minus the friction; and at the ordinary ascertained travel of a mule it will make over one hundred and fifty revolutions with that force per minute, or sixty revolutions of the band-shaft to one of the master wheel, equal to what is required to drive a gin. This equalizing the force at the driving and working-points is the important feature of my invention." The report of the commissioner proceeds to say: "This specification thus changed was returned to the office for consideration, with an argument by Mr. Fultz's attorney, (No. 3,) and some calculations (No. 4) by Mr. Fultz intended to demonstrate the superiority of his machine over those to which he was referred. The argument opens with the following remarks: 'From your postulate that all horse-powers throw upon the working-point all the power of the prime mover, less the friction, we beg leave to dissent. Friction is but a single element of loss, and a very minor one, in many horse-powers, between the prime mover and the working-point, by which the power is wasted; and it is the avoidance of these and other errors, as well as the diminution of friction, that we base the merits of this invention upon.'" The commissioner proceeds: "No effort was made in this argument to show what were the 'other elements of loss,' or the 'other errors' spoken of, or how such errors had been avoided; but a simple 'dissent' from the fact assumed by the office was stated upon the assumption of the 'easier running' of the machine in question." To that part of the letter which refers to legal authorities to prove that if the result of the improvement was a superiority in utility over all those to which he had referred them, or might thereafter refer them, that would entitle Fultz to a patent, the commissioner says: "Advantages, which the office after the most careful and repeated examinations have not been able to discover, should not only be set forth specifically and plainly by the applicant in his specification or argument, but be demonstrated and proved actually to exist before precedents and authorities be adduced to show that letters-patent could be based upon them; the calculations made by Fultz must fall, because he has omitted the most important element in them, viz., the number of revolutions in a given space of time; and the calculations themselves will be found to be filled with mistakes, and are based upon the fundamental error that the friction of moving machinery is dependent upon the amount of pressure put upon the wheels, without reference to the number of revolutions made by the wheels in a given space of time." This matter, the commissioner says, was discussed in brief, in official letter of July 13th, 1852, and was replied to by applicant on the 14th. (See letter No. 6.) In that letter the counsel for Fultz says "that his letter of the 9th instant, addressed to the patent office in the case of H. H. Fultz, Esq., has been misunderstood. In that letter it was distinctly intimated that friction was not the only element of loss of power in this case. If it was, and your axiom contained in your letter of July 13th is correct, no change in the construction of the parts of a machine for transmitting power from the motion to the working-point would make any difference or decrease the effect." To support the position, he says that the best authorities he has been able to consult on the subject of friction leave it an uncertain matter, and the best experiments show but an approximation to the truth in any practical machine. He refers to various authorities on the subject. Towards the close of the last authority cited by him, it is said "no conjectural calculation should be relied on when the real loss of power can be obtained by experiment."

The commissioner proceeds: "If, then, the number of revolutions performed in a certain specified time be a grand essential in all calculations concerning moving machinery, the calculations of Mr. Fultz are based upon an entirely erroneous assumption, as the element of time, or rather the number of revolutions made in a given time, is excluded from them; furthermore, this matter is not now involved in the uncertainty which the letter No. 6 would lead to suppose. The recent experiments made by the French Academy, and allowed by the best English authorities to warrant implicit confidence, &c., have set the matter at rest. A reference is

made to the 'Engineer and Machinist Assistant, Blackie & Son,' Glasgow, 1847, page 54." The commissioner further states: "Mr. Fultz has been referred to four-horse powers having precisely the same arrangement of wheels with his, and differing only in the relative size and proportions of the parts. This case comes clearly within the dictum of Judge Story, who says: 'It is not necessary to defeat the plaintiff's patent that a machine should have previously existed in every respect similar to his own, for a mere change of former proportions will not entitle a party to a patent,' (Woodcock v. Parker [Case No. 17,971,]) Mr. Fultz having entirely failed to demonstrate that his is anything more than a mere change of former proportions, or that any useful result has been produced by such change, other than is always produced when the relative proportions of gearing are adapted to the speed required for various mechanical operations."

The claim of Mr. Fultz being thus rejected, he notified the commissioner of his desire and intention to appeal, and filed in the office his reasons of appeal, five in number: 1. That the commissioner in his refusal to issue the patent gives no reason, but to the effect only that the application did not set forth such a case as would authorize the issuing of a patent, whereas the specification given and the model furnished in accordance with the acts of congress in such case made and provided set forth and demonstrated new and important results produced by a particular proportion of some of the mechanical powers in a mode and manner not before used or applied. 2. Reason is, in substance, the same with the first. 3. Because it was evident from the specifications and model aforesaid that in consequence of the particular size and mode of the application of the different parts of the machinery exhibited by said model that the improvement therein was new and useful in a high degree, producing results never before produced or attained. 4. Because the novelty claimed is the specific proportions of the machine, whereby a beneficial result is produced, and that result is due to the proportions of the machine. 5. The commissioner refused to receive additional proof of the new results claimed by the applicant as having been produced by his machine.

The commissioner, in more particularly stating the grounds of his decision touching the points involved by the reasons of appeal, says, in answer to the first and second reasons, that neither the specification nor the model set forth or demonstrate any new or important result produced by the particular proportions used, while the mode and manner in which the mechanical powers are used or applied are precisely similar to that found in the four machines referred to. It is not evident that the improvements produced new and important and useful results. To the third, the oath of the applicant is but one of the requisites which must be complied with before letters-patent can issue, and it is of no force except as a test of the honesty of the belief of the applicant as regards the novelty of the alleged invention. To the fourth, the applicant has failed to demonstrate that any beneficial result has been produced, and therefore the change of proportion is clearly not patentable. To the fifth, reference is made to letters S and 9, from which it will appear that the applicant was informed that the office was at all times ready to receive any evidence which he might see fit to offer, though it could not encourage him to offer any further evidence with a view to a reconsideration of the case.

After which the party (Hugh H. Fultz) presented to me his petition for an appeal, stating in substance his previous application for a patent, the grounds of it, and the refusal of the commissioner to grant the patent; also that he was willing and very desirous of offering the testimony of highly respectable gentlemen, who had seen his machine in operation, in further corroboration of the new results produced by his said machine. Yet the said commissioner refused to receive the same, and rejected his application for a patent; of all which due notice was given to the commissioner, and of the time and place appointed by me for the trial, at which time and place the petitioner, by Mr. Greenough, his counsel, and Mr. Weightman, chief clerk in the office of patents, and Mr. Renwick, the examiner, attended; and it appearing that from sickness the report had not been prepared, the trial for that cause was postponed from time to time until the 22d of September, when the petitioner, by his counsel (Mr. Carlisle) and an examiner on the part of the office, appeared with the report of the commissioner and original papers and models; and after the reading said report, on the motion of the petitioner's counsel and affidavit to show the commissioner's refusal to receive evidence on the part of Fultz, an order was made by me authorizing the said Fultz to take and file in this appeal the testimony of witnesses to prove the novelty of the results produced by his alleged invention, and the utility thereof, such evidence to be taken before any justice of the peace duly authenticated as such, and to be filed, &c., saving the question of its admissibility to the final decision; under which order sundry depositions of witnesses were duly and, from what appears, fairly taken, and have been filed with me; and on notice given to the commissioner of the party's offer to use the same on the trial of this appeal, the commissioner addressed the following note to me, dated the 16th of February, 1853: "Sir: Your note of the 14th instant, in regard to the hearing of the appeal of H. H. Fultz on Monday next, has been received. In this note you state that it is proposed to take additional testimony. This office would beg leave to call your attention to the following words in the act of March 3d, 1849: 'On the evidence produced before the

commissioner,' and also to the orders in appeals made by you, '(3) the appeal will be tried upon the evidence which was in the case and produced before the commissioner.' "

The rule alluded to was intended to be in accordance with the provisions contained in the statute of congress of the 3d of March, 1839, c. 88, § 11 [supra], the proper construction of which will be an answer to the objection made by the office to the admissibility of the testimony which has been offered on this occasion. It provides "that in cases where an appeal is now allowed by law from the decision of the commissioner of patents to a board of examiners provided for in the seventh section of the act to which this is additional, the party, instead thereof, shall have a right to appeal to the chief justice of the district court of the United States for the District of Columbia, by giving notice thereof to the commissioner and filing in the patent office, within such time as the commissioner shall appoint, his reasons of appeal specifically set forth in writing, and also paying into the patent office to the credit of the patent fund the sum of twenty-five dollars. And it shall be the duty of the said chief justice, on petition, to hear and determine all such appeals, and to revise such decisions in a summary way, on the evidence produced before the commissioner, at such early and convenient time as he may appoint, first notifying the commissioner of the time and place of hearing, whose duty it shall be to give notice thereof to all parties who appear to be interested therein, in such manner as said judge shall prescribe. The commissioner shall also lay before the said judge all the original papers and evidence in the case, together with the grounds of his decision fully set forth in writing, touching all the points involved by the reasons of appeal, to which the revision shall be confined." The twelfth section provides for the taking of evidence—"that the commissioner of patents shall have power to make all such regulations in respect to the taking of evidence to be used in contesting cases before him as may be just and reasonable. And so much of the act to which this is additional as provides for a board of examiners is hereby repealed." Those parts of the act of 1836 [5 Stat. 117] not repealed by the law which I have just recited, and which relate to the question which I am now considering, are to be found in the seventh and eighth sections.

The seventh section, in effect, provides that on the presentation of an application for a patent, it shall be granted on the party's oath required to be previously made, unless on examination by the commissioner it should appear to him, first, that the applicant was not the original and first inventor or discoverer thereof; or, second, that any part of that which is claimed as new had before been invented, or discovered, or patented, or described in any printed publication in this or any foreign country as aforesaid; or, third, that the description is defective or insufficient, in which case he shall notify the party, giving him briefly such information and references as may be useful in judging of the propriety of renewing his application, &c. But if the applicant shall persist in his claim for a patent, &c., he may, on appeal and upon request in writing, have the decision of a board of examiners, to be composed, &c. "Said board shall be furnished with a certificate in writing of the opinion and decision of the commissioner, stating the particular grounds of his objection and the part or parts of the invention which he considers as not entitled to be patented; and the said board shall give reasonable notice to the applicant as well as to the commissioner of the time and place of their meeting, that they may have an opportunity of furnishing them with such facts and evidence as they may deem necessary to a just decision. And it shall be the duty of the commissioner to furnish to the board of examiners such information as he may possess, relative to the matter under their consideration; and on examination and consideration of the matter by such board, it shall be in their power, or a majority of them, to reverse the decision of the commissioner either in whole or in part," &c.

The eighth section makes a similar provision for an appeal in the case of interfering applications, thus: "Whenever an application shall be made for a patent which, in the opinion of the commissioner, would interfere with any other patent for which an application may be pending, or with any unexpired patent which shall have been granted, it shall be the duty of the commissioner to give notice thereof to such applicants or patentees, as the case may be; and if either shall be dissatisfied with the decision of the commissioner on the question of priority of right or invention, on a hearing thereof he may appeal from such decision on the like terms and conditions as are provided in the preceding section of this act. And the like proceedings shall be had to determine which, or whether either, of the applicants is entitled to receive a patent as prayed for."

Thus it appears that two classes of cases are provided for in the sections of the act of 1836 just recited—the one where there is no opposing party, and the other where there are interfering applications. In each case the applicant has a right equally to reasonable notice of the decision of the commissioner, in order to prepare to support his claim and to be heard upon the evidence or facts deemed necessary by him or them to a just decision thereof. I can perceive nothing in the repealing act of 1839 which takes away or impairs that right; on the contrary, every reason to infer that it was intended to be saved and secured to the fullest extent. The act, it is true, abolishes the particular tribunal, but it substitutes the chief judge of

the district court of the United States for the District of Columbia in place thereof. The difficulty arises out of that part of the section which says "that the said chief justice shall hear and determine all such appeals, and revise such decisions in a summary way 'on the evidence produced before the commissioner;'" but rather than to conclude that there has been a casus omissus, every reasonable endeavor must be used to reconcile the apparent conflict in the different parts of the same statute. If, then, I have shown (as I think I have done) that the party equally in both classes of cases is still entitled to be heard upon the facts and evidence of his case, and the restrictive part of the eleventh section confines the judge, in trying the merits of the case, to such evidence as was produced before the commissioner, it follows that it is his duty, in a case like the present, to pursue, by reasonable regulations similar to those directed by the twelfth section, such a course as to afford an opportunity to the party to produce and lay before him on the trial his proofs to support his claim. If, then, the law be as I have stated it, the party has a right to insist, before the commissioner on the trial, on this privilege; and in offering competent and material evidence, if it is refused, or if his objection to inadmissible or incompetent testimony is overruled by the commissioner, he has a right to assign that as a reason of appeal; and the commissioner, in stating the grounds of his decision, is bound fully to answer such reason and the judge to decide it on appeal and afford relief, although the rule be as I have stated it when trying the cause upon its merits. In deciding upon such a reason of appeal, the judge must be satisfied of the relevancy, materiality, and competency of the testimony offered and refused, which he could not be satisfied of in the present case without permitting the ex-parte depositions to be taken and offered. There is no reason to believe that they have been unfairly taken. I will now proceed to consider the materiality and applicability of the evidence contained in the various depositions produced and offered.

The deposition of Thomas E. Warner (marked "J. S. M., No. 1") says he is a machinist. When in Washington, D. C., July, 1852, he examined Mr. H. H. Fultz's plan of a horse-power for driving cotton-gins or other machinery; that he believes it a very useful and important improvement in horse-power, requiring, in the first place, less power to set it in motion; second, it is more compact, easier to manage, and more durable in every respect, than any horse-power that has ever come to his knowledge. This appears to be taken before Wm. H. Sparks, commissioner of deeds, 31st December, 1852. The paper marked "J. S. M., 2," is the opinion of an expert and is an examination of the calculations made by Fultz. It was filed in the case at the time of the trial before the commissioner: "Judging from the model and diagrams before me, (the same filed in this case before the commissioner,) Fultz's machine combines correct proportions in the various parts constituting the whole machine. These parts again have the exact proportion for the purpose for which they were put together, performing the work intended with a great saving of power without additional transfer fixtures." He subjoins calculations by which a result is shown decidedly in favor of Fultz's improved machine over those of Emmerson, Fitzgerald, and Whipple. Maddison McAfee (J. S. M., 3) says that "he is familiar with the old mode now in use of propelling gins; that he has seen and examined the above-named power, (commonly called Fultz's propeller,) and is satisfied that it is decidedly superior to any power he has ever known for propelling gins, and, being a planter, has himself purchased one; and from the repeated and anxious inquiries by the farmers, and the expressed wishes to obtain one, he believes it will entirely supersede all others." William A. Purdom says "that he is familiar with the old mode now in use of propelling gins; that he has seen the power above named (Fultz's) in successful operation, and with two very ordinary mules it did the work which, with the old gearing, invariably required at least four good mules or horses; that deponent believes it to be the most useful invention of the kind that has ever been made, and from the repeated and anxious inquiries among the farmers and their expressed wishes to procure one, he believes that it will supersede all others." John M. West, James Simmes, Samuel Gibbons, R. A. Anderson, Wellington Jenkins, D. C. Sharpe, and forty-one other persons depose to substantially the same effect. There can be no doubt that the testimony stated in the aforegoing depositions would have been most material, if admissible and applicable, on the trial before the commissioner.

I have already stated the specifications, and the grounds of the commissioner's decision in answer to the reasons of appeal, one of which states that the letter (9) in answer to the application contained in appellant's letter (8) shows that the office was at all times ready to receive any evidence which he might see fit to offer, "though it could not encourage him to offer any further evidence with a view to a reconsideration of the case." If such an intimation can be understood as giving permission to offer his evidence for the purpose of a rehearing of the case thereon, it would seem from his affidavit that Fultz entirely misunderstood it.

With respect to the principles of mechanical philosophy stated by the commissioner, and which have been the ruling influence in his decision, the counsel for Fultz, in his argument, urged what he had before contended for, "that friction was not the only element of loss of power in the question before the commissioner before whom the arguments

were made; that the best authorities on that subject leave it an uncertain matter, and the best experiments show but an approximation to the truth in any practical machine, while, upon the experiments of learned professors, under similar circumstances, the weight that overcame the friction was found to be nearly the same at all velocities," &c. Again, that "no conjectural calculation should be relied on when the real loss of power can be obtained by experiment;" that Mr. Fultz had tried practically, by actual experiment, the advantages of his machine over others, and found them to coincide essentially with his calculations," &c. The argument before me on the same point insists on the principle of the "loss of power by the indirect application of the force from the prime mover to the working point, and the loss very frequently resulting, as in this case, from the previous erroneous proportions of the machinery." This loss, counsel argues, has been saved by Fultz's improvement, and is the advantage over all the other machines referred to. And so with respect to the commissioner's objection to Fultz's calculations, because of his disregard of the time and number of the revolutions, he says that the fact is otherwise; that the assumption throughout those calculations was a given number of revolutions of the master-wheel, equal in all, which must necessarily be restricted to the speed at which the animal can walk. These are constant quantities, and need not therefore be brought into the account.

In connection with these arguments I think it would be proper to restate a part of Fultz's description, which may be taken as a part of the specification, to wit: "By this proportion of parts it will be found that one hundred pounds force upon the end of the lever will produce one hundred pounds force upon the pinion (F), minus the friction, and at the ordinary ascertained travel of a mule it will make over one hundred and fifty revolutions with that force per minute, or sixty revolutions of the band-shaft to one of the master-wheel, equal to what is required to drive a gin. This equalizing the force at the driving and working points is the important feature of my invention." This, in connection with the specifications, is intended to show a new proportion and arrangement of the parts between the driving and working points, which saves the loss of power over the horse-power referred to.

However forcibly I may feel myself affected by the aforegoing arguments, I wish it to be understood that it is very far from my purpose in this investigation to question the truth of the principles of mechanical philosophy stated by the commissioner and examiners, or to call in question the principle as settled by the officer and the courts, "that a mere change in the relative size of the parts of an old machine for the purpose of obtaining a required velocity is not patentable."

With respect to the party's own oath in the present case it is unopposed by the oath of any other party, and although not of itself sufficient, is some evidence of the novelty, invention and usefulness of the improvement. The rule of law is, that a patent issuing, grounded on the oath of the patentee, under such circumstances, will be considered as prima-facie evidence in an action for an infringement of a patent-right. And this brings me to the consideration of the answer of the commissioner to the fourth reason of appeal, in which he says: "It is only necessary to state that as the applicant has failed to demonstrate that any beneficial result has been produced, and as therefore the change of proportions is clearly not patentable, the action of the commissioner was fully in accordance with the decisions of the courts." What, therefore, are the decisions of the courts in like cases? But slight evidence of the invention is required when it is shown in what the invention consists, as has been done in this case, and where proof is given of its practical utility. This is a main and principal test, and this may be shown by the testimony of those who have seen the practical effect or result. To this point the proof offered by the appellant was very full and ample. It appears to me that the argument and authorities presented by the counsel for the appellant are conclusive.

Chief Justice Marshall, in the case of Davis v. Palmer [Case No. 3,645], says: "It is not every change of form and proportion which is declared to be no discovery, but that which is simply a change of form or proportion, and nothing more. If by changing the form and proportion a new effect is produced, there is not simply a change of form and proportion but a change of principle also." Curtis (sections 14 and 15): "It appears, then, according to the English authorities, that the amount of invention may be estimated from the result, although not capable of being directly estimated on a view of the invention itself." "The utility of the change is the best to be applied for this purpose," &c. "When a real utility is seen to exist, a sufficiency of invention may be presumed, and it is said that whenever utility is proved to exist in a very great degree, a sufficiency of invention to support a patent must be presumed." Webster, Subject-Matter, p. 30; Webst. Pat. Cas. 71. Curtis (section 95): "The statute also makes a new and useful improvement of a machine the subject of a patent. A patent for improvement of a machine is the same thing as a patent for an improved machine. Improvement applied to machinery is where a specific machine already exists, and an addition or alteration is made to produce the same effects in better manner, or some new combinations are added to produce new effects. In such cases the patent can only be for the improvement or new combination. The great question, of course, when an alleged invention

purports to be an improvement of an existing machine, is to ascertain whether it be a real and material improvement or only a change of form. In such cases it is necessary to ascertain, with as much accuracy as the nature of such inquiries admits, the boundaries between what was known and used before, and what is new in the mode of operation. The inquiry, therefore, must be, not whether the same elements of motion, or the same component parts, are used, but whether the given effect is produced substantially by the same mode of operation and the same combination of powers in both machines, or whether some new element, combination, or feature has been added to the old machine, which produces either the same effect in a cheaper or more expeditious manner, or an entirely new effect, or an effect that is in some material respects superior, though in other respects similar, to that produced by the old machine."

Upon the whole, I think a new trial ought to be granted.

FUNK (SWARTZ v.). See Case No. 13,678.

Case No. 5,157.

In re FUNKENSTEIN et al.

[1 Pac. Law Rep. 11.]

District Court, D. California. Nov. 8, 1870.

BANKRUPTCY — COMPETENCY OF AN ASSIGNEE — FITNESS OF NOMINEE—THE LAW APPLICABLE.

[The discretion reserved to the court by the act of 1867 (14 Stat. 517) to approve or disapprove the creditors' election of an assignee is a legal discretion, and disapproval of an assignee elected by the great majority both in number and amount of creditors can only be warranted by the fact that the nominee is commercially dishonest, and has such a reputation in the commercial community; nor should the court take such action upon mere rumors, which, upon investigation, cannot be traced to any facts justifying them.]

[In bankruptcy. In the matter of J. Funkenstein & Co. Report of register.]

By Asher B. Bates, Register:

To Hon. Ogden Hoffman, District Judge: Pursuant to the order entered in this case on the 20th of October, A. D. 1870, I have taken the proofs offered in relation to the competency and fitness of E. Suskind to serve as assignee, and also the testimony presented by E. Suskind, to establish his good reputation and in rebuttal of the testimony introduced by the opposing creditors, and the same as herewith reported to the court. Before the examination took place, the counsel for the opposing creditors declared that it was their purpose to withdraw all opposition to A. Morris, the other person nominated as assignee, and that they admitted that E. Suskind was competent to act, being a man of commercial experience and pecuniary responsibility, and that they only desired to take testimony as to his fitness for the place to which he had been nominated. Preliminary to announcing my opinion upon the testimony taken, I deem it proper to state certain facts and principles, that have controlled me in the conclusions I shall announce.

First. The bankrupt act provides that a majority in amount and number of the creditors shall have the privilege of nominating and electing an assignee to take charge of the bankrupt's estate.

Second. It also reserves to the court the power of approval or disapproval of the nomination or election.

Third. It grants to the court the power to require of the assignee, when appointed, to give good and sufficient bonds for the faithful and honest discharge of the trust confided to him.

It was clearly the intention of congress, in granting to the creditors the privilege of nominating and electing assignees, that they should directly participate in the administration of bankrupt estates, and there is good reason why the bankrupt act should contain the provisions which I have stated. The creditors are alone interested in the distribution of the estate, and it is to be supposed that creditors having pecuniary interests will carefully canvass and inquire into the qualifications of the assignee, to whom they recommend the estate to be entrusted; they are supposed to be commercial men, intimately acquainted with the affair of the bankrupts, and the qualifications essential and proper to fit a man to act as their trustee; and unless good and strong reasons are presented to the court, it seems to me, that the opinion of the creditors representing a large majority in amount and number of the parties interested, is entitled to great weight in determining who is the proper person to administer the estate, in which they are interested. It is conceded that creditors may be ignorant or misled as to their rights, and when it is apparent to the court that they have acted under a mistake as to the law, and in ignorance of grave charges, that can be sustained against the person they have nominated, it would clearly be the duty of the court to disapprove of their nomination, if such facts should be made apparent, and refer the matter back again to the creditors for a new election, stating the reasons that controlled the court in disapproving of their prior decision; but until the court has before it clear and positive evidence that the parties nominated are commercially dishonest or disreputable in the commercial community, it seems to me it would be my duty to recommend their approval. In this case, a prolonged and earnest investigation has taken place as to the fitness of Mr. Suskind to discharge the duties of assignee, and the most liberal scope has been granted to the opposing creditors to introduce testimony to show that he is commercially dishonest, and has a bad reputation in the commercial community. It is apparent from the testimony

as recorded, that there have been rumors afloat in some way affecting his reputation, but when they have been traced to their source, as far as it has been possible, in the opinion of the register they have been based upon no sufficient foundation; as far as they have been traced to their origin it is to be inferred that they grew out of litigations that transpired some years since, in which there were many parties interested, and some of them defeated. No facts were elicited showing commercial dishonesty, and the opinions that were given by the witnesses as to his character appear to have been based upon some indefinite rumor, without the witnesses being able to state any good and sufficient reasons for their believing the rumors to be true. If Mr. Suskind is commercially dishonest or disreputable, the presumption is that facts could be produced to establish such a reputation. It seems to the register, it would be grossly unjust on his part to recommend to the court to disapprove of the nomination made in this case upon mere rumors. All men in actual business have their enemies, and if a man's character for commercial honesty and integrity is to be destroyed or injured by the simple declaration that he is unfit to discharge the trust, it would be difficult to find a man, who by experience and business habits is fitted for the place, who could not be successfully attacked. Even the very best men in the community are liable to be spoken evil of, and it appears to the register that facts should be presented to guide the court in determining as to the fitness of any candidate presented, and that it should not be expected that the court would allow itself to be influenced in the least by mere public scandal. Upon a review of all the testimony in this case, the register is of the opinion that Mr. Suskind is fit to discharge the duties for which a majority in amount and number of the creditors have recommended him.

It was contended before me that the discretion vested in the court of approving or disapproving of an assignee was an arbitrary discretion, and it was not incumbent upon the court to give any reason, should it deem it proper, to disapprove of a nomination. I could not justify myself in recommending to the court to disapprove the nomination made in this case, unless I was able to state specific facts that justified me in so doing. In my opinion, the discretion invested in the court is a legal discretion, one that must be controlled, not by caprice, prejudice, partiality, likes or dislikes, or any other reason than the fact that the candidate is commercially dishonest, and has such a reputation in the commercial community, with whom he associates. Such being my opinion as to my own duty, I have come to the conclusions which I have stated; besides the bankrupt act, as I have already stated, provides for the protection of the minority, in granting to the court the power to require bonds of the assignee. In case I am mistaken in the opinion I have announced as to the fitness of Mr. Suskind to discharge his duty, the minority of the creditors, who have opposed his nomination, can be secured and protected in all of their rights by asking the court to require him to give good and sufficient bonds, for the honest and faithful discharge of the trust.

* * * * * *

It is claimed that Mr. Suskind is a candidate of the bankrupts, but there is no proof to sustain the allegation that he is in any way in collusion with them. He has heretofore been frequently in their company, and been on intimate terms with them, but he is a creditor without security, to a large amount, and the presumption is, that his interest would prompt him to be faithful in gathering in the estate, that his dividend might be increased. There is no evidence to show that he in any improper way sought for the nomination, or that the bankrupts were controlled in recommending him to one or two of the creditors to vote for him, by any other motive than a desire that their estate should pay the largest dividend practicable. I have no doubt that the opposing creditors were controlled by correct motives, and believed in the commencement of the investigation, and anticipated that they would be enabled to show that Mr. Suskind was commercially dishonest, and had such a general reputation among commercial men. I deem it proper to make this statement, that it may not be inferred that the opposition in this case was factious, or induced by a desire on the part of any one to acquire an unjust advantage of other creditors.

Case No. 5,158.

In re FUNKENSTEIN.

[3 Sawy. 605;[1] 14 N. B. R. 213; 8 Chi. Leg. News, 345; 3 Cent. Law J. 448; 3 N. Y. Wkly. Dig. 92.]

District Court, D. California. April 18, 1876.

PETITIONING CREDITORS—REQUISITE NUMBER AND AMOUNT.

The judgment of the court that the requisite number and amount of creditors have petitioned is final, and the matters so adjudged are not thereafter re-examinable, except in cases of fraud and imposition practiced on the court.

[Cited in Re Lalor, Case No. 8,001; Re Meade, Id. 9,370.]

In bankruptcy.

Joseph Naphtaly, for petitioning creditors.

David Freidenrich, for opposing creditors.

HOFFMAN, District Judge. The petition against the bankrupt in this case was filed on the ninth of April, 1875. It contained the usual averment that the petitioners constituted one-fourth in number of the creditors of

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

the bankrupt, and that the aggregate of their debts, provable under the act [of 1867 (14 Stat. 517)], amounted to at least one-third of the debts so provable.

On the return day of the order to show cause the bankrupt made default and he was adjudged bankrupt. The order was in the form prescribed by the supreme court under the original act. It was not modified to accommodate it to the provisions of the amended act of June 22, 1874 [18 Stat. 178]. With respect to the allegations of the petition the court adjudged "that the facts set forth in the petition were true."

On the twenty-ninth of April the bankrupt filed his duly verified schedules, setting forth his debts and liabilities. On the twenty-first day of May, 1875, the bankrupt filed his petition for discharge. This was opposed by several of his creditors, who also moved that the adjudication be set aside, and the proceedings vacated and dismissed, on the ground that the requisite number of creditors had not joined in the petition, and the debts due them were not of the amount required by the act. The matter was referred to the register, whose report is admitted to be true. It appears that the petition was signed by seven creditors, representing in the aggregate $4,292 of indebtedness.

By the bankrupts' own schedules it appeared that the number of his creditors whose claims are undisputed are thirty-eight, and the aggregate of the indebtedness due them is $115,062.76. These schedules were offered in evidence before the register and their accuracy admitted. It thus appears that the petitioning creditors constitute less than a fifth in number of all the creditors, and the debts due them amount to less than a twentieth of the total indebtedness of the bankrupt. Had these facts appeared on the return day of the rule to show cause the petition would have been dismissed as of course.

The question presented is, can the court now take notice of them, and if so, what action should be taken. The statute provides that if on the return day the debtor "shall admit in writing that the requisite number and amount of creditors have petitioned the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject." And if it shall appear that such number and amount have not so petitioned, the court shall grant a reasonable time not exceeding ten days within which other creditors may join in such "petition." If, at the expiration of that time, the requirements of the statute are complied with, the matter may proceed. If not, it is to be dismissed.

It will be observed that these provisions contemplate two cases. The first where the debtor admits in writing the allegations of the petition with regard to the number and amount of creditors, and the second where those allegations are denied. No provision is made for cases where the debtor neither admits nor denies, but merely makes default. In the first case the court is required, if satisfied that the admission was made in good faith, to so adjudge, which judgment is final. In the succeeding section the provisions seem to embrace cases of default as well as those where the bankrupt admits the facts. It enacts in substance that if on the return day of the order to show cause the court shall be satisfied that the requirement of the act as to the number and amount of creditors has been complied with, or if within the prescribed time creditors sufficient to make up the required number and amount shall sign the petition, the court shall so adjudge, "which judgment shall be final."

It will be noticed that the form of the adjudication in the case at bar very imperfectly complies with these requirements. The act seems to contemplate a distinct and explicit judicial finding of the fact that the requisite number and amount of creditors have petitioned. And the judgment of the court on that point is made final. The form used merely finds that the allegations of the petition are true. This form, as before stated, is prescribed by the supreme court. It has not been modified since the passage of the amended act. The propriety of inserting the more explicit judgment which the act seems to contemplate has been overlooked. But I do not consider that this irregularity is fatal to the proceeding. The judgment of the court that the allegations of the petition are true, embraces all the allegations of the petition, as well those relating to the number and amount of the petitioning creditors as the other necessary averments. The court has in fact passed upon the truth of those allegations as much as on that of the allegations of the residence of the plaintiff, and the date and existence of the act of bankruptcy, which are also facts necessary either to give the court jurisdiction or to authorize the proceeding. The mere circumstance that its judgment has not been so explicit on one point as the act would seem to contemplate ought not to defeat the proceeding. The inconvenience and hardship of so holding would be very great, for the same form has been followed in all cases of involuntary bankruptcy in this district, and it is presumed in many others. The clerks have no doubt very generally contented themselves with following the forms prescribed by the supreme court.

The briefs of counsel in the case at bar discuss the question whether the averment with regard to the number and amount of creditors is a jurisdictional averment. On this point the opinions of the district judges are conflicting. The learned judge of the district court for the Eastern district of Michigan, holds that to give the court jurisdiction, the petition must contain a clear, consistent and explicit allegation as to the proportionate number of creditors petition-

ing, and the amount of debts represented by them. For the want of such an allegation he vacated the order to show cause, and refused to allow an amendment. In re Rosenfields [Case No. 12,061].

In Ex parte Jewett [Id. 7,303], Lowell, J., the learned judge for the district of Massachusetts, held that the insertion of the name of one of the creditors instead of that of the debtor, by a clerical mistake, did not vitiate a proceeding under the act to effect a composition, and that notwithstanding the error there was "a case in bankruptcy pending against the debtor." In this case there had been no adjudication. The views of Lowell, J., were adopted by the learned judge of the Southern district of New York, in the recent case of In re Duncan [Cases Nos. 4,131, 4,132, and 4,133], where the point raised in the case at bar was distinctly adjudged. In the two previous cases the point upon which the judges differed was whether it was necessary, in order to give jurisdiction, that the petition should contain a clear, explicit, and consistent allegation that the requisite number and amount of creditors had joined in the petition.

In the case at bar as in that of In re Duncan the petition contains the requisite allegation, and the question really is, can the inquiry as to whether that allegation be true be reopened after the court has, on the return day of the rule to show cause, adjudged that it is? Blatchford, J., held that the provision of the statute, which declares that the judgment of the court on the point shall be final, forbids the reopening of the question at any subsequent stage of the proceeding, unless fraud be alleged and proved. His language is: "Unless this be so, there is no necessary limit to the number of times the court may be required to re-examine the question thus declared to be finally adjudged. I speak now of an allegation merely that the court has erred, and not of an allegation of fraud or bad faith."

In these views I concur. I think the finalty, attributed by the act to the judgment of the court, does not mean merely that no appeal shall lie from its judgment, but that the matters so adjudged shall not be thereafter re-examinable even by itself. But I do not consider that congress meant to deprive the court of its inherent right, where fraud and imposition have been practiced upon it, to apply the remedy. The ground upon which the present motion is based is merely the insufficiency in number and amount of the petitioning creditors. In the brief of counsel fraud and bad faith are charged. There is certainly much color for this accusation. The gross disparity between the aggregate of provable debts due the petitioning creditors, and the total amount of the bankrupt's indebtedness, vehemently suggests the suspicion that both parties must have known that the allegation that they represented one-third of his entire indebtedness was untrue. The creditors could have been at little pains to ascertain the facts if they supposed $4,292 to be one-third of an indebtedness which twenty days subsequently to the filing of the petition the bankrupt stated under oath to be $115,062 76.

For some reason the opposing creditors failed to prove their debts before the election of an assignee. The assignee was therefore chosen by the petitioning creditors. He reports that no assets whatever have come into his possession.

The counsel for the petitioning creditors intimate in their brief that the object of the opposing creditors in procuring the adjudication to be set aside, is to obtain the benefit of certain judgment liens on the real estate of the bankrupt. But if so, why has the assignee failed to find the real estate? and why have they failed to point out to the assignee of their own selection assets which it is his duty to collect and distribute amongst all the creditors? The bankrupt, about two years ago, was adjudged bankrupt, but denied his discharge. The debts set forth in his schedule seem to have been contracted since the former adjudication. He claims that the debts from which he then sought to be discharged are barred by the statute of limitations. Under all the circumstances, I think it proper that the opposing creditors should have an opportunity to allege and prove, if they can, fraud, bad faith or collusion in obtaining the adjudication.

I therefore deny the motion as it is now made, but leave is given to renew it on the ground of fraud, bad faith or collusion.

FUNKHOUSER (UNITED STATES v.). See Case No. 15,177.

FURBER (POSTMASTER GENERAL v.). See Case No. 11,308.

Case No. 5,159.

In re FURBISH.

[2 Hask. 120.] [1]

District Court, D. Maine. Dec., 1876.

BANKRUPTCY—COMPROMISE BY ASSIGNEE.

An assignee in bankruptcy, jointly interested with others in certain judgments for a lien upon a building, is allowed to compromise his claim upon receiving a pro rata share, and not otherwise.

In bankruptcy. Petition by Seth M. Carter, the assignee, to compromise a lien claim upon a building in which he has a part interest.

Seth M. Carter, pro se.

FOX, District Judge. This is a petition by the assignee in bankruptcy to compound certain demands held by E. S. Coe, as surviving partner of S. R. Bearce & Co., and of

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

R. C. Pingree & Co., against the bankrupt's estate, the whole amounting to about $15,000, and also for authority to release any rights in certain collateral securities held by him.

The facts upon which the petition is based, I find to be, substantially, as follows: In July, 1873, [Albert B.] Furbish was a copartner with one Swett, engaged in business as contractors for erection of buildings. The firm entered into an agreement with the Catholic priest at Biddeford to erect in that place a large and expensive church, on a lot of land, the title to which was in the name of Bishop Bacon. This building contract was subsequently modified by a new contract in June, 1874, between Furbish alone and the priest.

Large expenditures were incurred by Swett & Furbish in the erection of this church; but it was not completed by them, and still remains in an unfinished state. The firm of Swett & Furbish was dissolved in 1874, and Furbish secured from Swett an assignment of all his interest in the copartnership affairs, and in October, 1874, Furbish assigned to Coe and R. C. Pingree & Co. his interest in the claims against the priest under their contracts as security for what he owed these parties, they agreeing to account to him for any surplus they might recover beyond their claims.

Writs were instituted against the priest in the name of Swett & Furbish, and of Furbish, in order to enforce an alleged builder's lien on the property, and the proper attachments and returns were made. The building was also attached as the personal property of the priest. These suits were referred to Chief Justice Appleton, who awarded as damages in the suit of Swett & Furbish $18,535; and in that of Furbish $1,089.09, with costs of each suit.

Before these suits were instituted, the Savings Bank in Saco and Biddeford had loaned some $20,000 upon the property, receiving as security a warranty deed of the property from Bishop Bacon; but giving him a writing at the same time, not under seal, to reconvey the estate on being paid its advances and interest. It is understood that the interest has been punctually paid. This loan was made, to aid in construction of the building, with the assent of Furbish, and he received the full amount. Bishop Bacon did not in any way render himself personally accountable for the amount of the loan. After his decease and the appointment of his successor, Bishop Healey, various interviews took place between him and Furbish relative to this church, and also some correspondence; and it is claimed that Bishop Healey became personally accountable to Furbish for the payment of the awards of Chief Justice Appleton, which is strenuously denied by the bishop.

The priest is understood to be entirely without means; and the only hope of payment of these awards is either by an enforcement of the statutory lien on the building, and by sustaining it as against the mortgage to the bank, or by collecting the same from Bishop Healey. Claiming to act in behalf of the parish at Biddeford, Bishop Healey is ready to aid in accomplishing an adjustment of the awards at a considerable discount, if the parties can be authorized to do so, which is the purpose of the present petition; and it is suggested that the court, in consideration of a nominal sum, should authorize the assignee to release to Coe, and Pingree & Co. all claim to any interest in the judgments recovered against the priest, and permit them to make any settlement they see fit.

It does not appear to me that the court ought to sanction such an arrangement, and for the reason that the estate in bankruptcy will derive no benefit therefrom. As these parties now stand upon their assignment, they are bound to enforce their claims against the priest, and account to the assignee in bankruptcy for any surplus they may obtain, beyond their demands against Furbish. If the whole of the judgments should be collected there would be more than $5,000 coming to the estate in bankruptcy for the benefit of creditors. Whether this full amount will be realized is subject to the uncertainties of litigation; and it may well be conceded that the claims as presented before me are involved in more than the ordinary perplexities of legal contingencies, so that the court can not see with absolute certainty that a successful issue will be the result.

The rights of both parties are each subject to this uncertainty, and the object of this petition is to avoid it by a compromise to be affected with the priest or Bishop Healey, by which a very considerable amount will be realized. It is for the common benefit of both parties thus to adjust these claims, provided the assignee's rights are duly regarded; and being so, it would seem that loss, which must result from this settlement, should be at the joint expense and burden of all interested, and should be borne in the same ratio by them that they would have divided the gain, if the whole of the judgments were to be eventually collected by legal proceedings for that purpose; otherwise, the advantage from this adjustment and compromise is wholly one-sided. Coe, and Pingree & Co. get all, surrender nothing, and the assignee utterly relinquishes, without any return, the chance which he now has of securing $5,000 if the demands can be collected.

It is asking altogether too much to require the assignee to surrender this possibility without an equivalent; and in the opinion of the court, Coe, and Pingree & Co., to secure adjustment and compromise, without rendering themselves responsible to the assignee, ought, and can well afford to make

a fair division with him of whatever sum they may choose to accept in satisfaction of the judgment against the priest. The court, therefore, will sanction any adjustment by which these judgments will be discharged, upon a compromise, provided Coe, and Pingree & Co. enter into an agreement with the assignee that the amount received by them on such compromise shall be divided and apportioned between the assignee and Coe, and Pingree & Co. pro rata, according to their present respective interests in said judgments, in the same ratio they would be entitled to the whole amount of the judgments if they had been fully paid, less the cost of obtaining the same. If this is not acceptable to Coe, and Pingree & Co., this petition is denied, and each party will stand upon their respective legal rights under the assignment.

Case No. 5,160.

FURBISH v. SEARS.

[2 Cliff. 454.] [1]

Circuit Court, D. Massachusetts. May Term, 1865.

MORTGAGES—PURPOSE OF THE SECURITY — POWER TO SELL—FORECLOSURE.

1. Where a mortgage for the security of certain payments, as well as for the performance of a certain specified agreement, further provided that it should also become security for the performance of a certain other agreement, if the mortgagor should elect to perform the second agreement, *held*, that after election and notice by the mortgagor, such mortgage became security for the performance of the second agreement, as effectually as if the same had been set forth in the mortgage.

2. By the conditions of the mortgage, it was stipulated "that on nonpayment of certain instalments, the mortgagee was authorized to sell the mortgaged property at auction, giving thirty days' notice, the proceeds to be applied to the payment of the instalments overdue and unpaid; and if at any time after such disposal of the mortgaged estate, any other instalments shall become due, and remain unpaid ninety days, the agreement shall become null and void, and no further obligatory in any way on either party." *Held*, that the power to sell was merely cumulative, and did not debar the party from foreclosing the mortgage.

[Cited in Lockett v. Hill, Case No. 8,443; Same v. Hoge, Id. 8,444.]

This was a writ of entry for the foreclosure of a mortgage, and the case came before the court upon an agreed statement of facts. The following abstract from the statement is sufficient for an understanding of the case: The demandant [D. H. Furbish] and one J. B. Cahoon were the proprietors of certain letters-patent on a machine, or on an improvement on a machine, for sowing seed and fertilizing material broadcast. On the 15th of January, 1860, they entered into an agreement with the defendant [Willard Sears] and one Warren Sparrow, by which they contracted, in consideration of $5,000, to sell to said defendant and Sparrow a certain number of machines made, and to be made, and delivered, as in said contract specified. The agreement was to continue in operation for six years, and was to embrace any and all improvements made on the invention within that period; it was also to include the exclusive right of manufacturing a certain description of machines for a certain territory, as therein described. The conditions were that the purchasers were to keep an account of machines manufactured by or under them, and to pay a certain sum for each machine so made within that territory. The purchasers also covenanted to furnish security by mortgage on real estate in Massachusetts, to the amount of $5,000, for the faithful performance of the unexecuted parts of the agreement. The agreed statement also showed that on the 17th of January, 1860, the defendant executed to the demandant the mortgage on which this suit was founded, in order to secure the faithful performance of the agreement. In the agreement was the following stipulation: "In case the party of the first part, on or before the 1st day of May next, shall elect to purchase the patent right for a certain territory, as specified by another agreement between the parties, of even date herewith, this agreement is to be cancelled, and all payments made under the same, are to be applied to, and constitute a part of, the payments stipulated for by such agreement, and the security of $5,000 above provided for is to stand as security for the performance of such agreement." Such "another agreement," it must be observed, described as "of even date herewith," bore date on the following, and not on the same day, as the agreement in which it was thus referred to and described; but the court said that they had both been duly executed before the execution of the mortgage deed; and from the reciprocal references in each to the other, the identity of the second, as the one referred to in the first, was established beyond controversy. The court understood the counsel of the tenant as conceding that proposition, and as assuming that the court would adjudge that the second agreement, was the one referred to in the mortgage. It was provided in the first agreement that the second agreement should not become operative unless the party of the second part should, on or before the 1st of May then next, elect that it should be so, and give written notice of such election; in that event, it was covenanted that "another contract, of even date herewith between said parties, shall be void, and the payment of $5,000 cash, to be made under the other agreement, shall be taken as the cash payment provided for by this agreement; and the security of $5,000, to be given by the party of the second part to the party of the first part, shall be held by them as security for the faithful performance of this agreement."

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

C. T. & T. H. Russell, for demandant.
John S. Abbott, for tenant.

CLIFFORD, Circuit Justice. Undoubtedly it is competent for the court to look at the situation of the parties, and the surrounding circumstances, in order to ascertain the true intent and meaning of a written instrument. Wilson v. Troup, 2 Cow. 200; Barreda v. Silsbee, 21 How. [62 U. S.] 147.

Viewed in the light of that principle, I have no doubt that the mortgage, after the party of the second part made the election and gave the notice, became a security for the faithful performance of the second agreement just as effectually as if the same had been fully set forth in the mortgage deed; or, in other words, it is a mortgage to secure the conditions and stipulations of the second agreement. Among the conditions and stipulations, was one for the payment of certain semi annual instalments of $2,000, annexed to which is the following condition: "provided in case two of such semi-annual instalments shall be due and remain unpaid, said party of the first part is hereby fully authorized and empowered to sell at public auction said security," giving thirty days' previous notice, &c., as therein required, the proceeds therefrom to be applied to the payment of the instalments overdue and unpaid. But the instrument further provides that, "if at any time after such disposal of the mortgage security, any other instalment shall become due, and remain unpaid ninety days from the date it becomes due and payable, the agreement shall become null and void, and no further obligatory in any way on either party."

The second proposition of the tenant is, that by the true construction of the agreement, if he paid the $5,000 in advance, and gave up the mortgaged property, he was to be relieved from all further liability on the contract. Consequently he insists that judgment should be entered for the tenant, inasmuch as he has paid $5,000, and the demandant may appropriate the mortgage security under the power of sale. The authority conferred however is an authority to sell the mortgage security, and it is very doubtful whether it can be lawfully exercised without selling the debt as well as the land; but it is unnecessary to decide that point, as I am clearly of the opinion that the power to sell, in this case, is only a cumulative power, and does not deprive the party from foreclosing the mortgage in the usual manner. 1 Hill. Mortg. (3d Ed.) 129; Walton v. Cody, 1 Wis. 420; Burdick v. McVanner, 2 Denio. 170; Shaw v. Norfolk Co. R. Co., 5 Gray, 181; Eaton v. Whiting, 3 Pick. 491. The parties agree that there has been a breach of the condition of the mortgage, if it secures the second contract.

Pursuant to the agreement of the parties, a conditional judgment for possession is to be entered for the demandant, according to the law of the state and the practice of this court. Unless the parties otherwise agree, the cause must be referred to an assessor to determine the amount of the conditional judgment.

FURBUR (SHERIDAN v.). See Case No. 12,761.

FURBUSH v. BRADFORD. See Case No. 4,930.

Case No. 5,161.

FURLONG v. COLEMAN.

[3 Cranch, C. C. 178.] [1]

Circuit Court, District of Columbia. Nov. Term, 1827.

COSTS—RULE ON PLAINTIFF TO GIVE SECURITY.

If the defendant has obtained a rule on the plaintiff to give security for costs, the court, at a subsequent term will presume that the fact of non-residence of the plaintiff was sufficiently proved, or admitted; and the burden of proof of residence is then on the plaintiff.

A rule, on the plaintiff, to give security for costs was laid on the 2d day of the last term.

Mr. Hewitt, for defendant, now objected that the rule was laid without any evidence being produced of the non-residence of the plaintiff; and that the defendant must now produce such evidence before he can obtain judgment against the plaintiff upon the rule.

THE COURT (THRUSTON, Circuit Judge, absent) said, that the rule being laid at the last term in open court, and not objected to, at that time, the burden of proof was now on the plaintiff to show that he was a resident of the county at that time. That the plaintiff, and his counsel were bound to take notice of all the orders made by the court in the cause.

FURLONG (UNITED STATES v.). See Case No. 15,178.

FURNISS (DIBBLEE v.). See Case No. 3,888.

Case No. 5,162.

FURNISS et al. v. ELLIS et al.

[2 Brock. 14.] [2]

Circuit Court, D. Virginia. May Term, 1822.

PLEADING—INCONSISTENT MATTERS — NATURE OF DEMURRER—AMENDMENT OF DECLARATION.

1. The law which governs pleading in Virginia is different from that which regulates it in England. In England, the courts exercise a controlling power over the defendant who seeks to plead inconsistent matters, conferred by 4 & 5 Anne, c. 16, and it is discretionary with them to receive or reject the inconsistent pleas which may be tendered. But in Virginia, the right to "plead as many several matters, whether of law or of fact, as he shall think necessary for his defence," is expressly given by statute, and the courts cannot control that right, if the

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reported by John W. Brockenbrough, Esq.]

pleas be offered in time. Where they are not so offered, (as where the defendants permitted a writ of inquiry to be entered against them, and the term at which it might be set aside to pass away without pleading,) the English doctrine then applies, and the right depends upon the favour of the court. Hence, when in an action of assumpsit, the defendants at the rules pleaded both the general issue and demurred, and the plaintiffs took issue on the plea, but refused to join in demurrer, this was *held* to be a discontinuance, by virtue of the act of assembly, and the plaintiffs were nonsuited, though they were permitted to reinstate their cause.

[Approved in Tyler v. Hand, 7 How. (48 U. S.) 584. Cited in Gerling v. Baltimore & O. R. Co., 151 U. S. 686, 14 Sup. Ct. 538.]

2. A demurrer is in its nature a plea to the action, and will not be considered as a plea in abatement, though the special causes alleged for demurring be matter of abatement. The court will disregard those special causes, and considering the demurrer independently of them, will decide upon it as if they had not been inserted in it.

3. The plaintiffs' counsel filed a memorandum with the clerk, and the latter in filling up the writ, mistook the name of one of the plaintiffs. The clerk also drew the declaration in which the same mistake occurred. Upon a motion to amend the pleadings, it was *held*: 1. That the memorandum of counsel was a document by which the error in the writ might be amended. on the ground of clerical misprision. 2. That the error in the declaration might also be amended, but not on the ground of clerical misprision. It is no part of the clerical duty to prepare the declaration for counsel. In such a case, the clerk must be regarded as the agent of the attorney, and the declaration is to be treated as if it was drawn and filed by the attorney himself. Therefore, though the court should give leave to amend the declaration, when amended, it must be considered as a new declaration, and the defendants should be permitted to plead de novo.

This was an action of assumpsit brought by Furniss, Cutler & Stacey, an English mercantile house, against Ellis & Allan, merchants and partners in the city of Richmond. The counsel for the plaintiffs left with the clerk a memorandum directing suit against the defendants, and the clerk, in filling up the writ, mistook the name of the plaintiff Stacey for Staney. The declaration also was drawn by the clerk, and the same error occurred in that. The variance was not between the declaration and writ, but between the declaration and writ on the one hand, and the memorandum of counsel on the other. The defendant at the rules pleaded the general issue of non assumpsit, and also craved oyer of the plaintiffs' writ and the memorandum of counsel, and demurred to their declaration, setting forth in their demurrer, as special ground of demurrer, matter in abatement, viz., that the persons to answer whose plea of trespass on the case the defendants were taken and were in custody, were not the same persons named as plaintiffs in their declaration. The plaintiffs took issue on the plea of non assumpsit, but refused to join in demurrer, and judgment was entered at the rules for the defendants upon the demurrer. Notwithstanding this, however, the clerk set the cause down for trial among the writs of inquiry. The plaintiffs moved the court to strike out the demurrer, and proceed to trial upon the issue joined. They also moved that they be allowed to amend the error assigned as cause of demurrer, on the ground of clerical misprision.

MARSHALL, Circuit Justice. This motion is sustained by the allegation that the demurrer ought not to have been received by the clerk; and consequently admits of no inquiry into its sufficiency, farther than is necessary to determine on the right to offer it. It was offered at a time when the right to plead was complete and under a law which authorizes the defendant to plead as many several matters, both of law and fact, as he may think necessary for his defense.[2] From the comprehensive letter of this law, there would be some difficulty in excluding any plea which the defendant might offer at a time when he had a right to offer it. The sufficiency of the plea is not submitted to the clerk. He cannot judge of it. Consequently, it would seem, he must receive it if it be tendered in proper time.

But the plaintiffs contend that there is in the nature and fitness of things, an objection to the allowance of inconsistent matter to be pleaded in the same cause which must enter into the construction of the act of assembly, and control, or at least influence, the meaning of its words. There is, they say, this inconsistency in a demurrer to the whole declaration and a plea to the whole. The demurrer confesses all the facts, and the plea denies them all.

But a demurrer confesses those facts only which are sufficiently pleaded; and the plea, as the plea of non-assumpsit, though it admits nothing, is not false, though many of the facts alleged in the declaration are true. It amounts to pleading double, but not to a positive inconsistency. I cannot however admit, that it is beyond the power of the legislature to pass an act allowing inconsistent pleas, or that a court can disregard such an act.

The plaintiffs' counsel supports his argument by reference to several English authorities, to all which it may be observed, that the law which governs the practice in England, is different from that which governs the practice in Virginia. The statute of 4 & 5 Anne, c. 16, allows the defendant to plead several matters only with the leave of the court. The English statute gives to the court a controlling power over the admission of the plea: the statute of Virginia gives the court no such power. In the exercise of this controlling power, the courts of England have prescribed rules by which they will be governed in granting or refusing an application to plead different matters. But the

[2] "The plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence." 1 Rev. Code Va. 1819, p. 510, § 88.

courts of Virginia can prescribe no such rules. The law declares that the defendant may plead as many several matters of law and fact as he pleases, without making any application to the court necessary. The defendant in England is, when he first pleads, in the same situation as to a double plea, that the defendant in Virginia is, after his right to plead depends on the favour of the court. But the cases quoted to show that the demurrer is not good, do not show that, even in England, it ought not to be received, if tendered in proper time. In 5 Bac. Abr. 459, it is said, "if a defendant demur in abatement, the court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement." This does not prove that the demurrer itself shall be rejected, but that it shall be received and that the judgment upon it shall be final. A judgment on a plea in abatement, or on a demurrer to a plea in abatement, is not final, but on a demurrer which contains matter in abatement it shall be final, because a demurrer cannot partake of the character of a plea in abatement. 1 Salk. 220, is quoted by Bacon and is to the same purport, indeed in the same words. These cases show that a demurrer being in its own nature a plea to the action, and being even in form a plea to the action, shall not be considered as a plea in abatement, though the special causes alleged for demurring be matter of abatement. The court will disregard those special causes, and considering the demurrer independently of them, will decide upon it as if they had not been inserted in it.

These cases go far to show that the court would overrule this demurrer, and decide the cause against the party demurring, not that it should be expunged from the pleadings. (1 Tidd, Pr. 475.) "If the defendant plead in abatement, &c." These cases show that if a plea in abatement be tendered when it is not receivable, the plaintiff may proceed as if no plea had been offered, or he may move the court to strike it out. It is obvious that they do not apply directly to the case at bar. This demurrer was receivable when it was tendered. But the counsel brings this case within their reasoning, by considering the demurrer as a plea in abatement. Now, this it cannot be. The cases cited from Bacon and Salkeld, show that a demurrer cannot be in abatement. The court, therefore, can consider this only as a general demurrer, and, of course, it was offered in proper time. Tidd (484, 485,) shows, that where a defendant is under a judge's order to plead issuably, and he pleads a plea which is not issuable, or puts in a sham demurrer, the plaintiff may consider it as a mere nullity. But these defendants were not under a judge's order to plead. They were not acting under the guidance of the court, but acting by authority of the law of the land, according to their own judgment. Had they permitted a writ of inquiry to be entered against them, and the term at which it might be set aside to pass away; or had they been in a situation in which they could not plead but under the direction of the court, this doctrine would certainly be applicable to the case. At present, I think it is not. Tidd (482)[3] shows that the court will set aside irregular proceedings. But this is not an irregular proceeding. It is perfectly regular. The demurrer was offered in proper time, and though it may not be sustainable, it must be considered. Any plea in bar may be unsustainable; but it is not on that account to be discarded without being considered. The cases cited from the Term Reports only confirm the doctrines of Tidd.

In another book of practice which has been cited, it is said: "But if the demurrer be frivolous, only to put off the trial or for delay of the proceedings, they will not allow of such a demurrer, nor cause the other party to join, but will give judgment against the party upon his frivolous demurrer." It would require a person more conversant with the English practice than I am, to understand precisely the bearing of this dictum. The court must examine the declaration, to determine whether a demurrer be frivolous. Although the special causes assigned for demurring may be frivolous, the demurrer itself may be substantial. But be this as it may, the rule is inapplicable to this case, and perhaps to the practice of this country. The demurrer, according to our practice, can produce no delay, cannot put off the trial of the cause. Had the plaintiffs joined in demurrer, and it had appeared to be frivolous, a writ of inquiry would have been awarded and executed immediately; or the issue would have been tried without allowing a continuance. A frivolous demurrer, therefore, in this case, could not put off the cause, or have occasioned any delay. I do not know what delays, according to the practice of England, a frivolous demurrer may occasion. But this doctrine is founded on the controlling power of the courts of England over pleading, a power which the courts of this country do not possess. If the demurrer in this case was receivable, and I think it was, the refusal to join in it was a discontinuance which is provided for in the act of assembly. The plaintiffs must be nonsuited. This proceeding, however, is now under the direction of the court, and the cause may certainly be reinstated.

I come now to consider the application to amend. I have no doubt of the power of the court to allow amendments in all cases of clerical misprision, where there is any thing to amend by, but I had doubted whether the memorandum of counsel was a document by which an amendment would be made. The cases cited by Mr. Call have in a great measure removed that doubt, and

[3] These references are to the second American from the eighth London edition of Tidd's Practice (1828).

I am inclined to permit an amendment of the writ. An amendment of the declaration will be allowed also, but not on the ground of clerical misprision. To copy a declaration in order to file it, is no part of the duty of the clerk. He acted as the agent of the plaintiff's attorney. It is to be considered as a declaration drawn and filed by the attorney himself. In every such case the amendment will be allowed, but it is a new declaration, and the defendants are permitted to plead de novo.

This motion involves no question about the recognizance of the bail. I do not at present perceive how that recognizance can avail the party, but I do not understand that the motion extends to it.

Case No. 5,163.

FURNISS et al. v. The MAGOUN.

BUJAC v. SAME.

[Olcott, 55.] [1]

District Court, S. D. New York. Nov., 1844.

PLEADING IN ADMIRALTY—OBJECTIONS TO THE ACTION—DILATORY EXCEPTIONS—BOTTOMRY—MASTER AS WITNESS—INTERVENTION OF MORTGAGEE—REFERENCE—PRIORITY OF CLAIMS—WAGES.

1. Objections to an action merely formal in their character, cannot be taken on final hearing.

[Cited in Cohan v. The Rolling Wave, Case No. 2,959a.]

2. Exceptions, dilatory or declinatory, should be interposed on the return day of process, or at the day appointed for answering the libel.

3. If the objection intended to be made be, that the suit was commenced before the cause of action was matured, but it had become so before the hearing, the objection will be considered waived, particularly after an answer or claim is filed.

4. There would be still less reason for allowing such objection after the vessel sued had been condemned and sold, in another action, and her proceeds placed in court, subject to these actions and others in prosecution against her.

5. The master of a vessel who hypothecated her on bottomry, is a competent witness in favor of the holder of the bottomry—particularly if released by him.

6. A mortgagee of a vessel can intervene in a suit by a bottomry holder against the vessel, and contest the validity of the bottomry or its priority of lien, as against his mortgage.

7. Conditions preceding the authority of a master to hypothecate his vessel in a foreign port by bottomry.

[Cited in Burke v. The M. P. Rich, Case No. 2,161; The Rapid Transit, 11 Fed. 335.]

8. A bottomry is not rendered invalid because it covers items of advance not entitled to a bottomry lien. It will be good for the sums which are clearly claimed as marine hypothecation, and will be reformed by the court, rejecting the surplus in its final decree.

9. The court will order a referee to ascertain and report the actual constituents of a bottomry lien, the validity of which is contested.

10. Seamen's wages, in this case, entitled to priority of payment out of the proceeds of the vessel, over the lien of libellants.

[Cited in The Antelope, Case No. 481.]

These two actions [by William R. Furniss & Co. against the brig Magoun, and by Daniel Bujac against the same], brought to hearing together, are instituted on separate bottomry bonds given by Haven, acting as master of the brig Magoun, for advances made for repairing and fitting her for sea. The first one was given at Bordeaux, February 4, 1843, for 4,000 francs, at a premium of 35 per cent., marine interest, payable three days after notice, at Philadelphia. The other to Furniss & Co., at St. Thomas, May 19, 1843, for $1,272 68, payable at New-York on the arrival of the vessel, with 6¾ premium on this sum. The notice in the first case was given at Philadelphia May 10, 1843. The material facts are, that the brig was on a voyage from New-York to Trieste, Bordeaux, Angostura, St. Thomas, and back to this port. On the voyage from Angostura to St. Thomas, 19th May, 1843, while in charge of the pilot off Angostura, she was run on a bed of rocks in the river at Orinoco. On arrival at St. Thomas, a survey was held on the brig, and it appeared that the copper was much broken, and some of the planks were damaged, and the false keel greatly injured. The surveyors ordered the vessel thoroughly caulked, and the damaged places to be repaired. All the money for these repairs was taken up at St. Thomas; part of the amount obtained was expended in payment of stores, shipping a crew and other expenses, which had been incurred in the port of Orinoco. The vessel was consigned to J. L. Furniss & Co., in St. Thomas. The money raised there was in part necessary for the immediate uses of the vessel, and it was in proof that she could not sail from St. Thomas without it. The master had no means of raising money, except by bottomry. After the vessel was repaired, she sailed for Mayaguez, (Porto Rico,) and thence to New-York, where she arrived on the 19th of June, 1843. It also appeared that a portion of the money raised at Bordeaux, on the first bottomry, was not for the necessities of the vessel then existing, but in anticipation of liabilities or necessities she might be subjected to if she prosecuted a voyage then projected.

J. W. Claghorn, a mortgagee of the vessel prior to either bottomry, appeared in both cases, and contested the validity of the hypothecations.

R. J. Dillon, for libellants, Furniss & Co.

F. R. Tillou and F. B. Cutting, for claimant and owner.

Charles C. Anderson and James A. Bayard, for Bujac.

Mr. Dillon, for Furniss & Co., denied that the claim put the bottomry in issue. He

[1] [Reported by Edward R. Olcott, Esq.]

insisted that the proofs showed a legal case for a bottomry hypothecation at St. Thomas, and that it took priority of payment on the one given at Bordeaux. He cited: 1 Dod. 451; The Fortitude [Case No. 4,953]; Emerig. Ins. 87, 89, Index, iv.; [The Aurora] 1 Wheat. [14 U. S.] 96; [The Virgin v. Vyfhius] 8 Pet. [33 U. S.] 538; 8 Serg. & R. 98; 2 Phil. Ins. 78; 8 Pick. 14; 3 Hagg. Adm. 66.

Mr. Bayard, for Bujac, maintained the validity of his demand, and its priority to Furniss & Co.'s. He cited: The Fortitude [supra]; 2 Caines, 77; 7 Durn. & E. [7 Term R.] 481; 1 Starkie, 27; 1 Dod. 464; The Aurora [supra]; 2 Dod. 146; Liebart v. The Emperor [Case No. 8,340]; Rucher v. Conyngham [Id. 12,106]; 2 Dod. 143; Abb. Shipp. 125, note 1; 1 Hagg. Adm. 176; 1 Dod. 201; 2 Hagg. Adm. 377, 374; 2 Park, Ins. 879; 3 Hagg. Adm. 66; Crawford v. The William Penn [Case No. 3,373].

Mr. Cutting, for claimant, insisted that neither hypothecation had priority over the mortgage lien; and for the owner, he contended both bottomry bonds were invalid in law. He cited: Abb. Shipp. 125, note 1; 3 Hagg. Adm. 66; 2 Park, Ins. (Ed. 1842) 875-879; The Fortitude [supra]; 1 Hagg. Adm. 169; 1 Dod. 273-275; 2 Camp. 485, 486.

BETTS, District Judge. The defence set up against the hypothecations in suit contests the validity of both bonds, upon the ground that the repairs and expenditures upon the vessel were unnecessary, and that the master had other resources sufficient for her actual wants, and had no authority to resort to a bottomry for other than necessary supplies or expenses connected with the voyage, and that he obtained the money for other objects and purposes. No misconduct or fraud is imputed to the master in the pleadings, and no proof has been adduced to show a misapplication of the funds raised, or that he had any freights which the brig had earned previous to her bottomry. The master had been in command of the brig for three or four years, and enjoyed the full confidence of her owners. Bujac also controverts the validity of the bottomry to Furniss & Co., and claims the priority of his hypothecation.

The cause has been argued with great ability and a thorough examination of the facts and authorities bearing upon the questions raised on the issues. Two preliminary objections have been interposed by the claimant and owner, either of which, if sustained, may bar the action in the case to which it applies. It was insisted, that at the time of filing the libel in Bujac's case, the bond had not become absolute and suable, the condition being, that the sum received should be paid at or before the expiration of ten days after the arrival of the vessel in New-York, whilst the action was commenced previous to that time. This objection, which is in the nature of a dilatory plea, should have been raised on the return day of the warrant of arrest by way of exception. It does not go to the merits of the action, but merely alleges the prematurity of the suit, and amounts to no more than the dilatory or declinatory exception of the civil law. Browne, Civil & Adm. Law, 363; Dunl. Adm. Pr. 192. Moreover, when the claimant intervened and filed his claim, the bond had become absolute, and the vessel or her proceeds was then under actual arrest and in custody. She had been libelled and attached in this court on a suit for seamen's wages for the same voyage, and had been condemned and sold in that action, and her proceeds paid into court. These are adequate reasons for disregarding exceptions to the action of a merely formal nature, and first raised in the case on the hearing. The claimants may well be deemed to have acquiesced in the antecedent proceedings. The Neptune, 3 Hagg. Adm. 132.

An objection was also raised to the right of a mortgagee to intervene in an admiralty case and contest the validity of these hypothecations. As this point was not suggested on the argument, and not put forth in the pleadings, it would not be now regarded by the court, if it supplied sufficient cause for the exclusion of the claimant. But as a mere defect of pleading might be remedied by an amendment, it is proper to observe, that all holders of liens on a vessel or her proceeds, are competent parties to contest, in admiralty, the titles or claims of other lien holders upon the fund or ship. 3 Hagg. Adm. 331.

The second preliminary point is to the competency of the master to be a witness for the libellants, notwithstanding the release given by them on the hearing. His testimony is urged to be indispensable to the libellants, as without it they have failed in establishing the preliminary facts upon which their right to a decree is dependent. The production of the bottomry bond is not of itself sufficient proof of those facts as against the claimant and owner. It must be shown by extraneous evidence that the advances were made for repairs or supplies necessary for the instant use of the vessel, or effectuating the objects of the voyage, and that they could not have been raised otherwise than by resorting to a bottomry. The Aurora, 1 Wheat. [14 U. S.] 96. It was insisted that the master had a direct interest in the suit, which was not removed by the release, as, if the libellants did not succeed, he would stand liable to them personally for the debt. And the case of The Fortitude [Case No. 4,953] was relied upon as sustaining the objection. This case is in conflict with Evans v. Williams, 7 Term. R. 481, note; Milward v. Hallett, 2 Caines, 77; and Rocher v. Busher, 1 Starkie, 27. And the eminent judge speaks with great reserve in giving his decision in the cause. He remarks, "I am ready to confess that I am not confident that this opinion rests upon grounds so clear that it ought not to yield to a settled course of practice; and I greatly fear that there is no au-

thority which directly sustains it." It seems to me that the opinion of Judge Thompson, in Milward v. Hallett, presents the true rule upon this point, upon reason and authority. The interest of the master is balanced. If the libellants could recover of him upon the bond, for advances necessary for the ship, he would have his action over against the owners for the moneys so employed. He was merely an agent acting within the line of his duty, and if made liable in the first instance on his contracts for the loans, he would be entitled to indemnity and reimbursement by the owner. This interest, indeed, leans rather to the owner than to the libellants, for if the bottomry contracts are defeated by his testimony, his liability to the lenders would be discharged by their release, and they be limited to their rights against the vessel and owner for the moneys advanced for the necessary refitment of the vessel (U. S. v. The Kitty [Case No. 15,537]; Rucher v. Conyngham [Id. 12,106]), and the master would only be answerable to him for integrity and good faith in his conduct. The admissibility of the master as a witness to bottomry contracts is placed by the judges sometimes on the necessity of the ship. Judge Livingston says, unless masters be admitted as witnesses in cases of this kind, it will be extremely difficult to ascertain whether such a necessity existed as would justify their taking up moneys on their owner's account. 2 Caines, 77. The objection to the competency of the witness cannot, therefore, prevail; it can, at most, only go to his credibility.

There can be no doubt of the authority of the master to borrow money on bottomry of the vessel. Abb. Shipp. (Ed. 1829) 117–131; Curt. Merch. Seam. 175. The previous contingencies upon which his power may be exercised embrace his destitution of funds in foreign ports, and all the occasions occurring abroad, which render money necessary to enable him to complete the enterprise in which the vessel is engaged, whether the necessity arises from an extraordinary peril or misfortune, or from the ordinary exigencies of maritime adventures. The master, under like emergencies, may borrow money at marine interest, and pledge the ship and freight to be earned on the voyage for repayment at the termination of the entire voyage, or an intermediate port of it, and may also draw bills of exchange, which the owner is bound to accept. Milward v. Hallett, 2 Caines, 77; The Tartar, 1 Hagg. Adm. 3; The Nelson, Id. 179; The Jane, 1 Dod. 466. This general doctrine is not in question in this issue, but the owner and claimant contended that there was no necessity justifying a bottomry loan; that the master had funds in hand from freights sufficient to meet the wants of the vessel, and accordingly the loans were not warranted by the maritime law; that the loan was made by the consignee of the ship, and that the master had no right to hypothecate the ship in his favor.

This objection lies substantially to both hypothecations. Upon this latter point there was for a time some uncertainty in the books, because it was considered as conducive to surreptitious and covinous practices between the master and consignee in remote ports. 3 Johns. 352; The Aurora [supra]. No case of authority has, however, repudiated such bonds, and the decisions acquiesce in them, if not positively sanction them. The Tartar, 1 Hagg. Adm. 1; The Zodiac, Id. 320. Lord Stowell, in repeated instances, developes the policy and ethics of bottomry transactions. He says, the loans are to be taken when the owner was known to have no credit, nor resources for obtaining necessary supplies. It is that state of unprovided necessity that alone supports these bonds. The absence of that necessity is their undoing. If the master takes up money from a person who knows that he has a general credit in the place, or at least an empowered consignee or agent there willing to supply his wants, the giving a bottomry bond is a void transaction, not affecting the property of the owner, and only fixing loss and shame on the fraudulent lender. But where honorably transacted, under an honest ignorance of this fact, an ignorance that could not be removed by any reasonable inquiry, it is the disposition of this court to uphold such bonds, as necessary for the support of commerce in its extremities of distress, and, as such, recognised in the maritime codes of all commercial ages and nations. The Nelson, 1 Hagg. Adm. 179; 3 Hagg. Adm. 74, 163. The objection that the bottomry holders are consignees of the ship, is obviated by the proof that they were not so by the appointment of the owner. They did not know each other; had no commercial relations; and, also, that the owner had no funds in their hands. The necessity of the loan is proved by the master. He says, the ship had been greatly injured by rubbing upon the rocks in the river Orinoco, and that upon a survey, the surveyors required that she should be overhauled and repaired; that he was absolutely in want of money for supplies, and that he could not leave St. Thomas unless he could have the money; that he applied to various persons without success, and he could not get the money unless he could secure the loan by bottomry. He knew of no other resource; he had none himself, and without this advance he would be unable to prosecute his adventure.

The further objection is taken, that the moneys loaned were lent upon the personal credit of the master. That would make no difference, provided the advance was made on an engagement for a bottomry security; and it is clear, from the proofs and the circumstances of the case, that the understanding of the parties was, when the advances

began, that they were to be secured by a bottomry of the ship. La Ysabel, 1 Dod. 273; The Virgin v. Vyfhius, 8 Pet. [33 U. S.] 538. This is usually so, for it is difficult to ascertain the precise amount requisite until the repairs are made and the supplies obtained. Lord Stowell remarked, upon a similar objection, that it was the understanding of the parties at the time, that the money should be secured by means of bottomry; and that it was of no consequence whether the money was advanced at once, and the bond immediately entered into, or whether the master received it from time to time, in different sums, and gave a bond for the whole amount. 1 Dod. 273; Hurry v. Hurry [Case No. 6,922]; The Aurora [supra]. It is further objected, that the master disregarded the instructions of the owner as to the voyage, and that the lender, upon due inquiry, might have learned this fact, and his negligence in this regard should avoid his bottomry security. No fraud is any where charged in the pleadings, no connivance or unfair dealing is set up, nor is it asserted that the lender was aware of any instructions received by the master, from the owner, which had been disregarded. If the master had deviated from instructions, and there was no connivance on the part of the lender, he will not be affected by the fact, without clear evidence of notice to him before his security was taken. The proof shows no want of good faith on the part of the master. By his correspondence he kept the owner fully informed of his situation, and solicited directions. When he arrived at Bordeaux, no instructions were given, other than to exercise the broadest discretion. The lenders, also, are to be presumed to have acted in good faith. The necessities of the vessel, her want of repairs and supplies, that the master had no means of his own, and had in vain resorted to others for raising money on bottomry, were facts of notoriety. If, in addition to such circumstances, the lender is required to give positive proof that the necessity of the master was absolute and remediless but by a bottomry loan, the doctrine would be disastrous to commerce, by destroying confidence in such securities, or rendering it impracticable to negotiate them. It is well established by the evidence that one if not both the bonds were taken for a larger amount than was required at the time for repairs and supplies to the vessel. There is included in one the wages of the master and expenses of board here and at St. Thomas, and in the other, advances to meet liabilities or necessities it was anticipated the vessel might be under after leaving Bordeaux, and in her after employment.

These are not particulars for which the vessel can be subjected by the master to a bottomry charge, but such irregularity in the bond does not destroy its obligation. These items of excess may be expunged. A bottomry bond may be good in part and bad in part, and it will be upheld by courts of admiralty as a lien to the extent to which it is valid. Courts of admiralty are not, in this respect, bound to the strict rules of the common law, but decide upon the broadest principles of equity. The Augusta, 1 Dod. 283; The Tartar, 1 Hagg. Adm. 1; The Virgin v. Vyfhius [supra]. The reference to be made in the cause will provide for a specification of the particulars composing each bond, and when and for what causes the money was obtained.

Upon full consideration of the merits of the case, I am of opinion that both hypothecations are valid in law, and that the respective libellants are entitled to have their remedies enforced against the fund in court. That fund is brought into court upon a demand for seamen's wages earned on this voyage. Those wages are to be first satisfied out of the fund. 1 Dod. 40; 2 Dod. 13; 3 Hagg. Adm. 407; [Blaine v. The Charles Carter] 4 Cranch [8 U. S.] 328; The Mary [Case No. 9,187]. Both hypothecations being deemed by the court substantially valid, and no sufficient cause in the opinion of the court being shown for giving, between the two, priority of satisfaction to Bujac's or the elder bond, the ordinary privilege in bottomry cases (Abb. Shipp., Ed. 1829, 128; The Sydney Cove, 2 Dod. 1) must prevail here, and the bond to Furniss & Co. will be entitled to be first paid out of the proceeds. But both decrees in these causes are entitled to priority of payment over the mortgage lien of the claimant. 3 Kent, Comm. 358; 2 Hagg. Adm. 294. The clerk, on the reference, will ascertain and report to the court the particulars composing each bond, and the time and occasion upon which the advances were made by the obligees, to enable the court to reform, if necessary, the amount legally secured by the bottomry hypothecation.

It is therefore adjudged, that the libellants respectively recover the amount of their said bottomry bonds, with the marine interest reserved thereon, and six per cent. on the sum of such principal and marine interest, computed from the time of the falling due of the respective bonds to the day of this decree, together with their costs to be taxed, and that the decree in favor of Furniss & Co. on the junior bottomry be first satisfied out of the proceeds of said vessel, her tackle, &c., in court, subject to such deductions and reform of the amount as may be thus ordered by the court, on the coming in of the clerk's report in the premises, and it is referred to the clerk to ascertain and report the amount payable to the libellants, upon the said bonds respectively, conformably to the principles of this decree.

FURST, Ex parte. See Case No. 8,369.

Case No. 5,164.

FUTTERER v. ABENHEIM.

[31 Leg. Int. 133; [1] 10 Phila. 225; 6 Leg. Gaz. 116.]

Circuit Court, E. D. Pennsylvania. April 6, 1874.

DEMURRAGE—DELAY CAUSED BY OTHER VESSELS.

1. The charter party stipulated that the ship should "be discharged as fast as the custom of the port will admit," and demurrage to be charged after the expiration of 10 days. *Held*, that after that time she was entitled to demurrage, although it was occasioned by the pre-occupancy of the wharf by other vessels.

2. Where a vessel is required to load or discharge her cargo at a particular dock, and she is there detained by reason of its crowded condition, the delay must be compensated by the charterer.

[Appeal from the district court of the United States for the Eastern district of Pennsylvania.]

In admiralty.

J. Warren Coulston, for libellants.
Morton P. Henry, for respondent.

McKENNAN, Circuit Judge. The charter party in this case provided for a voyage from an indefinite port in England to Philadelphia, and for the discharge of the cargo at a wharf to be directed by the consignee on the arrival of the vessel. It was also stipulated, that fifteen days should be allowed the charterers for loading the vessel (if she was not sooner dispatched), "and the ship to be discharged as fast as the custom of the port will admit, and ten days on demurrage over and above the said days, at seven pounds per day." The vessel reached Philadelphia on the 13th of September, 1871, when she was ordered to discharge her cargo at Willow street wharf. She accordingly proceeded to that wharf on the 19th of September, where she remained until October 9th, before she could begin the discharge of her cargo, on account of the pre occupancy of the wharf by other vessels. For the detention thus caused, the libellant claims the stipulated demurrage and damages in the nature of demurrage.

In view of numerous decisions of the English and American courts, and of the evident justness of the rule, it must be taken as now settled, that where a vessel is required to load or discharge her cargo at a particular dock, and she is there detained by reason of its crowded condition, the delay must be compensated by the charterer. The ship owner has done all that he was required to do when he has taken his ship to the appointed place of discharge. It is implied in his contract, that he shall then not be subjected to any delay, which is not necessary, to unload his vessel. Detention of the vessel for any other reason, may justly be regarded as the fault of the charterer, because she is placed in the circumstances, by which it is caused, by his act, without right on the part of the owner to escape from them. He is, therefore, rightly held accountable for the consequent loss to the owner.

In Randall v. Lynch, 2 Camp. 352, the ship was in the London docks, to which she was destined by her charter party, and could not be unladen within the stipulated time, by reason of the crowded state of the docks, and Lord Ellenborough said: "The question is, whether the detention of the ship, arising from the inability of the London Dock Company to discharge her, is, in point of law, imputable to the freighter; and I am of opinion, that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so. While the goods remained on board the vessel in the London docks, it was impossible for the plaintiff to make any use of her, and to all intents and purposes she was there detained by the defendant. When she was brought into the docks, all had been done which depended upon the plaintiff, and the dock company were the defendant's agents for her delivery. The defendant is as much responsible for a delay arising from the want of a berth, as if it had arisen from tempestuous weather, or any other cause." In conformity to the rule thus stated, many English and American cases have been decided. Bessey v. Evans, 4 Camp. 131; Barret v. Dutton, Id. 333; Hill v. Idle, Id. 327; Philadelphia & R. R. Co. v. Northam [Case No. 11,090]; Davis v. Wallace [Id. 3,657], per Clifford, J. It is true, that Rodgers v. Forresters, 2 Camp. 483, and Burmester v. Hodgson, Id. 488, are in apparent conflict with these cases. But they were decided upon proof of a custom prevailing at the London docks, with reference to the discharging of the special kind of cargo with which the vessels were laden, and upon the effect under this proof of a stipulation, express or implied, in the charter party, that the freighter should be allowed "the usual and customary time," for unloading the vessels. Beyond this, they have not been followed in England, for, as was said by Boville, Chief Justice, in Topscott v. Balfour, Law Rep. Jan., 1873, pt. 1, 52: "The rule is, that when a port is named in the charter party as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port; not the actual berth at which she loads, but the dock or roadstead where loading usually takes place. If, when she arrives there, the place is so crowded that she cannot load, the loss must fall on the charterer." The charter provided for the selec-

[1] [Reprinted from 31 Leg. Int. 133, by permission.]

tion of the dock by the freighters, and they named the Wellington dock, and the chief justice says further: "Treating the charter, as I have before said it must be treated, viz., as though it provided that the ship should proceed direct to the Wellington dock, then any loss arising from the state of the dock must fall, according to the authorities, on the charterers, and not on the ship owner." He held, however, that delay arising from the exclusion of the vessel from the dock, in pursuance of its established regulations, was not imputable to the charterer, for the reason that the parties must be taken to have known such regulations, and to have made their contract in reference to them. But for detention caused by a fortuitous condition of the dock, which obviously could not have been foreseen or contemplated when the charter was made, the charterer was adjudged to be accountable. And such must be regarded as the rule which is established by the preponderating weight of authority.

The learned counsel for the respondent has, however, argued with great earnestness, that this rule is not applicable in this case, because of the terms of the charter. It contains this clause: "And the ship to be discharged as fast as the custom of the port will admit;" and it is urged that this means that the vessel must await her regular turn for a berth at the wharf appointed for her discharge. As a vessel seeking a berth to unload, has no right to displace another which is in it before her, she must necessarily wait her turn, and as the custom to do this is universal, every charter must be taken as made with reference to it. If the meaning ascribed to the clause then be its true meaning, it only expresses what is implied in every charter. And yet, in the numerous cases referred to, it was held, that the unavoidable observance of the custom did not relieve the charterer from accountability for the consequent loss. But I do not think it is to be so construed. It does not refer to the time when the discharge of the vessel is to be begun, but to the process of discharging her. If there should be any special custom at the port of Philadelphia, by which the unloading of the vessel would be delayed, the charterer was not to be accountable for it. And by this reference to it as a custom of the port of Philadelphia, it is not reasonable to regard it as applicable to a custom which is not peculiar to that port, but of general and universal prevalence. For the loss, therefore, resulting from the condition of the dock, the respondents must, therefore, be held liable. The whole loss, including the stipulated demurrage and damages, is accurately computed at $736.33, in the decree of the district court. [Case unreported.] That decree is therefore affirmed, and a decree will be entered in this court for the sum so adjudged by it against the respondents, with interest from June 7th, 1873, and costs.

Case No. 5,165.

FUZZARD WADDING MANUF'G CO. v. DICKINSON et al.

[6 Blatchf. 80; 3 Fish. Pat. Cas. 289.] [1]

Circuit Court, D. Connecticut. April 3, 1868.

PATENTS—INFRINGEMENT.

The claim, in the reissued letters patent granted to William Fuzzard and James Hatch, April 5th, 1864, to "the employment or use of a heated metallic cylinder, B, or one having a metallic exterior or periphery, in combination with a heated pressure cylinder, C, one or more, and a polishing roller, G, or its equivalent, arranged as shown, for the purpose of surfacing and drying simultaneously, or at one operation, fibrous materials, as set forth," is not infringed by the use of a machine which employs a pressure roller that is not heated, and is not constructed so as to be heated, in any particular way.

[This was a bill in equity filed to restrain the defendants [Thomas N. Dickinson and others] from infringing letters patent [No. 41,214] for an improved machine for surface-sizing fibrous material, granted to William Fuzzard, January 12, 1864, assigned to William Fuzzard and James Hatch and reissued to them April 5, 1864 [No. 1,649], and assigned to complainants.

[The claims of the patent were as follows, although the first one, only, was in controversy: "The employment or use of a heated metallic cylinder B, or one having a metallic exterior or periphery, in combination with a heated pressure cylinder, one or more, and a polishing roller G, or its equivalent, arranged as shown, for the purpose of surfacing and drying simultaneously or at one operation, fibrous material, as set forth. Also, the distributing or throwing of the glazing or sizing upon or against the cylinder or upon or against a web without a cylinder, by means of a brush, substantially as set forth."

[A description of the invention and of the defendant's machine so far as involved in the suit, will be found in the opinion of the court.] [2]

SHIPMAN, District Judge. The defendants, who are engaged, like the plaintiffs, in the manufacture of wadding, are charged in the bill with infringing the rights of the plaintiffs secured by this patent. The character of the machine used by the defendants is clearly proved, and, in order to determine whether or not it embraces the invention of Fuzzard, we must look into the specification and claim of the patent and see what is there set forth as such invention.

The object of the alleged new device is described, in the body of the specification, to be "for applying a glazing or size to fibrous substances, such as cotton, wadding, &c., in such

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 6 Blatchf. 80, and the statement is from 3 Fish. Pat. Cas. 289.]

[2] [From 3 Fish. Pat. Cas. 289.]

a manner that a quite thin or attenuated sizing may be used and applied to the web or material to be glazed, sized, or 'surfaced,' as it is technically termed, and said material dried at the same operation. * * * To this end the invention consists in the employment and use of a smooth or polished metal cylinder, heated by steam, or otherwise, over a portion of which the web to be surfaced passes, and of a heated pressure roller bearing against the web upon the metal cylinder, the cylinder or web having the glazing or size previously distributed upon it by means of a revolving brush, or its equivalent, as hereinafter set forth."

The machine is very simple, and may be briefly described as follows: First, a solid frame of suitable dimensions, near the central part of which is placed a hollow metal cylinder, of large size. This cylinder revolves upon a hollow shaft, the ends of which rest upon the two sides of the frame, and is heated usually by steam. The web to be sized is placed on a common roller at one end of the frame, and is, during the operation of the machine, made to pass over the upper portion of the cylinder, and off on to another roller, which receives it as it leaves the cylinder. Between the roller from which the web is taken to the cylinder, and the cylinder itself, and very close to the latter, is a small heated pressure roller, between which and the cylinder the web passes, and by which it is pressed into close contact with the cylinder. The sheet of web passes under this pressure roller and over the cylinder, and the former is so adjusted as to give the degree of pressure required. Underneath the cylinder there is a roller, attached to the frame, and made to revolve in contact with the cylinder. This is called a polishing roller. It has a surface of felt, or some other suitable material, and, as it revolves, with its surface in contact with the surface of the revolving cylinder, it cleans and polishes the latter. Between the point where this polishing roller and the cylinder come in contact, and the point on the cylinder where the web first reaches it, there is a size trough, in which another roller wallows, carrying the size into contact with a revolving brush, which takes it up and distributes it on the surface of the cylinder. The different parts of the machine are rotated in the usual way, by cog-wheels and endless aprons. When the machine is in motion, the size is thrown on the surface of the cylinder, (or it may be thrown on the under surface of the web, or on both that and the cylinder,) and the web passes under the pressure roller, on to, and in close contact with, the cylinder, from which it is peeled off at a point nearly opposite from where it is taken on, and wound on the roller which receives it after the sizing and glazing are completed. By this combined operation of the machine, sheets or webs of very slight strength or toughness are run through and glazed with a smooth surface.

I have thus given a description of the material parts of the machine and its mode of operation, without designating the parts by letters referring to the drawings. But, as these letters are introduced into the claim, it will be well, before citing that, to say, that the large heated cylinder is designated as B, and the small heated pressure roller as C, and the polishing roller as G. The claim is as follows: "The employment or use of a heated metallic cylinder, B, or one having a metallic exterior or periphery, in combination with a heated pressure cylinder, C, one or more, and a polishing roller, G, or its equivalent, arranged as shown, for the purpose of surfacing and drying simultaneously,

[Drawings of patent No. 41,214, published from the records of the United States patent office:]

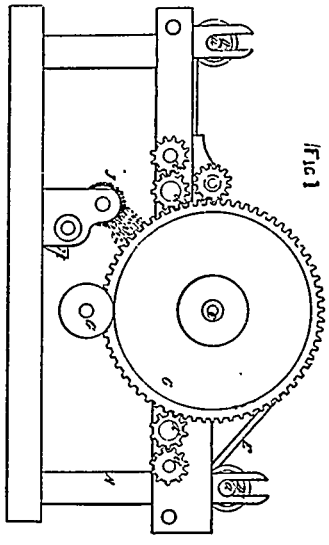

Fig 1

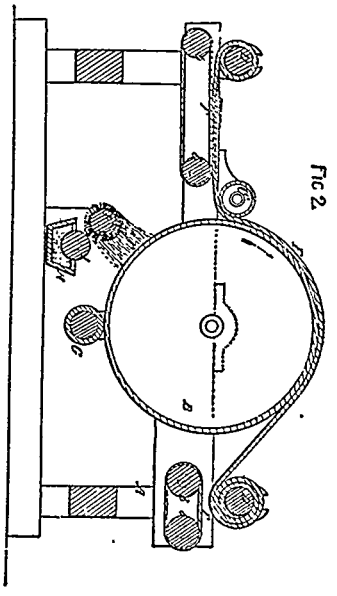

Fig 2

or at one operation, fibrous materials, as set forth." There is a further claim touching the operation of the revolving brush, but that is not in controversy here.

Now, the frame and large cylinder of the defendants' machine are like those of the plaintiffs'. The defendants also use a pressure roller, which presses the web into contact with the cylinder. In place of the polishing roller of the plaintiffs, the defendants use a clearing bar, placed across the frame, and very nearly in contact with the cylinder. As the cylinder revolves, this bar catches, and takes from its surface, any portion of the wadding that may have adhered to it. A packing is thus soon formed between the clearing bar and cylinder, which wipes, and, to some extent, cleans the latter, as it revolves. It can hardly be said to polish it, though, for the purposes of this case, we may assume that it does.

By recurring to the description of the plaintiffs' invention, it will be seen, that it consists of three elements in combination, namely, a heated metallic cylinder, a heated pressure roller, and a polishing roller. The question now presents itself whether the defendants use the same elements, or their equivalents, in combination. If they do, they infringe the rights secured by the plaintiffs' patent. If they do not, then they do not infringe. The defendants' cylinder is the same as that of the plaintiffs, and we will assume, for the purposes of this case, that their clearing bar is an equivalent for the plaintiffs' polishing roller, though that may well be doubted. We have, then, two elements of the invention in combination. But the third is equally essential to the infringement. This third element is the pressure roller. In the specification it is described as a small metallic cylinder, and, in that, as well as in the claim, it is described as a "heated pressure roller" or cylinder. This heated pressure roller is described, in the body of the specification, as performing two functions, namely, drying and pressure. "The cylinder C," the pressure roller, "being also heated, dries off the steam that passes through the web at this point"—the point of contact of the web with the main cylinder—"and the web, passing over the upper part of the cylinder B, is glazed, or sized, and dried, the two processes being performed simultaneously, and finished before the web reaches the point where it leaves the cylinder B. The cylinder C," the pressure roller, "also presses the web to the cylinder B, and causes it to adhere to the glazing or sizing on cylinder B. One or more of these cylinders, C, may be used." Now, the defendants use, for a pressure roller, a common solid wooden cylinder, not only not heated, but not constructed so as to be heated in any particular way. The only function that it performs is to press the web into contact with the large metal cylinder, in order to make the sizing adhere to and glaze the surface of the sheet of wadding. But, I am asked to hold that this roller of the defendants is the equivalent of the heated pressure roller of the plaintiffs. This cannot be done, under any reasonable rule of construction. The patentees do not, either in the body of their specification, or in their claim, assert their exclusive right to any combination except one in which the heated pressure roller forms one of the essential elements. Wherever they describe their roller, they call it a heated roller, and, in setting forth its functions, they describe it as drying off the steam which passes through the web. It is true, that they also say that it performs the other function of pressing the web against the cylinder. But they nowhere intimate that they claim this roller when it is so constructed and used as to perform only the duty of pressure. It is clear to my mind, in view of the state of the art, that they deemed it essential to the validity of their patent, that the element of heat should characterize and qualify this member of the combination. In some branches of the wadding manufacture, the ordinary non-heated roller is nearly or quite as useful as the heated roller described in the patent; and this must have been perfectly obvious to the inventor, who was well acquainted with the state of the art. It is incredible that, with this fact before him, he should have omitted to claim simply a pressure roller, whether heated or not, had he deemed it within the scope of his invention. But, whether this is so or not, the specification and claim are so drawn as fairly to exclude the idea that any except a heated pressure roller was intended to be claimed. If Fuzzard was the first and original inventor of the combination of cylinder, polishing roller, and pressure roller, whether heated or not, the specification should have so described and claimed it. As it does not, either expressly or by fair inference, this suit fails, for the defendants do not use the combination described and claimed in the patent.

The bill must, therefore, be dismissed, with costs.

Case No. 5,166.

The F. W. GIFFORD.

[7 Biss. 249;[1] 9 Chi. Leg. News, 9.]

District Court, E. D. Wisconsin. Aug., 1876.

COLLISION — SEVENTEENTH RULE — RIGHT TO COURSE — ERROR, IMPENDING DANGER.

1. A collision, occurring in open sea, and in broad daylight between two vessels, easily seen when miles apart, and whose courses, on the tacks upon which they were sailing, necessarily intersected each other, cannot be attributed to unavoidable accident.

2. The above is a case where the seventeenth rule of the navigation act is applicable; that "when two sail vessels are crossing so as to in-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

volve risk of collision, then if they have the wind on different sides, the vessel with the wind on the port side shall keep out of the way of the vessel with the wind on the starboard side," neither vessel being free, but both being close hauled.

3. The vessel on the starboard tack must keep her course, in order that she may not mislead or baffle the movements of the vessel on the larboard tack, and she should only change her course when a collision seems otherwise unavoidable.

4. Where a vessel commits an error under impending danger, or in extremis, produced or brought about by another vessel, such error cannot be alleged as a fault by such other vessel.

5. English and American admiralty decisions cited and commented upon.

In admiralty. The libel in this case charged that on the 16th of August, 1873, the schooner Aetna, of which libellants were owners, was bound on a voyage from Buffalo to Chicago, laden with a cargo of coal; that on that day, when about fifteen or twenty miles southward of Thunder Bay, on Lake Huron, she was run into by the schooner Gifford, and that serious injuries were inflicted upon libellants' vessel by the collision; that at the time, the wind was blowing quite strong from the northwest; that the Aetna was sailing by the wind, with reefed mainsail, foresail and three jibs, "starboard tacks aboard," and that the Gifford was sailing by the wind, "port tacks aboard;" that the collision occurred in open lake, and in broad daylight; that the Gifford, had she been properly navigated, could have given way and avoided the Aetna, and that the collision was occasioned by the negligence, carelessness, and unskillful management of the Gifford by her master and crew.

The answer of the claimants admitted that at the time of the collision, the wind was northwest; that the Aetna had her starboard tacks aboard, and that the Gifford was sailing by the wind upon the port tacks; that at about six o'clock in the morning, the Aetna was sighted about a point and a-half or two points off the Gifford's starboard bow, heading about west-southwest; that the wind was strong and a heavy sea running; that the Gifford was carrying foresail, mainsail, and double-reefed mizzen sail, fore staysail and jib, and that there were on her deck the master, second mate, a man at the wheel and one seaman; that the Gifford proceeded on her course until the vessels were about one mile apart, when her master came to the conclusion that if both vessels proceeded on their respective courses, there would be danger of a collision, and for the purpose of avoiding it, he gave the order to light up the jib sheets and to put the wheel down slow, which order was obeyed, and the schooner came up into the wind, but for some unknown reason, missed stays, and hung in the wind; and that all on board did all that was possible to bring her around; but to no avail; that though the movements of the Gifford could have been easily seen by the men on board the Aetna, and her helpless condition fully understood, and though those on board the Aetna knew that the Gifford was thus in irons, they made no effort to avoid a collision, but continued on their course, running across the Gifford's bows and striking her jib-boom with her foresail; that the collision occurred without fault on the part of the Gifford, and without negligence or want of care or skill on the part of those on board, but that it was occasioned by the negligence, and want of care and skill on the part of those in charge of the Aetna; that after the Gifford had missed stays and became helpless there was opportunity for the Aetna to have gone clear of her, had any effort been made by those navigating her for that purpose, but nothing was done on her part to avoid the collision.

Wm. P. Lynde, for libellants.
H. H. Markham, for claimants.

DYER, District Judge. Upon some of the material questions of fact, there is no dispute. The collision occurred in daylight, between six and seven o'clock in the morning, and when the weather was clear. The wind was from the northwest, blowing a fresh breeze, and causing considerable sea. The Aetna was sailing close hauled on the starboard tack, at a speed of four or four and a half miles an hour, on a west-southwest course, under a single reefed mainsail, full foresail and three jibs. The Gifford was sailing on the port tack, close hauled at a speed of about five miles an hour, heading north-northeast, and carrying double-reefed mizzen sail, whole mainsail, foresail, staysail and jib. The captain of the Gifford testifies that when he first discovered the Aetna, she was three or four miles away, and from a point and a half to two points on the starboard bow of the Gifford. The captain of the Aetna says that when he sighted the Gifford, she was from four to five miles distant, and from three to four points on the port bow of the Aetna. It seems not to be disputed that each vessel could be seen from three to five miles away, and that they were continually in sight of each other, from the moment when first observed until the collision.

[2] [Concerning circumstances transpiring just before the collision, and the respective movements of the two vessels as they approached each other, there is disagreement. The master of the Gifford testifies that the vessels stood on their courses until they were about three-quarters of a mile apart, when he ordered the man at the wheel to give her a good full, preparatory to going about; that when he thought his vessel had way, he ordered the wheel put down slow, having first directed the men forward to get ready for stays; that the wheel was put down, the jib-sheets were let go, and the vessel came up into the wind, but did not swing around; that

[2] [From 9 Chi. Leg. News, 9.]

he thereupon ran aft and ported the helm; that he also called the mate from below, a collision being then imminent, and the mate immediately let go the fore sheet, when the Gifford having thus missed stays, the vessels struck. He says when he attempted to stay the Gifford, she was from one-half to three-quarters of a mile from the Aetna; that at the time of the collision, he thinks the Aetna was on her course, heading west southwest; that the effect of the collision was to swing the Gifford round so that she then stood on her starboard tack; that at the time the Gifford missed stays, and when the collision occurred, she stood head to the wind, with both jib sheets and the fore sheets gone, and the fore-boom half way out to the fore rigging, and the foresail with it. That he attempted to stay his vessel because he thought that, having room, and never having had trouble in staying her before, she would go around; that she did not fill away again after missing stays at the time of the collision; that the collision could have been averted by porting the helm of the Aetna and putting her in stays, but that no such movement was executed; that she was heading across the bows of the Gifford when they struck, and that, at the time of the collision, the Gifford had no headway. Corroborative of this testimony of the master, in various particulars, is that of the mate, wheelsman, and one seaman.

[The master of the Aetna testifies, that his vessel was kept on her course until a collision being imminent, he ordered her put in stays, but that before she got around the Gifford struck her; that he saw the jibs of the Gifford shaking when at some distance away, but could not tell what maneuver she was executing; that from appearances she might be in the wind, or might be lighting up her sheets; that he could not see that she was in a helpless condition, and that he supposed she was getting away from the Aetna's course; that her jib-boom struck the Aetna's foresail, carrying away her main rigging, breaking her rail and stanchions, springing the main mast head and inflicting other injuries. The witness, Charles Miller, seaman, was on the deck of the Aetna before and at the time the collision occurred, and testifies that it was thought by those on board the Aetna that the Gifford would tack and pass clear of the former's course; that, as the danger of collision increased, the wheel of the Aetna was put hard down, and the head sheets were eased up; that he saw the Gifford's jibs shaking in the wind, and that she filled away again, and at the time of the collision he thinks she had some headway. Henry Lang, mate of the Aetna testifies, that he saw the Gifford lighten her head sails, but could not tell whether she was going about or what she was doing, and that when he first saw the Gifford she had plenty of time to get out of the way. In a few moments he saw her head sheets hauled aft, and he says she filled away again. He testifies that he saw the Gifford coming toward the Aetna, when the captain of the Aetna ordered her wheel hard down, and the witness went forward and let go the head sheets, and as this was being accomplished, to put the Aetna about, the vessels struck. This witness says further, that when the wheel of the Aetna was put hard down, she answered her helm directly, and was coming up into the wind when the Gifford struck her.] [2]

It is plain that a collision thus occurring in open sea and in broad daylight, between two vessels easily seen miles apart, and whose courses, on the tacks upon which they were sailing, necessarily intersected each other, cannot be attributed to unavoidable accident. It is equally clear that the case is one where the 17th rule of the navigation act is applicable; that, "when two sail vessels are crossing so as to involve risk of collision, then, if they have the wind on different sides, the vessel with the wind on the port side, shall keep out of the way of the vessel with the wind on the starboard side," neither vessel being free, but both being close hauled.

This rule has been not only frequently, but rigidly enforced by the courts. The Friends, 1 W. Rob. Adm. 483; The Chester, 3 Hagg. Adm. 316; The Woodrop-Sims, 2 Dod. 86; The Thames, 5 C. Rob. Adm. 345; The Celt, 3 Hagg. Adm. 327; The Jupiter, Id. 320; Allen v. Mackey [Case No. 228].

In the case of St. John v. Paine, 10 How. [51 U. S.] 579, Nelson, J., in his opinion, says: "The vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. * * * When vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere in her course, while that on the larboard tack should bear up or keep away before the wind. * * * No one can look through the reports in admiralty in England, without being struck with the steadiness and rigor with which these general nautical rules have been enforced in cases of collision, under the advice of the trinity masters of that court, or fail to be impressed with the justice and propriety of such application, and the salutary results flowing from it."

In the case of The Kingston-by-Sea, 3 W. Rob. Adm. 153, it was an established fact that the two vessels had ample time to see each other at the distance of two or three miles, and had abundant opportunity to take measures to avoid a collision. The Kingston-by-Sea attempted to go in stays but missed, and the trinity masters held, first, that she had it in her power to choose the distance at which she would tack, and, secondly, if a vessel is put in stays and misses, it is the duty of those on board to so navigate the vessel as to let her pay off.

In the case of The Ann and Mary, 2 W.

[2] [From 9 Chi. Leg. News, 9.]

Rob. Adm. 189, the rule was declared as one to be strictly adhered to, that the vessel on the starboard tack must put her helm aport to keep the wind, and the vessel on the larboard tack must do the same to bear away; and the vessel proceeded against was adjudged in fault because she put her helm alee and did not bear away. See, also, The Traveller, Id. 198; Holt, Rule of Road, 92, 100, 114; Bently v. Coyne, 4 Wall. [71 U. S.] 509.

That part of the rule, that a close hauled vessel on the port tack, must give way to one sailing by the wind on the starboard tack, close hauled, is not more imperative than is the further branch of the same rule, as enforced by the courts, that the latter vessel must keep her course. In the case of The Richard R. Higgins [Case No. 11,768], it was held that to relieve a vessel from fault in changing her course when the rule required her to keep it, she must show clearly that it was done after a collision had become inevitable, or at least, after a courageous and skilful navigator would have thought it so.

Justice Clifford in the case of Bently v. Coyne, before cited, says: "Persons engaged in navigating vessels upon navigable waters are bound to observe the nautical rules recognized by law in the management of their vessels, on approaching a point where there is danger of collision. Undoubtedly the same law which requires vessels having the wind free, or sailing on the larboard tack, to keep out of the way or give way, as the case may be, also imposes the correlative duty upon those close hauled on the wind, or sailing on the starboard tack, to keep their course, in order that the former may know the position of the object to be avoided, and not be baffled or led into error in their endeavors to comply with the requirement." See, also, New York & L. Steamship Co. v. Rumball, 21 How. [62 U. S.] 372.

Both vessels, in the present case, were in the precise position requiring compliance with the rule. There was devolved upon the Aetna the general duty to pursue her course, so that the Gifford might not be misled or baffled in her movements, and the duty imposed upon the Gifford was to keep out of the way of the Aetna. The burden was upon her of avoiding the danger of collision. The captain of the Gifford testifies that he sighted the Aetna when four or five miles away. The wind was fresh, causing about a six or eight-foot sea. Under these circumstances there can be no doubt that there was ample time and room for the Gifford to bear away under a port helm, and to have passed astern of the Aetna; and this is precisely the movement which the court in St. John v. Paine, supra, says should be executed under such circumstances. But the master of the Gifford took the responsibility to execute a different maneuver, which was to continue on his course until, as he says, his vessel was three-quarters of a mile from the Aetna, when he attempted to put her in stays, which she missed.

Upon the positive testimony in the case, my conclusion is, that the Aetna kept her course until a collision became inevitable. It is urged that the Gifford was three-quarters of a mile off when she attempted to go in stays and stood in the wind, and that there was a space of 1185 feet between the Gifford's bows while in the wind and the direct course of the Aetna at that distance; from which the conclusion is deduced that the Aetna must have fallen off from her original course. But this theory rests strongly upon conjecture and is against the positive testimony on both sides, and is, I think against the circumstances. The captain of the Gifford as positively testifies that the Aetna kept her course as does any witness for libellants. Then it cannot be assumed as a certainty that the Gifford was three-quarters of a mile from the Aetna when she attempted to go in stays. Capt. Berryman states the distance as one-half to three-quarters of a mile. One of libellants' witnesses also testifies that the effort to go in stays was made from seven to nine minutes before the collision, and that the jib-boom of the Aetna was then pointed to the fore-rigging of the Gifford, which would certainly bring the latter vessel very near to the Aetna's course. It is clear that the Gifford was nearer to the point where the courses of the two vessels intersected, than was the Aetna, when the effort was made to stay the Gifford. The evidence is that she would forge ahead some distance under a slackening headway, after her wheel was put hard down, and adding to that, the possibility of her filling away again, a point disputed by the witnesses, I am constrained to believe, that at the time and point where the attempt was made to stay the Gifford, the proximity of the two vessels made that maneuver hazardous. The captain of the Gifford says, that at the point where his vessel stood, there was room to get out of the way if she did not miss stays; but that there was not room to do so if she missed, which tends strongly to show that the movement was not made at sufficient distance. It is exceedingly difficult upon all the testimony and in view of the ample time, space and opportunity which the Gifford had for taking a course that should be entirely safe for both vessels, to resist the conclusion that she was in fault in the movement she did make. She had it in her power to determine at what distance she would attempt to go about, upon choosing that as the maneuver for avoiding the Aetna. The burden was cast upon her by the law of the sea, of keeping out of the way, and when, with the time and room she had for adopting a course which would beyond question avoid not only a collision but all danger, it must be held that when she chose another course attended with hazard, she did so at her peril. It is true that the captain of the

Gifford had not before had any difficulty in staying his vessel, but he says he never before attempted to stay her in such a sea. He may have exercised what he thought at the time was proper judgment, but his judgment proved erroneous, because his vessel missed in the attempted movement.

The testimony on the part of the claimants is to the effect that the Gifford was head to wind, with shivered canvass at the time of the collision; and upon the point of proximity to the Aetna, it should be noted that the captain of the Gifford says she was in the wind four or five minutes or more, and when in that position was too near the Aetna then to try to stay her. Moreover, the spirit of the rule laid down by the trinity masters in The Kingston-by-Sea, is, that when a vessel misses stays under such circumstances, efforts should be made to let her pay off instead of standing steadily in the wind.

It is true that experienced seamen have testified that the movements of the Gifford, as they are given by her master, were proper, though most of them speak cautiously, and make the case depend on circumstances. It is evident that their approval of going in stays in such cases, rests largely upon the fact that time and distance are saved, which are considerations certainly not to be weighed against safety.

One of these witnesses is so clear in his view, that the suitable course is to go in stays, that he gives it as his understanding of the rule of the navigation act, that when two vessels are meeting on opposite tacks, close hauled, to avoid collision, it requires the vessel bound to give way, to put the helm down and go in stays, when, in fact, the rule says nothing about such a movement; and the diagram issued by the bureau of navigation, illustrative of the rule, shows that the port tack gives way to the close hauled starboard tack by porting. The captain of the Gifford gives as one of his reasons for going in stays, the fact that he would have lost time and distance if he kept his vessel off, a reason which cannot receive approval. Since it would have been entirely a safe and successful movement, in the time and space which the Gifford had, to have ported her helm and gone to the leeward of the Aetna, passing her stern, it seems clear that this should have been done. As some of the witnesses say, this movement would probably have carried her to some extent into the troughs of the sea; but the danger to the Gifford in this respect would have been less than the other course proved to be to both vessels.

The remarks of the court in Allen v. Mackey [Case No. 228], are applicable. The Gifford should have gone under the stern of the Aetna, "because by doing so the vessels would be constantly increasing their distance from each other, and because this course would not require on her part any calculation of the rate of speed at which the other vessel was going." The circumstance that, after the Gifford came up in the wind and did not go around, the captain then put the helm to port, is indicative of an attempt then useless, to do that which if done in proper season, would have avoided the collision.

But it is contended that the Aetna brought the injury upon herself, and that the collision was not averted because of her own recklessness. She stood on her course. In doing this, she was complying with the rule and with the principle laid down by the courts with so much emphasis, that when there is the least doubt of vessels on opposite tacks going clear, the vessel on the starboard tack should persevere in her course. The Aetna had the right to proceed upon the presumption that the Gifford would give way and was in the act of doing so. Under the rules laid down in the decisions, her duty was to keep her course until a collision was impending; otherwise, the movements of the other vessel might be baffled. It is said that the Gifford was disabled, that her sails were shaking in the wind, and that her condition of alleged helplessness must have been apparent to those on board the Aetna. But I am not convinced that her disability was so great, when first she missed stays, as to render her entirely helpless. And, moreover, the fact that she stood in the wind, and that her foresails were shaking, would not be a conclusive indication to those on board the Aetna that the Gifford had missed stays. Captain Norris testifies that if he had been on the Aetna, he could not have concluded, upon seeing her head sails lifting, that the Gifford had missed stays, until he should see her fall off and fill away. Other witnesses on both sides substantially concur with him. Upon all the testimony I regard it as reasonable that those on board the Aetna would, from natural observation, judge that the Gifford was endeavoring to give way, and would give way. An extremity was soon disclosed that forbade the Aetna from standing further on her course, and that brought her within the principle of the 24th rule. Special circumstances were presented which made it necessary to depart from the rule of adhering to her course, and which involved "due regard to the dangers of navigation." And I think the testimony and the circumstances establish that when peril was impending, measures were taken to put the Aetna about. Of course the Aetna had not the right to persist in her course so as to run the Gifford down. If it became the duty of the master of the Aetna to take measures to keep out of the way of the Gifford, the question is, when did that duty begin. Following the reasoning of Judge Longyear in the case of The H. P. Baldwin [Case No. 6,812], it will not do to say that it began when it became probable that the Gifford would not get out of the way, because by article 17 it was the duty of the Aetna to keep her

course, and it would not do for her to change it so long as there was any room for doubt as to the intentions of the Gifford.

At what point did the duty arise requiring the Aetna to take steps to avoid a collision? She was where the law says she should be under such circumstances. Adopting further the language of Judge Longyear, "the master of the vessel stood there with all the circumstances before him, and no doubt used his best judgment and acted accordingly. And although it may be now apparent that if he had given the order he did give, a little sooner, a collision might have been avoided, yet in view of the doubts with which the matter was necessarily surrounded at the time, I cannot say it was his duty so to have given the order," and that the Aetna is responsible because the order was not sooner given. The H. P. Baldwin, supra. I consider the Gifford as then in a position where she was to be regarded as a vessel in motion, with the duty resting upon her to give way to the Aetna, and so bringing the case within the principle of the decision, "holding, that where a vessel commits an error under impending danger, or in extremis, produced or brought about by another vessel, such error cannot be alleged as a fault by such other vessel."

The positive testimony of the men on the Aetna, that she was going about, head to wind, when the collision became imminent, is fortified by the fact that the jib-boom of the Gifford struck her foresail and then carried away the main rigging, and that the first blow was not forward of the foresail.

The case of The Charlotte Raab [Case No. 2,622], has been cited by claimants' counsel. But there, both vessels were on the starboard tack, close hauled. The Wall properly went in stays to avoid ice on her lee bow. As to the Raab, the vessel proceeded against, the case was not within rule 17, and the situation was fully comprehended by her master, who chose to push his vessel on, without giving the Wall time to get away on her port tack.

Decree for libellants.

F. W. JOHNSON, The (UNITED STATES v.). See Case No. 15,179.

F. WOODRUFF, The. See Case No. 2,763.

G.

GAAR (MOFFITT v.). See Case No. 9,690.

Case No. 5,167.

GADSBY v. MILLER.

[1 Cranch, C. C. 39.] [1]

Circuit Court, District of Columbia. Oct. Term, 1801.

PRACTICE AT LAW—APPEARANCE—SCIRE FACIAS—SERVICE—DISCONTINUANCE.

1. If a defendant appear to a sci. fa. it is not material by whom the writ was served. It is no plea for bail to say that the principal was in jail in Maryland at the time of the judgment against him and has remained in jail ever since.

2. Bail is not discharged by a discontinuance of the suit at the rules, if it be reinstated.

Scire facias. 1st plea: That Miller [special bail of Colquhoun], resides in Caroline county, in Virginia, and was served with the scire facias by the sheriff of Caroline county. To this plea there was a special demurrer. 2d plea: That Colquhoun was in jail in Baltimore at the time of the original judgment, and has remained so ever since. 3d plea: That the original writ against Colquhoun was discontinued by the plaintiff at the rules in October, and reinstated, at the motion of the plaintiff, at the next rules in November. 4th plea was the same in substance as the 3d. To these three last pleas there was a general demurrer.

Mr. Faw and Mr. Swann, for plaintiff.

Mr. Simms and Mr. Jones, for defendant.

On the part of the plaintiff, it was said; as to the first plea, that such a service of a scire facias is good by the laws of Virginia. Rev. Code, p. 95, § 30. And, at all events, it is cured by the appearance of the defendant. The second plea was abandoned by the defendant's counsel. As to the third and fourth pleas, the defendant in a scire facias, cannot plead that which the original defendant might have pleaded to the original action. Wraight v. Kitchingman, 1 Strange, 197. For the defendant, it was said, as to the first plea, that if the defendant comes and pleads the want of proper process, he shall not be prevented by his having appeared. 1 Bac. Abr. As to the third plea. If the plaintiff does any act by which the bail loses the right of taking the principal in order to surrender him, the bail is discharged. In this case the original action was discontinued one month, and during that time the bail would not have been justified in seizing the principal. It gave him an opportunity to escape. Judgment for the plaintiff.

GADSBY (MOORE v.). See Case No. 9,762.

GADSBY (UNITED STATES v.). See Case No. 15,180.

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 5,168.

GAFFNEY et al. v. GILLETTE et al.

[4 Dill. 264, note.] [1]

Circuit Court, D. Colorado. July Term, 1878.

REMOVAL OF CAUSES—WAIVER OF RIGHT—CAUSES PENDING ON ADMISSION OF STATE.

[1. The supreme court of Colorado refused to hear a cause which was pending therein at the time of the state's admission unless both parties should invoke its action, which they accordingly did by written stipulation of submission. *Held*, that this was a waiver of any right to remove the cause to a federal court after a reversal of the judgment and the return of the cause for a new trial.]

[2. After such reversal and return of the cause it was too late to remove it under the act of March 3, 1875 (18 Stat. 470), even if that act was applicable to such a case.]

The plaintiffs move to remand this cause to the state court.

Mr. Johnson, for plaintiffs.

Mr. Webster, for defendants.

Before DILLON, Circuit Judge, and HALLETT, District Judge.

DILLON, Circuit Judge. At the time of the admission of Colorado as a state, this cause was pending in the supreme court of the territory on appeal from a final decree of one of the district courts of Colorado territory. The plaintiffs were then and still are citizens of Illinois, and the defendants citizens of New York and Colorado. The supreme court of the state, in consequence of the provisions of section 8 of the act of June 26, 1876 (19 Stat. 62), refused to entertain jurisdiction of the cause, or to decide the same, unless both parties should invoke its action and submit the same to its judgment. The parties did this by a written stipulation duly filed. The supreme court of the state, after argument, reversed the decree below and remanded the cause to the proper district court of the state, with leave to complainants to amend their bill, if so advised, and with leave to one of the defendants to file a cross-bill, if so advised, and dismissing the bill as to another defendant, unless the complainants should make him a proper party by an amended bill to be filed within such time as the court should direct.

After the case was remanded an amended bill was filed, and the same was demurred to by the defendants. At the same term the defendants filed their petition to remove the cause to this court, on the ground of citizenship of the parties, and the removal was ordered. The plaintiffs now move to remand the cause to the state court.

We hold that the defendants waived their right to a removal of the cause under the above mentioned act of congress of June 26, 1876, by their voluntary and deliberate submission of the same to the supreme court of the state.

We also hold that it was too late to remove the cause under the act of March 3, 1875, even if it be conceded that said act has any application to this cause. Remanded.

[NOTE. In original report in 4 Dill. 264, this case is published as a note to Ames v. Colorado Cent. R. Co., Case No. 325.]

[1] [Opinion reprinted from 4 Dill. 264, note, by permission.]

Case No. 5,169.

GAFFNEY'S ASSIGNEE v. SIGNAIGO.

[1 Dill. 158: [1] 14 Int. Rev. Rec. 95; 5 West. Jur. 450.]

Circuit Court, E. D. Missouri. 1870.

BANKRUPTCY—FRAUDULENT CONVEYANCES—LOANS TO INSOLVENTS ON SECURITY—VALIDITY OF.

1. There is no provision of the bankrupt act which avoids a security otherwise valid, because it is taken in the form of an absolute deed instead of a mortgage.

2. A person who is insolvent may borrow money, and give a valid security therefor on his property, if no fraud in fact be intended, and no fraud on the bankrupt act be effected.

This is an appeal from a decree of the district court for the eastern district of Missouri. [Case unreported.] Gaffney made an absolute conveyance of certain property in the city of St. Louis to the defendant, and this is a bill by the assignee of Gaffney to set aside this conveyance because the same was fraudulent, and in violation of the bankrupt act. The answer admits the making of the conveyance, but denies the fraud, and sets up that the deed was executed to secure a sum of money advanced at the time by the defendant to Gaffney, and actually applied by the latter to the payment of judgments, taxes, and debts which were liens on the property, and certain other judgments rendered by justices of the peace, which could at will be made liens thereon. The answer claims to hold the property as security only, and prays, by way of cross bill, that the amount of advances made on the security of the deed be declared a lien on the property. The district court found that the deed was made as security only, ascertained the amount of the advances, and entered a decree in conformity with the prayer of the cross bill, from which the assignee appeals.

E. T. Allen, for assignee.

Lackland, Martin & Lackland, for defendant.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. 1. The fact is conclusively established that the money which the defendant loaned was applied to the payment of debts against Gaffney, which were either liens on the property, or could

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

have been made so at any time, at the election of the creditors.

It is claimed by the assignee that an absolute conveyance, made for the purpose of securing a bona fide debt, though created at the time with a parol understanding between the parties that the land is to be reconveyed upon the payment of the debt and interest, is void against creditors, especially if the grantee is aware of the existence of other creditors, and knows or has reason to believe the grantor to be insolvent.

Such, however, is not the law, and the deed is valid as a security, and may be enforced as such, unless actually or constructively fraudulent. There is no provision of the bankrupt act which avoids a security otherwise valid, because taken in the form of an absolute deed instead of a mortgage. The fact that it is so taken may be a circumstance to show fraud, but alone does not establish it, and why it was thus taken, has, in the case at bar, been satisfactorily explained.

The case is unlike Lukins v. Aird, 6 Wall. [73 U. S.] 79, where a valuable right—that of possession—was secretly reserved to the failing debtor, contrary to the terms of the deed; here, there was no absolute sale in fact, and no attempt by the debtor to reserve a right at the expense of his creditors.

2. It is also claimed by the assignee, that Gaffney, being insolvent at the time the deed was made, and the defendant having reasonable cause to believe this to be the fact, that the making of any disposition of his property was fraudulent because in contravention of the 35th section of the bankrupt act.

But a person who is believed to be insolvent may borrow money bona fide and give a valid security therefor, on his property, no fraud in fact, or on the bankrupt act, being intended or effected. Darby v. Boatman's Sav. Inst. [Case No. 3,571], and authorities cited.

The court finds from the evidence in the case, that the defendant had money to loan; that Gaffney, learning of this, applied to defendant's agents to borrow it to pay off liens and debts as above mentioned; that defendant, on the agents' recommendation, at last consented to make the loan; that the agents advised the security to be taken by way of absolute deed, which was not done secretly, and that the whole sum borrowed (except a few dollars excluded from the decree by the district court) was by the defendant's agents actually paid over to the creditors of Gaffney, whose liens were extinguished and whose judgments were satisfied on the record.

Certain it is, therefore, that no fraud was wrought by the transaction, upon the creditors of Gaffney; and equally clear is it upon the evidence, that no fraud was meditated by the defendant. There is no evidence that he ever claimed to own the property absolutely. Gaffney was allowed to remain in possession, and the theory that the conveyance was taken in this way to deceive creditors, or to defraud them, has no support in the evidence.

Decree affirmed.

GAGE (CHICAGO v.). See Case No. 2,664.

GAGE (HAWES v.). See Case No. 6,237.

GAGE (HERRING v.). See Case No. 6,422.

GAGE (TOMPKINS v.). See Case No. 14,088.

GAGE (YELLOW JACKET SILVER MIN. CO. v.). See Case No. 18,134.

Case No. 5,170.

GAGER v. The A. D. PATCHIN.

[1 Am. Law J. (N. S.) 529.]

District Court, N. D. New York. Jan., 1849.[1]

SALVAGE — PROCEEDINGS IN REM AND IN PERSONAM—PREVIOUS AGREEMENT—JOINDER OF ALL SUITORS.

1. A suit for salvage in rem as well as in personam may be maintained in the admiralty for services, which, if rendered voluntarily would be salvage services, notwithstanding they were rendered in pursuance of a previous agreement specifying the amount of the remuneration therefor, and although the contract was made with the owner of the vessel saved, especially if the owner was also the master, and the fact of his proprietary interest was unknown to the other party.

2. Although all the suitors for salvage ought to join in the suit against the property saved, the non-joinder of the crew of the salvor vessel in a suit by the master and owner, is no impediment to the maintenance of such suit, especially if the services of the crew required no extraordinary exertions and were attended with no extraordinary personal danger.

3. Although the amount agreed to be paid for salvage services is not binding in a court of admiralty upon the party at whose instance, or for whose benefit the service was performed, and will be reduced by the court if exorbitant, and especially when assented to by such party under the pressure of alarm or distress, yet where the agreement has been deliberately entered into and does not appear to be oppressive, it will be enforced according to its terms.

This was a suit for salvage on account of services rendered by the steamer Albany, of which the libellant [Charles L. Gager] was owner and master, to the steamer A. D. Patchin, [Harry Whittaker, claimant], while hard aground on a ledge of rocks, upon which she had been carelessly run at Racine point, in the state of Wisconsin. The facts and circumstances of the case will be sufficiently manifest from the judgment of the court.

Eli Cook, for libellant.

George Underwood, for claimant.

CONKLING, District Judge. One of the objections urged against the libellant's right to maintain this action is, that the services for which he claims compensation, having been performed in pursuance of an express agreement between the parties, and for a

[1] [Affirmed in Case No. 87.]

stipulated compensation, this is not a case of salvage but a case of contract of which the court has no jurisdiction. In support of this objection, the counsel for the claimant relies upon the similar case of The Mulgrave, 2 Hagg. Adm. 77, in which Lord Stowell pronounced against the action on this ground, observing that it was not a case of salvage, but one of contract, and that he could not entertain the question. Lord Stowell did not, of course, intend to say that he could entertain no action arising ex contractu, but only that the case before him not being a case of salvage, he could not entertain it as a case of that character; and not being a case falling within either of the descriptions of contract embraced within the jurisdiction of the court, he could not entertain it as such. It is well known that the only contracts upon which, at the date of this decision, original suits were in fact entertained in the English high court of admiralty were those for seaman's wages and bottomry bonds, although it has always been conceded that the jurisdiction of the court extended to all such contracts as were made on the high seas and were to be there executed. But by a long series of American decisions, terminating with that of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, the principle is now firmly established that the jurisdiction of the American courts of admiralty does not depend on the decisions of the English common law courts, relative to the jurisdiction of the high court of admiralty of England, but that all contracts in their nature strictly maritime are cognizable in the admiralty. Such, certainly, is the character of this contract; and if the suit had been in personam, the jurisdiction of the court would have been unquestionable. But whether the contract created a lien on the Patchin, and may therefore also be enforced in a suit in rem, is another question not devoid of difficulty.—That a suit in the admiralty for salvage may be maintained in either form, has never been doubted, and this right is moreover expressly recognized and declared by one of the late rules prescribed by the supreme court. If, therefore, the salvor's title to remuneration in ordinary cases may be considered as founded in implied contract, it might, with great apparent force and propriety, be insisted that the remedial right of the salvor could not, in any degree, be impaired by an express contract, entered into before hand, for the mere purpose of fixing the amount of compensation, without any express or clearly implied intention of waiving the right to prosecute in either of the accustomed forms. But suits for salvage have generally been considered—though I confess it has always appeared to me with somewhat questionable propriety—as cases rather of tort than of contract. It would not necessarily follow, therefore, because the maritime law gives a lien in favor of the salvor in a case strictly of salvage, that it also confers one for services of the like nature rendered in pursuance of a contract. But it is a general principle of the maritime law, that from contracts made by the master which bind the owner, as all authorized contracts entered into by him on account of his ship do, unless otherwise expressly provided, there results an implied hypothecation of the ship. The master, undoubtedly, has authority to hire the services of others, when necessary, for the preservation of his vessel, and I imagine that such a contract, subject to the revisory power of the court, would constitute a lien on the vessel. It happens, however, in the present instance that the master was also the sole owner of the vessel to which assistance was rendered; and it is insisted that on this account, he incurred no other than a personal responsibility. Admitting the general principle thus asserted, it becomes necessary, nevertheless, to enquire whether the present is a case to which it is properly applicable.

The contract was originally entered into between the libellant in person and Lewis J. Higby, professing to act as agent for the claimant. It was in writing and is in the following words: "This article of agreement made this 13th day of June, 1848, between the steamer Albany and the steamer Patchin, Capt. H. Whittaker, in which Capt. Gager of the steamer Albany, agrees to do all he can do, to assist said Patchin, now on the rocks at Racine point, Wisconsin, and to stay with her until discharged by said Capt. Whittaker, and said Albany is to be paid four hundred and fifty dollars per day, and the time to commence four o'clock to-day, said Albany to have the privilege to make harbor in case of storm. H. Whittaker, Per L. J. Higby, agent. Milwaukee, June 13, 1848." The agreement was made at the place where it bears date, a few miles from the place where the Patchin lay, and on being soon afterwards made known to the claimant, was by him assented to. His residence was in Buffalo, in the state of New York. The claimant, it will be observed, is described simply as captain of the Patchin, and there is no allegation in the pleadings, nor any evidence that the libellant had any knowledge of his proprietary interest in the vessel. In the case of The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409, 5 Pet. Cond. R. 631, it was held that although for materials or supplies furnished in a home port, no implied lien in general attaches to the ship, the reasonable presumption being that they were furnished on the credit of the owner, yet that if a vessel comes into her home port, in a foreign guise, and obtains supplies, this principle is applicable to the case, and a lien in favor of the material men arises. "The questions," say the court, "then arise, on what does the privilege of the material men depend? on the state of facts, or on their belief of facts?" The answer given by the court is that it depends on the latter. "De non apparentibus et non existentibus, eadem est

ratio"; and applying the principle decided in The St. Jago de Cuba to the present case, it would follow that the contract ought to be treated as having been made with the master as such, unless the libellant was bound to show affirmatively his ignorance of the fact, that the claimant was also the owner of the Patchin. But considering that the contract was made at a place remote from the owner's residence, and that the claimant is described in it only as master; and considering also that his ownership is now set up by him for the purpose of exempting his vessel by way of exception from the general rule, I am of opinion that the onus probandi lies upon him to show the libellant's knowledge of such ownership.

In discussing this point, I have thus far conceded that if the libellant had known that the claimant was the owner and had contracted with him as such, no lien would have resulted from the contract. But I infer that the late Mr. Justice Story entertained a different view of the law, and that he supposed it to be in this respect immaterial whether the contract was made with the master or owner. In The Emulous [Case No. 4,480], which was a suit in rem, the vessel was owned in Boston, and having struck on a rock within the waters of that state, one of the sets of salvors contracted to tow her into port for a specific sum agreed upon. The contract, it is true, was made with the master of the schooner, though, as already observed, in the state to which she belonged. But the learned judge in a formal exposition of what he understood to be the law applicable to cases of that nature, seems not to have recognized any distinction between contracts of this description entered into by the master and those made by the owner in person. His language is as follows:

"The court has been asked upon this occasion to lay down some clear and definite rule as to what shall be deemed salvage service, and what shall be deemed a mere common contract for labor and services. I take it to be very clear, that whenever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances which establish that the parties have voluntarily and without any controlling circumstances on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation, for labor and services quantum meruerunt; in either case it does not alter the nature of the service, as a salvage service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage contract and a salvage compensation. It is true, that contracts made for salvage services are not ordinarily held obligatory by the court of admiralty upon the persons whose property is saved, unless the court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of public policy as well as upon just views of moral obligation. No system of jurisprudence purporting to be founded upon moral or religious or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract, unjust, oppressive or exorbitant, that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty, into a traffic of profit which would outrage human feelings and disgrace human justice."

In The Centurion [Case No. 2,554], the learned judge of the district of Maine cites the case of The Emulous [supra] as in his judgment containing a just exposition of the law of salvage. It is quite "immaterial," he observes, "whether the salvors accidentally fall in with the wreck and volunteer their services, or are called upon by the owners or persons interested in the wreck to aid in saving it. It is the place where the property is situated, and the circumstances of exposure and peril in which it is found, that determine the question whether it is a case of salvage or not." But in a later case,—that of Bearse v. Three Hundred and Forty Pigs of Copper [Case No. 1,193],—which arose in the district of Massachusetts, and was finally decided on appeal at the circuit court, the objection was distinctly taken, that the services having been performed in pursuance of an express contract, no action in rem could be maintained therefor. The contract was made in that case not by the master, but by the proprietors in person, of the property saved; but this circumstance does not seem to have been considered of any importance even by the counsel for the claimants. The objection was that the service, though of a nature which would otherwise have been a salvage service, having been performed by contract, no right accrued from it to the libellants to proceed against the property. The district judge "held that as the respondents had denied in their answer that any contract subsisted between them and the libellants, at the time the property was recovered, which also appeared upon the evidence, the libel was rightly brought against the property, whether the principle contended for by the libellants was correct or not." The conclusion of Mr. Justice Story on the appeal also was, that the particular services in question were not embraced within the contract set up by the claimants, under which other salvage services had been previously performed by the libellants. But he adverts to the question only as one bearing upon the amount of remuneration to be awarded, and seems not to have considered it at all affecting the right of the libellant

to maintain his action in rem. He refers also with apparent approbation, to his observations above cited in the case of The Emulous. The just inference, therefore, appears to be, that he considered all services, which if rendered voluntarily would be salvage services, as not the less so because rendered in pursuance of an agreement for that purpose; and as entitling the salvor to the like remedies, whether rendered in the one form or the other. If the salvor, especially after the performance of the service, should take a bond or receive a bill of exchange or a negotiable promissory note in payment, it may be conceded that his remedy would be limited to a personal action on the security so taken. But there does not appear to be solid reason for denying to the salvor, a lien on the property saved, merely because the salvage service was performed at the request whether of the master or the owner, and under a promise of remuneration, especially as a court of admiralty possesses an unquestionable power to shield the owners of property saved, against extortionate exactions, by reducing an exorbitant reward, promised under the pressure of alarm or distress. My opinion therefore is that this objection is invalid.

It is farther insisted by the counsel for the claimant, that the stipulated services were not faithfully performed, and that they were in fact worthless. I think this objection has not been substantiated. The witnesses for the libellant give a very exact and intelligible account of the services rendered and the means used by the libellant to relieve the Patchin from her highly perilous situation. This evidence in itself considered is entirely satisfactory, and leaves no room for doubt that the libellant did all that he could reasonably be expected to do, for the relief of the Patchin; that he contributed essentially to her rescue. The witnesses on the other side deal in general censures of the libellant's management; but when pressed to specify the particulars in which his misconduct consisted, they are unable to do so. Indeed, all the more important measures resorted to, were dictated by the claimant himself, and his directions appear to have been readily acquiesced in by the libellant. It was insisted also by the counsel for the claimant, that the persons composing the crew of the Albany ought to have been parties to the suit. When, as is commonly the case, salvage is claimed by the crew, as well as by the master and owners of the salvor vessel, and a suit is to be instituted in the admiralty therefor, it is certainly proper that all should join in such suit; and in case where the salvage service was highly meritorious, as, where it required exhausting labor, or was attended by great danger, if the master should designedly institute a suit in behalf of himself or of himself and his owner, alone, in the hope that through the ignorance of the crew, he might secure a large reward to himself at their expense, he would expose himself to just censure; and there may be cases in which it would be the duty of the court to enquire into the reason of the non-joinder of the seamen, and to see that their rights are maintained, unless they choose voluntarily to relinquish them. But in the present case the crew of the salvor vessel were exposed to no extraordinary hardships or personal danger. Their services were rendered chiefly on board their own steamer, and were substantially such as they had contracted to perform; and they probably and perhaps very properly deemed their stipulated wages a sufficient compensation therefor. If they had thought otherwise, it may be supposed that they would have applied to the court for redress, and it is a mistake to suppose that the right of the libellant, as owner and master of the Albany, to prosecute his suit, is prejudiced by their non-joinder in the action.

With respect to the amount of remuneration to be awarded, there are no circumstances attending the case, which demand the jealous scrutiny of the court, into the reasonableness of the stipulated reward. At the time the contract was entered into, the Patchin was in no danger of immediate destruction. The weather was fair and calm; a large number of persons were already engaged in endeavoring to get her off the rocks; steamers were frequently passing very near to the spot where she lay; the terms of the agreement seem to have been deliberately settled, and in order to determine the just measure of compensation, the books of the Albany were resorted to, for the purpose of ascertaining her ordinary earnings, and the amount to be paid was fixed accordingly. The circumstances of the case scarcely admitted of the indulgence of a spirit of rapacity by the libellant, and there is no evidence tending to show that he was actuated by any such spirit. To say nothing of the great value of the Patchin, the Albany herself was a large and valuable steamer. After transferring her numerous passengers to another steamer and refunding their passage money, she was constantly employed not altogether without danger to herself from hidden rocks, in rendering assistance to the Patchin, during four successive days and nights, and during a portion of the time in strenuous efforts, subjecting her to heavy strains to jerk or drag the Patchin from the rocks. For these sacrifices and services, I cannot say that the stipulated sum of $450 a day is an exorbitant or even an unreasonable compensation; and I am satisfied that the duty of the court will be best performed, by simply enforcing the voluntary agreement of the parties. I accordingly award to the libellant the sum of $1,800, deducting the sum of $300 already paid, with interest from the 17th day of June last, when the service was consummated.

[NOTE. The claimant appealed to the circuit court, where the decree of the district court was affirmed. Case No. 87.]

Case No. 5,171.

GAGER v. HARRISON.

[9 Chi. Leg. News, 377.]

Circuit Court, D. Oregon. July 23, 1877.

FRIVOLOUS PLEAS—DENIAL OF CITIZENSHIP WITH MATTER TO THE MERITS—ESTOPPEL—AMBIGUITY.

1. Denial of citienship of the plaintiff pleaded with matter to the merits becomes frivolous.

2. Ambiguity or uncertainty not a ground for motion to strike out.

3. A plea of estoppel which does not show that the defendant was misled by the plaintiff, or those under whom he claims, is frivolous.

[This was an action at law by Edwin B. Gager against John Harrison to recover possession of certain real property.]

Charles Upton, for plaintiff.

Walter W. Thayer, for defendant.

DEADY, District Judge. This motion is made on the grounds that the allegations asked to be stricken out are "sham, frivolous and irrelevant." So far as the first ground is concerned the motion is certainly not well taken and the last two may be considered as one. The first two allegations included in the motion are denials of allegations in the complaint—one, a denial of the alleged citizenship of the plaintiff, and the other of the value of the portion of the premises alleged to belong to the plaintiff.

An answer may always contain a denial of a material allegation in the complaint, and must do so if the defendant intends to controvert it. Civ. Code Or. § 71. But the subsequent denials and defenses in the answer are a waiver of the denial of the alleged citizenship of the plaintiff, as that matter must be plead in abatement, and not to or with the merits. If so it becomes frivolous and may be stricken out. Susquehanna & W. V. Railroad & Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 177; Wythe v. Myers [Case No. 18,119]. The objection to the second denial is that it is ambiguous, as it includes in the same terms the denial of the value and plaintiff's ownership of the premises in question. But the answer to this is, that the denial is on a par in this respect with the allegation denied. Besides ambiguity is not a cause for striking out. The motion is allowed as to the first of these allegations, and denied as to the second.

The plea of ownership in the defendant is next asked to be stricken out, because it only alleges that he is the owner in fee of the premises, without saying in severalty, and therefore it does not appear but that he is only the owner of the undivided three fourths thereof not claimed by the plaintiff in this action. If this criticism of the plea is just, it only shows that it is uncertain, and the remedy for that is a motion to make certain and not to strike out. Civ. Code Or. § 84.

The remainder of the motion is aimed at the third defense, the same being a plea of estoppel The action is brought to recover an undivided one-fourth of certain premises alleged to be wrongfully withheld from the plaintiff by the defendant. This defense states that the plaintiff is the successor in interest of Nancy Northrup, the widow of John L. Northrup, and that the premises are a part of his donation claim, which, in 1863, and after the decease of said John L., were partitioned by the county court of Washington county among the children and certain grandchildren of said John L., as his heirs, and the said Nancy as his widow, upon the theory that she was only entitled to dower therein, and that the defendant is the successor in interest of said heirs. The facts do not constitute an estoppel. It is not alleged in the plea that the widow, at the time of the partition, was aware that she was entitled to an equal share of her husband's donation with his three children, or that any admission she may have made by her declarations or conduct in the partition proceeding were made with intent to deceive, or culpable neglect, or that the defendant or his grantors were deceived or misled by them, or that he or they had not the same knowledge and means of knowledge as to the interest of the widow in her husband's donation and the correctness and validity of said partition as any one. Davis v. Davis, 26 Cal. 40. The plea is therefore certainly frivolous, and must be stricken out. If the facts, or any of them, tend to show title in the defendant, they may be used as evidence in support of the plea to that effect.

Case No. 5,172.

GAGER v. HENRY.

[5 Sawy. 237; 11 Chi. Leg. News, 84.][1]

Circuit Court, D. Oregon. Aug. 30, 1878.

PETITION TO SELL LANDS OF WARD—JURISDICTION TO SELL LAND OF WARD—KNOWLEDGE OF THE COURT—ADJOURNED SALE—JUDICIAL SALE.

1. A petition by a guardian to sell the lands of his ward, is not a proceeding between the guardian or ward and the next of kin and others to whom the statute directs that notice thereof shall be given and adverse to the latter, but a proceeding in the nature of one in rem conducted by the ward through his guardian, in the interest of and for the benefit of the ward.

[Cited in Sprigg v. Stump, 8 Fed. 217.]

2. Under the act relating to the sales of lands of minors (Laws Or. p. 738), a county court acquires jurisdiction of a proceeding by a guardian to sell the lands of his ward upon the filing of a proper petition therefor; and such court, when acting as a court of probate, being a court of general jurisdiction, its judgment or action upon such petition cannot be questioned collaterally for errors occurring in the proceedings thereon, after the filing thereof, except as provided by statute.

[Cited in Holmes v. Oregon & C. Ry. Co., 5 Fed. 535; Sprigg v. Stump, 8 Fed. 217; Goldsmith v. Gilliland, 23 Fed. 646.]

3. Section 20 of the act aforesaid, having provided that in an action relating to lands

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. Syllabus, only in 11 Chi. Leg. News, 84.]

sold by a guardian where the ward contests the validity of the sale, the same shall not be avoided for irregularity in the proceedings, provided certain particulars appear therefrom, the presumption in favor of the jurisdiction of the county court and the lawfulness of its exercise is thereby qualified and restrained accordingly, so that if any of such particulars, e. g., that the guardian gave notice of the time and place of the sale of the premises and sold them accordingly, do not appear from the record, the sale is invalid and void.

4. The court takes notice of the existence of the political subdivision of Oregon called Yamhill county, and that Lafayette is the county seat thereof, and therefore a notice to sell lands, upon the order of the Yamhill county court, at the court-house in Lafayette is notice of a place of sale in Yamhill county.

5. Where a guardian gave due notice of time and place of the sale of his ward's lands, and upon the day of such sale for good cause adjourned the same for four weeks and then made a sale which was duly confirmed by the court, such sale was in effect made upon the original notice; and this although the statute (Civ. Code, Or. § 290) forbid the adjournment of the sale for more than one week at a time.

6. A guardian's sale authorized by the county court is a "judicial sale"—that is, one made in effect by the court after getting a bid by means of a public auction conducted by the guardian under its direction, and such a sale cannot be questioned collaterally for an error in the adjournment thereof.

Action [by E. B. Gager against A. B. Henry] to recover possession of real property.

Charles B. Upton, for plaintiff.

E. C. Bronnaugh and Joseph M. Dolph, for defendant.

DEADY, District Judge. This action is brought to recover the possession of the undivided half of fifty-one and eighty-two one hundredths acres of land situate in the northwestern corner of the donation of Joel Perkins and Laura Ann his wife, in Yamhill county. It was tried by the court without the intervention of a jury. There is no conflict in the evidence and the material facts are as follows: That in 1847 Joel Perkins occupied the premises, and prior to 1851 became a married man and a settler thereon under section 4 of the donation act of September 27, 1850 (9 Stat. 497), and prior to 1855 complied with the provisions of said act so as to entitle himself and wife to the grant thereof and died in 1856, intestate, and before the patent issued, leaving a widow, now living, and three children, two of whom, Harriet Jane and Joan Minnette, died in infancy and prior to April 14, 1877, and the commencement of this action; that Dan Hawn Perkins, the remaining one of said children, was born in 1854, and on April 14, 1877, did convey all his interest in the premises to the plaintiff.

This is the plaintiff's case; and upon this state of facts he is, as the successor in interest of said Dan Hawn, the owner of the undivided one half of the premises and entitled to the possession thereof. The settlement being made under section 4 of the donation act, and the settler having died intestate before the patent issued, the case falls within that provision of said section 4, which provides: "In all cases where such married persons have complied with the provisions of this act so as to entitle them to the grant, as above provided * * * and either shall have died before patent issues, the survivor and children or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions." 9 Stat. 497. Under this act upon the death of Perkins, his share of the donation was granted over to his widow and three children in equal parts, and upon the death of Harriet Jane and Joan Minnette, without issue, their interests, under subsection 3 of section 1 of the "Act to regulate the descent of real property," etc. (Laws Or. p. 547), descended to the surviving child, Dan Hawn, and the mother in equal parts, whereby they two became the equal owners of the premises.

But from the evidence introduced by the defendant it appears that on September 7, 1865, one Hank W. Allen, was, by the county court of Yamhill county, duly appointed guardian of the three minor children aforesaid, and then and there duly qualified as such; that on December 4, 1865, said guardian filed a petition, duly verified, in said county court, setting forth therein that his wards' estate consisted wholly of real property worth about eight thousand dollars, and that it was incumbered with a debt of eight hundred dollars, which the income of the property was insufficient to pay after supporting said wards, and praying for a license to sell enough of said real property to pay said indebtedness; that upon the filing of said petition said county court made an order fixing the hearing of the same on January 5, 1866, and directing notice thereof to be given to the next of kin, and others interested, and that said notice be published in the Oregon Statesman for four successive weeks, that said notice was duly published in said paper "for three consecutive weeks, to wit, from the week commencing December 18, 1865, to the week ending January 1, 1866;" that on January 5, 1866, said county court made an order licensing said guardian to sell in the manner provided by law certain portions of the real estate of said wards not exceeding one thousand dollars in value, to pay the debts aforesaid, including a portion in the north-west corner of said donation not to exceed one hundred and forty acres which portion includes the premises in controversy, and which order recites that the notice aforesaid to the next of kin and others interested had been duly published in the Oregon Statesman "for three successive weeks, ending January 1, 1866;" and that no one objected or appeared to show cause why said license should not be granted; that said guardian published due notice that said property would be sold "at public auction" on February 6,

1866, between the hours of 9 a. m. and 4 p. m., at the court-house door in Lafayette, in the Oregon Statesman aforesaid, a paper of general circulation in Yamhill county, for four consecutive weeks, to wit, from the week commencing January 8, 1866, to the week ending February 5, 1866, and before fixing the time and place of such sale, gave the bond and took the oath required by law from guardians licensed to sell the real property of their wards; that afterwards, on April 4, 1866, said guardian reported to said county court that on February 4, 1866, after giving legal notice of such sale by posting written notices thereof in four public places in Yamhill county, Oregon, four weeks prior thereto, and by publishing a similar notice in the Oregon Statesman of the time and place of sale as aforesaid, he offered the premises for sale at the court-house aforesaid, and there being no bids therefor did, by proclamation, then and there publicly postpone said sale until March 6, 1866, between the hours aforesaid, and that on the day last aforesaid, at the court-house aforesaid, he again offered the interests of his wards in the premises, the same being the undivided three fourths thereof, for sale at public auction, and then and there sold the same to the defendant for four dollars and seventy-five cents per acre, that being the highest and best bid therefor, and prayed that said sale be confirmed, whereupon said court made an order continuing said matter until its next regular term; that afterwards, on May 10, 1866, said county court on consideration of said report found that said guardian had given due and legal notice of the time and place of the sale of said premises "by publication and written posted notices as required by law," and sold them at public auction accordingly, at the court-house aforesaid in the county aforesaid to the defendant, he being the highest and best bidder for the sum of four dollars and seventy-five cents per acre, that being the fair value of the same, and thereupon ordered that said sale be confirmed, and that said guardian upon the payment of the sum bid in gold coin, convey to the defendant all the interest of his said wards in the premises, by metes and bounds, as therein described, which was duly done upon the day last aforesaid.

Upon these facts the defendant claims to have acquired the interests of the children of Joel Perkins, deceased, before the death of Harriet Jane and Joan Minnette, aforesaid, in the premises, and to be the owner of the same. On the contrary, the plaintiff insists that the proceedings in the guardian's sale are invalid, and therefore nothing passed by his deed to the defendant.

The objections made to the proceedings are: (1) The order setting the petition down for hearing does not find that the sale was "necessary;" (2) said order does not require any one to appear and "show cause why a license should not be granted;" (3) neither the petition, the said order, nor the citation contain any description of the premises; (4) there was no sufficient service of the citation by publication; and (5) there was no notice given of the time and place of sale.

In considering these objections it must be borne in mind that according to section 1 of article 7 of the Oregon constitution, as construed by the supreme court of the state in Tustin v. Gaunt, 4 Or. 306, the county court of Yamhill county, when exercising this jurisdiction over the lands of these minors, was a court of general jurisdiction, and therefore its proceedings and judgments are to be considered in the light of the rule that prevails in such cases—the jurisdiction is presumed until the contrary appears; and that where the record is silent, that which ought to have been done is presumed to have been done, and rightly done. Neff v. Pennoyer [Case No. 10,083]; Gray v. Larrimore [Id. 5,721]; Grignon's Lessee v. Astor, 2 How. [43 U. S.] 341.

The first of these objections is based upon the fact that the statute (Laws Or. p. 739, § 7), provides in effect that if it shall appear to the court from the petition of the guardian for license to sell the real estate of the ward, "that it is necessary, or would be beneficial to the ward," that the property or some part of it should be sold, it shall make the order for the next of kin, or those interested in the estate, to appear and show cause why the prayer of the petition should not be granted, and upon the assumption that the court must not only have found that the sale was necessary, but that such finding must be stated in the order. Now, it is an elementary rule that the judgment of a court of general jurisdiction need not state that the facts or conclusions of fact upon which it is founded or authorized. Grignon's Lessee v. Astor; supra. This it is which primarily distinguishes it from the judgment of a court of inferior jurisdiction. That which is necessary to the judgment of such a court is presumed to have been shown to it, and found or determined by it. Civ. Code Or. § 726.

But it is to be observed that the statute does not absolutely require that it should appear to the court that the sale was necessary, it is sufficient if it appears that it would be beneficial. No question is made but what the petition is sufficient. It states the character and value of the wards' estate, and the amount of the indebtedness thereon, and that the income thereof is not sufficient to pay such indebtedness and maintain the wards. This makes a case of apparent necessity, and the court in making the order found, and stated therein, that it was "proper and reasonable" that the petition should be heard. Of course, it was not proper that the petition should be heard, unless it appeared therefrom, either that it was "necessary" or "beneficial" to the wards, that the prayer thereof should be granted.

It is also objected that the order is insufficient, because it does not require any one to

appear and show cause why the license should not be granted. It is true that the order does not contain such a direction in so many words, but it does require that notice be given to the next of kin, and all others interested, to appear at a proper time and place, when and where said petition will be heard and determined. This, we think, is the substantial equivalent of the language of the statute (section 7, supra), "to show cause why a license should not be granted," etc. The only purpose of the statute is to provide for giving notice of the time and place of the hearing of the petition to those most likely to be interested in the welfare of the minors, so that, if need be, the petition may be contested by them. But the court can not compel any one to show cause against the petition, or say aught against its allowance. When it has directed notice to be given to the proper persons of the hearing of the petition, the statute is substantially complied with, although such direction and notice should not require them, in so many words, to show cause thereon. Indeed, it seems too plain for argument, that when the next of kin, and others interested, are duly notified to appear at the hearing upon a petition by a guardian to sell a minor's land, that such persons are thereby in effect required, notified, to appear and show cause, if need be, why the petition should not be granted.

The order is sufficient. As to the third objection: The statute (Laws Or. p. 739, § 6) provides that the petition for a sale by guardian shall set "forth the condition of the estate of his ward, and the facts and circumstances under which it is founded, tending to show the necessity or expediency of such a sale." Section 1 of the statute (Laws Or. p. 738) authorizes the sale of the ward's "real estate," whenever his income is insufficient to maintain him. Section 6, supra, authorizes the guardian to file a petition to obtain a license for such sale; that is, the real estate of the ward, the whole of it, if need be. Doubtless the petition may ask for the sale of a specific portion of the estate, and in such case the order of sale should not go beyond such portion. But there is nothing in the statute, or the nature of the case, that requires the guardian to petition for the sale of any specific portion of the real property. Except by a sale ordinarily it cannot be known what quantity of the estate must be disposed of to meet the particular exigency. Upon the hearing of the petition the court will ascertain whether it is necessary or expedient to sell the whole of the property, or only a portion of it, and order accordingly.

The fourth objection is based upon the fact that the order for a hearing upon the petition directs the notice to the next of kin and others to be published "for four successive weeks," while the proof of publication only shows that it was published three weeks. This, at least, is a serious irregularity; and if the jurisdiction of the court did not attach upon the filing of the petition, but until due service of the prescribed notice of the time and place of the hearing on the petition, the subsequent proceeding would be probably void. The county court being one of general jurisdiction, its authority to license and confirm this sale will be presumed unless the contrary appears. But in this case the contrary does appear, for it is shown by the record that the notice was not duly served, and therefore, so far as it depends upon this fact, it affirmatively appears that the court did not acquire jurisdiction. But the better opinion seems to be that the proceeding by a guardian to obtain a license to sell his ward's land is not one between adverse parties, and of which the court does not acquire jurisdiction until due service is made of the notice of the application, but rather a proceeding in the nature of one in rem carried on by and in the interest of the ward through his legal representative—the guardian. Mason v. Wait, 4 Scam. 133; Fitzgibbon v. Lake, 29 Ill. 177; Fitch v. Miller, 20 Cal. 381.

In Fitzgibbon v. Lake, supra, the court, in considering the question of what gives jurisdiction in such a case, cites with approval the following from Young v. Lorain, 11 Ill. 637: "They all agree that enough must appear in the application or the order, or at least somewhere on the face of the proceedings, to call upon the court to proceed to act; and all agree that when that does appear, then the court has properly acquired jurisdiction, or, in other words, is properly set to work."

Now, upon the filing of the petition by Allen—it being a sufficient one—the county court was called upon to proceed to act, to make an order prescribing what and how notice should be given to the next of kin and others. In Fitch v. Miller, supra, the court say: "In order to render the sale (a guardian's) effectual to confer a valid title, the probate court must have acquired jurisdiction of the case by the presentation of a proper petition by the guardian."

It follows, that when the county court of Yamhill county made the order directing the publication of the notice to the next of kin and others, and afterwards heard the petition upon a publication of such notice for a shorter time, it had acquired jurisdiction by the presentation of a proper petition—and this fact itself would be presumed in the absence of anything to the contrary—and therefore its judgment cannot be questioned collaterally on account of any errors it may have committed in the course of its subsequent proceedings. And for the same reason, the first three objections already otherwise disposed of cannot be made in this manner.

Besides, so far as this action is concerned, all the errors or irregularities so far considered are cured by the statute (Laws Or. p.

740, § 20), which provides that when the ward or any person claiming under him shall contest the validity of a guardian's sale "the same shall not be avoided on account of any irregularity in the proceedings; provided it shall appear: (1) That the guardian was licensed to make the sale by a county court of competent jurisdiction; (2) that he gave a bond that was approved by the county judge; (3) that he took the oath prescribed by statute; (4) that he gave notice of the time and place of sale as prescribed by law; and (5) that the premises were sold accordingly at public auction, and are held by one who purchased them in good faith."

This statute was enacted in the territorial times (December 16, 1863) with reference to such proceedings in the probate courts, and appears to assume, as I suppose the fact was, that they were not courts of general jurisdiction, but that the evidence of their jurisdiction and its lawful exercise must appear on the face of their proceedings, and therefore provides that their jurisdiction shall not be questioned collaterally except for some of the errors specified in the aforesaid five particulars. But the constitution of the state having conferred the probate jurisdiction on the county courts and declared them courts of general jurisdiction, their judgments in this respect, without this statute, could not be inquired into collaterally upon any of these grounds except the first—was the court that granted the license for the sale competent to do so?—in other words, had it jurisdiction of the subject? The effect of the statute was to limit the grounds upon which such proceedings in the probate courts could be attacked collaterally while its application to them in the county courts operates to enlarge the scope of such attack. Assuming what was taken for granted upon the argument, that the statute is applicable to the proceedings for the sale of a minor's land in the county court, the result is that the jurisdiction and lawfulness of the proceeding is not unqualifiedly presumed, but it must appear therefrom not only that the license was granted by a court of competent jurisdiction but that in the exercise of that jurisdiction, the matters and things specified in the last four of the particulars aforesaid were had or done. But as to any errors or irregularities in other respects the statute operates as an absolute confirmation of the sale when it declares in effect that the sale shall not be avoided on account of them. Therefore the first four of the plaintiff's objections to the validity of the sale, even if otherwise sufficient, are obviated by the statute. Neither of them come within the category of objections which the statute permits to be made in this action to the validity of the sale. It only remains to consider the fifth and last objection—that there was no notice of the time and place of sale.

This objection as to place is based upon the statute (Civ. Code Or. § 289) which provides that all sales of real property shall take place at the court-house door, and the fact that the notice only states that by virtue of a license from the Yamhill county court, the guardian will sell the premises at the court-house door in Lafayette, without expressly stating in what county. Being established by law, it is a matter of judicial cognizance that there is a county of Yamhill in Oregon, and that the place where its court-house is situated and its courts held is Lafayette. Prima facie, then, a sale made at the court-house door in Lafayette, in Oregon, was made in Yamhill county, Oregon, because there is no other Lafayette in Oregon which contains a court-house or is a county seat. We think the notice of the place of sale sufficient. The report of the sale, showing that the sale was made "accordingly," is still more explicit. It states that the premises were sold at the court-house door in Lafayette in said county, meaning Yamhill.

This objection, as to time, is based upon the fact that the sale was adjourned from February 6 to March 6, 1866, for want of bidders, instead of one week, as directed by statute. Laws Or. p. 739, § 12; Id. p. 329, § 1110; Id. p. 168, § 290. The statute provides that the guardian shall conduct the sale as upon an execution. In making a sale upon execution, the officer entrusted with the process may postpone the sale for want of purchasers or other sufficient cause, "not exceeding one week * * * and so on for like cause, giving notice of every adjournment by public proclamation made at the same time." Page 168, § 290.

In considering this objection, it may be well to premise, that but for the statute (section 20, subs. 4, 5, supra) the irregularity upon which it was predicated would be cured by the confirmation of the sale, and it could not now be used to avoid it. This was a sale upon a decree of a court acting as a court of probate, and proceeding substantially as a court of equity—what is called a "judicial sale," as distinguished from one made by a ministerial officer upon process to enforce the judgment of a court of law. In such a sale, the matter is under the direction of the court and the proceedings are reported to it for its approval. The purchaser is simply a preferred bidder, and the court may accept or refuse his bid. The sale is really made by the court—it is a part of the judicial proceedings in the case—and the decree of confirmation, when the court has acquired jurisdiction, is conclusive of the regularity of the intermediate proceedings. Williamson v. Berry, 8 How. [49 U. S.] 546; Freem. Ex'ns, § 311; Blossom v. Railroad Co., 3 Wall. [70 U. S.] 207. This being the case, this statute limiting the general rule as to the effect of a confirmation of such a sale ought not to be construed with a view of enlarging its operation, but the contrary. Passed originally with a view of sustaining the proceeding for the sale of a minor's land

in a court of inferior jurisdiction, in the mutations of government and tribunals, it has come to be applied to the same proceeding in a court of general jurisdiction, so as to materially modify the presumption in favor of its validity. The question, then, upon which this case must now turn is, was the guardian's sale made upon a notice of the time thereof as prescribed by law? It is admitted that due notice of the time of sale was given originally, but it is denied that the sale was made "accordingly." It is admitted that the guardian had the power to adjourn the sale from week to week for more than four weeks, but it is denied that he could do so at any one time for more than one week. But if a sale made at an adjourned day is nevertheless made upon or in pursuance of the original notice thereof, then this sale was made according thereto—that is, conformably to, and not contrary to such notice. If so, the irregularity of continuing the sale for four weeks by one adjournment rather than by four, does not vitiate the proceeding. We think this sale was made conformably to the original notice. The terms and place of sale were not changed. Such notice was the foundation of the proceedings, and the adjournment by the guardian for good cause prolonged it until the day appointed.

All persons who attended at the place of sale in February were then duly apprized by the public proclamation of the guardian that the sale was postponed until March, and thereby the publicity imparted to the transaction by the original notice, was continued to the time of sale. The time of the sale is primarily fixed by the notice, but may be postponed by the guardian. This power is inherent in his office, and although the statute has prescribed limits to its exercise, we do not think a single postponement for four weeks, rather than four postponements for four weeks, is such an irregularity as makes the sale not according to the notice as to time. In Richards v. Holmes 18 How. [59 U. S.] 147, a trustee was authorized to sell real property on thirty days' notice, published in a certain newspaper. At the time and place designated, the sale was adjourned for want of bidders. The court held the subsequent sale valid, because there was an implied power in the trustee to adjourn the sale, and because the sale, although made without any other than the first publication of the required notice was, "when made, in effect, the sale of which previous public notice was given."

A question was made on the trial as to the sufficiency of the description of the premises in the guardian's deed. But by reference to the survey introduced by the plaintiff, and the calls in the deed for the adjoining premises, we find no difficulty in locating the land.

We think that the defendant has the legal title to the premises, and there must be a finding accordingly.

GAGES (MILLER v.). See Case No. 9,571.

Case No. 5,173.

GAINES v. AGNELLY et al.

[1 Woods, 238.] [1]

Circuit Court, D. Louisiana. April Term, 1872.

PLEADING IN EQUITY—39TH EQUITY RULE — MATTER IN BAR SET FORTH IN ANSWER — OLD PRACTICE—PLEA IN BAR—SUFFICIENCY.

1. The well known rule of chancery pleading, that if a defendant submits to answer, he shall answer fully to all matters of the bill, is abrogated, in cases where the defendant might by plea protect himself from such answer and discovery, and in his answer sets forth the matter of such plea as a bar to the merits of the bill, by the 39th rule in equity established by the supreme court of the United States.

2. Under the old equity practice, if a plea in bar was filed, and issue taken upon it, and that issue decided in complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matters were set up in an answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill.

3. The new rule in equity practice (the 39th) which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer; but the defendant is liable to be called as a witness in the cause.

4. Under the new rule in equity (39th), where the answer sets up a bar to the whole bill, and claims the benefit of it, as a plea in bar, it is no longer a ground of exception, that it does not fully answer the allegations of the bill.

5. If the bar set up in the answer and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs according to the exigencies of the case.

6. If the bar set up in the answer be insufficient as such, the complainant would be entitled to except as for want of a full answer; and to avoid answering the exceptions, the defendant in such case would require leave of the court before he could amend the bar. If instead of excepting, the complainant should go to proof, the burden would be on him to prove his bill, and on the defendant to prove his bar; each being entitled to examine the other as a witness. If however, he should set the cause down for hearing on bill and answer only, the answer would have to be taken as true, and the bar therein as proved; and though insufficient as a defense, the complainant could not have a decree, unless the answer admitted the allegations of the bill on which the prayer for relief was founded.

[Cited in McClaskey v. Barr, 40 Fed. 563.]

7. If the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them; and the rule no longer applies that if the defendant does answer at all, even on matters outside of the bar, he must answer fully.

8. A plea which alleges just title, good faith, the requisite period of possession, and that pos-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

session continued peaceful and without interruption, sets out all the circumstances which the laws of Louisiana require to exist as the basis of a prescription.

9. If a title be obtained in good faith, and under the honest belief that the author was the real owner of the property, it is prima facie sufficient to lay the foundation of a prescription in good faith; any information, knowledge or belief to the contrary, obtained since the possession commenced, cannot under the laws of Louisiana impair the efficacy of such possession as a ground of prescription.

In equity. Heard on exceptions to the answer.

E. T. Merrick and J. Q. A. Fellows, for complainant.

Miles Taylor and James McConnell, for defendants.

BRADLEY, Circuit Justice. The complainant [Myra Clark Gaines] excepts to the answer of the defendants in this case for insufficiency. She complains that they have not to the best of their knowledge, information, remembrance and belief answered and set forth the matters required to be answered by the bill, especially those which were called for by the special interrogatories annexed to the bill.

The complainant claims certain lands, mostly in the city of New Orleans, which she alleges were the property of Daniel Clark at the time of his decease in 1813, were by him devised to her by a will dated July 13, 1813, and have since been taken possession of by the defendants. The bill describes the lands, sets out the will and the probate thereof granted in 1855, and calls upon the defendants severally to show the particular portions of property claimed by them. The bill also states several pretenses which it is supposed will be set up by the defendants: as first, title derived under a sale of the land by Richard Relf and Beverly Chew, executors of Daniel Clark under a prior will made in 1811, which was revoked by the will of 1813, and as attorneys of Mary Clark, the mother of Daniel Clark, who was devisee under the will of 1811; and secondly, prescription; but the bill charges that the sale by Relf and Chew was unauthorized and void, and would appear to be so on the face of the proceedings; all which must necessarily have been known to the defendants when they purchased. The defendants are called upon, according to the best of their knowledge, information, remembrance and belief to answer: First. Whether the property described was not a part of the estate of Daniel Clark, of which he died seized? Second. Whether the defendants, severally, claim to be owners of any portion of it? and if so, what portion, and by what right? setting forth metes, bounds and titles. Third. How long the defendants have severally been in possession, and what revenue the property has yielded? Fourth. Whether they have sold any part? if so, what, and for what consideration? These are in substance the interrogatories annexed to the bill, and all the defendants are required to answer them. The bill prays for a discovery of all the matters alleged, that the defendants may be decreed to hold the property as trustees for the complainant, may account for the rents and profits, and for general relief. The answers on the point of Daniel Clark's ownership and seizin of the property described in the bill simply say in each case that the defendant has no knowledge whether said Daniel Clark did or did not hold the legal title thereto, and that therefore he cannot admit, but denies that Clark was seized or lawfully possessed of the same.

The answers then severally set forth and describe by metes and bounds the lands claimed by the defendants, with a statement of the immediate title of the defendants, making the answer and such antecedent acts of title from which the same was derived, as are sufficient to carry back the defendants' title far enough to set up prescription under the laws of Louisiana, with averments on information and belief, that the successive owners purchased in good faith, believing their vendors to be lawful owners of the property; and had continuous, uninterrupted and peaceable possession for the time requisite for the prescription pleaded. The answers further state that proceedings have been instituted in one of the state courts for a revocation of the probate of the will of 1813, under which Mrs. Gaines claims the property; that a decree of revocation has already been made in the court of first instance; and that an appeal from that decree to the supreme court has been taken and argued, and the case is now under the final consideration of that court; and the defendants claim that if the decree of revocation shall be affirmed, it will have the effect to deprive the complainant of all foundation of any right to the land claimed. And they pray that they may have the benefit of such decree if it shall be affirmed. They submit that they are not bound in law to make any other or further answer to any matter or thing contained in the bill.

The answers fail to state, except as it may impliedly appear from the descriptions given by streets and by metes and bounds, whether the lands claimed by the defendants were or were not portions of the land described in the complainant's bill, or whether the defendants have any information or belief on the subject; or whether they have any information or belief on the question, whether the lands claimed by them belonged to Daniel Clark's estate, or to the lands of which he died seized, as set forth in the bill. The defendants were required to answer fully on these points, not merely upon personal knowledge (which at this day they could not be expected to have), but upon their information and belief as well.

The defendants, however, to obviate the force of this objection, refer to the 39th

rule in equity, established by the supreme court of the United States, by which the well known rule of chancery pleading, that if a defendant submits to answer he shall answer fully to all matters of the bill, is abrogated in cases where the defendant might by plea protect himself from such answer and discovery; and in his answer sets forth the matter of such plea as a bar to the merits of the bill. The 39th rule declares that in such answer the defendant shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. The defendants claim that prescription is such a bar, and that having set that up in their answer, they are excused from answering further.

Under the old practice if a plea in bar were filed, and issue taken upon it, and that issue were decided in the complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matter were set up in an answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill. The new rule, which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer. But this disadvantage is compensated for, in some degree, by the liability of the defendant to be called as a witness in the cause. Still, the general effect of the new rule being such as I have stated, it seems to be no longer a ground of exception, where the answer sets up a bar to the whole bill, and claims the benefit of it, as of a plea in bar, that it does not fully answer the allegations of the bill. If the bar set up and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs, according to the exigency of the case. If the bar set up should be insufficient as such, I think the complainant would be entitled to except, as for want of a full answer, and to avoid answering the exceptions, the defendant, in such case, would require leave of the court before he could amend the bar set up in the answer. If, instead of excepting, the complainant should go to proofs, the burden would be on him to prove his bill, and on the defendant to prove his bar, each being entitled to examine the other as a witness. If, on the other hand, he should set the cause down for hearing on bill and answer only, the answer would have to be taken as true, and the bar therein as proved; and though insufficient as a defense, the complainant could not have a decree unless the answer admitted those allegations of the bill, on which the prayer for relief was founded. These are the general rules which seem to me to govern the pleadings in equity, as affected by the introduction of this new rule.

From this view of the subject, it is manifest that if the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them, and the rule no longer applies, that if the defendant does answer at all, even on matters outside of the bar, he must answer fully. If that rule did apply, it would have the effect of converting the answer, in such a case, into a strict plea in bar. Any divergence of statement, any notice of the allegations of the bill outside of the strict line of the defense would be held a waiver of the bar, and would subject the defendant to the old burden of a full answer. I do not think that this would be a sound construction of the rule. If there are any authorities favoring this view, I should have been glad to have had a reference to them. As counsel has not produced any, I feel the greater confidence in the conclusions to which I have come.

The question then is, whether the bar set up is, by the laws of Louisiana, a sufficient defense, and whether it is sufficiently averred. And I do not understand the counsel of the complainant to contend that it is not. It seems to me that the bar is very fully and carefully drawn. It sets out all those circumstances which the laws of Louisiana require to exist as the basis of a prescription. Just title, good faith, the requisite period of possession, and that possession continued peaceably and without interruption. All these circumstances are fully alleged. And the defendant has also traversed the effect of the interruption of prescription resulting from the litigation referred to in the bill. How far the proofs, when taken, will sustain the defense, is another matter, with which the court has at present no concern. Whether, if the complainant shows that the title of the defendants really originated in a void sale and conveyance by the executors of Daniel Clark, it will affect the defense, on the point of good faith, is a question I do not decide. In the cases of Gaines v. Hennen and Gaines v. New Orleans, 24 How. [(65 U. S.) 553], and 6 Wall. [(73 U. S.) 642], the answers admitted that the defendants obtained their title through the sales made by Relf and Chew; and the supreme court held that the illegality of the proceeding was apparent, and constituted a vice in the title, which took from the vendees all pretense of being purchasers or possessors in good faith; and that the interruptions in the prescription prevented its becoming a bar on any other ground. But in this case, the defendants do not set up any claim of title under the executors of Daniel

Clark. They rely on certain titles, which they exhibit as just titles, and which they allege to have been obtained with good faith, and under the honest belief that the author was the real owner. This is, at least, prima facie, sufficient to lay the foundation of the prescription claimed. Any knowledge, information or belief, obtained since the possession commenced, to the effect that the property once belonged to Daniel Clark would not, as I understand the law of Louisiana, impair the efficacy of such possession, as a ground of prescription. The Code expressly says: "It is sufficient, if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription." Article 3448. Therefore, the allegations in the bill, that the property once belonged to Daniel Clark, and that he died seized thereof, are not inconsistent with or repugnant to the plea of prescription. Hence, any present knowledge or belief of the defendants on those points is perfectly immaterial. Their claim by prescription is independent of those facts, and perfectly consistent with them. These allegations, therefore, do not belong to that class of allegations which it is necessary for a defendant to meet and deny in order to support and maintain his plea in bar.

Had the bill charged that the defendants claimed title to the lands in their possession under Relf and Chew, acting as executors of Daniel Clark, it might, perhaps, have been incumbent on the defendants to have cleared their possession of the imputation thus cast upon it. But no such charge is made in the bill. On the contrary, the bill expressly states that the complainant is ignorant of the title and claim of title by which the defendants severally hold; and calls upon the defendants to show their title. The defendants do show title sufficient to lay the foundation of a prescription; and on that defense they take their stand. It seems to me that they are not called upon to answer further. The bar set up is prima facie a good defense; and the exceptions must be overruled. As to the answers which the defendants have brought into court and now ask leave to file, I shall allow them to be filed as of the 6th of May instant, without prejudice to the complainant as to proceeding with proofs in the cause, and bringing it on for hearing.

As to those defendants who are in default and now apply for further time to answer, I shall grant a decree pro confesso against them, subject to this qualification and these terms, to wit: that during the taking of proofs in the cause, they shall be at liberty, severally, to file with the master or examiner and serve on the solicitor of the complainant, a description of the property which they claim, with the chain of title thereto extending back to the period at which the complainant claims it belonged to the estate of Daniel Clark; and to prove, if they can, a legal prescription for the same; subject also to this further qualification, that if, before the proofs are closed, the decree of the Second district court of the parish of Orleans, in the case of Joseph Fuentes v. Myra Clark Gaines [25 La. Ann. 85], revoking the will of Daniel Clark of 1813, be affirmed by the supreme court of Louisiana, the said defendants may have the benefit of said decree for what it may be worth, as if they had pleaded the same. Provided, however, that any further answers of said defendants which may be filed before the first day of June next, may be filed as of the 6th day of May instant, as are mentioned in reference to answers above allowed to be filed as of said day.

[NOTE. For other cases involved in this litigation, see note to Gaines v. Lizardi, Case No. 5,175.]

GAINES v. BROWN. See Cases Nos. 5,174 and 5,175.

GAINES v. COMPTON. See Cases Nos. 5,174–5,176.

GAINES v. CRONAN. See Cases Nos. 5,174–5,176.

GAINES v. DE LA CROIX. See Cases Nos. 5,174 and 5,175.

GAINES (FUENTES v.). See Case No. 5,145.

GAINES v. HERMAN. See Cases Nos. 5,174 and 5,175.

Case No. 5,174.

GAINES v. LIZARDI et al.

SAME v. DE LA CROIX et al.

SAME v. NEW ORLEANS.

[1 Woods, 56.] [1]

Circuit Court, D. Louisiana. June, 1870.

TRUSTEES—POSSESSION OF LAND BY ADVERSE BUT DEFECTIVE TITLE — POSSESSION NOT IN GOOD FAITH—RENTS AND PROFITS—CONSTRUCTION OF PRIOR DECISION.

1. The decision of the supreme court of the United States in these cases did not authorize this court to enter a decree for complainant against defendants for the proceeds of lands which were in their possession, but which they had sold before the filing of the bills in these cases.

2. Where a party is in possession of lands, claiming under an adverse but defective title, without any fraud either of himself or his grantors, he cannot be held to be the trustee of the party holding the true title, nor if he has sold the lands, made to account for the proceeds of the sale to the true owner.

3. The decree of the supreme court in these cases found that the defendants were not possessors in good faith of the lands sued for. They were therefore liable for rents and profits, and were not entitled to compensation for their improvements.

These cases had been taken by appeal to the supreme court of the United States, and a decree was rendered by the court in December term, 1867 (see the opinion [Gaines v. New Orleans] 6 Wall. [73 U. S.] 642), and a

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mandate was sent to this court. But Judge Durell having recused himself on account of interest, no decree had as yet been entered to carry out the mandate. The case came up on motion to enter the proper decree.

John A. Campbell, for complainant.
McConnell & Taylor, for defendants.

BRADLEY, Circuit Justice. These cases are before us on mandates from the supreme court of the United States, and motion is made to enter the proper decrees, pursuant to said mandates. By reason of the explicit manner in which the views of the supreme court are expressed in its opinions, as found in Gaines v. New Orleans, 6 Wall. [73 U. S.] 642, and in Gaines v. De la Croix, Id. 719, and in Gaines v. Hennen, 24 How. [65 U. S.] 553 (which last is adopted in the present cases), very little discretion is left to this court. Some questions, however, have been raised, which it is necessary now to determine.

First, the complainant [Myra Clark Gaines] claims a decree not only for the lands of which the several defendants were possessed at the time of filing the bills respectively, but for the proceeds of lands formerly belonging to Daniel Clark, which the defendants had previously possessed and sold before the filing of said bills. She claims to hold the defendants as trustees for her of the lands thus previously disposed of, and elects to receive the purchase money, instead of following the lands themselves.

This claim, I think, is untenable. The claim of the defendants is adverse to that of the complainant. There is no privity between them. They stand and have always stood at arm's length. The defendants claimed the lands to be theirs by one title; she claimed them to be hers by another. There was no privity or trusteeship between them. Had the defendants, by any fraudulent practice, or by the fraudulent practice of their grantors or predecessors (known to them), procured the legal title to the lands, then they might have been held as trustees, and if they had disposed of the same, especially to innocent purchasers, might have been made to respond for the proceeds thereof. In such case the lands themselves might have been placed beyond the complainant's reach, and the proceeds might have been the only fund to which the complainant could resort. But in the present case the defendants never acquired the title of the complainant, nor legal title at all, but a spurious title; and their conveyance of the lands has transferred no title to the vendees; but the lands still remain subject to the complainant's title and are recoverable by her in whosesoever hands they may be. The conveyance thereof by the defendants to third parties has not in the slightest degree had the effect to place any barriers or obstacles in the way of the complainant to their recovery. Her title remains perfect and unimpaired. Had the legal title been transferred, though subject to her right to avoid it, her election to take the proceeds would have confirmed that title in the possessor, and her remedy would have been exhausted. But her election in the present case does not extinguish her title to the lands. Being the legal title, it remains valid; and a further act on her part, by way of release or other conveyance, in addition to the act of election, would be necessary to effectuate justice. And to whom should such release or conveyance be made? The persons that would have been entitled thereto have not been made parties to the suit; and the court does not know who they are, and can give no directions on the subject. And if they had been made parties, the difficulty would not have been surmounted; because they can never be converted into trustees for her by claiming a title paramount to hers without any actual fraud on their part.

The cases in which a person entitled to the possession of personal property has been allowed to waive his right to the specific property, or to damages for its detention, and to sue the wrongful appropriator thereof for the price of it, as upon a sale, do not bear upon the point in question. For a recovery either of damages for the detention or of the price as for a sale, changes the title of the property, and is itself an election to have the money instead. And the cases of Gaines v. Chew, 2 How. [43 U. S.] 619; Hallett v. Collins, 10 How. [51 U. S.] 174; Oliver v. Piatt, 3 How. [44 U. S.] 333, Jenkins v. Eldridge [Case No. 7,266], and the other authorities, relating to real estate, referred to by counsel for the complainant, as far as I have been able to examine them, do not conflict with the views now presented.

The decrees, therefore, should be confined in each case to the lands of which the parties respectively, either by themselves or their tenants, were, or claimed to be, in possession at the time of filing the bill. As to lands which they may have possessed prior to that time, they are only liable for the rents and profits or fruits whilst thus in possession. In fact, the bill is nothing but what is sometimes called an ejectment bill, and this court has jurisdiction of the case only on the ground of discovery, and the complainant should be satisfied to recover what she could have recovered in an action of ejectment, or the equivalent action under the laws of Louisiana.

The next question relates to the accountability of the defendants for the rents and profits or fruits of the lands possessed by them respectively. The defendants contend that they are not liable for these, because they were possessors in good faith; or if liable at all, they are entitled to compensation for their improvements; and they rely on those provisions of the Code which declare: (1) The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses. Article 3414. (2) Every possessor has a right to gather, for his

benefit, the fruits of the thing, until it is claimed by the owners, without being bound to account for them, except from the time of the claim for restitution. Article 3416. (3) He has also the right in case of eviction from the thing reclaimed, to retain it till he is reimbursed the expenses he may have incurred on it. Id. Whatever might be the views of this court on this point, were it open before us for discussion, is of no consequence. It seems to be entirely covered by the judgment of the supreme court.

To understand that judgment, it is necessary to premise that the lands in dispute belonged to Daniel Clark at the time of his death in August, 1813; that the said Clark left behind him a will dated in 1811, making Richard Relf and Beverley Chew his executors, and Mary Clark, his mother, his general legatee, which will was admitted to probate; that this was not his last will, but that he made another will shortly before his death, in which he acknowledged the complainant to be his legitimate and only daughter, and made her his universal legatee, giving to his mother an annuity, and to other persons certain legacies, and making Francois Duseau De la Croix, James Pitot and Joseph D. D. Bellechasse, his executors; that this will was suppressed, and did not, nor did her paternity come to the knowledge of the complainant till about 1834, when she applied for probate of said will, which was at first refused; that nevertheless, probate was granted in December, 1855; and this suit was therefore commenced in December, 1856. That, in the mean time, in or about 1820, Relf and Chew, claiming to act as executors of the will of 1811, and as attorneys of Mary Clark, the legatee under it, but without any authority from the proper court, undertook by action and private sale, to sell the lands of Daniel Clark, and did sell the same to various purchasers, from whom, mediately or immediately, the defendants claim title to the lands. That even after the complainant came of age, and discovered her paternity, and the fact that her father had made the will of 1813, she commenced various suits to recover the said lands, both against the city of New Orleans and others, and her claim became universally known.

These suits met with various fortune, but finally, in the case of Gaines v. Hennen, reported in 24 How. [65 U. S.] 553, a decree was made in the supreme court of the United States, which has been reaffirmed and adopted by the same court in this case, and which it is necessary to examine in order to understand fully the form and effect of the decree to be entered now. It seems to me that the decree of the supreme court in the case of Hennen thus reaffirmed and adopted in these cases, has fully answered the question as to the claim of good faith on the part of defendants, as bearing both on the matter of rents and profits, and on the matter of reclamation for improvements.

The decree in the Hennen Case declares: "That the said Richard Relf and Beverly Chew, at the time and times when, under the pretended authority aforesaid, they caused the property so described and claimed by the defendant, Hennen, to be set up and sold by public auction, on the 19th day of December, 1820, and when they executed their act of sale aforesaid, of the 28th of December, 1820, to the said Azelie Lavigne, had no legal right or authority whatever so to sell and dispose of the same, or in any manner to alienate the same; that the said sale at auction, and the said act of sale to Azelie Lavigne in confirmation thereof, were wholly unauthorized and illegal, and are utterly null and void; and that the defendant Hennen, at the time when he purchased the property so described and claimed by him as aforesaid, was bound to take notice of the circumstances which rendered the actions and doings of the said Beverly Chew and Richard Relf, in the premises, illegal, null and void; and that he, the said Hennen, ought to be deemed and held, and is hereby deemed and held to have purchased the property in question, with full notice that the said sale at auction, under the pretended authority of the said Richard Relf and Beverly Chew, and their said act of sale to said Azelie Lavigne were illegal, null and void, and in fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark." The court further decreed that the complainant was justly and lawfully entitled to the property claimed and held by Hennen, together with all the yearly rents and profits accruing from the same from the time he went into possession, and they remanded the cause to this court with directions: (1) To cause Hennen to surrender all the property claimed and held by him into the hands of complainant. (2) To cause an account to be taken of the yearly rents and profits accrued and accruing from the property since it came into Hennen's possession, and to be paid to the complainant; such account to be taken subject to the laws of Louisiana in cases of such recovery, as is now decreed in favor of the complainant. Such was the decree in the Hennen Case.

In the case now before us, the supreme court, in their opinion, say that the sales made by Relf and Chew (under whose conveyance the defendants claim title), whether made as executors or as attorneys of Mary Clark, were void and conveyed no title [Gaines v. New Orleans] 6 Wall. [73 U. S.] 711, 712; and after adverting to the fact that the defendants say they are purchasers in good faith for value without notice, or have acquired titles from those who were, add (page 816): "We cannot see, in view of the discussion already given to this case, how this plea can be true, but as it cannot avail the defendants, if true, it is unnecessary to discuss the evidence further in order to ascertain whether it is true or false. For

the question at issue is only on the legal title."

The court further hold that the plea of good faith can only aid the defendants on the plea of prescription. They then add: "But the title of the complainant is not barred by prescription, according to the law of Louisiana. This defense was made in the case of Gaines v. Hennen [supra], and disposed of adversely to the defendant, and is no longer an open question in this court. The description relied upon by the defendants in this case is the same that was relied upon by the defendant in that, and as the proofs are common to both, it follows, as the plea of prescription was not available in the one, it is not in the other." The court, in conclusion, say: "The questions of law and fact applicable to those rights (the rights of the complainant) were determined in the case of Gaines v. Hennen. After argument by able counsel, and mature consideration, we have reaffirmed that decision." Thus, taking the opinion and decree of the supreme court in the Hennen Case, and their opinion in these cases, together, it is very manifest that the supreme court have adjudged against the plea of good faith set up by the defendants.

It is true that, in this case, the court, considering the legal title as the question involved, seem to regard the fact of good faith, except as bearing on the question of prescription, as not material; but they also, in conformity with the views expressed in Gaines v. Hennen, say that they do not see how the plea of good faith can be true, and they expressly adopt the decision in that case against the plea of prescription in reference to which they admit that the plea of good faith is pertinent, and I also understand them to adopt the definitive decree made in that case, which awards rents and profits to the complainant and against the defendant. And this (as we have seen from the Code) could not be done if the defendants were purchasers in good faith. The whole effect of their decision, therefore, is against the plea of good faith for any purpose whatever.

The judgment is that the titles attempted to be created and passed by Relf and Chew were bad—not only bad, but void—and that the defendants, claiming under and through them, ought to have known it. This judgment we are bound to carry out. We cannot inquire whether it is right or wrong. We are to presume that all the questions involved in it were duly and fully discussed, as we have no doubt they were.

The decrees presented to me seem to be in conformity with the views and mandate of the supreme court except that against the city of New Orleans, which will be so modified as to embrace only the lands which were in possession of the city at the time of filing the bill in this case.

[NOTE. For other cases involved in this litigation, see note to Gaines v. Lizardi, Case No. 5,175.]

Case No. 5,175.

GAINES v. LIZARDI et al.

FUENTES et al. v. GAINES.

[3 Woods, 77;[1] 9 Chi. Leg. News, 305.]

Circuit Court, D. Louisiana. April Term, 1877.

PRESCRIPTION—ACTIONS FOR THE NULLITY OF TESTAMENTS IN LOUISIANA—OPENING AND PROVING WILL—REQUIREMENTS AS TO OLOGRAPHIC WILL—POSSESSORS IN GOOD FAITH.

1. Article 3540 of the Civil Code of Louisiana, which declares that actions for the nullity of testaments are prescribed in five years, refers to actions brought against parties who are in possession under a will, and has no application to a suit in which a will is relied on as a muniment of title by a party out of possession.

2. Articles 942, 943, La. Code Pr., prescribing what the proces verbal required to be made at the opening and proving of a will shall contain, do not, with the exception of that provision which relates to the order for executing and recording a will, apply to wills which are lost.

3. Where the proof showed that an olographic will was written, dated and signed by the testator, and bore date of some day in a designated month, but did not show of what particular day, this established sufficiently a compliance with the requirement of the Civil Code, that an olographic will shall be entirely written, dated and signed by the testator.

4. A discussion of the evidence to establish the fact that Daniel Clark duly executed a will in the year 1813, whereby he instituted his daughter, Myra Clark, as his universal legatee.

5. Discussion of the evidence to rebut the presumption that Daniel Clark destroyed said will, arising from the fact that it could not be found after his death.

6. Parties who claimed title to property of the estate of Daniel Clark, derived under his will executed in 1811, could not, in a suit brought by the universal legatee under his will executed in 1813, be considered as possessors in good faith and entitled to plead the prescription of ten years.

[In equity. These were suits by Myra Clark Gaines against M. J. Lizardi and others, and seven other suits by the same complainant against divers defendants, and by Joseph Fuentes and others against Myra Clark Gaines.]

Heard upon the pleading and evidence for final decrees. In the case of Fuentes v. Gaines, the complainants sought a revocation of the probate of the will of Daniel Clark, known as the "Will of 1813." In the other cases Mrs. Gaines, as complainant, set up title claiming as universal legatee of Daniel Clark, under his said will, executed in 1813, to real estate in the city of New Orleans, in possession of and claimed by the defendants respectively, charged them as trustees, prayed for discovery, and for a decree establishing her title and putting her in possession. By agreement of parties the cases were all argued and decided together.

W. R. Mills, for Myra Clark Gaines.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

James McConnell, for Joseph Fuentes, complainant in the last named case, and for the defendants in the other cases.

BILLINGS, District Judge. The full argument of counsel, occupying seventeen entire days and an examination of the records, have satisfied me that the various decisions rendered by the supreme court of the United States have concluded me upon very many of the questions of law which have been presented. I shall first consider the suit for the revocation of the probate of the will.

The supreme court of the United States in their opinion pronounced in this case (Gaines v. Fuentes, 92 U. S. 10), in order to determine whether it was removable from the state to the United States court, has defined its nature and has characterized it as follows: "The action cannot be treated as properly instituted for the revocation of the probate, but must be treated as brought against the devisee by strangers to the estate to annul the will, as a muniment of title and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property."

It is a suit which was instituted as an adjunct and means of defense to the numerous other suits for the recovery of real estate in which the complainant rested her title upon a will, the substantial allegation being that the will was admitted to probate upon false and insufficient testimony. It has now been cumulated with these other actions. It is therefore to be viewed and tried as if it were a pleading in these other actions, presenting the issue devisavit vel non. It presents the broad question, was there a will, unfettered by the restrictions of the Code relating to actions to annul the probate of wills? Before considering the cause upon the merits, I will dispose of the plea of prescription of five years. Civ. Code, art. 3540 (3505), provides as follows: "That actions for the nullity or revision of contracts, testaments or other acts are prescribed by five years."

I think this article refers to actions brought against parties who are in possession under a will, and that it has no application to a will invoked as here, by a party out of possession as a muniment of title against those in possession not claiming under the same will, and that whenever by and against such parties a will is relied upon to establish a link in the chain of title it may be attacked. I think, therefore, the plea should be overruled.

The other exception, viz., that the plaintiffs (complainants), Fuentes et al., could not maintain their actions, as strangers to the estate of Daniel Clark, is disposed of by the fact that in the supplemental petition they claimed to have derived title from Relf and Chew, executors, or as attorneys in fact of Myra Clark, universal legatee, under the will of Daniel Clark, known as the "Will of 1811;" and by the further fact that the consideration of this case with the others renders the petition or bill of complaint in this action in effect a plea interposed in the others, which may be termed direct actions.

This brings me to the question: Was there, according to the evidence presented before me, a will? Has the will of 1813 been established before me as an instrument executed by Daniel Clark, and clothed with the requisite formalities of a last will and testament according to the laws of Louisiana? It is urged by the complainants, Fuentes and others: 1. That the proces verbal which entitles this will to be received as a probated will is wanting. 2. That the will as probated is not shown to have been dated, and thus does not, in that respect, comply with the requirements of the law in respect to olographic wills. 3. That the evidence disproves, or fails to prove, that such a will ever existed; and, 4. That if such a will was ever executed, since it was not found after the death of the testator, the presumption of law is, that it was destroyed by the testator animo cancellandi, and that this presumption has not been rebutted by the proofs.

1. As to the absence of the proces verbal. Articles 492, 493, Code Pr., give the textual provisions of the law as to what the proces verbal shall contain; but it is clear they cannot, with the exception of that provision which relates to the order for executing and recording the will, apply to wills, which, as in this case, are lost.

The reasoning of the supreme court of Louisiana, and their decree in which they order the recording and execution of this identical will without any such proces verbal, and when in the nature of things no such recital as is pointed out in the requirements of the Code of Practice before referred to could exist, is an authoritative decision upon the law of Louisiana on this point. Succession of Clark, 11 La. Ann. 125. Judge Lee, sitting as a probate judge, while finding the proofs sufficient to establish the will, decreed against its being admitted to probate on the ground that the proof was not, in manner and form, such as the statute required. There was, therefore, no probate of the will in the lower court, but on appeal the supreme court reversed the decree and ordered the will executed. What they did in that case is a practical construction of the law upon the point as to how a lost will may be probated, and of its admissibility when so probated.

The second objection: "That the will is not shown to have been dated." Article 1588 (1581), Civ. Code, declares "an olographic will shall be enirely written, dated and signed by the hand of the testator." On this point of date the testimony adduced before me is precisely the same as that before the supreme court of Louisiana at the time the will was probated. They found it sufficient —that is—they must have found that the will was dated; that the year, month and date were written by the testator.

Again, the two witnesses who read the will were Mrs. Smythe and Mr. Bellechasse. Mrs. Smythe, at page 141, probate record, in answer to the twenty-sixth interrogatory, says: "The whole of this will was in Mr. Clark's handwriting; it was dated and signed by Mr. Clark at the time I read it." At page 143, in answer to the thirty-second interrogatory, she says: "It was dated in July, 1813." Bellechasse, at page 162, probate record, says in answer to interrogatory twelve:

"The last will of Clark, to wit, the will of 1813, was legal in form because it was written wholly in his (Clark's) handwriting, and was dated and signed by him." These witnesses both testify that the will was dated, and one of them adds, "it was dated in July, 1813." The fair meaning of their language is that it bore the year, month and day; and the meaning of the language of Mrs. Smythe, that it bore date on a particular day of July, Anno Domini 1813.

If a jury had found a special verdict that the will bore date on some day in July, 1813, though they did not specify what day, so long as being in July, left it the last will of Clark, would not a court be bound to give judgment that the will was dated? And the testimony of these two witnesses, uncontradicted, is on this point equivalent to a special verdict. It is proven that the will bore date on some one of the days in July, 1813, and this is sufficient.

The third objection, that the evidence disproves, or fails to prove, that this will ever existed; and, fourth, that if it was ever executed, since it was not found after the death of the testator, the presumption of law is that it was destroyed by him for the purpose of canceling, and that this presumption has not been rebutted.

The testimony which has been read before me is in almost all respects identical with that adduced before the supreme court of Louisiana (Succession of Clark, 11 La. Ann. 125, 126, 127), and is there stated with clearness and fairness by Judge Lee and by the supreme court, as follows:

"In looking for the testimony which might solve the question whether such a will had ever been executed or not, a reasonable inquirer would naturally turn for information to those who were most with the deceased in the latter part of his life, and especially (if they could be found) to those who were with him in the last moments of his existence, when the hand of death was on him. Such witnesses, if they had no interest in diverting his property into any particular channel, might be considered as the best and most reliable that could be produced, and it appears to be precisely testimony of this character that the petitioner presents in support of her application.

"It appears that Boisfontaine had business relations with the deceased, which brought him into frequent intercourse with him, and that for the last two days of his life, and up to the moment of his death, he was with him; that De la Croix and Bellechasse were intimate personal friends, and that they were with him shortly before his death. Now, these witnesses all concur in stating that Clark said he had executed a will posterior to that of 1811. They also testify that within a few months prior to his death he was making arrangements for the disposal of his property by a last will. He called on De la Croix to get his consent to act as executor, and also as tutor to his daughter Myra, expressing his intention of making a generous provision for her in his will. De la Croix further states that Clark afterwards presented to him in his (Clark's) cabinet a sealed packet which he declared to be his last will, informing him at the same time that in case of his death it would be found in a small black trunk which he had there.

"Boisfontaine, who was with Clark when he died, says that Clark in his last illness spoke of executing his last will; said it was to be found in a room down-stairs in a small black trunk; that he had left the greater portion of his property to his child, Myra; that Bellechasse, De la Croix and Pitot were to be his executors, and that about two hours before he died he instructed his confidential servant, Lubin, that in case of his death the small black trunk above referred to was to be delivered to De la Croix, and enjoined on him, as soon as he (Clark) was dead, to be sure and take it to him. He stated that Clark expressed his satisfaction that he had provided for his daughter Myra, leaving her all his estate, and that De la Croix had consented to act as her tutor. He also states that he was present about fifteen days before Clark's death, when Clark took from the small black case a sealed package and presented it to De la Croix, stating that it was his last will, recapitulating some of its provisions, and reminding him of his promise to act as tutor to his daughter. He further states that several persons, shortly before Clark's death, had seen the will, and corroborated Clark's statement as to its contents, and that Judge Pitot, Lynd, the notary, the wife of William Harper and Bellechasse were among the persons referred to." "Now," the judge a quo proceeds, "I think there can be no doubt, setting aside the testimony of Bellechasse and Mrs. Wm. Harper, that Clark did execute a will shortly before his death; that the principal object of making this will was to recognize as his daughter the present applicant, and to make suitable provision for her; that the executors of this will were Pitot, Bellechasse and De la Croix, and that De la Croix was appointed tutor of his daughter Myra; that this will must have been in existence until death, if not after that event, and that Clark within a very short time previous to Clark's himself died believing it was in existence.

"That such was the opinion of De la Croix himself at the time, is evident from the fact

that twenty-four hours had scarcely elapsed after the probate of the will of 1811, before he made oath that he verily believed that Daniel Clark had made a testament posterior to that of 1811, and its existence was known to several persons, and he accordingly applied for and obtained an order of the court commanding every notary in the city to declare whether such document had been deposited with him."

If the foregoing facts may be considered as proved, independent of the testimony of Bellechasse and Mrs. Wm. Harper, the additional testimony of these last named witnesses, with reference to the form of the execution of the will and its contents, will rest upon a basis of probability, which must strengthen if it does not anticipate the conviction of its truth, for it is to be remembered that Clark knew how to draw an olographic will in due form, having already done so in the execution of a previous will, and knowing what was necessary to its validity it would be improbable in the extreme that he would omit any of the few necessary formalities.

When Bellechasse and Mrs. Harper, therefore, testify directly to the execution of the will, and having been written, dated and signed in the proper handwriting of the testator, they testify to the existence of facts which are, at least, probable, and upon the assumption that the will was executed, are matters approaching to certainty independent of their testimony; so with regard to the appointment of executors, of the tutor, and of the general dispositions of the will described in the petition.

They state that Clark did what he told others he intended to do, and what, from the whole tenor of his conduct, it was very probable he would do.

It does appear, however, that all the contents of the will as sworn to by Mrs. William Harper, are also sworn to by Bellechasse, and though the testimony of the latter does not contradict that of the former, but confirms it, yet his testimony does not relate to any portions of the will, except such as relate to its form, the institution of his daughter as universal legatee, and the appointment of De la Croix, Pitot and Bellechasse as executors. Indeed, the examination of witnesses does not appear to have been conducted with any reference to a detailed description of the will.

They, however, both state distinctly that they read the will; that it was wholly written, dated and signed by Clark; that he thereby instituted Myra Clark, his daughter, his universal legatee, and appointed De la Croix, Pitot and Bellechasse his executors. From an examination of the whole testimony, and considering the conduct of the deceased, his repeated declarations up to the very day of his death, together with his anxiety to make ample provision for his daughter, the judge of the lower court adds: "I feel satisfied that the legal presumption (which in the case of a lost will would necessarily exist) that it was destroyed or revoked by the testator, must be considered as satisfactorily rebutted."

In addition to the statement of facts and conclusions in regard to them of the judge of the lower court, it may be remarked that De la Croix states that the indorsement upon the will which he saw sealed up was in these words. "Pour être ouvert en cas de mort." This indorsement does not appear in the will of 1811, and the will which he saw was doubtless the will of 1813.

The chief testimony offered by the complainant Fuentes in addition to that which is there offered, is the testimony of Mazureau's probate record, page 432, and the answers of Relf and Chew. Mazureau's letter, cannot, in my opinion, be received as evidence. It is simply a statement in writing of a person not a party to, or a witness in these causes or in any cause, and not under oath, and I know of no principle of evidence upon which it is admissible. The answers of Relf and Chew are an emphatic denial, but they do not outweigh the force of the direct and circumstantial evidence in favor of the execution of this will. In this connection I will consider the testimony of Mr. Brown, which is urged to invalidate that of Mrs. Smythe, and the letter of Bellechasse to Mr. Cox, as tending to show uncertainty in his recollection of the terms of the will. Mr. Brown testifies that Mrs. Smythe visited in his family during the summer after Mr. Clark's death; that she spoke often and most particularly about his death and estate, and never referred to the will of 1813. If these statements are to be considered as properly in evidence, they are to be considered as urged against the witness, to whose attention they were never called, and who, therefore, never had an opportunity to explain, or by other testimony rebut them. Mrs. Smythe was evidently attached to Myra, now Mrs. Gaines, whom she had suckled, and may have considered that there was no good then to be derived by her in speaking of the will; or, what is equally possible, she may have made reference to it which was not understood or was forgotten by Mr. Brown. A number of witnesses attest her entire respectability and credibility, and taking Brown's testimony in the most favorable light, it does not necessarily contradict and cannot avail to materially weaken the testimony of a disinterested witness, clearly intelligent, and proved by numerous witnesses to be trustworthy.

As to the letter of Bellechasse to Mr. Cox, probate record, page 855, vol. 1, he is recorded as saying: "I was one of his executors, as well as Messrs. Relf, De la Croix and Pitot." Thus adding Relf to the executors whom he and Mrs. Smythe say were named in the last will. But in the next sentence, with reference to his avowal of having re-

ceived a conveyance of fifty-one lots in secret trust for Myra, now Mrs. Gaines, he uses the same names and in the same order. This all appears as a translation, the French original having mysteriously disappeared. Now, it is quite possible that either in writing out the translation of the letter, the copyist may have fallen into the error of using all the three names in both collocations, though in the first, that of Relf might not have stood in the original, or in the original letter, if, as Bellechasse states, he wrote through an amanuensis and by dictation; the name of Relf may have by mistake slipped in in one of the collocations, although the writer never designed it to be there, and never observed that it was there.

Now, as to Bellechasse, with the exception of this letter to Cox, there is nothing in the record to impugn or qualify what he says; his language and ideas throughout are those of an earnest, chivalrous man, who is entirely sincere. There is a further fact, that upon the death of Clark he avowed that the fifty-one lots of ground had been placed in his name in secret trust for Clark's daughter, now Mrs. Gaines. It seems to me that he appears not only as an unimpeached, but as a thoroughly upright witness, and I have never read testimony which has impressed me as uttering more frankly the truth.

I think, then, that the testimony of Mrs. Smythe and that of Bellechasse is unshaken, and they establish the will. But they are not alone. De la Croix himself was a witness in favor of the second will, though subsequently he sought to vary his testimony. On page 78 of the probate record, he says: "Clark, some months previous to his death, asked me to become tutor to Myra;" that a month or two after this conversation he, deponent, called to see Clark, who had his house on the Bayou road; he found him in his cabinet; he had just sealed up a packet, the superscription on which was as follows: "Pour être ouvert en cas de mort;" that Clark threw it down in presence of deponent and told him that it contained his last will and some other papers which would be of service.

It is to be observed, as the supreme court of Louisiana noticed, this superscription effectually proves that this envelope must have contained a will other than that of the will of 1811. The testimony of Boisfontaine, at page 79 of the probate record, states that Clark, in his last illness spoke to him about his last will and testament, and told deponent that he had left the greater part of his property to his child, Myra, and that he had made a disposition in his last will to that effect. He says Clark always told him (deponent) that Myra was his daughter; that he loved her, and would leave her all that he could as a father. It is to be observed that Bellechasse's testimony, at page 162 of the probate record, in reply to the 12th cross-interrogatory, states that Judge Pitot, the judge of the court of probate, at New Orleans, examined the will after it was finished. Mrs. Marian Rose Davis, at page 167 of the probate record, in answer to the 19th interrogatory, says, "When we were about to depart from Louisiana in 1812, Mr. Clark said that she, Myra, would be his heir; that he intended to leave his estate to her. He spoke in terms of great affection and pecuniary ambition about her, and again said that he should leave her all his estate; his ambition was stimulated to make her very rich." Again, in answer to the 21st interrogatory, "He spoke of her as his heir, and in speaking of her education said, he wished her educated in a manner suitable to take in society the standing of the heir of his estate."

Samuel B. Davis, page 172, in answer to the twelfth interrogatory, says: "Mr. Clark always did manifest the warmest affection and deepest interest towards his daughter; he has repeatedly told me that he intended to leave her his property, and I never doubted that he was entirely sincere." To the eighteenth interrogatory, on the same page, he says: "I heard him (Clark) on all occasions express himself in favor of her (Mrs. Gaines) as his daughter and heir; it was an everyday conversation when we met." In answer to the twenty-first interrogatory, at page 173, he says: "It was impossible for any father to have manifested more solicitude and affection than he did. In my last interview with Mr. Clark his conversation turned almost exclusively on the subject of his child; it was then that I received the instructions relative to her education, about which he seemed to be very solicitous, and about the place he wished her to take in society when she arrived at the years of maturity."

Wiliam Miller, at page 179 of the probate record, says, in answer to the twelfth, thirteenth and fourteenth points: "That Clark frequently expressed much affection for the said child Myra, and stated that he intended to make ample provision for her as one of his heirs."

If human testimony can establish a fact, it is here proved by overwhelming evidence that it was the settled purpose of Clark to make Myra his heir by his last will; that for some reason, probably that stated by the supreme court in 24 How. [65 U. S.] 553 and 6 Wall. [73 U. S.] 642, he did not, during his life-time, wish publicly to acknowledge her as his child, or admit the marriage with her mother, but that to all his friends he admitted that she was to be his heir. Now, can any reason be suggested why Daniel Clark, when the shadows of death gathered around him, should have changed his purpose to do this late justice to a daughter to whom he was so devotedly attached, and from whom he had withheld the enjoyment of the rights to which, as his child, she was entitled? It seems to me not. It seems to me that

as his years advanced his attachment to his child and his purpose to provide for her by his last will, as was natural, continued to increase. Now, when we add to this the clear and undisputed testimony of Mrs. Smythe and Bellechasse as to the terms of this will, that it was a will made in Myra's interest, and precisely such a one as a father, with the settled purpose that the other witnesses testify he avowed to them with reference to her, would have made, that we have here conclusive testimony not only of his purpose to make this will, but that he did make it. And this testimony is drawn from precisely the sources where we would have supposed that it would be found to exist, viz., from the intimate friends of the testator.

I think if human testimony can establish the execution of this will, it is found in this record, and that an olographic will, such as is claimed by Mrs. Gaines, to have existed was made, written, signed and dated by her father, Daniel Clark. This brings me to the last question of fact, with reference to the will.

The will not being found after his death, is the presumption of law overcome by the evidence in this case? Is it proved that the will existed up to and after the death of Clark? It does not seem to me to be necessary to conclude that Relf destroyed it. Clark may have deposited it with some person who never produced it. What does the evidence show as to the continuance of its existence up to the time of his death? The mind of any one familiar with the evidence in this case, it being established by irrefragable testimony that he had made the will of 1813, would be reluctant to believe that a father who had by a last will given all his property to an only daughter, who from the reason probably that the acknowledgment of the marriage with her mother would have interfered with his personal ambition, had during his life time withheld such an acknowledgment from the public; had, in fact, lived a two-fold life, one part of which was necessarily inconsistent with the other, but who had centered upon this daughter all the affection which a father was capable of feeling, I say the mind of such a one would reluctantly receive the conviction that he had, without any change in his circumstances, and without any reason assigned or assignable, upon his death-bed, changed his plan and left his daughter penniless, excepting the provision which he had made for her through Bellechasse. I do not say that the presumption arising from these central facts in Clark's life would in law be sufficient to show that the will of 1813 survived him; but I do say that they prepare the mind to find in the record the testimony which will establish that fact. Such testimony is found in the statement of Boisfontaine. Boisfontaine, at pages 79 and 80, says that he was with Clark during the last two days of his life—he never left his bedside, and that during his last hours he spoke of this will and of the gratification it gave him that by means of it he had provided for his daughter. What more natural than this? What more credible? And it is testified to by a witness who is uncontradicted, excepting by a circumstance which has been attempted to be drawn from the testimony of De la Croix. De la Croix was made the tutor of Myra in the will of 1813, as well as one of the executors. De la Croix, in his testimony in the case known as No. 122, at page 536, states in substance, that the day before Clark's death he called at his house and had an interview with him; that nothing was said about the will of 1813.

The argument has been pressed with great force by the solicitors for Fuentes et al., that if Clark then had the will he would have delivered it to De la Croix, and I am asked to infer from the silence of Clark in this interview on the subject of the will, that it had ceased to exist. The conclusive answer to that argument is that whatever that interview was, it had not, in De la Croix's mind, destroyed, or at all shaken his belief that Clark had left the will of 1813 in existence at the time of his death, for at page 11 of the probate record, he presented to the judge of probate a petition sworn to by himself, in which he stated that he had strong reasons to believe, and did verily believe, that there was a subsequent will to that of 1811, whose existence was well known by several persons, and asked that the notaries of New Orleans be subpoenaed to see if they could not produce the duplicate of this last will—that is, the will of 1813. It is clear from this affidavit made within a day or two, or a few days after the death of Clark, that De la Croix not only believed that the will of 1813 survived Clark, but that it was executed in duplicate, and the clear implication is that he believed that one of these duplicate copies had been destroyed after the death of Clark. It further appears from this affidavit of De la Croix, that he was expressing, not only his belief, but the belief of the friends of Clark.

Now, I think the conclusion of the supreme court of the United States, in the case of Gaines v. De la Croix, 6 Wall. [73 U. S.] 719, as to the effect which should be given to this statement of his, is unanswerable.

I think his subsequent testimony, given in 1848, after a controversy had arisen between him and Mrs. Gaines, goes for nothing as contrasted with his own affidavit made in 1813, and so far from the statements of De la Croix contradicting Boisfontaine, they are a powerful confirmation of his evidence upon this point, and go far to establish not only that he believed that the will of 1813 existed after the death of Clark, but that he believed it upon sufficient evidence. I think, therefore, that the presumption which under the law of Louisiana arises from the non-production of the will of 1813, and its disappearance, is most satisfactorily rebutted by the evidence in this case, and that it is proved

that the will known as the will of 1813 was in existence after the death of the testator.

I, therefore, find as a fact, that an olographic will of Daniel Clark, in which Mrs. Gaines was recognized as his legitimate child, and, with the exception of the legacy to his mother, and some other small legacies, was made his universal legatee, was written, signed and dated by him; that this will was clothed with the requisite and legal formalities of a last will and testament according to the laws of Louisiana.

Let the decree, therefore, be, that the prayer of the petitioners in the case of Fuentes et al., etc., against Mrs. Myra Clark Gaines, be rejected.

I now come to a decision upon what may be termed the direct actions, viz., the suits in which Mrs. Gaines seeks to charge these numerous defendants as trustees, and to recover from them certain real estate, alleging that she was the legitimate child of Daniel Clark, and under his last will and testament his universal legatee. I have found as a fact, upon a fresh consideration of all the evidence, that her allegations as to the will and her heirship are established. This finding carries with it all the consequences which are necessary to establish her title to the property, and leaves nothing remaining to be considered but the plea of prescription.

The plea of the respondents is to the effect that they derived their title and have possessed the property in good faith, and that this possession has continued for more than a period of ten years. They have thus sought to dissever their title from its origin, and have sought to stand before the court simply as possessors with what they say seemed a good title, and that therefore they are possessors in good faith. It is claimed by the solicitors of the complainant, and by his analysis of the chains of title under which the several defendants hold, it is shown that the title of each and every one of them comes back, or traces itself back to the estate of Daniel Clark through Relf and Chew, as the executors of the first will, and as the attorneys in fact of Mary Clark, legatee, under the first will. Indeed, in the supplemental petition of Fuentes et al., which has been adopted by all these defendants under the agreement on file, it is alleged at page 48 of the Fuentes Case, 160 and 161 of the marginal paging, "that the said R. Relf and B. Chew were the testamentary executors of the said D. Clark under the will of 1811, and were also the agents and attorneys in fact of Mary Clark, mother and sole testamentary and legal heir of the said D. Clark, and as such were the parties through whom these petitioners derived title to the property now claimed by the said defendant."

It is not necessary for me to comment upon the effect of this judicial admission further than to say that it is a distinct avowal that they claim under Relf and Chew as the executors and attorneys in fact under the first will, and this leaves them in the situation of having denied what they were legally bound to know. See Gaines v. Hennen, 24 How. [65 U. S.] 615, 616; Gaines v. Mausseaux [Case No. 5,176], and what they admit in the Fuentes Case they did know.

These cases are undistinguishable in principle from that of the case of Gaines v. Hennen, supra. It is both proved and avowed in this case, which was admitted there, viz., that the title was derived from Relf and Chew by the sales under the first will. Such a title the supreme court of the United States, in the case of Gaines v. Hennen, decided was an illegal and vicious title, and that the vice of the title took from the vendees all pretense of purchasers or possessors in good faith. In that case the supreme court took pains to put into their decree, after reciting the conveyance from Relf and Chew through these intermediate grantees and the conveyance to Hennen, that "the defendant Hennen at the time when he purchased the property so described and claimed by him as aforesaid, was bound to take notice of the circumstances which rendered the acts and doings of the said Relf and Chew in the premises illegal, null and void; that the said Hennen ought to be deemed and held, and is hereby deemed and held, to have purchased the property in question with full notice," etc. This view is adhered to in Gaines v. New Orleans, 6 Wall. [73 U. S.] 716, 717, where the court declare that the question is no longer an open one.

The evidence here on both sides as to the minority and the interruptions of prescription is precisely what it was in the case last referred to. Indeed it is all taken from the record in that case, and I think the supreme court of the United States have settled in the most solemn and authoritative manner that this plea cannot be urged by these defendants. Let there be judgment, therefore, for the complainant, Myra Clark Gaines.

[NOTE. For other cases involved in this litigation, see Fuentes v. Gaines, Case No. 5,145; Gaines v. Agnelly, Id. 5,173; Same v. Lizardi, Id. 5,174; Same v. Mausseaux, Id. 5,176; Same v. New Orleans, Id. 5,177; New Orleans v. Gaines, 15 Wall. (82 U. S.) 624; and Gaines v. City of New Orleans, 17 Fed. 16.]

GAINES v. LIZARDI. See Case No. 5,177.

GAINES v. LOUQUE. See Cases Nos. 5,174 and 5,175.

Case No. 5,176.

GAINES v. MAUSSEAUX et al. GAINES v. CRONAN et al. GAINES v. COMPTON et al.

[1 Woods, 118.] [1]

Circuit Court. E. D. Louisiana. April Term, 1871.

DISCOVERY — RIGHT OF COMPLAINANT TO DISCOVERY OF DEFENDANT'S TITLE—MULTIFARIOUSNESS —FRAUD—EQUITY—PLEADING—DUPLICITY.

1. If evidence of defendant's title furnishes evidence of the complainant's, the latter may compel a discovery of it.

2. The fact that in Louisiana titles are registered in a public office does not affect complainant's right to call for such discovery.

3. A bill is not objectionable for multifariousness because it joins defendants holding distinct tracts of land, under distinct conveyances, if the main ground of defense is common to all the defendants.

[Cited in Jones v. Slauson, 33 Fed. 634.]

4. If fraud is charged against executors in proving a will, and acting under it, and notice of such fraud before their purchase of the property is alleged against the other defendants, a suit at law could not give adequate relief.

[Cited in Gaines v. Lizardi, Case No. 5,175.]

5. If a plea contain matter proper for a demurrer, for a plea in bar, for a plea in abatement, and for an answer, it is bad for duplicity.

These were bills in equity, and came on for hearing on demurrers and pleas.

E. T. Merrick and J. Q. A. Fellows, for complainant.

Miles Taylor and James McConnell, for defendants.

BRADLEY, Circuit Justice. These cases come up on demurrers and pleas. The bills are similar in character, and a description of one is a description of all. They are all substantially in the same form, as were the bills in the cases of Gaines v. Hennen, 24 How. [65 U. S.] 553, and Gaines v. New Orleans, 6 Wall. [73 U. S.] 642.

The complainant in each of these bills alleges that she is the legitimate daughter of Daniel Clark, deceased, who died in August, 1813; and that said Clark, by his will dated July 13, 1813, declared the complainant to be his legitimate and only daughter, and made her his universal legatee; that he died seized and possessed of several tracts of land and real estate in the city of New Orleans and its vicinity, a description of which is given: that in the year 1811, he had made another will (which was revoked by the will of 1813), by which former will he made his mother, Mary Clark, his universal legatee, and one Relf and one Chew executors; that the defendants claim the lands possessed by them, which are parcel of the lands described as belonging to Daniel Clark, under and by virtue of sales made by Relf and Chew as such executors; whereas the bill charges that such sales were void; that the requisite formalities were not observed to authorize executors to sell; that no orders to sell were made by the proper judges; that the proceedings were in divers other respects, specified in the bill, defective and illegal; and that the defendants were chargeable with notice of these illegalities when they became purchasers of the property held by them respectively. The bill sets out the probate of the will of 1813, and various collateral matters relating to the history thereof, and of the complainant, and prays for a discovery of the particular deeds and chain of title under which the defendants severally claim; and a discovery and account of the rents and profits received by them respectively; and a decree that the property be delivered to the complainant. The bill is objected to:

1. Because it seeks discovery of the defendant's title. It is undoubtedly, a general rule that the complainant cannot compel the defendant to discover the evidence of his (the defendant's) title when it does not also constitute evidence of the complainant's title. But if it does furnish evidence of the complainant's title, then it is not privileged from discovery. It is laid down distinctly that a complainant "is entitled to a discovery of everything which may enable him to defeat the title which it is expected will be set up against him." Pol. Prod. Doc. p. 22, vol. 77, Law Library. "If the defendant," says the lord chancellor, in one case, "pleads that a certain deed forms a part of his title, and withholds the deed, he cannot be compelled to produce it, because it is the defendant's title, and not the plaintiff's; but if the plaintiff alleges that the deed contains something which would show that the plaintiff is entitled, to support the plaintiff's title, the defendant is bound to answer that question. He may not be bound to produce the deed, if he negatives that ground on which the plaintiff claims the inspection of it; but then, although it is the defendant's title, it is part of the plaintiff's evidence, and may be the most important part of the plaintiff's evidence, who may find in a deed constituting the defendant's title a recognition of that which, if true, would supersede the title set up by this subsequent instrument." Attorney General v. Corporation of London, 12 Beav. 8.

This is precisely the case here. The complainant alleges that defendants hold under the void sale of Relf and Chew. If this be true, the complainant's case is established. For as both titles are derived from Daniel Clark; one through the will of 1811, and the other through the will of 1813; the latter title must be the best. It is important to the complainant, therefore, to show that the defendants do claim title under the will of 1811. This is a part of her evidence of title as against the defendants. Of this evidence she is entitled to a discovery. If the defendants do not, either immediately or remotely, derive title from Relf and Chew un-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

der the will of 1811, they can so state in their answer, and thus excuse themselves from showing how they do derive their title. But they must be careful not to deny what they are legally bound to know. The fact that, in this state, titles are registered in a public office, does not alter the case. The defendants may, possibly, rely on other titles than those which are registered. And, moreover, the complainant is not bound to search the records for the purpose for which she desires this discovery.

2. The next ground taken is, that the bill is multifarious, because it joins defendants holding distinct tracts of land under distinct conveyances. This very question was fully discussed in the first case which the complainant brought in this court for the recovery of her rights,—the case of Gaines v. Relf, commenced in July, 1836, and reported in 2 How. [43 U. S.] 619. The various tracts of which Daniel Clark died seized were described by the bill in that case, as in this; and recovery was sought against a large number of persons in possession thereof, as is sought here; and on demurrer in this court, the judges were divided in opinion. The case being certified to the supreme court, it was held that the bill was not objectionable for multifariousness in the respect referred to. The court say: "The main ground of defense, the validity of the bill of 1811, and the proceedings under it, is common to all the defendants. Their interests may be of greater or less extent, but that constitutes a difference in degree only, and not in principle. There can be no doubt that a bill might have been filed against each of the defendants, but the question is, whether they may not all be included in the same bill. The facts of the purchase, including notice, may be peculiar to each defendant; but these may be ascertained without inconvenience or expense to codefendants. In every fact which goes to impair or establish the authority of the executors, all the defendants are alike interested. In its present form the bill avoids multiplicity of suits, without subjecting the defendants to inconvenience or unreasonable expense." 2 How. [43 U. S.] 643, 644. Two distinct matters were introduced into that case, in which the majority of the defendants were not interested; namely, the claims of Catharine Barnes and her husband, and the account prayed against the executors, Relf and Chew. The court permitted the bill to be amended by the omission of these matters, and, with that amendment, held it to be unobjectionable. That case is precisely in point, and must be considered as governing this.

3. The next objection is, that the complainant has a sufficient remedy at law. This point, if well founded, could not have escaped the attention of the eminent counsel who argued the cases of Gaines v. Hennen and Gaines v. New Orleans [supra], before the supreme court. Some of the very cases now before me were before that court then. And the very same point was taken in the answers of the defendants in the latter case, and must have been passed upon by the court, although not formally discussed in the opinion.

The precise question was also raised in the before mentioned case of Gaines v. Relf, 2 How. [43 U. S.] 619. And although the executors of the will of 1811 were parties to that suit, and were charged with fraudulently setting up that will, yet jurisdiction was sustained, as well in view of the peculiar nature of the case, independent of that part of it. The point is discussed by the court on pages 647–650, and on page 649 the following observations occur: "But the controversy is rendered complicated by the numerous parties and the various circumstances under which the purchases were made. Besides, many facts essential to the complainant's rights are within the knowledge of the defendants and may be proved only by their answers. Of this character is the fraud charged against the executors in proving the will and acting under it, and the notice of such fraud before their purchase, alleged against the other defendants. If fraud shall be established against the executors, and a notice of the fraud by the other defendants, they must be considered, though the sales have the forms of law, as holding the property in trust for the complainants. Under these circumstances a suit at law could not give adequate relief. A surrender of papers and a relinquishment of title may become necessary. The powers of a court of chancery in this view are required to do complete justice between the parties."

In view of these considerations, the supreme court, in that case, returned for answer, the circuit court had jurisdiction of the case, and that it did not belong exclusively to a court of law. Add to this the discovery sought in relation to the claim of title by the defendants under the will of 1811, and in relation to the rents and profits received by them, and it will appear that the elements of equitable jurisdiction are sufficiently involved in the case.

4. Several matters are set up by way of plea. A glance at these pleas shows, however, that they not only contain matter not proper for a plea, but that they are bad for duplicity.

It is a general rule, that a plea must contain but one matter or point, and that only one plea can be filed to the whole bill, or to any specific part thereof. Story, Eq. Pl. §§ 652–657. The pleas in these cases really amount to answers. The matters set up therein can as well be set up in answers as in pleas, and several of the points made are such as have already been disposed of on demurrer. Most of them are a jumble of different defenses. Take for example the pleas of Mrs. Matthews, in case [docket] No. 5,058:

"For her several and separate pleas," to use her own language, "she doth say" (I give the substance of the pleas that follow): (1) That the complainant has a complete remedy at law. (2) Prescription for thirty years. (3) That the defendant has made expensive and useful improvements for which she is entitled to compensation by the laws of Louisiana. (4) That a suit in chancery deprives her of a trial by jury to which she is entitled by the seventh amendment of the constitution. (5) That a suit is now pending in the state probate court (Second district court of New Orleans), in which the validity of the will of 1813 is called in question.

In this paper we have presented to us, mixed up together, matters proper for a demurrer, for a plea in bar, for a plea in abatement, and for an answer, and severally unsuitable for any other form of pleading. Such irregular modes of pleading cannot be tolerated. And when it is remembered, that every defense, whether in law or in fact, can be set up in an answer, I have no hesitation in overruling the demurrers and pleas in these cases.

An order will be made to overrule the several demurrers and pleas with costs, and requiring the defendants to answer the complainant's bill in each case, on or before the rule day in December next.

[NOTE. For other cases involved in this litigation, see note to Gaines v. Lizardi, Case No. 5,175.]

GAINES v. MOUSSEAUX. See Cases Nos. 5,174 and 5,175.

Case No. 5,177.

GAINES v. NEW ORLEANS.

GAINES v. LIZARDI et al.

[1 Woods, 104.] [1]

Circuit Court, E. D. Louisiana. April Term, 1871.

PRACTICE IN EQUITY — EXCEPTIONS TO MASTER'S REPORT — HEARING BY COURT — POSSESSION OF PROPERTY IN BAD FAITH — RENTS AND PROFITS — IMPROVEMENTS — PRESCRIPTION.

1. The rule of practice is, that no exceptions to a master's report will be heard by the court, which have not been made before the master; and in the absence of very special circumstances, the court will feel bound to enforce it.

[Cited in Hatch v. Indianapolis & S. R. Co., 9 Fed. 858; In re Thomas, 45 Fed. 790; Cutting v. Florida Ry. & Nav. Co., 48 Fed. 508.]

2. Unless some particular matter is pointed out in which the master has committed an error, or unless it be shown that he has adopted some erroneous principle on which his account or calculation is based, his report will be allowed to stand.

[Cited in Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 40 Fed. 477.]

3. In Louisiana, where the possession is in bad faith, the possessor will not only be charged with what he has received, but with what he might have received; in other words, with the worth or value of the property.

4. Possessors in bad faith cannot, by the law of Louisiana, claim the benefit of prescription with regard to rents and profits, any more than with regard to the land itself.

[Cited in Gaines v. New Orleans, 17 Fed. 30.]

5. Under the law of Louisiana, possessors in bad faith are entitled to compensation for improvements which they have erected, if accepted by the owner. The latter may require them to be removed.

[Cited in Jackson v. Ludeling, Case No. 7,139.]

6. Manner of estimating rents and profits on lands, buildings and draining machine in possession and use by the city of New Orleans.

These were cases in equity, and were heard upon exceptions to the master's report.

E. T. Merrick and J. Q. A. Fellows, for complainant.

Miles Taylor, H. M. Hyams, and J. McConnell, for defendants.

BRADLEY, Circuit Justice. In these cases the defendants except to the master's report. It does not appear, by the report of the master's minutes, that the exceptions were taken before him. The rule of practice is that no exceptions will be heard by the court which have not been made before the master, so as to give him an opportunity of considering the same and correcting his report. But as counsel on both sides have evidently acted under a misapprehension of the rule, I will not overrule the exceptions on that ground, especially as some of them are of great importance to the rights of the parties. But it is desirable that the rule should be observed, and hereafter in the absence of very special circumstances, the court will feel bound to enforce it. It was declared by the supreme court of the United States, in McMicken v. Perin, 18 How. [59 U. S.] 507, and in other cases there referred to.

The principal exceptions are:

1. That the defendants did not realize the rents and profits which the master has charged them with. As this is a matter of fact arising upon the evidence, the court will not undertake to reexamine and retry the whole case; but will allow the report to stand, unless some particular matter is pointed out in which the master has committed an error, or unless it be shown that he has adopted some erroneous principle on which his account or calculation is based. It must be remembered that where the possession is in bad faith, the possessor will not only be charged with what he has received, but with what he might have received; in other words, with the worth or value of the property. The case of the city will be adverted to more particularly hereafter.

2. It is excepted, secondly: That the mas-

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ter has not allowed the defendants the prescription of three years for rents and profits received by them before the commencement of the suit. In this the master only followed the decree. The supreme court of the United States decided that the defendants were possessors in bad faith, chargeable with notice of the defectiveness of their title, and that they must severally account to the complainant for the rents and profits received by them, from the time that they severally came into possession; and, being possessors in bad faith, I think, by the law of Louisiana, they cannot claim the benefit of prescription with regard to rents and profits, any more than with regard to the land itself. There are repeated decisions to this effect, some of which are referred to in 2 Hen. Dig. tit. "Possessions," II. a, p. 1195, No. 5. And Touillier says: "Bad faith renders him (the possessor) liable to account for not only the fruits which he has received, but even those which he might have received, and which have perished by his negligence; and this obligation is extinguished only by the prescription of the thing itself; and restitution is due from the day when the bad faith commenced." 3 Droit Civile Française, pp. 71, 72.

The defendants' counsel have referred me to a provision of the Code of 1808, which declares that the prescription of 30 years may be pleaded even by a knavish possessor. Precisely the same provision is found in article 3438 of the present Code, only a little differently rendered in English. It reads thus: "The same species of property is prescribed for by 30 years, without any title on the part of the possessor, or whether he be in good faith or not." The species of property referred to is immovables.

It is a sufficient answer to the argument derived from this article to say that it was not overlooked by the supreme court of the United States, and that its rejection as applied to this case is res judicata. And it is hardly necessary to remind the defendants, that if Mrs. Gaines did not arrive at full age until December 31, 1827, as alleged in the bill, the 30 years had not expired when the bill was filed, letting alone the previous litigation of many years which had interrupted the prescription.

3. The defendants except, thirdly: Because the master charges them with the rents and profits of the buildings and improvements, as well as of the land in its original state as owned by Daniel Clark. They claim that they are entitled to the use of the improvements, whether erected by themselves or by their predecessors in possession, and are liable to the complainant only for the use of the lands as Daniel Clark left them.

This objection involves the general question of the defendants' right to compensation for improvements and the extent thereof and exceptions thereto. Generally speaking, according to article 500 of the present Code, which is identical with the corresponding article in the Code of 1808, and with article 555 of the Code Napoleon, when plantations, constructions and works have been made by a third person, with his own materials, the owner of the soil has the right to keep them, or to compel the author to take away or demolish them. If he keeps them, he must pay for the value of the materials and the price of the labor. In other words, he must pay for their original cost. From the moment he approves of and accepts the improvements, he is regarded as having ordered them. Locré, vol. 8, p. 181.

This rule is a modification of the Roman law, which made a distinction between necessary and useful works. If necessary to the preservation of the property, the possessor in bad as well as in good faith was entitled to compensation; but if useful only, whilst the latter was entitled to reimbursements, the former had only the right to withdraw and keep the gain which he had derived from the improvements. The Roman rule seems to be adopted in this state, in the case of improvements which cannot be separated from the property, and cannot, therefore, according to article 500, be removed at the owner's option, such as the clearing of wild land and rendering it fit for cultivation. In such cases the possessor is permitted to retire with the profits he may have made, but without any claim of compensation for his labor. Gibson v. Hutchins, 12 La. Ann. 547, overruling the previous case of Pearce v. Frantum, 16 La. 423.

The supreme court of this state seems also to have established another exception to the general rule laid down in the Code, namely, that a possessor, knowing that he has no title, that is, a mere trespasser or intermeddler, is not entitled to any compensation for improvements. This was held in the case of Herriot v. Broussard, 4 Mart. (N. S.) 267. The court say: "The defendant's claim for remuneration on account of ameliorations or improvements on the disputed premises was properly rejected by the court below. He is not one of those possessors to whom our laws accord such a right; he knew that he held no title, for he did not accept that intended to be conveyed, etc."

The same doctrine is laid down in Gibson v. Hutchins, 12 La. Ann. 547. Referring to a previous case not reported, the court say: "We said in Hemkin v. Overly, that we are unable to recognize the doctrine that one who makes improvements upon property to which he knows he has no title has any legal or equitable claim to reimbursement for such improvements."

The court applies the doctrine to the case of a settler, who takes possession with the hope of a preemption. "Until he actually makes his entry, he knows he has no title. He has an expectancy and nothing more. He is a tenant by sufferance. * * * When

the government parts with the title to a third person, that title carries with it such inseparable ameliorations as the land may have received from the settler. The settler has no claim upon the owner. Of course the possessor, who knows he has no title, is a possessor in bad faith."

A subsequent case to that of Gibson v. Hutchins—Cannon v. White, reported in 16 La. Ann. 85–91,—leaves us in some uncertainty as to the true distinctions to be made on this subject. The defendant in that case had reason to suspect his grantor's title (which was a fraudulent one), and was held to be a possessor in bad faith. He went into possession in 1853, when only 250 acres of the land was under cultivation. He remained in possession 8 years, and made and erected improvements valued at $5,250. The court considered that the use of the 230 acres of additional clearing and the cord wood consumed, more than compensated for the expense of clearing, and set off one against the other. But they allowed him compensation for his other improvements. In other words, he was allowed for his inseparable improvements (the additional clearing) only what he was able to realize therefrom, in accordance with the doctrine of Gibson v. Hutchins, and for his constructions he was allowed cost.

In the cases before us, the bill charges and the decree declares that the defendants purchased with full notice that the auction sale of Relf and Chew was illegal, null and void, and in fraud of the rights of complainant, and the defendants are decreed to surrender the property to the complainant forthwith, and to account to her for all the rents and profits from the time they came into possession. No deduction or limitation is mentioned except this, that the account should be taken subject to the laws of Louisiana in cases of such recovery. The fair interpretation of this limitation is, that these laws are to determine what elements go to make up rents and profits, and what are the proper allowances to be made in estimating the same under judgments or decrees of this kind.

How is this limitation to be applied in this case? The bill prayed possession of the property and an account and payment of all the rents and profits. The decree grants both without restriction. The defendants, in their answers, did not ask for any deduction or allowance for improvements. They placed themselves altogether upon their title and the invalidity of the complainant's title. They defended the title only. Nothing was said about improvements; and even when they came before the master, no statement in writing is made setting up any such claim. The defendants, if they relied on such a claim, ought to have presented to the master a statement of facts in writing, setting forth their claim, and forming a basis for revisory action, if proper, on the part of the court. The claim of the defendants is full of embarrassments. Nevertheless, on account of neglect of the proper forms of presentation, if they are really entitled to compensation for improvements under the law of Louisiana, and if that subject has never been considered by the supreme court, it would be very hard to conclude them by the mere forms of law. The supreme court has expressly decreed that the complainant should have immediate possession of the disputed property. The claim for improvements, therefore, if it exists at all, cannot interfere with the surrender of possession. It must either be adjusted in the account for rents and profits or by a subsequent proceeding. A subsequent proceeding would be intolerable on account of the increase and protraction of the litigation that would ensue. The clause of the decree above referred to, requiring the account to be taken subject to the laws of Louisiana, opens a way for the adjustment of this question before the master, upon proper proceedings to be had on the part of the defendants.

Upon a careful examination of the law, I am of the opinion that the defendants, were it not for the difficulties presented by the pleadings, would be entitled to compensation for their improvements erected on the land. And as the question seems never to have been presented to the supreme court for adjudication, the want of a decree for such compensation is not necessarily to be regarded as res judicata against the claim. And although the fact that the defendants have never formally set up such a claim in their answers or in any proceeding in the case, presents a strong barrier to its allowance, and although it may be a great stretch of indulgence on the part of the court to allow it to be set up at this time, still the court may avail itself of that clause of the decree which directs the accounts of rents and profits to be taken, subject to the laws of Louisiana, as a basis for its allowance before the master on a proper presentation of the facts before him. But the defendants are in gross laches, and as a condition of referring the cases or any of them back to the master for this purpose, they must first severally pay the costs of the proceedings already had before the master; and when any case comes up before him, the defendant concerned must present a written statement of the facts on which he bases his claim, together with a statement of the cost of the improvements claimed, in order that the complainant may then elect within thirty days from the master's report thereon, whether she will keep the improvements, or have them removed at the expense of the defendant. Her election should not be regarded as made by reason of her taking possession of the property with the improvements on it, because no proper claim for improvements has ever been made in the cause. And the presentation of the claim under oath is not to be regarded as superseding due proof

thereof. Of course the statement should show when the improvements were erected, and by whom, and if not erected by the defendant, that he purchased the same with the property. Where the grantor and grantee are both parties to the cause, the supreme court of this state has decided that the improvements should be apportioned between the grantor and grantee in proportion to the improvements made by each. Lejeune v. Barrow, 11 La. Ann. 501. But that will depend on the fact whether the grantee has or has not paid for them, and does or does not look to his grantor for indemnity.

In taking this account, I consider the decree of the supreme court as requiring, and the law of the case to be, that the entire rents and profits are to be accounted for by the defendants. As the accounts have already been taken by the master on this basis, with due allowances for all ordinary expenses for repairs, insurance, taxes, etc., that part of the work will not require to be repeated.

The case of the city is a peculiar one. The estimation of the rents and profits in that case is so uncertain and speculative, that I do not feel entirely satisfied as to the decision that should be made. The master evidently felt the same embarrassment. He says: "As the city received no rents whatever, and no profits, except by the increase of its revenue, it is difficult to fix the amount to which she (the complainant) is justly entitled. The master presents facts and figures which he trusts will enable the court to arrive at an equitable conclusion." He then gives the estimate of various witnesses as to the annual value of the premises, including the draining machine, the average of which was $8,000; and, after deducting the cost of the machine and all improvements and repairs, he brings the city in debt the sum of half a million dollars ($500,000). Another estimate based on the additional revenues derived from the lands reclaimed by the use of the machine, after deducting cost and repairs, shows a profit of two hundred and eight thousand, eight hundred and twenty-five dollars ($208,825). Both of these estimates are vague, uncertain, and somewhat speculative.

A third estimate is made, based on the value of the land and buildings, without the drainage machine, and giving credit for ordinary repairs to the buildings, independent of the machine. This makes the rents $157,600, and the repairs $32,333.21, leaving a balance of $125,267.79. As the master has not signified his adoption of either of these estimates, but has stated the facts to the court for its equitable determination, I have come to the conclusion that it would be equitable and just to set off the profits derived by the city from the drainage machine for the past 35 years against the cost of construction and repairs, and to charge the city with the rents of the building and land, less the ordinary repairs of the buildings, amounting, as shown by the report, to the sum of $125,267.77. Whilst the profits and advantages of the drainage machine were indefinite and uncertain in amount, there is no doubt of their reality, nor, if we can place any reliance upon the estimates, is there any doubt of their being amply sufficient to reimburse the city for all its expenditures, including even the rent with which it is charged.

A decree will be made confirming the report of the master in the Case of The City of New Orleans, upon the basis of the last alternative stated in his report; and also confirming his several reports in the other cases as far as they have gone, with leave, however, to each of the defendants in the other cases, upon payment of the master's costs respectively, to have a further reference to the master for estimating the compensation due to them for improvements, upon the terms and principles above stated in this opinion.

[NOTE. One of the respondents, the city of New Orleans, appealed from this decision to the supreme court, alleging for error—First, that the decree rendered by the circuit court was erroneous, in that it had the effect of giving to the plaintiff the buildings and machinery erected by the city, without paying the value of the materials and the cost of workmanship, or any other price whatever; second, that the sum of the rents and profits was made up, in part, by the allowance of interest at the rate of 5 per cent. per annum on each year's rent from the end of the year, which is in violation of the doctrine of the Code of Louisiana; third, the refusal to allow the plea of prescription in bar of all rents or profits for the use of the square, which were received by the city more than three years anterior to the institution of the suit, December 26, 1856.

[The judgment of the circuit court was duly affirmed, and the exceptions were disallowed. New Orleans v. Gaines, 15 Wall. (82 U. S.) 624.

[For other cases involved in this litigation, see note to Case No. 5,175.]

GAINES v. NEW ORLEANS. See Cases Nos. 5,174 and 5,175.

Case No. 5,178.

GAINES et al. v. SPANN et al.

[2 Brock. 81.] [1]

Circuit Court, D. Virginia. May Term, 1823.

WILLS—CONSTRUCTION—APPOINTMENT OF GUARDIAN—LEGACIES FOR THE BENEFIT OF THE WARDS.

1. A testator made his will in Virginia, disposing of his estate among his wife and children, which will contained the following clause:—"It is farther my will that my wife shall clothe, maintain, and educate my children, in the best manner that the circumstances of the estate herein or hereby given, or to be given or bequeathed to her, will admit; and that she shall consult my executors hereinafter named, as to the mode of my said children's education." The executors appointed by this will were the testator's brothers, J. and S. Some eighteen months after the date of this will, the testator

[1] [Reported by John W. Brockenbrough, Esq.]

made an additional will in England, ratifying and confirming his former will, disposing of property acquired subsequently to the execution of the first will. By the English will, the testator bequeathed pecuniary legacies to his children to be paid out of the subsequently acquired estate, and £50 per annum to his wife, chargeable on those legacies. He then added: "And do will and direct that the guardians of my said children, by my said former will appointed, shall, by their bond, of a sufficient penalty, &c., secure to be paid to my said wife, for her life, as aforesaid, out of the moneys coming to their hands, or which they shall be in the receipt of, for the use of, or in trust for, my said children, the said annuity or yearly sum of £50." The testator appointed by this will P. and H. (both in England) "guardians of the persons and estates of (his) said children, during and until such time as the several sums of money by (him) hereinbefore bequeathed to them (could) be paid, for their use and benefit, into the hands of the several persons by (him) nominated and appointed guardians of the persons and estates of (his) said children, under the said will and disposition by (him) made and executed, prior to (his) departure from America, as aforesaid." "And I hereby appoint the said P. and H. joint executors in trust of this my will." P., one of the executors and guardians under the English will, failing for a long period of time to account for the moneys which came to his hands, to a large amount, and eventually becoming insolvent, this suit was brought by the legatees, inter alia, to subject J. and S. to the payment of P.'s debt. *Held*, that the first will did not appoint the executors J. and S. guardians also of the testator's children. Though no form of words is prescribed for the appointment of a guardian, and such appointment may be made by words of implication, yet these words must convey the powers essential to the office.

[Cited in Desribes . Wilmer, 69 Ala. 25.]

2. Nor does the recognition, in the English will, of the executors under the Virginia will as guardians, amount to an appointment of them, by implication, to that office. It is true that the two papers constitute, in point of law, but one will, but they are not to be so considered in point of fact. Had the English will been written (by way of codicil) on the same paper with the Virginia will; or had the Virginia will been before the testator when the English will was written, the subsequent clauses could not have been founded in ignorance or forgetfulness of the provisions of the Virginia will, but would have shown the construction put by the testator upon his own words, and that those words were intended to appoint, and did in fact appoint, the executors, J. and S., guardians also. In such case, it seems that the court would be bound to adopt the testator's construction. But in this case, there is no reason to suppose that the Virginia will was before the testator when he drew the English will. The testator relied upon his memory, and this betrayed him into the error of supposing that, by his former will, he had appointed J. and S. guardians, when that will, in fact, contained no such appointment. The question is not, whether a testator has a right to construe his own language, employed in a former will, but whether a plain mistake respecting that language shall control its natural construction, and give to it a meaning which it will not bear? This is forbidden, both by authority and by general principles.

3. Quaere, whether the fact, assuming it to be true, that the executors under the first will acted as guardians, could influence the construction of the will? The proof that they did act in that character should at least be unequivocal. A general understanding that they were guardians, founded on the care taken by them of the infants and their estates, could not make them guardians: nor the fact of their signing their names (without adding their characters as guardians), to a direction to a clerk to issue a marriage license to one of the female infants, though it would have amounted to an acceptance of the guardianship, had the appointment been explicit.

4. But supposing J. and S. to have been guardians as well as executors, quaere if they would be chargeable, in their character of guardians, with legacies which they never received, and which, in strictness, never constituted a part of the ward's estate?

[Cited in Freeman's Appeal, 68 Pa. St. 156.]

5. Nor were J. and S. responsible, as executors, for the legacies which came to P.'s hands. P. was both guardian and executor under the English will, and he received the legacies in one of those characters: if as guardian, the executors had no right to sue him for money of the wards which came lawfully to his hands, if it was not required for the payment of debts: if as executor, his co-executors could not sue him. The English will, too, directed the money to be paid to the guardians in Virginia, and not to the executors. The legatees, and not the executors, were the cestui que trust, and they alone could coerce the execution of the trust.

Camm Garlick, Samuel Garlick, and John Garlick, citizens of Virginia, were the nephews of Edward Garlick, a subject of the king of Great Britain, residing in Bristol, from whom they expected considerable legacies. In 1780, Camm Garlick went to England for the purpose of visiting his uncle, who, some time afterwards, departed this life. By his will, Edward Garlick bequeathed to each of his nephews, Camm, Samuel, and John Garlick, £6000 sterling. In 1782, after the death of his uncle, Camm Garlick went to Portugal, on account of ill health, where he died some time in that year. Before his departure from Virginia, viz., on the 21st of May, 1780, Camm Garlick made his will, disposing of his estate among his wife and children. In that will is the following clause: "It is further my will that my wife shall clothe, maintain, and educate my children in the best manner that the circumstances of the estate herein or hereby given, or to be given or bequeathed to her, will admit; and that she shall consult my executors hereinafter named, as to the mode of my said children's education." The testator appointed his brothers, John and Samuel Garlick, executors of his will. On the 6th of December, 1781, Camm Garlick, being then in England, made an additional will, in which he mentioned and confirmed his will made before his departure from Virginia. By this additional will, he bequeathed to his son Samuel, and his two daughters, Sarah and Mary Camm, pecuniary legacies, to be paid out of the money bequeathed to him by his uncle Edward, and gave also £50 per annum to his wife, chargeable on the legacies to his children. He then added: "And do will and direct that the guardians of my said children, by my said former will appointed, shall, by their bond, of a sufficient penalty, or such other security as shall be thought reasonable and competent, secure to be paid to my said wife, for her life, as aforesaid, out of the moneys coming to their hands, or

which they shall be in the receipt of, for the use of, or in trust for, my said children, the said annuity or yearly sum of £50." He also gave a legacy of £500 to Benjamin Pollard, who was then in England, and added: "And I do hereby appoint the said Benjamin Pollard, and the Reverend Mr. Thomas Hall (also in England) guardians of the persons and estates of my said children, during, and until such time as the several sums of money by me, hereinbefore bequeathed to them, can be paid for their use and benefit, into the hands of the several persons by me nominated and appointed guardians of the persons and estates of my said children, under the said will and disposition by me made and executed, prior to my departure from America, as aforesaid." The testator then directed the said Pollard and Hall, as his money should be collected, "and until the same can be paid and applied as before mentioned," to place the same at interest for the benefit of his children; "and I hereby appoint the said Benjamin Pollard and Thomas Hall joint executors in trust of this my will." He recommended it to his brothers to pay the sum of £100 yearly to the said Thomas Hall, for the space of three years, if that time should be required for the collection of the effects and settlement of the affairs of his uncle Edward; and if his brothers should decline to comply with this recommendation, so long as the said Thomas Hall should be employed as one of his executors in settling the accounts of his uncle, he gave him a sum equal in proportion to the said sum of £300.

In 1783, a commercial partnership was formed between Samuel Spann, a merchant residing in Great Britain, and Benjamin Pollard, for the purpose of carrying on a trade in Virginia, under the name and firm of Benjamin Pollard & Co., and under the management of the said Benjamin Pollard. Into this concern the moneys of the Garlicks seem to have entered, and the privilege was reserved to John and Samuel Garlick, to become members of the company. In 1784, Benjamin Pollard arrived in Virginia with a cargo of goods, and John and Samuel Garlick acceded to the proposition which was made to them, and became members of the company. The business of the firm was exceedingly disastrous, and ended in total insolvency. In July, 1799, the legatees of Camm Garlick instituted a suit in the court of chancery of this state, against John and Samuel Garlick, the general executors of Camm Garlick, and against Benjamin Pollard, the executor in trust, for the legacies bequeathed to them by Camm Garlick. In 1803, the executors of Samuel Spann instituted a suit in this court against John and Samuel Garlick, and Benjamin Pollard, as surviving partners of Benjamin Pollard & Co., for a debt due from that company to their testator. Before any answer was filed, John and Samuel Garlick died, and the suit was revived against their representatives. They stated in their answer the suit brought against John and Samuel Garlick, as executors of Camm Garlick, by the legatees of the said Camm, which suit was revived against the respondents; that it was a debt of superior dignity to that claimed by Spann's executors, and that they were ignorant of its amount. They therefore prayed that provision for this claim might be made in the decree. On the 17th day of December, in the year 1816, the cause came on to be finally heard, when this court decreed that the administrator of Samuel Garlick, deceased, should pay to the plaintiffs, a small sum mentioned in the decree, and that Edward Garlick, the administrator of John Garlick, deceased, should pay to the plaintiffs out of the assets in his hands to be administered, the sum of $16,238 92. Under this decree, a considerable sum of money was paid into court by Edward Garlick, administrator of John Garlick, deceased, under a stipulation that it should be applied in such manner as the assets of John Garlick ought to be applied, in a due course of administration, so as not to create a devastavit.

After a great number of abatements, revivals and reports, in the cause depending in the state court, the chancellor, on the 30th day of June, 1820, after the suit was revived by consent, as to all the proper parties, set aside all the orders directing accounts, and the last report of the commissioner thereon, and directed an account to be taken which comprehended every matter in controversy, and, especially, the administration of John and Samuel Garlick, of the estate of Camm Garlick, and the administration of their estates by their respective representatives. The commissioner stated an account between those parties on whom the case chiefly depended, which was received by consent, instead of the full report directed by the court. Some exceptions were taken which were in part overruled, and in part sustained; after which, the chancellor, by consent of parties, decreed that the defendant, Edward Garlick, administrator of John Garlick, should pay to Mary Camm Tunstal, one of the daughters of Camm Garlick, $5169 21, with interest at the rate of five per cent. per annum, from the 1st of January, 1801, and to Sarah Gaines, the other daughter of the said Camm Garlick, the sum of $4393 47, with like interest from the same time. After this decree, the plaintiffs in that court, Mary Camm Tunstal and Sarah Gaines, filed their bill of interpleader in this court, to which Spann's executors and the representatives of John and Samuel Garlick, were made defendants, stating the superior dignity of their debt, and praying that the sums of money paid into this court by Edward Garlick, as administrator of John Garlick, deceased, and by the sureties in the administration bond of the said Edward, and which were under the control of the court, should be paid to them.

The surviving executor of Samuel Spann, pleaded the decree of this court, heretofore recited, in bar of the plaintiff's claim; and if this plea should be overruled, insisted in his answer that the decree in the state court ought not to affect him, because it was made by consent, and, therefore, could not be revised by a superior tribunal. He farther insisted that the money paid into court was applicable to this decree, if it ought to be so applied, and that it ought to be so applied, because his decree was prior, in point of time, and equal in dignity, the debt due to the plaintiffs, legatees of Camm Garlick, not being payable by John and Samuel Garlick, either as guardians or executors.[2] The other defendants submitted themselves to the court. The plea was overruled, "the court being of opinion, that, under the laws of this state, and on the sound principles of equity, the claim now set up by the plaintiffs ought to avail the representatives of John and Samuel Garlick, in like manner as if they had been able to establish it, before the decree was pronounced in favor of Spann's executors: but the court was also of opinion, that the decree of the court of chancery of the state, having been given by consent, was not conclusive as to the dignity of the debt, or against a creditor having obtained a prior decree," and therefore directed one of its commissioners again to take the accounts between the parties, and to report them to this court. In pursuance of this order, the commissioner made his report, and the cause came on at this term on the report and on exceptions to it. The commissioner stated his report according to the views of each party. The chief subject of controversy respected the debt due from Benjamin Pollard to the estate of Camm Garlick. The plaintiffs claimed to charge John and Samuel Garlick with Pollard's debt, as the guardians of the infant children of Camm Garlick, or as his executors. They insisted that it was in the power of John and Samuel Garlick to collect the money due from Pollard, their omission to do which was gross negligence, which rendered them liable for the money lost. No portion of the estate of Camm Garlick, received by Benjamin Pollard, by virtue of the authority conferred upon him by the will of Camm Garlick, was ever accounted for by Pollard.

MARSHALL, Circuit Justice. This claim depends on two questions: 1. Were John and Samuel Garlick testamentary guardians of the children of Camm Garlick? 2. Were they bound, as executors, to collect the debt due from Pollard?

1. Were they the testamentary guardians of the infant children of Camm Garlick? His will, made in Virginia, empowers and directs his wife "to clothe, maintain, and educate his children, in the best manner that his estate, given to her, will admit," and desires her to consult his executors thereinafter named as to the mode of their education. It is admitted that a guardian may be appointed without using the term, and that no form of words is prescribed: but to appoint a guardian by implication, the powers essential to the office ought to be conferred. In this will, no power is given over the persons or estates of the orphans to John and Samuel Garlick. These remain with the mother, who is only to consult his executors as to the education of his children. She may follow or reject their advice, and they have no authority to enforce it. Nothing can be more clear, than that they are not appointed guardians in this will.

In his additional will, made in England, he ratifies and confirms the will made in Virginia, gives a legacy of £50 per annum to his wife, and directs that the guardians by his said former will appointed, shall, by their bond, of a sufficient penalty, "secure to be paid to his said wife for her life, out of the moneys coming to their hands, or which they shall be in receipt of, for the use of, or in trust for, his said children, the said annuity or yearly sum of £50. This is said to be a recognition of their character as guardians, and an appointment of them by implication to that office. This is a point on which I have felt no inconsiderable difficulty. The two papers making in point of law but one will, and the last ratifying, confirming, and establishing the first, I have supposed that they might be considered as if written on the same paper, at the same time; and as if the words of the last recited clause had been—"My will is, that the guardians of my children, herein by me above appointed, shall, by their bond, &c." Had this been the fact, it would have been very certain that the testator understood his words as appointing a guardian; and, although the powers of a guardian were in reality conferred on his wife, and not on his executors, the inference would have been very strong that the words of the last clause refer to his executors, and not to his wife, because the persons he supposed himself to have appointed, were directed to give bond, and to pay money to his wife. The allusion to his executors is almost as strong as if he had named them; and had he done so, had the language of such a will been—"It is my desire that my brothers, John and Samuel Garlick, whom I have hereinbefore appointed guardians of my children, shall, by their bond, &c., secure to be paid to my said wife, &c.," it would be difficult to resist the argu-

[2] In Virginia, the executors or administrators, of a guardian, of a committee, or of any other person who shall have been chargeable with the estate of a ward, idiot, or lunatic, or the estate of a dead person, committed to their testator or intestate by a court of record, are required to pay so much as shall be due from their testator or intestate, to the ward, idiot or lunatic, or the legatees or persons entitled to distribution, before any proper debt of their testator or intestate. 1 Rev. Code 1819, p. 389, § 60; Id. p. 408, § 12.

ment that such language would amount to an actual appointment. The subsequent clause, too, appointing Benjamin Pollard and the Rev. Thomas Hall guardians of the persons and estates of his children, until the legacies bequeathed to them in England could be collected and paid to the guardians appointed by his first will, would, under the same view of the case, afford an argument equally strong in favour of the construction for which the plaintiffs contend. I was the more disposed to yield to this construction, from perceiving that the chancellor, who decided the cause in the state court, treated John and Samuel Garlick as guardians. Had this point been directly made, and directly determined by him, the leaning of my own judgment to the contrary opinion would, probably, have yielded to my respect for his decision. But the point was not directly made; the report was not excepted to on this account; and the parties seem to have proceeded on the idea that John and Samuel Garlick were to be considered as guardians, and were, in that character, liable for Pollard's debt. Taking this view of the decree, I have felt it to be my duty to consider the question, uninfluenced by the proceedings of the state court.

I do not think that the case can be considered as if the two papers formed, in point of fact as well as law, one instrument. Had the provisions of the first will been before the testator when he wrote the last, the subsequent clauses could not have been founded on ignorance or forgetfulness of what he had before written, but would have shown his construction of the clause referred to. They would have shown his opinion, that the words he had previously employed were competent to the appointment of guardians for his children, and that he employed them with that intent. In such a case there would be great force in the argument requiring the court to construe these words as the testator himself obviously construed them. But in the case at bar, we have no reason to suppose that the will made in Virginia was in possession of Camm Garlick when he made his will in England. It rested only in his memory. We have, therefore, no right to suppose that the words used in it were used in a sense which they will not bear; we can only suppose that he was under a mistake respecting it; that he had no distinct recollection of it; that he supposed it to contain an appointment of guardians, when it contained no such appointment. I can find no case which decides that any thing passes by words used clearly under such mistake. In Wright v. Wivell, 4 Bac. Abr. 290 (reported in 3 Lev. 259, 2 Vent. 57, and Moore, 31), A. devised to his wife £600, to be paid to J. S., for the payment of lands he purchased from him, and are already settled on her for her jointure; the lands were not settled on her; and adjudged in favor of the heir; they did not pass by implication. The testator certainly supposed the lands were settled, but this mistake did not give the wife a right to them. So, in the same book, page 339, the following passages are cited from Godol. 282: "If a man says, out of the £100 which I bequeathed to A., I give B. £50; this is a good bequest of the £50 to B., because only a false demonstration in an immaterial circumstance, which shall not vitiate the legacy; but in this case, A. takes nothing; for words of diminution shall never be construed to give a legacy by implication. But if the demonstration be totally false, as if the testator says, I bequeath to A. the £100 which I have in my chest, and there is not any money in the chest, the legacy is void. So in the case at bar; a direction that money shall be paid to the persons who were, in a former will, appointed the guardians of his children, when no persons were so appointed, is a plain mistake, and can give no rights to those whom we may suppose the words allude to. Had his brothers been named, so as to render it absolutely certain that they were the persons to whom he alludes, this mere mistake would not, I think, under the authorities which have been quoted, or on general principles, have amounted to an appointment; their not being named would render it still more unjustifiable to put the construction on the will which is required by the plaintiff. If the words themselves be analyzed, nothing can be extracted from them intimating an intention in the testator to appoint; they only show the mistaken idea that he had made an appointment. This was completely an error in his recollection, and the court cannot, I think, supply the defect.

It is contended that they acted as guardians, and this fact is supposed to show their understanding of the will, and to have some influence on its construction. The proof that they acted as guardians is, I think, equivocal. Had the appointment been explicit, the evidence would be sufficient to show their acceptance of the office; but no regular appointment having been made, the evidence does not, I think, make out a clear case of their acting as guardians. Several witnesses depose to a general understanding, founded on the care they took of the infants and their property, that they were the guardians; but, I think, no fact, except signing a direction to the clerk to issue a marriage license for one of the young ladies, is proved, which is not entirely compatible with the relation in which they stood to the family, admitting them not to think themselves guardians. The testator had devised the whole of his estate to his wife during the minority of his children, charging her with their maintenance and education. There was, then, no estate for the guardian to manage. It did not belong to the children during their infancy, but to their mother. If their uncles attended to it, such attention could neither make them guardians, nor make the estate their prop-

erty. It was an attention to be expected from their connexion with the family, and they would have been chargeable with want of natural affection had they refused it. To the authority to the clerk to issue a marriage license, they sign their names, but do not add their character as guardians. This cannot make them guardians; and although it would amount to an acceptance of the guardianship, had they been appointed, it was dated in June, 1798, before which time Pollard had become insolvent. But supposing John and Samuel Garlick to have been the guardians of the infant children of Camm Garlick, are they responsible in that character for Pollard's debt? A guardian is, undoubtedly, responsible for all the estate of the ward, real or personal, which comes to his hands; but is he responsible for moneys which he might, but did not collect, and which, in strict legal language, never formed a part of the ward's estate? A legacy is not a part of the estate of the legatee, until the executor assents to it. As a part of the personal estate of the testator, it is cast by law on the executor, who has a right to retain it till debts are paid. I have seen no case in which a guardian is charged with a legacy, until he has received it. I do not know that this point has ever been settled in the courts of the state. Were I of opinion that John and Samuel Garlick were really to be considered as testamentary guardians, I should think it necessary to look into this point, before I should feel myself justified in saying that they were chargeable with this legacy.

If John and Samuel Garlick are not chargeable with Pollard's debt, as guardians, we are next to inquire whether

2. They are chargeable as executors? This depends, I think, on the English will, and on the character held by Pollard, under that will. That John and Samuel Garlick were general executors, and that they are liable for this debt, if it was their duty to collect it, and if they had the right and the power to enforce its payment, are, I think, propositions not to be questioned. The whole inquiry, then, is, was it their duty to collect it, and could they coerce its payment? The clauses of the will which relate to this subject, are those in which Benjamin Pollard and Thomas Hall are appointed guardians of his children, and executors of his will. They are in these words: "And I do hereby appoint the said Benjamin Pollard and the Rev. Thomas Hall, guardians of the persons and estate of my said children, during, and until such time as the several sums of money by me hereinbefore bequeathed, can be paid for their use and benefit, into the hands of the several persons by me nominated and appointed guardians of the persons and estates of my said children, under the said will and disposition, by me made and executed prior to my departure from America, as aforesaid." "And I hereby appoint the said Benjamin Pollard and Thomas Hall, joint executors, in trust, of this my will." The legacies to which the plaintiffs were entitled, were in the hands of Benjamin Pollard, either as their guardian, or as executor. Let it be that the money was held by him as guardian. Have the executors a right to sue the guardian for money of the ward, which came lawfully to his hands, if it be not required for the debts of the testator? I believe he has no such right; I am persuaded that such a suit would be of the first impression. But on coming to America, Benjamin Pollard ceased to be guardian, and was bound to pay over the money to those who were entitled to receive it. But who were entitled to receive it? Not the executors, I think, because it had been paid by them to the guardian for the use of the infants, and had consequently become a part of their estate. The testator had shown his intention that the executors in Virginia should not receive it, for he directed specially that the money should be paid to the guardians in Virginia. Had the executors been really guardians, they would have received the money as guardians, not as executors. Had the guardians and executors been different persons, the money would have been payable to the guardians, not to the executors—if not required for debts.

But suppose the executors entitled to receive this money, would this circumstance attach responsibility to John and Samuel Garlick? Benjamin Pollard, who was in possession of it, was also an executor; if he is to be considered as a general executor, the law is clear that one executor cannot sue another, and that one executor is not liable for money in the hands of another. The question whether he is to be considered as general executor, or, if not, what limitations are imposed on his power, depends on the will. The words are, "and I hereby appoint the said Benjamin Pollard and Thomas Hall joint executors in trust of this my will." The particular paper which contains this appointment, contains also a reference to, and a confirmation of, the former will. The two papers make one instrument, and constitute one will in law, and I should feel some difficulty in determining the question, whether Benjamin Pollard was not executor in Virginia as well as in England; whether he was executor of the whole will, or of that particular paper only which was executed in England. But let it be conceded that he was to execute that part of the will only which was made in England. What is the extent of his power, and what the relation in which he stood to the executors in Virginia, and to the legatees of Camm Garlick? He was an executor in trust of the English will; his power and duty under that will were, to settle the affairs of Camm Garlick in England, collect the money due to him, and pay it to the guardians of his children in Virginia. The guardians were to become

trustees of the money for the benefit of the infants. The beneficial interest, then, was, from the commencement, in the infants; the executors and guardians in England were trustees for them. Benjamin Pollard continued to be executor for the purpose of the trust; he received the money as executor and trustee, and retained those characters till the trust was executed. If, then, the money was in his hands as guardian, and the executors had a right to collect it, Benjamin Pollard might be considered executor of that part of the will, and being in possession of the money, his co-executors had no power over it. If this money which he collected is to be considered as remaining in his hands as executor, a part of the foregoing reasoning applies directly to the question. He was, it must be admitted, unfaithful to his trust as executor in trust; but he still retained that character, and could not divest himself of it till the trust was executed; the children, and not the executors, were the cestui que trust; the children, and not the executors, could coerce its execution; the executors, therefore, cannot be responsible for its non-execution. I feel myself constrained to say, that the representatives of John and Samuel Garlick, are not chargeable with Pollard's debt.

GAINES (TEXAS v.). See Case No. 13,847.

Case No. 5,179.

GAINES v. TRAVIS.

[Abb. Adm. 297.] [1]

District Court, S. D. New York. June, 1848.

PLEADING IN ADMIRALTY —DISREGARDING PLEADING AFTER REPLYING TO IT — RESPONDENT'S BOND—ADDITIONAL STIPULATION — COSTS — IRREGULAR DEFAULT — WAIVER — SETTING ASIDE PROCEEDINGS.

1. A party cannot be allowed, after receiving a pleading and replying to it, to treat it, upon any ground of defect afterwards discovered, as a nullity, and proceed as if none had been served.

[Cited in The Ontonagon, 19 Fed. 800.]

2. After a bond has been given by a respondent to the marshal, in compliance with the rules of the supreme court, the libellant cannot exact any additional stipulation.

3. If the former rules of the district court respecting security to be given for costs may be considered as still in force for the purpose of protection to the officers of the court for the recovery of their fees, this is not a matter which affects the libellant, and he is not entitled to ground any proceeding on the omission of the respondent to give the security prescribed by those rules.

[Cited in Pope v. Seckworth, 46 Fed. 859.]

4. The libellant entered an irregular default against respondent, and moved the cause on for hearing on a reference to a commissioner. The respondent appeared, took no objection, but consented to adjournments. *Held*, that his appearance, &c., before the referee, constituted a voluntary consent on his part to waive the irregularities committed, and to submit the case to the determination of the commissioner. The court had power, however, to set aside the proceedings, and would do so, on terms, inasmuch as it was necessary to do so in order to enable the respondent to have the benefit of his real defence.

This was a libel in personam, by Levi Gaines against John H. Travis, to recover seamen's wages. The libellant having proceeded to bring the cause to a hearing before a commissioner as upon default to answer, the respondent now moved, on grounds which fully appear in the opinion of the court, to set aside the default and all subsequent proceedings for irregularity.

S. Sanxay, for motion.
Alanson Nash, opposed.

BETTS, District Judge. The respondent moves to set aside the default taken against him by the libellant, and all subsequent proceedings, for irregularity. Both parties also put in statements touching the merits of the case, but it is not necessary at this stage of the cause to discuss them. The monition in the cause was returned on the 25th of April. The respondent appeared by his proctor, and a few days' time were conceded him by the libellant's proctor to put in an answer. The answer was filed and served on the libellant's proctor on the second day of May, and on the same day a notice was given by the latter in conformity with the provisions of rule 88 of this court, to the proctor of the respondent, that the matters of defence set up by the answer would be contested on the hearing of the cause. The cause was thus properly at issue on the merits, and neither party could afterwards proceed in it, except in subordination to the rules governing the practice of the court in respect to issues duly joined. At this point in the proceedings both parties deviated from the established course of practice, and were each guilty of irregularities.

The libellant having ascertained that the answer was filed without the stipulation for costs required to be given by the rules of the court, regarded it as a nullity, and proceeded to a reference before a commissioner. Notice of the reference was given to the libellant, who appeared before the commissioner, and without making any objection to the course of proceedings, consented to adjournments of the hearing which were directed by the commissioner. The course pursued by the libellant, in bringing the cause on before the commissioner, was irregular and unauthorized in two respects. The answer had already been accepted, and an issue framed upon it as perfect; and the libellant was thereby precluded from disregarding it, and must appeal to the court to compel the respondent to take further steps, if required for his protection, or for an order that the answer be deemed a nullity. A party cannot be allowed, after receiving a pleading

[1] [Reported by Abbott Brothers.]

and replying to it, to proceed as if none had been served. If, indeed, he is not to be held in such case absolutely concluded from objecting to it, either as imperfect in form or as put in an improper manner, he must at least apply to the court for relief, and cannot take the decision of the question into his own hands, at discretion. The answer was, however, regular and complete as against the libellant; and this furnishes the second ground of objection to the practice adopted by him. After a bond has been given to the marshal, pursuant to the rules of the supreme court, the libellant has no power to exact any additional stipulation from the respondent. If the rules of this court conflict with rule 3 of the supreme court, they are superseded by it. The rule of the supreme court not only secures to a libellant all the protection provided by the rules of this court as to costs, but more than that, the sureties to the bond became bound absolutely for the performance of the decree of the court; that is, in a case like this, for the payment of the debt. Accordingly, if the libellant required from the respondent the stipulations directed by the rules of the district court, he would of necessity be obliged to relinquish the higher security held by him in the bond to the marshal.

There may, indeed, be a doubt whether the costs payable to officers of the court are secured by the terms of the bond to the marshal. The clerk might, therefore, be justified in exacting pre-payment of those costs, before receiving and filing an answer or other pleading on the part of the respondent, or rendering other services on his behalf; or possibly the rules of this court may be held to remain yet in force, hac tenus, in protection of the interests of the clerk and marshal. The duty of giving a security which shall enure to the protection of the officers is, however, a matter which in no way affects the libellant, and he is not entitled to look into it, or to ground any proceeding upon his part, on its omission or imperfect performance by the respondent.

Had the respondent rested upon his rights, the court must have set aside the proceedings as wholly irregular, and the entry of an order of reference as nugatory. But he having appeared upon the reference, on due notice thereof, and consented to adjournments ordered by the commissioner, he must be held to have waived the irregularity, and to have assented to the reference. The court would, accordingly, hold the respondent to his implied election, and leave the question of the accounts between the parties to the investigation and report of the commissioner, if it were not made to appear that the respondent relies for his defence on evidence showing a payment received by the libellant, in full satisfaction of his demand; while the libellant resists the admissibility of the evidence under the order of reference. As this is a matter which does not appropriately come within an order of reference, there is a formal difficulty in trying the question of award and satisfaction before a commissioner under a general order of reference; and, therefore, to save the respondent from the loss of all opportunity to prove his defence, I shall direct the order of reference to be rescinded, and that the parties proceed to final hearing before the court on the issue as it stands.

Stress was laid by the counsel for the libellant upon rule 40 of the supreme court, as limiting the authority of this court in setting aside defaults. That rule has reference to more solemn and definite decrees, if, indeed, it is not confined in its application to final decrees in the cause. Rule 29 would be the one most applicable to the subject, if the action of the court is controlled by either. The inherent powers of all courts enable them to regulate the incidental and interlocutory orders and practice in the progress of a cause, and this court, so far as it is not restrained by the supreme court, can do so at its discretion. Those rules of the supreme court are in affirmance and not in restraint of that power. The order of reference will, however, be revoked, on condition that the respondent pay the costs created before the commissioner appointed by it. He is to be regarded as a voluntary party to those expenses; for if he intended to avail himself of the irregularity committed by the libellant in taking out the order, he ought to have done so when first apprised of it; and he cannot thus, by his acquiescence, induce the accumulation of costs and then cast them upon the libellant. The court will not, upon the proofs, hold his assent and acquiescence as conclusively binding upon him; but there would be no equity in relieving him from their effect upon easier terms than the reimbursement of the costs accrued from his own act. The libellant will not, however, be allowed any costs except disbursements actually incurred by the reference. His preliminary steps being irregular in themselves, cannot be the occasion of costs in his own favor against the respondent.

Order accordingly.

NOTE. This cause came before the court again in November, 1848, on a final hearing. It then appeared that the payment relied upon by the respondent as his defence, was made upon a private settlement of the suit between the parties, out of court, and without the concurrence of the libellant's proctor, and that the libellant's proctor was now continuing the suit to recover his costs. *Held*, that the rule was settled that such a settlement of a suit is to be regarded as fraudulent as against the proctors and officers of the court; that the settlement could not exonerate the respondent from his liability for costs; that the proper mode for a proctor to recover his costs in such case was by prosecuting the suit commenced, as if it had not been interfered with by the libellant; and that, upon the evidence, the decree must, therefore, be that the libellant recover his taxable costs in the cause.

The cause came before the court for the third time, in January, 1849 [Case No. 5,180], upon

a motion on behalf of the stipulator, to set aside the proceedings taken subsequent to the decree, and also to discharge him from arrest.

Case No. 5,180.

GAINES v. TRAVIS.

[Abb. Adm. 422;[1] 8 N. Y. Leg. Obs. 45; 3 Am. Law J. (N. S.) 199; 2 N. Y. Code Rep. 102.]

District Court, S. D. New York. Jan. 22, 1849.

PRACTICE IN ADMIRALTY — NOTICE OF FINAL DECREE—EXECUTION WITHIN TEN DAYS — STIPULATORS—REGULATION OF PRACTICE IN CIRCUIT AND DISTRICT COURTS BY SUPREME COURT — IMPRISONMENT FOR DEBT—RULES OF 1845.

1. There is no rule of practice governing proceedings in admiralty suits in the district court which requires either party to give the other notice of a final decree otherwise than by adopting the proper means for enforcing it.

2. A decree from which an appeal may be taken, cannot be executed within ten days after it has been rendered; but the delay is for no other purpose than to favor the right of appeal, and the mere entry of the decree is notice to all parties.

3. Under the rules promulgated by the supreme court, execution properly issues against stipulators, summarily upon the decree rendered against their principals; the giving the stipulation being regarded as a submission by the stipulator to such decree as may be rendered against the party for whom he is bound.

[Cited in U. S. v. Seven Barrels of Distilled Oil, Case No. 16,253.]

4. The act of congress of August 23, 1842 (4 Stat. 518, § 6), conferring upon the supreme court, power to regulate the practice of the circuit and district courts, taken in connection with the rules promulgated by the supreme court under that act, in 1845, operates as a suspension of the acts of congress of 1839 [4 Stat. 321] and 1841 [Id. 410], abolishing imprisonment for debt on process issuing out of the United States courts in all cases where, by the local law, it would be abolished.

[Cited in The Wanata, 95 U. S. 617.]

5. Since the adoption of the rules of 1845, parties are liable to arrest and imprisonment on process issuing out of the United States courts, irrespective of subsequent legislation in the several states abolishing imprisonment on like process.

[Cited in Atkins v. Fibre Disintegrating Co., Case No. 600; Hanson v. Fowle, Id. 6,041.]

This was a libel in personam, filed by Levi Gaines against John H. Travis, to recover wages as seaman. Former proceedings in the cause are reported in Gaines v. Travis [Case No. 5,179]. The cause now came before the court on a motion on behalf of the stipulator for the respondent, to set aside the proceedings subsequent to the final decree, and to discharge him from arrest.

S. Sanxay, for the motion.

Alanson Nash, opposed.

BETTS, District Judge. This is a motion on behalf of McKee, the stipulator for the respondent in the cause, to set aside all proceedings therein subsequent to the final decree, and also to discharge McKee from arrest on a capias and satisfaciendum issued upon the decree. It appears upon the papers and minutes of court, read on the motion, that the cause was brought to hearing upon proofs given in court, in September term last. The matter in contestation was the liability of the respondent to pay to the proctor of the libellant the taxable costs which had accrued in the case. Circumstances intervened after the argument which prevented the court considering and deciding the cause until November term last, when a decree was rendered in favor of the libellant. Early in December, his proctor served on the proctor of the respondent a copy of the bill of costs, with due notice of taxation. The bill was returned by the respondent's proctor with a note, stating that he had not yet received notice of any decision in the case, and saying, "when I do, if it is against me, I shall, I think, most certainly appeal." This note was dated December 5th. The libellant's proctor proceeded notwithstanding, to tax his costs, and having perfected the decree, issued a writ of capias ad satisfaciendum thereon. The decree entered was against the respondent, and McKee, his bail or stipulator, for the amount of taxed costs; and McKee was imprisoned upon the execution. These proceedings, it is alleged, are without warrant of law, and irregular; first, because the decree was inoperative against the respondent until a copy with a notice of its rendition and entry was served on the proctor of the respondent; and, secondly, because the libellant took a final decree summarily at once against the bail or stipulator, without any process against him or warning of the proceeding, and followed decree so obtained by peremptory process or arrest. It is further contended, that if the regularity of the practice is supported by the court, the respondent and his surety are, by the laws of the United States, exempt from imprisonment upon the judgment, and that the bail is accordingly entitled to instant discharge therefrom.

The first objection is not tenable. This court does not pursue the practice of the English admiralty and ecclesiastical courts in awarding edicts or monitions to parties to appear in court, and hear sentence or perform it, or admonish their fidejussors to do so. 2 Browne, Civ. & Adm. Law, 256, 407, 429; Clarke, Prax. 63, 65. The multifarious proceedings connected with the progress of a cause through its different stages in those courts, are here dispensed with, and after issue, an admiralty cause is put upon the calendar, brought to hearing, and disposed of substantially in the same manner as suits in the common-law courts. Betts' Adm. 98. The omission of the supreme court, in its code of rules adopted in 1845, to change the notorious course of the federal courts in this particular, strongly implies its sanction. No rule of this court, or of the supreme court,

[1] [Reported by Abbott Brothers.]

renders it necessary for either party to give the other notice of a final decree, otherwise than in employing the proper means for enforcing it, and no trace of such practice appears in any other of the United States courts. Dunl. Adm. Pr. 301; Conkl. Adm. Pr. 703. If the case is appealable, the decree cannot be executed in this court within ten days after it has been rendered (Dist. Ct. Rules, 152); but it is not made incumbent upon the party obtaining the decree to warn the other when that period of delay will expire. The entry apud acta, is notice to all parties. The delay or suspension of execution, is for no other purpose than to aid the party in exercising his right of appeal. In case of surprise or misapprehension, the court will always interfere on motion and due proofs, and enlarge the time or stay execution until a reasonable opportunity is afforded to perfect an appeal. Except to that end, the practice in this court extends no indulgence or privilege to the parties in the suit, to be notified or advised out of court of proceedings in respect to the final decree. The libellant is not, therefore, chargeable with any irregularity in omitting to serve a copy of the decree on the respondent or his proctor. In the present case, it is admitted that the respondent's proctor was informed by the deputy clerk that the decree was rendered before he received the bill of costs with notice of taxation, which of itself was sufficient intimation to put him on inquiry.

The proceeding excepted to by the second objection, is comparatively a novel one in the practice of this court, and therefore deserves more critical attention. Under the standing rules and usages of the court, it had formerly been necessary, in order to enforce the undertaking of stipulators, to proceed by independent orders and notices, after the lapse of ten days, to bring them before the court, to show cause why execution should not issue against them. Dist. Ct. Rules, 145; Betts' Adm. 98. The obligation of stipulators, as fixed by the rules of this court, and also the remedy against them, have, since the promulgation of these rules, been essentially altered by the rules of the supreme court. The bond or stipulation in this case was taken under the latter, (Sup. Ct. Rules, 3); and the condition prescribed by that rule is, that the respondent will appear in the suit, and abide by all orders of the court interlocutory or final in the cause, and pay the money awarded by the final decree rendered in court. And the rule provides that "upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court, to enforce the final decree." It appears this is a well-considered direction of the court, for the same language is repeated in rule 4. The practice in the Massachusetts courts had long antecedently been in conformity with that provision, (Dunl. Adm. Pr. 301–303), and in this court, since 1838, execution issued summarily against stipulators if the original decree was not satisfied, (Dist. Ct. Rules, 59), although the stipulators were charged by distinct proceedings (Dist. Ct. Rules, 145). Under the supreme court rule, however, execution goes against stipulators upon the decree against the principal; the sureties subjecting themselves by force of their undertaking to abide and fulfil the decree against the principal. Conkl. Adm. Pr. 459–774. This practice may fall within the usages familiar also to courts of law and equity, of requiring parties who have a common interest in questions litigated in the same court, in several distinct causes, either by agreements or stipulations between themselves, or by express order of the court to abide the decision of the subject-matter made in one case only. Such judgment or decree thereby, has the same effect and is executed in like manner against all. The stipulator under this rule binds himself to pay the money decreed against the principal. There is nothing, therefore, left open for him to question, as between the original parties, after a final decree fixing the liability of the principal. If admonished or cited by sci. fa., he could not be permitted to set up error of any kind in the decree, or surrender the principal, or invoke prior execution upon his property, and all the advantage of such after-proceeding would be to afford delay to him in satisfying the terms of the decree. The court, however, accepts his undertaking as placing him in a common predicament with his principal, and as a submission of himself to the same processes upon the decree. Conkl. Adm. Pr. 774. The execution taken out in this case was, therefore, authorized by rule 4, and is in conformity with rule 21; and the objection to this method of proceeding cannot, therefore, be supported.[2] The term "summary," when used in relation to process, means "immediate; instantaneous." This in no way interferes with the authority of the court over it, whilst in progress of execution, but it is issued summarily in contradistinction from the ordinary course by emanating and taking effect, without intermediate applications or delays.

The last point discussed in the case relates to the effect of the non-imprisonment acts of congress and of this state, and whether a stipulator can now be made subject to arrest and imprisonment on execution upon a decree in the admiralty, for breach of a contract. A preliminary question was raised as to the regularity of the process issued, it being a fi. fa. against the property, with direction to arrest the person in case no property was found to satisfy the decree. This objection is not tenable. Under rule 3 of the supreme court, the stipulator becomes subject to the same decree and process with his principal, and this form of execution is authorized by

[2] See, also, on this point, Holmes v. Dodge [Case No. 6,637].

Sup. Ct. Rule 21. The two acts of congress abolishing imprisonment for debt on process issuing out of the courts of the United States, were passed February 28, 1839, and May 14, 1841 (4 Stat. 321, 410). The second act is supplementary to and declaratory of the first, and directs it to "be so construed as to abolish imprisonment for debt on process issuing out of any court of the United States, in all cases whatever, where, by the laws of the State in which said court shall be held, imprisonment for debt has been or shall hereafter be abolished." The act of 1839, in terms applied only to the laws of the states existing at the time of its enactment.

The Revised Statutes of New York, in force when both acts of congress passed, direct that no person shall be arrested or imprisoned on any civil process issuing out of any court of law, or any execution issuing out of any court of equity, in any suit or proceeding instituted, for the recovery of any money due upon any judgment or decree, founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages from the non-performance of any contract. 1 Rev. St. 807, § 1. Regarding the state statute as thus incorporated into the act of congress, it would manifest the intention of the legislature to limit its application to arrests and imprisonments made on civil process issuing out of courts of law, and executions only issuing out of courts of equity. This court cannot enlarge the repealing force of the statute beyond the plain meaning of its language, nor suppose the legislature looked beyond the two descriptions of process specifically designated. The distinction between courts of law, equity, and admiralty, is pointedly marked in the constitution and laws of the United States. Const. art. 3; Process Acts of 1789. 1792, and 1828; 1 Stat. 93, 276. It is directed, that the forms of writs, executions, and other process, and the forms and modes of proceeding in suits in those of common law, shall be the same in each state, as used or allowed in the supreme court thereof, in those of equity, and in those of admiralty and maritime jurisdiction according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law. Act May 8, 1792; 1 Stat. 276, § 2. The act of May 19, 1828, is to the same effect in respect to states admitted into the Union since 1789 (4 Stat. 278); and section 3 of the latter act, which directs executions and final process issued on judgments and decrees rendered in any of the courts of the United States to conform to those of the state, plainly limits the decrees to those made by courts of equity. Manro v. Almeida, 10 Wheat. [23 U. S.] 473; Hinde v. Vattier, 5 Pet. [30 U. S.] 398. Power is given the courts by these acts, to vary their processes at discretion, and so as to render them operative entirely beyond like process issued by state courts (Bank of U. S. v. Halstead, 10 Wheat. [23 U. S.] 51), unless congress has regulated the subject by specific enactments (Duncan v. U. S., 7 Pet. [32 U. S.] 435).

It is manifest upon this succinct summary of the acts of congress and decisions of the United States courts, that the state statute referred to has no application to arrests and imprisonments under process from courts of admiralty. Their practice remains as it was declared by the acts of 1789 and 1792, and as altered by the courts under the authorization of those acts and that of 1842, to be adverted to hereafter. Gardner v. Isaacson [Case No. 5,230]. On April 12, 1848, the legislature of New York passed an act "to simplify and abridge the practice, pleadings, and proceedings of the courts of this state." [71 Sess. Laws N. Y. 497.] By section 153 of that act, it is declared, that "no person shall be arrested in a civil action except as prescribed by this act," and then specifies the cases in which a defendant may be arrested; none of which include suits or contracts without fraud or deceit. A libel and warrant of arrest, in personam in admiralty, is a civil action within the proper classification of remedies; and this interdiction of arrest, in connection with the act of 1841, would give to defendants in admiralty the same exemption from arrest as defendants have under processes from the courts of law and equity. There is no doubt that congress may, by clear enactment, adopt the prospective legislation of the states, and impart to it the effect of an act of the national government. U. S. v. Paul, 6 Pet. [31 U. S.] 141. Upon the same principles, congress can confer on the United States courts power to regulate process in conformity to existing state laws, or direct it to be conformed to future legislation of the state upon the subject. Ross v. Duval, 13 Pet. [38 U. S.] 45. All regulations relating to processes of courts are regulations of practice. [Wayman v. Southard], 10 Wheat. [23 U. S.] 1. In this, the United States jurisprudence is wholly distinct and independent of that of the states, and accordingly the local methods of proceeding govern the United States courts only in so far as they are sanctioned by authority of congress or the courts. This authority is expressed as well by rules which the courts are empowered to prescribe, as specifically by statutory enactment. The acts of congress to abolish imprisonment for debt, assume to act only over process, and are merely provisions regulating the practice of the United States courts. They are not placed upon high principles of humanity or public policy. They profess no more than a purpose to conform to the processes employed by the states where the courts exercise jurisdiction, forbidding the imprisonment of debtors when not allowed by the laws of one state, and permitting it wherever authorized by the laws of others. Ac-

cordingly, if the legislature of New York at its present session, should rescind the code of practice promulgated by the last, this provision, which is supposed to stand in connection with the act of congress of May 14, 1841 [supra], would eo instanti cease to have influence over the proceedings of the United States courts. It becomes necessary, therefore, to examine the act of congress of 1842, to ascertain whether this matter is not now withdrawn from the regulation of the state legislature, and specifically provided for by congress.

The act of August 3, 1842 (4 Stat. 518, § 6), confers upon the supreme court "full power and authority to prescribe and regulate and alter the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and generally to regulate the whole practice of said courts." In January term, 1845, the supreme court adopted a body of rules governing the United States courts in admiralty proceedings, and the portions of those rules before cited fully appoint the form of process used in this case. The question then is, does the existing law of New York, in connection with the act of congress of May 14, 1841, prevent the operation of the act of August 23, 1842, and the rules of the supreme court established under its provisions? The act of congress of May 14, 1841, at the time of its passage, took effect the same as if it had incorporated the state enactment of 1848. It thus interdicted the arrest and imprisonment of parties prosecuted in matters of contract and debt in this court, suits in admiralty being civil actions. Upon the same principle, the rules of the supreme court of 1845, are to be regarded as acquiring the force and effect of a positive enactment. Congress can legislate prospectively through the action of the supreme court as well as that of a state legislature. Manifestly then, the act of 1842, carried out by embodying the rules of the supreme court of 1845, repeals or suspends so much of the act of 1841, and its complement of state laws, as stand in contradiction to it. The latter law regulates the form and effect of admiralty process, and reinstates the power of arrest and imprisonment under it for debt. The law of New York, passed subsequent to the act of 1842, cannot supplant or suspend the provisions and effect of the latter, and restore those of the act of 1841, congress having, by the act of 1842, substituted the supreme court in place of state legislatures as the law-making power in the future regulation of the processes and practice of the courts, the action of the court under that power necessarily annuls all antecedents and subsequent control of the state laws over the subject. So long as the supreme court rules remain unchanged by the court or congress, they must supply the absolute law of practice over the subject.

I do not enter into the discussion whether, upon this construction of the act of 1842, the supreme court may not also extend to courts of law and equity, the same power to arrest and imprison on process, that is given in admiralty cases. The point is not before me for adjudication; and although that is a legitimate and forcible consideration on weighing the probable meaning and intent of congress in the entire provision, it is not in my judgment of such force as to justify me in holding that the supreme court had misinterpreted their powers under the statute in relation to admiralty practice, or that the act of 1841 should be expounded to draw within its provisions cases clearly not covered by it at its enactment, and brought into existence by state legislation subsequent to the act of 1842, and the rules of the supreme court established under its authority. The known usage in the admiralty courts, up to the present time, to arrest for debt and hold to bail, or imprison for want of it, upon their processes, notwithstanding the acts of congress of 1839 and 1841, and the laws of state legislatures abolishing arrests and imprisonment for debt, is impressive evidence that congress acquiesced in the judgments of the courts, that those laws did not govern the practice in admiralty; more especially since the promulgation of the admiralty rules, in 1845, by the supreme court, in which the authority to arrest and imprison on admiralty process, was explicitly recognized and declared. And the practice having since been constant and open to arrest and imprison parties on mesne and final process, from the admiralty, it must be accepted that congress intended by the act of 1842, to place the regulation of this branch of practice under the direction of the supreme court, and not leave it subject to the changeable legislation of the states.

I accordingly pronounce against the motion on all the points raised, but they being of novelty and importance, the decision is without costs.

GAINES v. UNITED STATES. See Case No. 3,097.

Case No. 5,181.

In re GAINEY.

[2 N. B. R. (1869) 525 (Quarto, 163).] [1]

District Court, North Carolina.[2]

BANKRUPTCY — UNAUTHORIZED EXEMPTION MADE BY ASSIGNEE—EXCEPTION BY CREDITORS.

Where creditors claim that unauthorized exemptions are exempted to be made to the bankrupt by the assignee, they must except, under general order nineteen, to his report within the requisite time, as respects household furniture, necessary articles, &c., but as to real estate the attempted exemption is void, no title thereto passes from the assignee, and creditors need not except to the report but only to the account of the assignee, and hold him responsible for any deficiency.

[1] [Reprinted by permission.]

[2] [District not given.]

The branch bank of Cape Fear, Fayetteville, North Carolina, creditor of said bankrupt [Elizur Gainey], by its attorney, John W. Hinsdale, excepts to so much of the schedule of exempted property filed by W. H. Morrow, assignee of the said bankrupt, on the 16th day of September, 1868, as sets apart to said bankrupt, as his own property, a homestead of fifty acres of land, described at length in said schedule, for the reason that the same is unauthorized by law. Question certified by Register Guthrie, to the judge for decision.

J. W. Hinsdale, for bank.

BROOKS, District Judge. The question presented by the certificate of Mr. Register Guthrie in this case, is the same presented from the Fourth district, in Re Harris [unreported], and in Re Farish [Case No. 4,647], and which have been fully answered by the opinion filed in the latter case. It is not necessary that I should repeat the same now. By the assignment of the register to the assignee of the bankrupt, Gainey, the title to the real estate attempted to be exempted passed to said assignee; the attempt to exempt was ineffectual; the title then remains in the assignee, and will so remain until the same shall be conveyed or divested in some one of the ways provided by law.

It is not required that exception shall be filed, and within the time prescribed, to the report of the assignee, to defeat the allotment of real estate as an exemption in this case. It would be otherwise if this exception was as to the value of articles comprehended by the terms "household or kitchen furniture, or other articles of necessaries." These exceptions must be made in the way, and also in the time, prescribed. But if an attempt be made to exempt a species of property which cannot be exempted (as real estate in the district of North Carolina, which was not saved from exemption by the laws in force in 1864), then no exception need be taken to the report of the assignee making such exemptions. But creditors may except to the account of such assignee, if he omits to account for the value of such property.

GAITHER (FARMERS' & MECHANICS' BANK v.). See Cases Nos. 4,654 and 4,655.

GAITHER (GREENWAY v.). See Case No. 5,788.

Case No. 5,182.

GAITHER v. LEE.

[2 Cranch, C. C. 205;[1] 18 Niles, Reg. 328.]

Circuit Court, District of Columbia. June Term, 1820.

WITNESS—COMPETENCY—INTEREST—USURY.

1. In an action by the indorsee against the acceptor of an inland bill of exchange, the indorser is a competent witness for the defendant to prove usury in the plaintiff's discounting of the bill.

[Cited in Bank of Alexandria v. Clarke, Case No. 844.]

2. If a bill be drawn, accepted, and indorsed for the purpose of raising money upon it in the market for the use of the payee, and be put into the hands of a broker who obtains the money from the plaintiff upon it, at four per cent. per month discount, the transaction is usurious and the bill void.

Assumpsit against the acceptor of a bill drawn by John Wells, Jr., upon the defendant, and by him accepted payable to James Hodnett, or order, on the 29th of March, 1819, and indorsed by him and A. McIntire, for $350. The bill, having seventy-five days to run, was put into the hands of Mr. Nicholls, a broker, to raise money upon it for the use of the drawer. Mr. Nicholls procured the money upon it from the plaintiff, discounting $25 for the seventy-five days.

Mr. Marbury, for defendant offered Hodnett and McIntire, the two indorsers, as witnesses to prove usury; and cited Brard v. Ackerman, 5 Esp. 119; Chit. Bills, 397; and Jordaine v. Lashbrooke, 7 Term R. 601.

Mr. Key, contra. Those cases were decided upon the ground of state policy; but in this country the decisions have been contrary; namely, that a party on a note shall not be admitted to give evidence to destroy it. Coleman v. Wise, 2 Johns. 165.

Mr. Ashton, in reply, contended that the witnesses were competent to show any thing subsequent to the execution of the note, that would invalidate it. He admitted the bill to be good in its execution.

THE COURT (nem. con.) overruled the objection and admitted the testimony.

Mr. Marbury, for defendant, then prayed the court to instruct the jury, that if they should be of opinion, from the evidence, that the bill was drawn, accepted, and indorsed for the purpose of raising money upon it in the market, and was put into the hands of Mr. Nicholls by Mr. Hodnett, for that purpose, who procured the money from the plaintiff upon it, discounting $25 upon $350, the amount of the bill, which had seventy-five days to run, the transaction was usurious, and the bill void.

Which instruction THE COURT (MORSELL, Circuit Judge, contra) gave, upon the authority of the two cases cited by Mr. Marbury, namely, Jones v. Hake, 2 Johns. Cas. 60, and Wilkie v. Roosevelt, 3 Johns. Cas. 66; Id. 206.

Verdict for the defendant.

The plaintiff took a bill of exceptions to the instruction of the court to the jury, but not to the admission of the indorsers as witnesses for the defendant. No writ of error was prosecuted. The cause stood several terms upon a motion for a new trial on the ground of misdirection of the jury, but it was never brought to a hearing, and at October term, 1821, the cause was struck off by the plaintiff.

[1] [Reported by Hon. William Cranch, Chief Judge.]

GALACAR (UNITED STATES v.). See Case No. 15,181.

Case No. 5,183.

GALA PLAID.

[Brown, Adm. 1.] [1]

District Court, D. Michigan. Feb., 1859.

SEIZURE—CERTIFICATE OF PROBABLE CAUSE—PRACTICE—EVIDENCE IN SUPPORT.

1. A motion for a certificate of probable cause of seizure may be made subsequent to the decree, and upon the hearing of such motion the court is not limited to the evidence introduced upon the trial, but may receive any evidence tending to show that the collector acted upon a reasonable suspicion.

2. In determining the question, the court is not at liberty to consider the fact that the seizure was made at night, without proper warrant, and that the conduct of the officer was otherwise oppressive and cruel, as his certificate would not protect him in an action for a personal trespass. The court can only consider whether his action was malicious and groundless, or whether he acted upon a reasonable suspicion that the goods were smuggled.

3. The fact that the claimant was selling them at a low price in an obscure town, declaring them to have been imported, and that duty had been paid upon only a small portion, was held sufficient to justify their seizure.

Motion for certificate of probable cause.

Jos. Miller, Dist. Atty., for the United States.

Alfred Russell, for claimant.

WILKINS, District Judge. The libel in this case embraced a large quantity of merchandise seized by the direction of the collector of the port of Detroit, in June 1857. The articles enumerated in the libel filled some twenty-two boxes, and consisted of gala plaid, merino, silks, dress goods, flannel, edging, muslin, lawn, silk veils, &c., in all numbering, in various quantities, some fifty different pieces and qualities of fancy merchandise of the value of about $1,000. The goods were all claimed by one John Larkin, who, with his family, emigrated to this country from England, in October, 1856.

The issue joined in the case was tried by a jury on the 14th of July, 1858, a little over a year after the seizure, and as appears by the record, no other testimony was introduced than that of Thomas Thayer, and Mary Ann Larkin, the daughter of the claimant. The former was the appraiser, called only to the identification of the articles.

The latter stated positively that all the goods enumerated in the libel were purchased from one Jackson, residing in a certain street in the city of New York, and as each article enumerated in the libel was separately called over by the district attorney, distinctly averred that the same was bought in New York, and she being the only witness for the government as to the fact of importation, the district attorney abandoned the prosecution. The jury gave a verdict that the allegations of the libel were not sustained, acquitting the goods, whereupon the court decreed a dismissal of the libel and a restitution of the property seized.

On the succeeding day a motion was made by the district attorney, in behalf of the collector, for a certificate of probable cause, under the acts of congress of 1799 [1 Stat. 627] and 1807 [2 Stat. 422]. The argument of the same was, by the stipulation of the proctors, postponed until the first week in November.

The practice of this court has generally been, on releasing after a hearing the property seized, to direct, with the decree dismissing the libel, this certificate of protection to the officer if the evidence warranted the presumption of a reasonable suspicion on his part that the goods had been illegally brought into the United States: the exoneration of this officer being placed by the law on the fact that, although the evidence did not warrant condemnation, yet there were sufficient circumstances disclosed to justify the seizure.

In this case the claimant was not called upon for any exculpatory evidence. The case was abandoned. The proctor of the claimant and the district attorney of the United States stipulated at a future day to present to the consideration of the court the present motion—a practice which does not meet the sanction of the court, which has led to much expense and confusion, and has only been tolerated with the view of doing justice to a public officer, who was not personally present at the seizure, and if any outrage was committed, either on the rights or feelings of others, is not at least morally amenable.

Had this course not been taken, I must have refused the certificate, for there was not, on the trial, a scintilla of evidence warranting suspicion.

When the motion came up for hearing, the district attorney offered in evidence the circumstances of suspicion upon which the collector directed the proceeding. This was objected to by claimant's counsel, on the ground that the trial was closed, and that it was not competent for the court on this motion to hear other proof, and that it was limited in the granting or refusing of this certificate to the testimony which had been submitted on the trial.

The testimony was heard under a reservation of the court, and after much consideration, I am satisfied that it was admissible at this stage of the proceeding, and on this motion, although the libel was dismissed and restitution decreed.

There is certainly nothing in the language of the statute that inhibits the motion being made subsequent to the rendition of the decree. In the case of U. S. v. Twenty-Six

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

Diamond Rings [Case No. 16,572], the motion was made on a day subsequent to the dismissal of the libel, and Judge Sprague, it would seem, granted the certificate upon evidence of a fact, which if offered, was not pressed during the trial, namely, the concealment of the rings by the passenger when the manifest was made containing similar articles by the same person.

The statute does not limit the evidence to that offered upon the trial. It declares if it shall appear to the court before which such prosecution has been had that there was a reasonable cause of seizure, the court shall cause a proper certificate or entry to be made thereof—that is, the fact is to be certified. The time when the application is to be made for such certificate is not determined, and it is not clearly inferable as the intent of the act that such certificate should be based exclusively on the testimony offered antecedent to the decree. Had the statute declared that the final decree should embody such certificate, then the court could hear no other evidence than that given on the trial; but, omitting so to enact, the inference is strong that the design of congress was to enable the collector to come in at any time after judgment has been given for the claimant, and procure from the court the certificate contemplated, on such a showing as he may be enabled to make.

The statute prescribes that the court shall cause a proper certificate to be given or entry to be made. The alternative is with the court to give the one or direct the other—and it is not, therefore, a necessary part of the record—not an essential journal entry, and consequently not a part of the original proceeding, unless the court so chooses to order.

To sustain the prosecution, the evidence is given to the jury, under the direction of the court, and it is the evidence upon which their determination is made; but whether or not the prosecutor had probable grounds for instituting a suit, is another question, and solely for the action of the court, which may proceed to hear the matter, either during the progress of the trial after the testimony is in, or subsequently, upon the application of the officer for leave to exhibit his grounds of suspicion. The only direction of the act being that the subject-matter excusatory of the officer, and protective of him against the action of any other judicial tribunal, is, that such excuse shall be judged of by the court before whom the prosecution is had.

In the case of U. S. v. The Forrester [Case No. 15,132], the court acted at once on the application of the district attorney, the proofs on the trial being conclusive upon the point.

The court holding then that this inquiry may be properly gone into after the prosecution has closed, will now inquire into the sufficiency of the excuse set up and proved by the collector. It is alleged on the part of the applicant for this certificate, that the circumstance of vending these goods in an obscure town, but sparsely inhabited, distant from any large village or city, and selling them at a low price, under the declaration by the claimant, repeatedly made to purchasers before seizure, that he had brought them from the old country, and paid duty only upon part of them, was sufficient to warrant his suspicion and his official action. And it is further alleged that the place of deposit and mode of sale confirmed the impression that they had been fraudulently brought into the country.

There can be no doubt that on this application the court is confined to the circumstances existing prior to the seizure. It is an application based on an acquittal. The prosecution has failed to establish the charge, and that trial is ended.

The property has been released and restored, and the issue determined. The court, then, is to hear the cause of seizure, and nothing else. The court may be satisfied, on the testimony adduced on the application, that the district attorney was misled in abandoning the prosecution, that his witness was guilty of perjury, and that, had all the facts been brought to the notice of the court, a decree of condemnation must have been rendered. But all this is of no avail, except so far as corroborative of the circumstances of suspicion which led to the seizure.

Furthermore, I am satisfied that the conduct of the officer in making the seizure, cruel, uncivil, oppressive or otherwise, with or without warrant, has nothing to do with the merit of this application. It presents a single question to the court, and when resisted, a single issue, and that is: What were the grounds of suspicion which led the collector to direct his deputy to seize the merchandise in question? Was the seizure malicious and groundless, or had the officer a reasonable warrant of suspicion, based on circumstances and facts which came to his knowledge and existed prior to his official action in seizing the goods?

By the act of 1799, § 68 [supra], when the collector has cause to suspect a concealment of smuggled goods in a dwelling-house, he is bound to make application under oath to a magistrate, and obtain a search warrant, which can only be executed in the daytime, in obedience to the constitutional injunction, forbidding unreasonable searches, and guaranteeing the security of private dwellings. A seizure at night is unreasonable and prohibited, and these provisions so essential to peace and safety are re-enacted in 1815 (3 Stat. 232).

But the mode pursued by the officer, and his official action upon his suspicions, have nothing to do with the question whether his suspicions were groundless or otherwise. If the collector, having a just and reasonable suspicion, acts without warrant, or on an

irregular warrant, or illegally in making the search at night, or oppressively in seizing what is not dutiable, such as articles of clothing, or commits a personal trespass, he certainly is amenable elsewhere to the parties injured, and is not protected by the certificate of the court, granted under the acts of 1799, 1807, or 1823 [3 Stat. 729].

Did I think so, I should be very loath to grant the certificate in this case. For although I am satisfied that the warrant is a genuine document, and not a forgery (as was supposed in the argument), yet I cannot sanction, by any act of mine, the conduct of Officer Cullen, in making an indiscriminate seizure of broadcloth and female chemises, of pantaloons, petticoats, French apparel, night-clothes, baby's clothes, &c., so completely stripping the apparel of the family that the children were left in nudity and the young women compelled to borrow from neighbors the requisite clothing for church.

Two exigencies are covered by the certificate: (1) The claimant cannot recover costs, although acquitted, because by his own conduct he misled the officer of the government. (2) He cannot recover damages in any action, because the proper tribunal determined that the officer was warranted in making the seizure. But, if the mode was unlawful and injurious, the certificate is but a blank piece of paper, as a shield of protection. The act of congress never designed to protect robbery, assault and battery, or midnight trespass under the cover of this certificate. It never designed to protect conduct forbidden by the statute itself. It means no more than this, that certain merchandise having been seized for a violation of the revenue laws, and that fact having been tried and the goods restored, the public officer had just grounds for his official action, and no costs are awarded to the claimant.

I recur then to the issue as stated, leaving with pleasure the outrageous conduct of the officer in performing his duty. In case of Locke v. U. S., 7 Cranch [11 U. S.] 339, decided as far back as 1813, Judge Marshall says that the term "probable cause," as used by congress, does not signify prima facie evidence, which, in the absence of exculpatory proof, would justify condemnation, but simply evidence of circumstances which warrant suspicion. And, at a later period, what constitutes probable cause, was held by Judge Story, in The Rover [Case No. 12,091], to be a question of law for the court,—in the facts exhibited justifying the officer.

And, as a question of law, the circumstances of each particular case must govern the court. In the case of The Friendship [Case No. 5,125], a doubt as to the construction of the law by the officer was held to be a reasonable cause for seizure. In The George [Id. 5,328], Judge Story defines " 'probable cause' to import a seizure made under circumstances which warrant suspicion." And in the case of U. S. v. The Forrester [supra], this court held that the circumstances which occurred when the vessel was unladen at the dock, of the captain calling in the presence of the revenue officer, the merchandise, "Port Sarnia stuff," warranted his seizure.

In the case of U. S. v. Twenty-Six Diamond Rings [supra], a very slight circumstance induced Judge Sprague to grant the certificate, namely, that the claimant was apprised of the fact that the diamond rings had been entered by him on his manifest. When the steamer came to their moorings at Boston, the revenue officer was notified, by the captain, that there had been a robbery on board, and no passengers were to land until a legal search had been made. The claimant came to the purser on the deck, and handed him a small parcel, containing the twenty-six rings, with a request to enter the same on the ship's manifest. This being in the presence of the revenue officer, he at once seized them. The claimant had previously entered on the manifest four cases of jewelry. The question was, had the twenty-six rings been concealed? The court dismissed the libel, but held that the claimant was apprised of the fact that there was a manifest in which he had caused similar goods to be entered, and that, although he had not actually concealed the goods in question, the circumstance was sufficient to warrant the suspicion of the officer.

What are the circumstances in this case, as proved, on which the collector acted?

The informer, J. H. Terry, states to him by letter of the 20th of June, 1857, that the claimant is selling, in the vicinity of Tecumseh, at his dwelling-house, a large quantity of fancy goods, in all of the value of about $1,000. That he and his daughter say, that they recently brought these goods from England, on a greater part of which they did not pay duty; that upon certain artificial flowers duty was paid, but no duty on the residue. That the claimant was an Englishman recently come into the country; that he kept no store, but had the goods stored away in the garret of a one-story house; and that he was personally present, and heard, with other witnesses, the statement that they had not paid duty on them. Now, if this statement has been made out by the proof, there was sufficient ground for the seizure.

Terry himself was put upon the stand, and testified—that he was at the place where these goods were sold; that they were kept in the garret of a one-story house; that they consisted of the articles enumerated in the libel; that he heard Mary Ann Larkin say, that they did not pay duty on all the goods, and would sell cheap; that they had brought over from England twenty-two cases; that they had only paid duty on the artificial flowers; and that the reason why they escaped paying duty on all was that the officer did not know that they had any other goods.

This statement is corroborated by the evidence of Cullen, as to the account given to

him by the claimant that the goods were brought from England, by the statement which he made to the collector himself when seeking the restoration of the property, by Holdrich, to whom claimant repeatedly said that the goods came from England, by Wheeler, who went to buy cloth, and to whom claimant said that he brought all the goods from England, and that he paid the duty only upon part, and by the affidavit of the claimant himself, made in October, 1857, in open court, when applying for the continuance of the cause, in which he solemnly states—"that he brought all the goods seized from Liverpool in the ship Bright, openly and without the least secrecy, and that he paid to the custom house officer at New York all the duties demanded, and that he could prove all these facts by his daughter Mary Ann and his fellow-passengers."

This affidavit was made on the 12th of October, 1857, and the daughter, as a witness on behalf of the government, swore on the trial, in July last, directly and particularly the reverse. One or the other is perjured. There is no room for charity, and the father's oath is supported by all the surrounding incidents of the case, by the declaration of the daughter to Terry, and by her testimony before the grand jury. It is true, the court must be governed on this application by the circumstances which led to the seizure; but the evidence of Cullen, Shoemaker, Holdrich and Wheeler, and the affidavit of the claimant are only used as corroborating, beyond all doubt, the testimony of Terry and the circumstances proved by him: That duty was not paid upon these goods, and that they could be sold cheap.

The circumstances of this case strongly illustrate the propriety of the ruling that the court should not, in all cases of seizure under the revenue laws, determine the propriety of the certificate on the facts elicited on the trial of the main issue.

Here the district attorney introduced only the evidence of the daughter of the claimant. Had he recollected, and called the attention of the court to this affidavit of John Larkin, the comparison between it and the barefaced, perilous, minute swearing of Mary Ann would have elicited from the court a course of procedure, calling peremptorily for the punishment of either the father or daughter for willful and corrupt perjury.

The court believed what appeared to be the frank statement of the woman, that each article was purchased in New York, and sympathized with the witness in the evident spoliation of part of her property, in a strange land, where she had sought a livelihood in the neighborhood of her relatives.

As the facts turn out, there should have been a condemnation. The proof then on file warranted it. The depositions of Dawson and Benedict, the custom house officers of New York, as to the non-payment of duty, the sworn avowal of John Larkin on file, and the proof of his declarations by Cullen, Wheeler, and Holdrich, with Mary Ann's avowal, would have overwhelmed her statement in court, and caused a condemnation. Motion granted.

Case No. 5,184.

The GALATEA.

[5 Ben. 211;[1] 14 Int. Rev. Rec. 29.]

District Court, S. D. New York. June, 1871.

COLLISION IN HELL GATE—STEAMBOATS MEETING.

1. A steam-tug, with three barges loaded with coal fastened alongside, was going through Hell Gate eastward, on a flood tide, about half-past five o'clock on the morning of the 18th of December, 1869. She saw the lights of the G., a large propeller, coming westward, meeting her before she arrived at Negro Point, where the channel turns to the northward. She blew one whistle and was answered with one whistle. Both vessels had the proper lights, and the engines of both were stopped and reversed before the collision, which took place near Pot Rock, in the narrowest part of the channel, the vessels coming together nearly at right angles. The three barges were sunk by the collision: *Held*, that the steam-tug did not have too heavy a tow, and had a right to go through Hell Gate as she did, and went as far to the southerly side of the true tide as she could go, and was not in fault.

[See note at end of case.]

2. This being so, the G. was in fault, either in not stopping sooner than she did, or in not keeping to the northerly edge of the true tide.

[This was a libel by Frederick Robert and others against the steam propeller Galatea (the Providence & New York Steamship Company, claimants) for damages by collision.]

E. H. Owen and T. C. T. Buckley, for libellants.

J. H. Choate, for claimants.

BLATCHFORD, District Judge. As the steam-tug Vim, a propeller, with three barges, loaded with coal, in tow of her, was proceeding from New York, through Hell Gate, on a voyage to New Haven, Connecticut, at about 5½ o'clock a. m., on the morning of the 18th of December, 1869, she encountered the steam propeller Galatea, then on a voyage from Providence to New York, directly off Negro Point, and between that and Pot Rock. The barges were lashed side by side with the Vim. The barge on the port side of the Vim was the Pottsville. On the port side of the Pottsville was the barge C. J. Hoffman. On the starboard side of the Vim was the barge Reading. The Vim, the Reading and the Pottsville belonged to the libellants Robert and Gladwish. The C. J. Hoffman belonged to the libellant McWilliams. The coal on board of the Reading and the Pottsville belonged to the libellants Benedict, Pardee and Benedict. A collision ensued, which resulted in the loss of the three barges and their cargoes, and this suit is brought to recover for such loss.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

except as to the cargo of the C. J. Hoffman. The tide was at the middle of the flood, running with the Vim. It was not yet daylight, the night was clear and there was some moonlight. The Vim was 70 feet long and 17 feet wide. The barges were from 100 to 115 feet long, and carried an average of 300 tons of coal each. The Galatea was 245 feet long and 54 feet wide, and of 1,566 tons burthen. The starboard bow of the Galatea, a few feet abaft her stem, came in contact with the stem of the C. J. Hoffman, and the stem of the Galatea came in contact with the port bow of the Pottsville a few feet abaft the stem of the Pottsville. The Vim was not hit by the Galatea. Whether the Reading was hit by the Galatea is not clear. The barges projected ahead of the Vim. The Pottsville projected ahead of the C. J. Hoffman. As the result of the collision, the C. J. Hoffman and the Pottsville sank immediately, their bows being opened and their cargoes of coal being spilled out, as the water rushed in and their bows sank. The Reading got adrift, and was soon picked up by the Vim, and towed a short distance, but she was so injured, as the result of the collision, that she shortly sank.

The libel avers, that the Galatea saw the lights of the Vim when the Vim was opposite Astoria, and when the Galatea was on the east side of Ward's Island, and had not yet arrived at Negro Point; that, while the vessels were in these positions, the Vim blew one long whistle, for each vessel to keep to the right; that such signal was answered by one long whistle from the Galatea; that, when the Vim had got just above Hallett's Point, the Galatea blew one long whistle, which was answered from the Vim; that the Vim continued her course with her helm as far to port as was safe; that the rudder of the Galatea worked imperfectly, through an accident to her steering apparatus, and her propeller and keel had sustained injuries, and she was unable to be properly navigated in that part of the river, in view of the tide and other dangers of that navigation; that, owing to such defects and the want of proper care and skill on the part of those engaged in navigating the Galatea, the collision occurred; and that it was caused by fault and negligence, or the want of ordinary care and skill, on the part of those engaged in navigating the Galatea, and not by the fault, negligence or want of care of those in charge of the tug or of the tow. The libel avers, that the collision took place at or about Pot Rock, and while the tug and her tow were heading about east by south.

The answer alleges, that the Vim and the barges drifted down upon the Galatea, and struck her when she was not moving towards them, but had stopped and was backing her engine, after perceiving the danger of collision; that the collision occurred not at Pot Rock but about abreast of Negro Point, very near the shore; that the barges struck the Galatea on her starboard side a little abaft her stem, and thereby turned her around with her stern towards the shore, and the full force of the tide bearing upon her starboard side, so that her headway was lost, and she was drifted backward by the tide; that the Galatea and the Vim saw each other while the Galatea was abreast of Ward's Island, before arriving at Negro Point, and while the Vim with her tow were abreast of Hallett's Point or nearly so; that, while the vesels were in these positions, the Galatea blew one long whistle, for each vessel to keep to the right; that the Vim answered by one long whistle; that the claimants have no knowledge of any signal, prior to the one first given by the Galatea and answered by the Vim when she was about abreast of Hallett's Point; that, after such answer by the Vim, the Galatea put and kept her helm to port and kept to the right, very close to the shore on the right or north, or northeast side, and as close to the shore as it was at all safe or practicable for her to keep, and was in such position until and at the time of the collision; that the Vim did not, after her answering signal, continue or keep her course to the right, with her helm as far to port as was safe, or in anywise; that there was ample room for her with her tow, had she continued her course to the right as she ought to have done, to pass the Galatea far to the southward of her, and without coming near her, but, instead of keeping to the right or the southward, the Vim, with her tow, came across very near to the north or northeast shore, on her left; and that, when the collision occurred, the Galatea was so close to the shore on the north or northeast, which was her right side, that, on the sheer or turn which was caused to her on her bow being struck by the barges, her stern actually touched the rocks on the shore. The answer also alleges, that the collision was wholly attributable to the Vim with her tow having gone to the left instead of the right; that her doing so was either wilful or gross mismanagement, or was owing to her having a tow heavier than she had strength or capacity to manage, and consequently, becoming unmanageable, and being drifted out of her course by the force of the tide; that, as soon as the fact that the Vim and her tow were drifting or coming out of their proper course, and towards their left, and that there was danger of a collision, was discovered or discoverable on board of the Galatea, she keeping as close as possible to the north or northeast shore, her engine was slowed and stopped, the proper movements for backing were made, and all possible steps and precautions were taken to avoid a collision; that it occurred owing to the Vim and her tow coming and being carried so far out of their proper course, and so close to the north or northeast shore which the Galatea was hugging, and could not be avoided by any action on the part of the Galatea; that

the steering apparatus of the Galatea was not disabled, and her rudder did not work imperfectly, and she had not sustained injuries to her propeller or her keel so that she could not be properly navigated; and that the collision was not due to any fault, misconduct or negligence on the part of the Galatea.

A great portion of the testimony taken on the trial was devoted to two points—the question whether the Vim could, without great peril, have gone to the southward of Pot Rock and to the right of the true tide; and the question whether there was any difficulty in steering the Galatea, arising from injuries to her propeller, her keel and the support of her rudder, which she had sustained two days previously by striking a reef of rocks off Tenth street, New York, in the East river. The evidence satisfactorily establishes, that the Vim, with her tows, could not, at half flood, have properly, or without peril, gone to the southward of Pot Rock, or to the right of the true tide. It also establishes, that there was no injury to the steering apparatus, or rudder, or propeller, or keel of the Galatea, which impaired or affected the facility of steering her. The case is, therefore, on the libel, left to the general allegation therein of fault and negligence, and the want of proper care and skill, on the part of those engaged in navigating the Galatea.

The testimony on the trial altogether negatives the statements in the answer, that it was the striking of the barges against the starboard side of the Galatea that turned her around with her stern to the shore; and that her headway was lost because she was turned around with her stern to the shore, and because the full force of the tide then bore upon her starboard side; and that, on a sheer or turn caused to the Galatea by the striking of her bow by the barges, her stern actually touched the rocks on the shore. The evidence shows, that, when the Galatea had just passed Negro Bluff, she saw the lights of the Vim, across the land at Negro Point, the Vim being then about abreast of Flood Rock; that the Galatea then gave one whistle; that the Vim replied by one whistle; that the Galatea shortly afterwards rang one bell and slowed; that, her helm being amidships, she kept it so till she reached Negro Point, when she hove it hard aport; that the vessels continued to approach each other until they had arrived within 500 or 600 feet of each other, when, the Galatea seeing the Vim and her tows coming rapidly with the tide, and presenting the port side of the port tow to view, the Galatea's engine was stopped; that, shortly afterwards, the engine of the Galatea was reversed; and that, as soon as the back motion of her engine commenced, her wheel still being kept hard aport, her head began to fall off to the south of west, and continued to fall off more and more rapidly as the tide began to take effect on her starboard bow, until, by the time of the collision, the head of the Galatea had fallen off four or five points. Her pilot says, that he hauled up around Negro Point, by porting, to a little north of west. A falling off of from four to five points from that, would bring her head, at the time of the collision, to southwest or southwest by south. The course of the tide was about east. The heads of the Vim and her tows, and of the Galatea were at about right angles to each other at the time of the collision. This would make the Vim and her tows head, then, southeast or southeast by east. The master of the Galatea says, that the Vim and her tows headed about east-southeast, a variation to the east of from one to two points; and the pilot of the Galatea says, that the Vim and her tows headed south-southeast, a variation to the south of from two to three points. The evidence also shows, that the Galatea continued backing for some time after the collision, and that, drifting with the tide on her starboard side, she touched bottom finally to the eastward of Negro Point, with her stern. It is fully established, that it was the backing of the Galatea before the collision, and not the blow of the collision, which turned the Galatea athwart the tide; that she, a vessel 245 feet long was, before the collision, turned across the tide, so that she was at an angle to it of about 45 degrees, in a channel-way where the width of the tide where vessels go, between Pot Rock and Negro Point, is about 300 feet; that her headway was lost by her stopping, and by the force of the opposing tide, and by her backing, and not by her being turned around as the result of the backing, or by the effect of the tide on her starboard side; and that she did not touch any rocks through any effect produced on her by the collision.

The contention on the part of the Galatea is, that the Galatea was on the northerly edge of the true tide off Negro Point, and at the place where she began to back, and as far to her right as she could safely go; that she had left nearly the whole width of the true tide to her left, for the passage of the Vim and her tows; that the Vim and her tows came drifting down with the tide, on the northerly edge of the true tide, and directly in the course of the Galatea, in violation of the agreement made by the signal whistles, heading, indeed, to the eastward and southward, but making no progress in that direction, because the Vim had not power enough to control the load she was towing; that, before the Galatea began to back, a collision was inevitable; that, if she had not backed, she would have struck the C. J. Hoffman about amidships on the port side of the latter, and would probably have destroyed the Vim herself, as well as all the barges; that the backing of the Galatea was a proper movement, and mitigated the force of the collision; that she would have been in fault,

under the statute, if she had not reversed; and that, even if her backing was an error of judgment, it was not a fault, because it was a movement made in the moment of peril, to avoid a collision brought about by the fault of the Vim in keeping to the north, after she had agreed to keep to the south.

On the part of the libellants, it is contended, that the Galatea knew that the Vim could not pass to the southward of Pot Rock, and could not stop her headway when going with such a tide, and that the vessels would meet at about Pot Rock; that, therefore, the greatest caution was required on the part of the Galatea; that it ought to have been apparent to the Galatea, very soon after the Vim responded to her signal, that, if she kept on, merely slowing, she would meet the Vim at or near Pot Rock, in about the narrowest part of the tide-way; that, therefore, the Galatea, going against the tide, and so having control of herself, ought not merely to have slowed before reaching Negro Point, but ought to have stopped entirely before reaching there; that she could have safely done so; that, although her wheel was ported at Negro Point, it was so ported only to turn the Point; that such porting did not carry her to the northerly edge of the true tide; that she was not north of the middle of the true tide when she began to back; and that she was in fault in throwing herself across the tide by backing.

It is impossible to determine the question of the fault of the Galatea, without first considering the question of the fault of the Vim. The Vim had her proper lights set and burning. Her tow was properly made up and fastened to her, and it is shown to have been, in weight and burden, not equal to what she was in the habit of carrying safely through Hell Gate. She had a right to go through at half flood tide, and it was not unusual or improper to do so. If it required more care and caution than at any other stage of the flood tide, or than at slack water, that fact was or ought to have been known to the Galatea, and she knew, when she whistled, that the Vim was a tug with tows, coming with a flood tide that was running at the rate of seven knots an hour. When the Vim responded to the whistle of the Galatea, the engine of the Vim was slowed, and her helm and the helms of her barges were ported, and, soon afterwards, and when the position of the Galatea was seen, the engine of the Vim was stopped, and reversed. I think the weight of the evidence is, that the Vim and her tows were as far towards the southerly edge of the true tide as they could be required to go, in the dangerous and intricate navigation of the strait. If there was not room to the north for the Galatea to pass in safety, then it was the duty of the Galatea not to have allowed herself to meet the Vim where she did meet her. The Vim was going with a seven-knot tide and could not stop. The Galatea was a powerful steamer, going against the same tide, and could have stopped and remained in a line with the tide, at a point much further to the eastward, and where the channel was wider, and where she could have hauled to a further distance to the north, from the southerly edge of the true tide, and she could have refrained from presenting her starboard side to the action of the tide. The fact that the Galatea was, at the time of the collision, heading about southwest, while the tide was running about east, and that the tide-way was about 300 feet wide, and that the Galatea was 245 feet long, and that the extreme port bow of the extreme port barge struck the starboard side of the Galatea as far forward on that side as about six feet abaft of the stem of the Galatea, is satisfactory evidence, to my mind, that the Vim and her tows were well over to the southerly edge of the true tide, and as far over as could be required of them. I can see no fault on the part of the Vim. This being so, the conclusion necessarily follows that the Galatea was in fault, either in not stopping sooner than she did, or in throwing herself athwart the tide to the southward or in not keeping to the northerly edge of the true tide, or in not keeping her stem to the north of west, or in all of these particulars.

There must be a decree in favor of the several libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by them severally by means of the collision.

[NOTE. The cause was next heard on exceptions to the commissioner's report, which exceptions were overruled, and a decree entered for libellants for the sum of $13,123.21 (Case No. 5185), and respondents thereupon appealed to the circuit court, where a decree was entered reversing the decree of the district court, and dismissing the libel (case not reported). On libellants' appeal, the supreme court reversed this decree, and remanded the cause, with directions to affirm the decree of the district court. Mr. Justice Clifford, in delivering the opinion of the court, after remarking that the evidence was satisfactory that the two vessels came to a distinct and clear understanding, by their signals, that each should port its helm, held that the steam-tug took every necessary step to carry that understanding into effect, and that she was as near to Pot Rock as the character of the navigation would safely allow. Concluding, the learned justice remarked that, "in the light of the whole evidence, the court is clearly of the opinion that the propeller was wholly in fault, and that the collision was occasioned by the negligence and want of due care on the part of those in charge of her navigation." Robert v. The Galatea, 92 U. S. 439.]

Case No. 5,185.

The GALATEA.

[6 Ben. 259.] [1]

District Court, S. D. New York. Nov., 1872.[2]

COLLISION—DAMAGES—EXCEPTIONS.

1. Two barges, loaded with coal, were sunk by a collision in Hell Gate. The commissioner

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

[2] [Reversed by circuit court (case unreported). Decree of the circuit court reversed by supreme court in 92 U. S. 439.]

to whom it was referred to ascertain the damages caused by the collision reported certain sums as being the value of the barges and their cargoes, as being totally lost. The claimants excepted to the report, on the ground that no proper or suitable efforts were made to raise the barges: *Held*, that the exception must be overruled, because it appeared, on the evidence, that reasonable exertions were made to raise the vessels and save the cargoes by the use of such nautical skill as owners of vessels usually employ in such emergencies.

2. It appeared that a small quantity of coal was raised from the wreck, and appropriated to his own use by the libellants' agent: *Held*, that the libellants, and not the claimants, were chargeable with the loss of this coal.

3. The report of the commissioner reported a certain sum for freight on the cargoes. The claimants excepted to the allowance of that amount, on the ground that no deduction had been made from the gross freight for the expenses of completing the voyage: *Held*, that, as it did not appear from the report how the commissioner arrived at the sum which he allowed, or that he did not make the deduction referred to, the exception would not lie. The report should have been excepted to, as not stating the principle on which the sum was allowed, or a motion should have been made to send the report back for correction.

[Cited in The Gorgas, Case No. 5,623.]

[This was a libel by Frederick Robert and others against the propeller Galatea for damages resulting from a collision between the propeller and the steam tug Vim, by which three barges in tow of the Vim were sunk. A decree was rendered for the libellants (Case No. 5,184), and the cause referred to a commissioner to ascertain the damages.]

T. C. T. Buckley, for libellants.

C. H. Tweed, for claimants.

BLATCHFORD, District Judge. The first and second exceptions on the part of the claimants relate to the barge Reading and her cargo of coal. The first exception is to the allowance of $2,000 as the value of the Reading at the time of the collision, and is made on the ground that "no proper or suitable efforts to save the said barge, after the collision, were made by the libellants, and there was no evidence showing that she might not have been raised and repaired for a sum less than her value when repaired," and on the ground that "the final loss of the said barge was occasioned by the negligence, fault and improper conduct of the libellants in reference to the same, subsequent to the collision." The second exception is to the allowance of the value of the cargo of the Reading at the time of the collision, on the ground that her cargo "might have been raised and saved for an amount less than its value when saved, and no proper or suitable efforts to raise or save the same were made in behalf of the libellants, and the same was finally lost by reason of the negligence, fault and improper conduct of the libellants, in reference thereto, after the collision."

The allegations of fact contained in these exceptions are not sustained by the evidence. The principle decided in the case of The Baltimore, 8 Wall. [75 U. S.] 377, is not applicable to this case, on the facts proved. In the case of The Baltimore, there was no proof of the fact of a total loss, further than that the vessel sank. The court said, in that case: "Evidence that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo, unless it appears that the circumstances were such that the vessel could not be raised and saved, or that the cost of raising and repairing her would exceed or equal her value after the repairs were made." It also said that the full value of vessel and cargo cannot be given as damages, on the ground of a total loss, "where, by reasonable exertions, the vessel may be raised and the cargo saved by the use of such nautical skill as the owners of vessels usually employ in such emergencies;" that the party injured must employ "reasonable measures" to stop the progress of the damage, and must not "wilfully and obstinately, or through gross negligence," suffer the damage to augment; and that the party in fault for the collision is not liable "for such damages as might have been reasonably avoided by the exercise of ordinary skill and diligence, after the collision, on the part of those in charge of the injured ship."

In the present case, there is much more proof of a total loss than merely that the vessel and cargo sank. The vessel and cargo were not abandoned. Reasonable exertions were made to raise the vessel and save the cargo, by the use of such nautical skill as the owners of vessels usually employ in such emergencies. The exertions were reasonable as to promptness, in view of the fact that the sinking took place in the middle of the month of December. They were reasonable as to character and extent, considering the fact that the sinking was in the swift tideway of Hell Gate. The usual appliances were employed, and the matter was put in charge of persons of competent skill. The result goes to prove the fact of total loss, and not the want of reasonable exertion.

The claimants do not appear to have had credit for the few tons of coal which were taken out of the wreck, six to ten tons. It fairly comes within the second exception, as lost by the improper conduct of the libellants. Their agent, after saving it, appropriated it to his own use.

The third exception of the claimants is to the allowance of $475.10, as and for the freight on the cargoes of the Reading and Pottsville, on the ground that "no deduction has been made from the gross freight on such voyage, for the expenses which would have been incurred by the owners of said barges, in having them towed by the Vim, upon the voyage on which they were engaged at the time of the collision." It does not appear, from the report of the commissioner, how he arrived at the sum of $475.10, or that he

did not make the deduction referred to in the exception. This should appear by his report, before the exception above set forth will lie. The report should have been excepted to, as not stating the principle on which it allowed the $475.10, and how that amount was made up, or a motion should have been made to send back the report for correction, in those particulars. A report either for a gross sum, or for gross items, should be accompanied by an explanation of the principles on which the sums are given, if it is intended to question those principles by exception. The court is not called upon to conjecture the principles, by examining the evidence to see what the principles may probably have been. They must be stated in the report. The report must state explicitly whether the deduction referred to was made, or must state facts, as found by the commissioner, from which no other conclusion can be drawn than that he made no such deduction. The proper practice is laid down in the case of Murray v. The Charming Betsey, 2 Cranch [6 U. S.] 64, 124.

The same view disposes of the fourth exception of the claimants, which is to the allowance of $80, as and for the towage to be earned by the tug-boat Vim, from the owners of the barge Hoffman, on the ground that "no deduction has been made therefrom, for the expenses which would have been incurred by the owners of said tug-boat in earning such towage." It does not appear from the report how the commissioner arrived at the sum of $80, or that he did not make the deduction named in the exception.

All the exceptions on the part of the claimants, must, therefore, be overruled, save the second one, in the particular above stated, as to which a proper deduction must be made, but the report furnishes no means of stating what the deduction should be.

The first and second exceptions of the libellants Robert and Gladwish are to the effect that the report, in allowing $2,000 as the value of the Reading, and $2,000 as the value of the Pottsville, at the time of the collision, ought to have allowed more as the value of the two boats, and ought to have allowed at least $6,000 as their value. The first and second exceptions of the libellant McWilliams are to the effect, that the report, in allowing $3,000 as the value of the C. J. Hoffman, at the time of the collision, ought to have allowed more, and ought to have allowed at least $4,300. An examination of the evidence satisfies me, that the allowance in respect to each of the three boats is sufficient.

The third exception of the libellants Robert and Gladwish is, that the report should have allowed $594.97, as the net freight on the Pottsville and Reading, instead of $475.10; and the third exception of the libellant McWilliams is, that the report should have allowed $179.68, as the net freight on the C. J. Hoffman, instead of $125.68. As the report does not state whether the items allowed are net freight or gross freight, and, if net freight, how the sums were arrived at, and on what principles, and what deductions were made from gross freight, these exceptions present no point for consideration, and are overruled.

[NOTE. Subsequently, the claimants appealed to the circuit court (case unreported), where the decree of the district court was reversed, and the libel dismissed. The decree of the circuit court was reversed by the supreme court. The Galatea, 92 U. S. 439. See note to Id., Case No. 5,184.]

Case No. 5,186.

The GALAXY.

[Blatchf. & H. 270.] [1]

District Court, S. D. New York. May 13, 1831.

SALVAGE—AMOUNT—DERELICT—DIVISION BETWEEN OWNERS AND CREW.

1. In a case of derelict, where there are no peculiar circumstances, courts of admiralty award of moiety as salvage.

[Cited in The John Wurts, Case No. 7,434.]

2. In distributing the salvage money, in a case where the salving vessel was exposed to no extraordinary risk or unnecessary deviation from her voyage, and where the salvage amounted to less than $2,000, one-fourth was awarded to the owners of the salving vessel, and the remaining three-fourths were divided among her master and crew—the master receiving four shares, the mate two shares, and seven seamen, including the cook, one share each.

This was a libel in rem, for salvage, against the schooner Galaxy. The facts were these: The Galaxy sailed from Baltimore on the 4th of April, 1831. On the 16th of that month, off Cape Hatteras, she encountered a gale of wind, in which her masts and spars were carried away. Her master and crew remained by her until the 18th, endeavoring to work her into some port, and refused to leave her, although spoken by two vessels, and urged to do so. On the 18th, they abandoned her in latitude 35° 30′ N., and were taken into Charleston by a vessel called the Invincible. On the 20th, the Galaxy was discovered and boarded by the brig Union, in latitude 36° 9′ N., and longitude 72° 50′ W. She was then a complete wreck. Her spars, sails and anchors were all gone, and nothing could be found on board indicating where she sailed from, where she was bound, or to whom she belonged. She had a full cargo, consisting of flour, whiskey, hams, &c., which had received no injury; and it was resolved, by the master and crew of the Union, to attempt to save the vessel and cargo. Jury-masts were accordingly rigged, necessary sails were supplied from the Union, two or three men were put on board the wreck, and she was taken in tow by the Union. Both vessels arrived safely at New-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

York on the 24th of April. The Union was on a voyage to New-York.

BETTS, District Judge. The claimants do not deny that this is a proper case for the allowance of salvage. They only insist upon circumstances which they suppose should diminish the allowance. These are, that the Union was not diverted from her course or delayed; that no lives were saved from the wreck; that no additional hazard of life or health was imposed on the salvors, by their efforts to save the vessel; and that she was towed easily into this port in about four days.

Another particular is brought to the notice of the court, which, if proved, would deprive the salvors of all claim to salvage, namely, that there has been an embezzlement by them of some part of the cargo of the Galaxy. It appears, by the marshal's account of sales, that twenty-three barrels of flour and one barrel of whiskey less than the bills of lading given by the master of the Galaxy expressed, were found on board. So, also, some hams and dried beef were missing. The master of the Galaxy proves, that the Invincible, which took him and his crew off the wreck, took away thirteen barrels of flour, and, he believes, some hams and dried beef, for fear her provisions would be short for the whole company then on board. Not only does each individual of the crew of the Union deny that anything was taken by that vessel out of the wreck, but their testimony is very fully supported by that of a passenger on board the Union, who has no interest in this suit. If any embezzlement occurred after the wreck arrived at this port, it could be proved by the pilot, and by other officers who were constantly on board until her arrest in this case; but they have none of them been examined by the claimants. The wreck had been abandoned two days or more, before she was fallen in with by the Union. In that interval, as she was directly in the track of coasting vessels, she may have been boarded by other vessels, or the Invincible may have removed a greater quantity of supplies than the master of the Galaxy was apprised of or recollects, or the bills of lading may not have stated the true quantity on board. The testimony does not, in my judgment, fix the embezzlement upon the salvors, and they cannot be denied compensation for that cause.

The services of the libellants were eminently meritorious and important to the wreck. She had been wholly abandoned, and was left in a condition which must very soon have resulted in her total loss. She was navigated for three or four days, with great fatigue to the crew of the Union, and with some considerable degree of exposure both to them and their vessel. For, by dividing the crew, each vessel was so short manned as to require every individual to be constantly on duty, and an occurrence of boisterous weather would, probably, have been fatal to both vessels. The labor and hazard incurred in saving this property were, therefore, such as courts of admiralty always favor. The rate of compensation rests in the discretion of the court, and is made to conform to the particular equities of the case. It accordingly varies, in a case of derelict, from a very trifling per centage upon the property saved, to two-thirds of its value. Judge Story collects a numerous list of cases on the subject, and concludes that, in cases of derelict, courts of admiralty adhere to a moiety as the favorite amount, and require some peculiar circumstances to vary it. Abb. Shipp. (Story's Ed. 1829) 397, note 1. I perceive nothing in this case to vary the allowance from that standard. The reward it affords is sufficient compensation for the services performed, and is a reasonable premium to induce the rescue from like peril, of property similarly circumstanced. I shall, accordingly, after deducting from the gross proceeds the costs of the libellants and of the officers of court, decree to the salvors one-half of the net proceeds of the vessel and cargo.

The next inquiry respects the distribution of the salvage-money amongst the salvors. The vessel is entitled to share in the distribution on account of her services in the adventure; but the ratio in which the vessel shall take, as amongst the salvors, seems no more determinate than the one by which the salvage itself is to be measured. The vessel was the essential instrument in effecting the salvage, and shares as salvor because put to risk in the adventure; and, as an inducement to owners to permit their masters to use their ships in the relief of vessels or property wrecked, or in imminent peril, it is meet that owners should participate in the benefit in some ratio to the hazard and value of their property so exposed. Where the risk of the vessel is extreme, and the salving vessel and cargo are of large value, the owner's share should be proportionably enlarged. In the case of The Blaireau, 2 Cranch [6 U. S.] 240, the court allowed the owners of the vessel and cargo one-third of the amount of salvage decreed. The exposure of the vessel in that case was greatly beyond that incurred by the Union; and, accordingly, that case aids the decision of this only by indicating that the measure of reward to the salving vessel should be generous. Where a master, in charge of a valuable vessel and cargo, abandoned his voyage to bring in a wreck found derelict, and the owner protested against his conduct, and immediately displaced him from his command, I considered the merit of the salvage service to belong to the vessel, and held that the master and his crew ought to receive no more than a quantum meruit for their services as laborers. The Waterloo [Case No. 17,257]. But there is no exception, in this

case, to the conduct of the master and crew. The owner of the Union appears in court as a witness in support of their claim, and it must, therefore, be assumed that he ratifies and approves their conduct.

It does not appear whether or not the Union and her cargo were insured. But, if they were, and if the policy was forfeited, the deviation was merely technical. There was no wilful misconduct in the crew. The Union did not leave her voyage; but, finding this wreck off the coast, in the direct track of her homeward route, towed it into her port of destination. The Union and her cargo were valued by her owner at about $30,000. The wreck and her cargo brought, at auction, about $4,000. Had the vessels been of about equal value, the allowance to the salving vessel would be proportionably less. Under all the circumstances, I shall direct one-fourth of the amount of the salvage to be paid to the owner of the Union, and the remaining three-fourths to be divided into thirteen equal shares, to be distributed as follows—four shares to the master, two shares to the mate, and one share to each seaman, including the cook.

Decree accordingly.

Case No. 5,187.

Ex parte GALBRAITH.

[1 N. Y. Leg. Obs. 5, note.]

District Court, Tennessee.[1] 1842.

INVOLUNTARY BANKRUPTCY—ASSIGNMENT BY PARTNERS—PREFERENCES.

[A firm of merchants doing business at New Orleans and at Clarksville, Tenn., was composed of four members, two of whom resided at the former place and two at the latter. One of the partners at Clarksville, with the assent of the other, made a deed of assignment of the firm property to secure part only of the creditors. The New Orleans members had no previous knowledge of the assignment, and dissented from it as soon as they heard of it. *Held*, that the assignment was void under the bankruptcy act of 1841 (5 Stat. 440), as creating a preference; that it was an act of bankruptcy on the part of the Clarksville partners, and brought them and their effects under the operation of the bankrupt law, on the petition of their creditors; that the New Orleans partners were not personally affected by reason of the assignment; but that the firm and the partners, being insolvent, must, by reason of their insolvency, be declared bankrupts, under section 14 of the act.]

[Cited in Ex parte Hull, Case No. 6,856.]

In bankruptcy.

Before BROWN, District Judge.

It appeared that Galbraith, Cromwell & Co. were partners in trade at Clarksville, and under the firm of Galbraith, Logan & Co., at New Orleans, La. In the month of April they failed in business and became insolvent. About the time of their failure Cromwell, one of the firm and the active partner at Clarksville, made an assignment of the partnership effects to secure certain creditors, leaving unprovided for a large debt due to the Planter's Bank, M'Keage, and other creditors. The claims of the preferred creditors amounted to upwards of $80,000, and the claims left out of the deed of trust to $100,000. Logan, one of the firm, was privy and consented to the assignment made by Cromwell; the other partners, Galbraith and Greenfield, were at New Orleans, and knew nothing of it when made, and dissented to the transfer of effects as soon as they heard of it.

It was held that the preference given by Cromwell in the deed of assignment made for the benefit of a part of the creditors, was in violation of the bankrupt law [of 1841 (5 Stat. 440)], and on account of this preference the debtors being merchants, it was a fraud on the part of Cromwell and also on the part of Logan who consented to the transfer; that it was an act of bankruptcy on their part, and brought them and their effects under the operation of the bankrupt law on the petition of their creditors; that the deed of transfer made by Cromwell was utterly void; that Galbraith and Greenfield, who had no knowledge of the deed at the time it was executed, and dissented from the transfer as soon as they heard of it, were not personally affected by the act of Cromwell, and that they had not therefore committed an act of bankruptcy; and that Galbraith, Cromwell & Co., and the partners composing the firm being insolvent and partners in trade, the whole of the partners must be declared bankrupts by reason of their insolvency under the 14th section of the act of congress in relation to bankruptcies, and a decree was entered accordingly.

GALBRAITH (COOPER v.). See Case No. 3,193.

GALBRAITH (UNITED STATES v.). See Case No. 15,182.

Case No. 5,188.

GALE v. BABCOCK.

[4 Wash. C. C. 199.][1]

Circuit Court, D. New Jersey. April Term, 1822.

PLEADING AT LAW—AMENDMENT OF DECLARATION IN EJECTMENT—CIRCUIT COURTS—JURISDICTION—SUITS BY A STATE.

1. Amendments of declarations in ejectment, by adding a count stating a demise under a new title, are not allowed.

2. The circuit courts have not jurisdiction of suits brought by a state, against a citizen of the same or of another state.

[Cited in North Carolina v. Trustees of University, Case No. 10,318; Wisconsin v. Duluth, Id. 17,902; Texas v. Lewis, 14 Fed. 66.]

[1] [District not given.]

[1] [Originally published from the MS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

At law.

Wall & Ewing, for plaintiff.
Mr. McIlvaine and Richard Stockton, for defendant.

Mr. Wall moved to amend the declaration, by adding two new counts, one laying a demise by the state of New Jersey, and the other by a Mr. Hall. He referred to an act of the legislature of this state, passed at their last session, authorising the governor to prosecute and defend any suit for trying the jurisdictional line between this state and Delaware. The land in controversy, (an island in the Delaware river) was granted by the state of Delaware to the United States, on which a fort is erecting under the command of the defendant. The counsel also produced a letter from the governor, authorising this motion. In support of the motion, the following cases were referred to: [Blackwell v. Patton] 7 Cranch. [11 U. S.] 477, 478; 2 Caines, 260, 261; 5 N. J. Law, 851; Adams, Ej. 200–203.

The defendant's counsel stated that this cause had originally been brought in the state court, and was removed into this upon the ground that the plaintiff claims under a grant from the state of New Jersey, and the defendant under a grant from the state of Delaware; and they contended: (1) That the cause being at issue, and the amendments being to introduce entirely new titles, the motion is unprecedented. (2) That the act of assembly does not authorise the governor to interfere in this suit, the jurisdictional limits of this state not being in question.

THE COURT overruled the motion. The practice of amending declarations in ejectment by introducing new titles, would be highly inconvenient, and is altogether unnecessary; as distinct ejectments may be brought to try them. None of the cases cited are as strong as the present, and the court feels no disposition to encourage motions of this sort, particularly after the cause is at issue. Besides, this kind of action is instituted not by writ, but by service of the declaration on the tenant in possession, from which alone he is informed of the subject in controversy, and which he is to prepare himself to combat. In the instructions given to the counsel by the governor, he professes to act under the act of assembly; but it is perfectly clear that this case is not embraced by the act, as the jurisdiction of New Jersey can in no respect be involved in this action, or be affected by the decision either way. For whether the plaintiff or defendant prevails, the judgment can only affect the right to the soil, which is not claimed by New Jersey. The right of jurisdiction can only be settled by a suit between the two states. The amendment, in respect to the demise by the state of New Jersey, would be to make that state a party plaintiff in the cause, and the circuit courts of the United States have not jurisdiction in cases between a state and its own citizens, or citizens of other states; the judiciary law not having extended the jurisdiction to such cases. Motion overruled.

[NOTE. See New Jersey v. Babcock, Case No. 10,163.]

Case No. 5,189.

GALE v. BEHLIN.

[Cited in case of The Pea Patch Island, Case No. 10,872. Nowhere reported; opinion not now accessible.]

GALE (CARR v.). See Cases Nos. 2,433–2,435.

Case No. 5,190.

GALE v. NORRIS et al.

[2 McLean, 469.] [1]

Circuit Court, D. Illinois. June Term, 1841.

EVIDENCE—BOOKS OF ACCOUNT—ENTRIES BY DECEASED CLERK—COPY.

1. Books of accounts are not evidence at common law. But entries made by a clerk, who is deceased, are evidence.

2. The original book, however, must be produced. A copy from it can not be received.

3. To make the entries evidence, they must have been regularly entered, and the books, upon their face, must have the appearance of fairness.

[Cited in Adams v. Coulliard, 102 Mass. 170.]

4. The rule on which this evidence is admitted, applies to all matters of entries made in a regular course of busines by a person, before his decease.

[Cited in Kennedy v. Doyle, 10 Allen, 168.]

Cowles & Krum, for plaintiff.
Mr. Strong, for defendants.

OPINION OF THE COURT. This is a motion for a new trial [in the suit of Gale against Norris and Burr], and it turns upon exceptions taken to a deposition at the last term, which was then, on the trial of this case, admitted in evidence. The motion was continued from that term. The deposition was introduced to prove a book account of the plaintiff, who resides at New Orleans, where the transactions, which led to this suit, were had, and where the books of the plaintiff now are. The witness states that he was clerk in the commission house of the plaintiff, at New Orleans; that he has examined the accounts on the book, and the items copied by him, and particularly designated, are correct. They are items advanced by the plaintiff to fit out a vessel, &c., and of which he had personal knowledge. There are some other items charged in gross, to wit: one for $361, and others, amounting to $700, which were entered by the bookkeeper, who is now deceased. Of these items the witness has no personal knowledge. They are such articles as are usually fur-

[1] [Reported by Hon. John McLean, Circuit Justice.]

nished on similar occasions, and they are set down at the customary prices; but the witness knows nothing of their delivery. This deposition was permitted to be read as evidence at the last term, and the question now is, whether it should have been admitted.

Books of accounts are not evidence at common law. But books are received as evidence under peculiar circumstances; as, where the entries have been regularly made by a clerk, who is deceased. In many of the states this subject is regulated by statute, and, in others, there have been certain rules established as to the admission of books in evidence, not entirely in accordance with the established law of evidence. The leading case on this subject is Lord Torrington's, reported in 1 Salk. 285. In that case it was held that, in an action of assumpsit, where the usual course of the plaintiff's dealings, who was a brewer, appeared to be, that his drayman should come every night to the clerk of the brewhouse, and give him an account of the beer delivered out by them, which he set down in a book kept for the purpose, and the drayman signed it. The drayman died: his entries, signed by him, were held to be good evidence, on proof of his hand-writing. If the person, who made the entry, was employed as shopman or clerk to deliver goods, &c., and he is since dead, an entry made by him will be evidence, under certain restrictions. Cooper v. Marsden, 1 Esp. 2, 3. The entries in a book are rejected, on the ground that they are mere hearsay, and can only be made evidence by some extrinsic circumstance. Some of the English authorities considered the evidence admissible, in Lord Torrington's Case, on the ground that the entry was made against the interest of the party making it. However this may have been viewed in certain cases, it is not the light in which the principle of that case has been generally considered. The rules of evidence were formed and modified to meet the exigencies of human transactions, and to conduct the mind to truth; that they should be matured and expanded, so as to meet the complicated and growing relations of society, was to be desired and expected. But these rules are not to be lightly departed from. Where they fail to meet the endless variety of facts in cases which arise, they afford principles susceptible of expansion, so as to apply to the leading facts in every controversy.

Mere entries in a book of accounts are not evidence, whether made by the party himself or his clerk. But where entries were made by a party against himself, they were held to be evidence, in case of his death. This was upon the ground, that he could have had no motive to make a false entry. And this principle was eventually applied to a clerk, where his entries were regularly made, and the books, upon their face, were fair. In the case of Nicholls v. Webb, 8 Wheat. [21 U. S.] 337, the court say: "We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is, of course, liable to be impugned by other evidence, and to be encountered by any presumptions or facts which diminish its credibility or certainty." And it is now fully settled, that the entries of his deceased clerk, in the books of a merchant, are evidence in his behalf, the hand-writing being proved. Clarke v. Magruder, 2 Har. & J. 77; Welsh v. Barrett, 15 Mass. 386; Brown v. Brown, 2 Wash. (Va.) 151; Union Bank v. Knapp, 8 Pick. 96; Patton's Adm'rs v. Craig's Adm'rs, 7 Serg. & R. 126; Hood v. Reeve, 3 Car. & P 532; Halliday v. Martinet, 20 Johns. 168; Wilbur v. Selden, 6 Cow. 162.

Had the books of the plaintiff been before the court, the entries in the hand-writing of the deceased clerk would have been evidence, his hand-writing being proved. But the paper, attached to the deposition, contained a copy from the books. So far as the deponent could swear to the items delivered, this copy was a part of the deposition; but it was no evidence of the articles charged, of which the deponent had no knowledge. This paper, in regard to these articles, was incompetent evidence, on two grounds: First, it was a mere copy from the books; and, in the second place, some of the entries are in gross, not specifying the items. A new trial must, therefore, be granted. As the books of the plaintiff are at New Orleans, some inconvenience may arise from this decision. If his books are so connected that he can not, without injury, bring them to this court, it might, perhaps, be deemed proper by the court to appoint a commissioner to examine the books, and take testimony respecting them. This, however, is a mere suggestion, and not a settled rule of practice.

Case No. 5,191.

GALE et al. v. SAUERWEIN.

[1 Hughes, 332.] [1]

Circuit Court, D. Maryland. July 1, 1864.

INTERNAL REVENUE—DUTY ON TOBACCO—PAYMENT UNDER PROTEST—ACTION TO RECOVER BACK.

Plaintiffs had their tobacco factory on Barre street, Baltimore, and their store and warehouse on Camden street. On the 1st July, 1864, they had on hand in Camden street a large quantity of tobacco removed from Barre street, on which duties had been paid before 1st July, 1864, as required by the act of 1st July, 1862 [12 Stat. 432]. After the later act imposing higher duties went into effect, the United States collector of national revenue (the defendant) demanded and received from them, under protest, the increased duties. *Held*, in an action to recover them back, that the in-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

creased duties could be recovered back, in view of the provisions of section 173 of the act of 1864.

[This was an action at law brought by Gale & Ax against P. G. Sauerwein, collector of internal revenue for the district of Maryland.]

William F. Frick, for plaintiffs.

William Price, Dist. Atty., and N. J. Thayer, Asst. Dist. Atty., for defendant.

GILES, District Judge. This action has been brought by the plaintiffs (who are tobacco manufacturers in this city) to recover back from the defendant the amount of certain duties on manufactured tobacco, paid by them under protest to defendant as collector of internal revenue for this district. The amount sought to be recovered in this action is the sum which plaintiffs were compelled to pay on the stock they had on hand on 1st July, 1864, which, when added to the sums they had paid on said stock before the last act went into operation, would make a sum equal to the increased duty imposed by said act. The case has been submitted to the court upon a case stated, which shows the following facts: That the plaintiffs have their factory on Barre street, and their store and warehouse on Camden street, in this city, to which they removed their manufactured tobacco for sale; that prior to 1st July, 1864, they made returns to the assessor of this district, of all the tobacco manufactured by them at the said factory, which was sold or removed for consumption or sale to their store, according to the form prescribed by the commissioner of internal revenue; and they punctually and regularly paid upon the tobacco so returned the duties imposed by the act of congress passed July 1, 1862. That on the 1st day of July, 1864, the plaintiffs had in their store on Camden street a large quantity of manufactured tobacco (removed from their factory on Barre street) for sale, on which the duties had been regularly paid before the 1st day of July, 1864, to the defendant, as collector of the internal revenue for this district. That after the last act (which imposed higher duties) went into operation, the defendant required the plaintiffs to render to him an account of all their manufactured tobacco then on hand and unsold, and they were compelled to pay the increased duty on the same by paying a sum which, added to the duty paid by them on said goods before, made the sum equal to the duty imposed by said last-mentioned act. The facts of the case are stated at length in the "case stated," but I have thus briefly given sufficient to show the question which is submitted for my adjudication. The case has been ably argued by the learned counsel engaged in it, and is one not free from difficulty. The objection that has been raised to the plaintiff's right to recover in this case is, that the duties paid by them on the manufactured tobacco remaining in their store for sale on the 1st July, 1864, and which duties were paid from time to time as the said manufactured tobacco was removed from the manufactory of plaintiffs to their store for sale, were not due and demandable when paid; that no duty was imposed on it by the act of 1862 until it was manufactured and sold, or removed for consumption or delivered to others than agents of the manufacturers; and that the payments therefor made by plaintiffs are to be considered as voluntary payments, and not the payment of duties required by the act of 1862.

This is undoubtedly the provision of the law of 1862 in reference to the tax on tobacco and other manufactures, in this respect differing from the provisions of the same law in relation to the tax on distilled spirits, which was required to be paid on the number of gallons distilled and sold or removed for consumption or sale. But in the view I take of this case, it does not depend upon the provisions of the act of 1862, but on the construction which may be given to the proviso in the 173d section of the act of 1864. It does not depend upon the question "whether the duties when paid were legally due and demandable," but whether they were actually paid before the 1st of July, 1864, as I shall endeavor to show. Now the general scope and intent of the act of 1864 is to tax only future manufactures and productions. Its general provisions and penalties only apply to future acts. This will appear by reference to the various sections requiring licenses, the sections imposing duties on distilled spirits, and the sections imposing duties on other manufactures and productions.

Now such being the general provisions of the law, if the provision in the 173d section had been omitted there could have been no duty collected from manufactured goods in the possession of the manufacturer on the 1st of July, 1864, in any case. Now in reference to tobacco, this is clear from the 90th section of the act, which requires every one engaged in the manufacture of tobacco to render a true statement of all his stock on hand on the 1st July, 1864; and then provides that every such person shall keep in a book an account of all the articles thereafter purchased by him, the quantity of tobacco, snuff, etc., sold, consumed, or removed for consumption or sale from the place of manufacture; and shall in every week furnish the assistant assessor of the district a true and accurate copy of the entries in said book during the preceding week; upon which an assessment of the duties due by said person shall be made and transmitted to the collector of the district, to whom the duties shall be paid within five days. And the same is equally clear with reference to distilled spirits. For by the first paragraph of the 55th section the duty is to be levied and collected

on all spirits that may be distilled and sold, or distilled and removed for consumption or sale, on or after the 1st of July, 1864. And if the second paragraph had not been added to said section the duty would have been imposed only on spirits distilled since 1st July, 1864. That part of the section is as follows: 'And all spirits which may be in the possession of the distiller or in public store or bonded warehouse on the 1st day of July, 1864, no duty having been paid thereon, shall be held and treated as distilled on the 1st day of July, 1864, and so liable to the increased duty." This is the same in effect in reference to spirits as the proviso in the 173d section in reference to other manufactures, and I shall not further notice it. Now the proviso in said section is in the following words: "And provided further, that all manufactures and productions on which a duty was imposed by either of the acts repealed by this act, which shall be in possession of the manufacturer or producer, or of his agent or agents, on the day when this act takes effect, the duty imposed by any such former act not having been paid, shall be held and deemed to have been manufactured or produced after said date," and so liable to the increased duty.

Now, they become liable on two conditions, both of which must concur: They must be in the possession of the manufacturer or his agent on the 1st of July, 1864, and no duty paid on them. Now, if any other construction is given to this proviso, and the similar one in section 55, you nullify one of the very conditions which congress has said must exist before the manufacture is liable to the duty prescribed by the law of 1864; for the duties on spirits in a bonded warehouse, and the duties on goods in the possession of the manufacturer, held by him for sale, were not then due and demandable, although, in the case of specific duties—such as the duties on tobacco and spirits—the inspection and return had already given the data for calculating the duties. If you adopt the idea suggested in the argument, that there was no duty imposed on these manufactures in their condition on the 1st July, 1864, you strike down the whole of the proviso, for it includes only manufactures and productions on which duties were imposed by the previous acts, and the result is the same. I am gratified to learn that in the view I have thus taken of this question I am sustained by Judges Grier and Cadwallader, in the adjoining circuit. For although their decisions were made in cases involving the claim to impose the increased duty on spirits in the possession of the manufacturer or in a bonded warehouse on the 1st of July, the old or former duty having been paid, a careful perusal of these laws will show that in this particular there is no difference between those cases and the present one. The judgment will, therefore, be entered for the plaintiffs for the sum of $4,870.28, with costs.

Case No. 5,191a.

GALE MANUF'G CO. v. PRUTZMAN et al.

[5 Ban. & A. 154;[1] 17 O. G. 743.]

Circuit Court, W. D. Michigan. Feb. 11, 1880.

PATENTS—CONSTRUCTION OF CLAIM—COMBINATION OF OLD ELEMENTS—PRODUCING NEW RESULTS—INFRINGEMENT.

1. The first claim of reissued letters patent No. 6,824, granted to Horatio Gale, December 28th, 1875, for an improvement in attachments to ploughs, namely: "In combination with the standard of a plough, a horizontally projecting arm carrying a jointer for the purposes set forth," being construed to be for a combination of old elements producing a new and useful result, there would be no infringement of the patent unless the defendants used all of the elements.

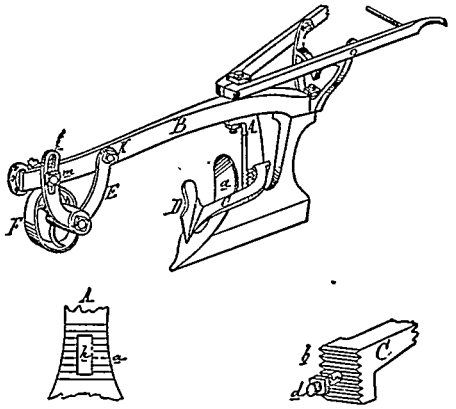
2. Where the defendants used all the elements of the combination claimed, with the exception of changing the points at which the vertical adjustment is made, from the standard to the lower end of the arm: *Held*, that they infringed the said first claim.

[This was a suit in equity, brought by the Gale Manufacturing Company against John P. Prutzman and others.]

Sprague & Hunt, for complainant.

Walker & Kent, for defendants.

WITHEY, District Judge. This is a bill for the alleged infringement of reissued letters patent [No. 6,824] of date December 28th, 1875,[2] to Horatio Gale, for an improvement in the attachments to ploughs, and consists principally in the construction and arrangement of the various parts. The letters patent cover three claims, which are stated as follows: "What I claim as my invention is: 1. In combination with the standard of a plough, a horizontally-projecting arm carrying a jointer, for the purposes set forth. 2. In combination with the serrated standard A, the curved arm C, carrying the jointer D,



[Drawings of reissued patent No. 6,824, published from the records of the United States patent office.]

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

[2] [The original patent, No. 147,629, was granted to Horatio Gale, February 17, 1874.]

substantially as and for the purposes set forth. 3. The combination, with a plough-standard, of the jointer D, having arm C, and vertically adjustable upon said standard, substantially as described."

The claim of infringement urged at the hearing was confined to the first clause. In order to understand what is embraced by this claim we must consider it in connection with the specification and description given by the patentee. He says: "The nature of this invention relates to improvements in the attachment of jointers to the standards of ploughs, and consists, principally, in the construction and arrangement of the various parts, so that the same are more readily adjusted vertically."

In describing the drawing, the patentee says: "This arm is curved, as shown, in order to bring the jointer into its proper position over the plough-point to readily cut the sward."

What, then, is the combination covered by the first clause of the claim? It is an arm attached at one end to the standard of a plough, carrying at the other end a jointer, and projecting horizontally on the land-side of the plough. The arm is curved so as to bring the jointer into its proper position over the plough-point, and has vertical adjustability at the point of contact with the standard, by which the depth of the cut made by the jointer is regulated. In other words, that which is combined is the standard of a plough, the curved projecting arm carrying a jointer, and adjustability, and this is done "for the purposes set forth." The patentee states that his construction and arrangement of the parts are to secure more ready vertical adjustability of the jointer, and to prevent clogging by stubble and weeds, which had previously occurred from the attachment of the jointer to the beam of the plough.

The alleged infringement consists in the manufacture and sale, by defendants, of a plough to the standard of which is attached an arm carrying a jointer, and having a projection, and occupying the position substantially as described in the Gale patent. The jointer is adjusted vertically upon the lower end of the arm, whereas in the Gale patent it is adjusted vertically upon the standard of the plough.

Defendants say that plaintiff's combination is not patentable, as being too abstract, or a claim for all ways of connecting jointer and standard. It is also claimed that plough colters and jointers had been used for more than three years anterior to plaintiff's patent in connection with the standard of ploughs; that attaching jointers to the standard is not a useful improvement, save when the beam of the plough is adjustable, and that the only claim of usefulness in complainant's patent is the prevention of clogging by means of the throat formed by the curved arm.

After such consideration as we have been able to give the case, we are of opinion that the prima facie presumption in favor of the validity of the Gale patent, assigned to plaintiff, has not been overcome. In brief, we conclude, that while attachment of colters to the standards of ploughs is much older than Gale's invention, which excludes the idea of originality in the mere attachment of jointers thereto, and that none of the elements of his combination were new at the date of his patent, still his combination was new, was invention, and produced new and useful results. In taking this view, we regard the construction and arrangement covered by Gale's letters patent as combination of the standard of a plough with the horizontally projecting and curved arm carrying a jointer, and vertical adjustment, for the purposes set forth. As all the parts were before known, the invention consists in such combination of them as produced a new and useful result. There would be no infringement of such combination unless defendants used all the parts or elements. This we have already indicated they have done. They have employed the horizontally-projecting curved arm attached to the plough standard, carrying a jointer, and vertical adjustability. Adjustability is secured at the lower end of the arm instead of at the standard. They employ, therefore, all the elements and the combination of the Gale patent with barely one difference—viz., the points at which the vertical adjustment is made being changed from the standard to the lower end of the arm. In the Gale patent, the slot is in the standard of the plough; defendants place it in the lower end of the arm. We regard this as producing the same result in substantially the same way.

Let decree for complainant be entered.

GALES (HARRISON v.). See Case No. 6,136.

GALES (LAPEYRE v.). See Case No. 8,081.

GALINDO (UNITED STATES v.). See Case No. 15,183.

GALLAGAN (McPHERSON v.). See Case No. 8,922.

Case No. 5,192.

In re GALLAGHER et al.

[16 Blatchf. 410; 19 N. B. R. 224.] [1]

Circuit Court, S. D. New York. June 11, 1879.[2]

BANKRUPTCY—WHAT PASSES TO ASSIGNEE — CITY MARKET LICENSES—ESTOPPEL.

A bankrupt had a permit from the comptroller of the city of New York to occupy a stand in a market, paying therefor a weekly rental. The license was revocable at the pleasure of the comptroller, and could not be transferred

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 19 N. B. R. 224, contains only the report of the case in the district court.]

[2] [Affirming Case No. 5,197.]

without written permission. It was the custom of the city to allow such a permit to be assigned. It bore a value, as an article of sale. The bankrupt paid $4,000 for his permit, to his assignor. He placed that value on it in a statement of his assets made by him, as a basis for credit, to a creditor who afterwards became his assignee in bankruptcy. The district court, on the petition of the assignee in bankruptcy, ordered that the bankrupt execute a transfer to the assignee of the right to the permit, and a request to the comptroller to consent to such transfer. On a petition of review, claiming that the permit was not property which passed to the assignee in bankruptcy: *Held*, that the bankrupt was estopped from asserting that the right enjoyed under the permit was not property in his hands; that the sale value of such right would, when realized by the assignee, under the transfer papers, be the proceeds of the property of the bankrupt; and that the order of the district court was proper.

[Cited in Re Ketchum, 1 Fed. 841.]

[Cited in Lafountain v. Burlington Sav. Bank, 56 Vt. 333.]

On the 16th of April, 1879, Horace W. Day, assignee in bankruptcy of Martin Gallagher and Daniel Lane, composing the firm of Gallagher & Lane, presented to the district court, in bankruptcy, a sworn petition, setting forth as follows: "That, for many years past, your petitioner and one Paolo Sgobel have transacted, in said city, a general commission business in imported fruits, particularly oranges and lemons, under the firm name of Sgobel & Day; that, during said years, it has been the custom of your petitioner's firm, as well as all other firms transacting similar business in said city, to sell the greater portion of their fruits through a certain firm of auctioneers; that it has also been the custom of said business for the several importers to require of all persons buying their goods on credit through said firm, to deposit with said auctioneers, at the beginning of each year, a statement showing their assets and liabilities, which statement was duly verified, and was the basis of such person's credit; that, during said years, the bankrupts were retail dealers in fruits, and had their place of business at a stand in Washington Market, New York, and were buyers of the fruits of your petitioner's firm, and other firms, through the aforesaid auctioneers; that, on or about the 10th of January, 1878, the said bankrupts, for the purpose of obtaining credit during that year on their purchases of fruit through said auctioneers, deposited, as aforesaid, a statement showing their assets and liabilities; that, according to said statement, the said bankrupts were the owners of the said stand in Washington Market, which was, in said statement, valued at the sum of $4,000; that, by reason of said statement, and partially because of the alleged situation and value of said stand, the said bankrupts were permitted to buy on credit, as aforesaid, large quantities of fruit belonging to your petitioner's firm and said other firms; that, thereafter, and on the 4th of June, 1878, the said bankrupts then being indebted to said firms for said fruit, to an amount exceeding $10,000, a petition in bankruptcy was filed in the said district court against said bankrupts, who were thereafter, and on the 15th day of said month, duly adjudicated bankrupts, and thereafter your petitioner was duly appointed and duly qualified as assignee of their estate, and still remains such assignee; that, as such assignee, your petitioner has inquired into the title and interest of said bankrupts in and to the aforesaid stand in said market, and has ascertained from the authorities of the city and county of New York, that said city owns the fee of the land upon which said stand is erected, and, as such owner, claims title to the said stand; but deponent is further informed, that said bankrupts, at the aforesaid times, held and now hold a license or permit from said city to occupy and enjoy said stand and conduct their business therein; and that, because of certain long prevailing customs, said license is practically irrevocable, and the right to occupy thereunder may continue unquestioned for an indefinite number of years, subject to the payment of a small yearly rent to said city; and that it is the custom and practice of said authorities to allow the holders of such licenses or permits to assign the same, and for said city to transfer such license to such assignee, and thereafter recognize such assignee as entitled to occupy said stand; that said permits are held by the owners thereof at a large price or premium; that said bankrupts have informed your petitioner that they paid to the assignor of their permit, and as consideration for the transfer thereof to them, the said bankrupts, about the sum of $4,000, which was the basis of the value of said stand, as set forth in said statement of assets, and your petitioner verily believes that a purchaser could be found for said permit, who would pay nearly the above mentioned sum therefor, provided the same would be transferred to him by said city; that your petitioner has exhibited the general assignment of said bankrupt's effects by the register in bankruptcy herein, to said authorities, but they refuse to recognize the same, and refuse, by virtue thereof, to transfer the said license or permit now held by said bankrupts to your petitioner, but your petitioner is informed and verily believes, that, if said bankrupts should personally, under their own hands, execute an assignment of said license to your petitioner, the said authorities would recognize the same, and would thereupon transfer said license to your petitioner, and thus enable your petitioner to obtain the value thereof for the benefit of the creditors therein; that said bankrupts have, ever since the adjudication herein, continued to use and occupy said stand for their own benefit, and now are conducting their business therein; and that said creditors have received no benefit therefrom." The petition prayed for an order directing

the bankrupts to severally execute an assignment to the petitioner of their interest in the said license, so that the value thereof might be secured to their creditors. The bankrupts answered the petition. The answer sets forth as follows: "That, prior to the year 1863, and under and by virtue of certain ordinances of the mayor, aldermen and commonalty of the city of New York, passed under the authority of the charter granted to said, the mayor, &c., by an act of the legislature of the state of New York, passed April 14, 1857, (Laws N. Y. 1857, c. 446, p. 874), a department was created, called and known as, 'Of the City Inspector's Department,' which embraced a 'Bureau of Markets;' that the provisions of said ordinance, with respect to markets, are as follows:. Section 45, Revision of 1859: 'This bureau, the chief officer of which shall be called the "Superintendent of Markets," is charged with the duty of superintending the public markets, the inspection, regulation and management thereof, and of the transferring stalls and stands, and all other stalls and stands therein, and shall receive an annual salary of two thousand dollars;' that the said ordinances contain these further provisions respecting the occupation of stalls and stands in the public markets, to wit: 'Sec. 50. He may, with the consent of the city inspector, grant permits, in writing, to such persons as may be proper, at a daily rate, to be mentioned therein, to occupy stands in the public markets, and may, at any time, with the like consent, annul such permits.' 'Sec. 57. It shall be the duty of the superintendent of markets to prepare a register or list of all permanent stalls or stands of the several markets; the names of those occupying, and the fee or rent per week or month, paid for the same; and the superintendent, under the direction of the city inspector, for that purpose, shall have the power to arrange and renumber the stands or stalls in the several markets, and equalize the rents or fees thereof; and the occupants of such stands or stalls, shall immediately, at their own expense, cause numbers to be placed thereon. A copy of such register or list shall, immediately after the same has been prepared, be filed by said superintendent with the comptroller, and all returns of market rents or fees shall be made in accordance with such register or list. Sec. 58. No transfer or assignment of any stall or stand, in any of the public markets, shall be made without written permission of the city inspector and the superintendent of markets, and such transfer duly entered upon such register or list, and notice thereof given to the comptroller, who shall consent to such transfer before any removal can be made of such transfer. In case of any person being removed, or any permit being annulled, the party or parties in interest shall have the privilege of making an appeal to the common council on any decision made by the city inspector concerning such removal.' 'Sec. 65. They, (the clerks of markets,) may suspend any person having a stated stall or stand in the public market, to which they are respectively attached, or occupying a part thereof, or of the street adjoining the same, from occupying or using any part of such market or street, whether he be a licensed butcher or not. Sec. 66. Immediately upon such suspension, the clerk making the same shall report the facts thereof, with the reasons for the suspension, to the city inspector, who shall hear the same, upon sufficient notice to the person suspended, and an opportunity afforded him to be heard in his defence, and whose decision upon the matter shall be final, provided the mayor shall approve the same;' that, by section 1 of the act of legislature of the state of New York, passed April 24, 1863, and known as chapter 227 of the Laws of 1863 (Laws N. Y. 1863, p. 407), it was provided, among other things, as follows: 'The bureau for the inspection, regulation and management of the public markets of the city of New York shall hereafter be in the finance department of said city, and all laws and ordinances now in force relative to the bureau of markets, or superintendent or other officers thereof, shall apply to the said bureau as herein provided;' that, by the said city charter (section 22,) the comptroller is made the chief officer of the finance department, and that, under and and by virtue of the said statute, the word 'comptroller' has been substituted for the word 'city inspector,' wherever the same occurs; that, by a certain other act of the legislature of said state of New York, known as chapter 158 of the Laws of 1832 (Laws N. Y. 1832, p. 251), it was provided, in substance, that any and all ordinances of the mayor, aldermen and commonalty of the city of New York might be read in evidence from a volume of said ordinances printed by authority of the common council of said city of New York; that, under said charter, laws and ordinances, and not otherwise, and on or about the 27th of September, 1873, a permit or license was issued to your respondents, in the following words and figures, to wit: 'No. ——. City and County of New York, Comptroller's Office, New York, September 27th, 1873. Permission is hereby granted to Martin Gallagher and Daniel Lane to occupy the stand Nos. ½ of 305, 306 and 307, 33, 35, 37, Country Row, in Washington Market, at the weekly rental of thirteen 75-100 dollars, or such other increased weekly rental as may be established from time to time, the said Gallagher and Lane stipulating and agreeing, in the use and occupancy of said stand, to be governed by and obey the ordinances, rules and regulations now established, or to be established hereafter, for the management of the public markets; the above stand to be occupied only as a stand for the sale of country produce. This permit is revocable

at the pleasure of the comptroller, and cannot be transferred without his written permission. And. H. Green, Comptroller. Thos. F. Devoe, Superintendent of Markets;' that a permit or license given under the aforesaid provisions does not constitute property; that it confers upon its holder no right or interest cognizable by courts, or capable of being protected by them; and that courts cannot compel a permit to be given, nor prevent one from being annulled, nor in any manner review the actions of any of the officers mentioned in the ordinance, nor compel the recognition of one who should purchase or acquire a permit under its order or decree, nor put such a purchaser or party acquiring such license in possession, or protect him in his possession."

The case was heard on such petition and answer, by the district court [Case No. 5,197], and that court (Choate, District Judge) made the following decision: "This is a motion to compel the bankrupts to transfer to the assignee their license or permit to occupy certain stalls in Washington Market. The objection is taken, that it is not property which passes to the assignee under the bankrupt law. It appears, that the right to use and occupy a certain portion of the market is granted by the city for a certain fixed rent, without limit of time; that it is revocable at the will of the city; and that its assignment gives the assignee no rights, unless consented to by certain officers of the city. It appears, however, that such rights have a well established pecuniary value, and, by an established usage of the city in dealing with them, there is no practical difficulty in the transfer of them from one party to another; that, in a statement of their assets made to induce credit in their business, these bankrupts, within a year before their bankruptcy, put down these Washington Market stands as worth $4,000; that they cost about that sum, and can be sold for nearly as much; and that the creditors of the bankrupts were, in fact, induced to give them credit, partly on the ownership of these rights. The assignee, having applied, under his general assignment in bankruptcy, to the city, has been refused any recognition as assignee of the license, and now shows, by affidavit, that, if he shall have an assignment directly from the bankrupts, his rights as assignee will, probably, be recognized. I think the objection, as applied to this case cannot avail. It is obvious enough, that this license or right, or whatever it may be called, has a fixed pecuniary value. It was a part of the bankrupts' capital in business, in which they had invested their money, and on the faith and credit of which they incurred their debts. It is grossly unjust and inequitable, under these circumstances, that they should be permitted, on merely technical grounds, to withhold it from their creditors. If, in one sense, and for some purposes, it cannot be regarded as 'property,' as, for instance, for the purpose of being held by a receiver,—Barry v. Kehnedy, 11 Abb. Pr. (N. S.) 421,—yet it seems to me that it is clearly property within the province of the bankrupt law. There is a distinction between this purely business right and the right of membership in a business exchange or company. Thus, it has been held, that the right of membership in a board of trade did not pass to the assignee, though having a pecuniary value,—In re Sutherland [Case No. 13,637]; but that case was not a case of a right of a purely business character. The element of personal choice of associates constituted a part of the basis of the membership. That element is wanting here. It is not to be presumed that any such consideration would or could affect the action of the city in giving or withholding its assent to an assignment. In an unreported case in this district, Judge Blatchford refused to make an order for the sale at auction of a seat in the stock exchange, solely, however, on the ground that he would not permit a public sale to be made under the sanction of the court, in a case where the assignee could not undertake with the purchaser to deliver the thing sold. The question raised in this case was not determined, and that case was more nearly analogous to the case of In re Sutherland, supra, than to the present case. The inclination of the courts in dealing with the question as to what passes by an assignment under bankrupt laws, has been to give a most liberal construction to it, for the benefit of creditors, in order to carry into effect their obvious purpose and intent. Thus, under the bankrupt law of 1800 [2 Stat. 19], it was held by the supreme court, reversing the decision of Mr. Justice Washington, that a claim against a foreign government, though a mere possibility of recovering through the future voluntary action of such government, was property that passed under the act. Technically, it was nothing which the law, for many purposes, could recognize as having any existence as property, yet it was within the purview of the act. Vasse v. Comegys [Case No. 16,893]; Id., 1 Pet. [26 U. S.] 193. And see Williamson v. Colcord [Case No. 17,752]. I see no greater difficulty in the present case. It is true, that the right of the bankrupts to assign is subject to the approval of the city, but so is the right of the lessee to assign his term often so subject to the approval of the lessor. The lease, nevertheless, passes in bankruptcy, if the assignee chooses to take it. It is, also, true that this permit or license is revocable at the will of the city. I do not think, under the circumstances of this case, this incident of the thing takes it out of the purview of the bankrupt law. The words denoting property, in the law, as it seems to me, ought not to be technically construed. There is an existing valuable right, perhaps, it may be called a chose in action or existing contract, of value, which, except in case of possible

action by the city, would continue to be in their hands, and has, in fact, continued to be, for all practical purposes, business capital. To allow the bankrupts to hold it, would encourage such debtors as should be disposed to defraud their creditors to make similar arrangements with their landlords, and thus lock up their business capital for their own use, permanently, and make the bankrupt law, so far as they are concerned, a farce. It is suggested, on behalf of the bankrupts, that any order the court may make, will be a brutum fulmen; that the bankrupts are at liberty to procure, at any time, the revocation of their license, and the grant of a new license to some person friendly to them; and that this would defeat any action their assignee in bankruptcy may propose to take to realize on this asset, if it be such. It is enough to say, in relation to this suggestion, which, indeed, I do not understand to be, in any sense, a threat of what the bankrupts intend to do, but only an argument, from what they may, as it is claimed, lawfully do, that the consequences of any interference with the action of the assignee or the court, in turning into money what is held to be property, whether such interference is direct or indirect, are likely to be very unpleasant. Such interference as is suggested, if it were attempted, would, of course, subject the bankrupts to proceedings for contempt. The motion is granted."

Thereupon, on the 7th of May, 1879, the district court made an order that the bankrupts, and each of them, appear before the register in charge, and severally, but at the expense of the assignee, execute and deliver to him an assignment, in the usual form required by said city, of all the right, title and interest which they may have had on the 4th of June, 1878, in and to the stand Numbers ½ of 305, 306 and 307, 33, 35 and 37, Country Row, in Washington Market, New York City, occupied by them, and also in and to the license or permit to occupy the said stand, theretofore issued or granted to them by the city and county of New York, and that they also deliver said license or permit to the assignee. Subsequently, on the 26th of May, 1879, the district court made a further order, as follows: "The annexed paper, having been submitted to the court as a proposed form of assignment, to be executed and delivered by the bankrupts to the assignee, in pursuance of the order made herein on the 7th of May, 1879, (such paper being as similar to the usual form of transfer of market stands as the circumstances will permit of,) and the said bankrupts having objected to the said form because of the request to the city authorities contained therein, it is ordered that such objection be overruled, and that the bankrupts execute the aforesaid paper as required by said order." The following was the paper annexed: "The undersigned, owners of stand known and designated as numbers 33, 35, 37, Country Row, West Washington Market, request that a permit may be issued for the same, in the name of Horace W. Day, assignee, and respectfully apply for permission to have such transfer made, and that the stand may be occupied for the sale of fruits." "Whereas, the undersigned were, on the 4th day of June, 1878, duly adjudicated bankrupts by the district court of the United States for the Southern district of New York, and Horace W. Day was thereafter duly elected and confirmed as assignee of their estate, which office was accepted by him, and, whereas, by an order of said district court, duly made and entered on the seventh day of May, 1879, the undersigned were ordered and directed to execute and deliver to said assignee an assignment of all the right, title and interest which they, or either of them, had in and to the stand and permit hereinafter mentioned, on said fourth day of June, 1878, now, therefore, in pursuance of said order, we do hereby assign, transfer and set over unto said Horace W. Day, assignee, all the right, title and interest which we, or either of us, had, on said fourth day of June, in and to that certain stand known and designated as numbers 33, 35, and 37 West Washington Market, the particulars of our ownership of said stand being as follows: Right acquired by purchase. Permit issued by Comptroller A. H. Green. T. F. Devoe, Superintendent of Markets. In the name of Gallagher & Lane. Occupied for sale of fruits. Rent, per week, as paid to present collector, $13.50. Witness our hands." The bankrupts, after executing the papers provisionally, applied to this court, by petition, for a review of said orders, alleging that the license was not property to which the assignee in bankruptcy became entitled.

Gershom A. Seixas, for bankrupts.
Scudder & Carter, opposed.

BLATCHFORD, Circuit Judge. I think the bankrupts are estopped, by the facts shown, from asserting that the right enjoyed by them under the paper signed by the comptroller, dated September 27th, 1873, is not property in their hands. It may require the execution on their part of such papers as they have executed, dated May 28th, 1879, and the written permission of the comptroller that such right be transferred, before the property is in such a condition that its salable value can be realized. But, such value, when realized, will be the proceeds of the property of the bankrupts, owned by them when the petition in bankruptcy was filed, quite as much as an equal sum of money to be now received by them for the salable value of such right, on its transfer by them, with the permission of the comptroller, would be the proceeds of such property. That the latter would be the proceeds of such property, I cannot doubt. I concur in the views of Judge Choate in his decision.

and am of opinion that the order of May 7th, 1879, and the order of May 26th, 1879, were proper orders. The prayer of the petition of review is denied.

GALLAGHER, In re. See Case No. 5,197.

GALLAGHER (BAKER v.). See Case No. 768.

GALLAGHER (BUNCE v.). See Case No. 2,133.

GALLAGHER (DOOLEY v.). See Case No. 3,996.

Case No. 5,193.

GALLAGHER et al. v. MURRAY et al.

CONDON v. SAME.

[10 Ben. 290.] [1]

District Court, S. D. New York. Feb., 1879.

SEAMEN'S WAGES — CONDEMNATION OF VESSEL — EXTRA WAGES FOR DELAY IN PAYMENT.

1. A steamer left New York on a voyage to Nassau, N. P., thence to Cuba and back to New York. Just before reaching Nassau she struck a rock and was so injured that, after she reached Nassau, a survey was called on the application of her master, and the surveyors recommended that she be condemned as unseaworthy, and thereafter the owners abandoned her to the underwriters. After the survey the master discharged the crew and offered them a passage to New York. Seventeen of them accepted the offer and came home to New York. The other eight refused the offer, claiming that the ship could be brought home; and they remained at Nassau for more than a month, during which time the master allowed them to sleep on board and he provided food for them. On the arrival of the seventeen at New York they claimed to be paid wages up to the time of their arrival besides three months' extra pay. The owners of the steamer refused to pay wages after the day when she was injured. The other eight, after their return to New York, made a similar claim, and suits were brought against the owners to recover the wages: *Held* that, by the proceedings taken as to the vessel, she was "condemned" as mentioned in section 4582 of the United States Revised Statutes, and the sailors therefore were not entitled to the three months' extra pay.

[Cited in Kelly v. Otis, 23 Fed. 905.]

2. The sailors were entitled to be paid up to the time of their discharge by the master in Nassau, and no later.

3. The seventeen were entitled to the ten days' extra pay provided by section 4529, because there was no sufficient cause for the delay in payment.

4. The act of the master at Nassau, in allowing them to sleep on board, and furnishing food for them after their discharge, did not entitle them to claim wages after such discharge.

[In admiralty. Libels by Michael Gallagher and others against D. Colden Murray and others, and by Michael Condon against the same.]

H. Heath, for libellants.

J. Sherwood, for respondents.

CHOATE, District Judge. These are suits in personam for seamen's wages, brought against the defendants, the owners of the steamship Cleopatra.

The Cleopatra left New York October 17, 1878, bound on a voyage to Nassau, N. P., and thence to a port or ports in Cuba and thence back to New York. Just before reaching Nassau she struck upon a rock and was injured, and most of her cargo and passengers were forwarded by other vessels. She then proceeded to the port of Nassau, where she has ever since remained. The accident happened on the 23d of October, and she got into port about seven days later. The crew were kept by the ship till December 11th, discharging their ordinary duties, such as there were for them to do in port. Meanwhile a survey was called on the application of the master. It was composed of the captain of the port and the agent of American underwriters, and they called in to their assistance an engineer and a ship carpenter. They made a written report to the effect that one of the boilers was thrown out of place, the keel was injured, bolts started, and that the vessel was badly hogged, and unseaworthy; and recommended that, in consequence of her machinery being thoroughly disabled and of there being no facilities for repairing her there, she be condemned. Afterwards, on December 18th, the owners in New York wrote a letter of abandonment to the underwriters. The evidence now produced sustains the case found by the survey, and shows that she had suffered such injuries by reason of sea perils that she was wholly unfit to continue her voyage, and that she could not be repaired so as to complete her voyage. On the 11th of December the master, by direction of the owners, called the crew together, and informed them that they were discharged, and offered them a passage home to New York in another steamer of the same owners. Seventeen of them, being the libellants in the first of these suits, accepted the offer and came home in the other steamer. The other eight refused to come home; took the ground that the ship could continue the voyage or be brought home, and remained at Nassau till about the 25th of January. The master permitted them to sleep on board and he provided board for them at Nassau. The libellants in the first suit now demand wages up to the time of their arrival at New York on the 11th of December, with three months' extra pay, on the ground that they were discharged at Nassau with their consent, and that the vessel was neither wrecked, stranded nor condemned as unfit for service. They rely on Rev. St. § 4582, which provides that the three months' extra wages due to seamen so discharged, shall not be required "where vessels are wrecked or stranded or condemned as unfit for service," but shall in no other case be remitted. It is claimed that "condemned" here means condemned by decree of an ad-

[1] [Reported by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq., and here reprinted by permission.]

miralty court. But considering the purpose of the statute, I cannot think the word was used in this restricted sense. Wreck, stranding or other fatal disability to the ship is recognized as discharging the contract between the ship and the seamen; but for the security of the seamen against possible imposition, it is required that where the case is not one of self-evident wreck or stranding, the proof of disability shall be shown by the condemnation of the vessel as unfit for service. The reference here is to that proceeding known in all ports, by which ships which have suffered disaster are condemned or pronounced unfit for service, the common method being by the report of a survey called by the consul of the nation to which the ship belongs, upon the application of the master. To give the words the restricted sense contended for by the libellants, would, in many ports and places, make performance of the condition impossible. In this case there was such a condemnation, and the claim for three months' extra pay is disallowed. As the master kept the crew on duty till December 11th, they are clearly entitled to their wages till that time. Tarleton v. Mallory [Case No. 13,753]. These seamen further claim that their wages should be paid up to the time of their arrival in New York. For this claim there seems to be authority in the case of The Elizabeth, 2 Dod. 411. But I think this is a case where the service of the seamen was terminated by reason of the wreck or loss of the vessel, within the meaning of Rev. St. § 4526, and therefore they cannot claim their wages after the day of their discharge, December 11th. When the seamen were informed that their services would not further be required, they were told that they would be paid in New York on their arrival. When they arrived a dispute arose as to the amount due, the owners claiming that the wages were due only up to the 23d of October, and the seamen insisting on being paid up to the time of their return. Rev. St. § 4529, imposes on the owner a penalty of two days' extra pay for every day not exceeding ten during which the payment of wages is delayed beyond the period when by law it is payable, provided the delay be without sufficient cause. I cannot think that there was sufficient cause in this case for the delay in payment. The only question which could be looked upon as doubtful was whether the wages should cease on the 11th of December or on the 17th, and if this had been the only difference it may well be supposed that it could have easily been adjusted. But the owners having made a wholly unreasonable claim, and thereby kept the crew waiting for their wages, I think they are chargeable with the twenty days' extra pay.

As to the seamen who stayed in Nassau, nothing which the captain did in sheltering and feeding them can be construed as a revocation of the discharge, as is claimed by the libellants. It was an act of humanity, for which the ship owner should not suffer. As these men refused the discharge and the offer of return to New York and put the master and the owners to unnecessary expense, there is no reason why their wages should be paid beyond the 11th of December, when they were discharged in consequence of the voyage being hopelessly broken up.

Decree for libellants with costs and reference to compute the amount.

Case No. 5,194.

GALLAGHER v. ROBERTS.

[1 Wash. C. C. 320.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

PLEADING IN EQUITY — EFFECT OF VERDICT AND JUDGMENT AT LAW—FAILURE TO REPLY TO PLEA —DEMURRER—SET-OFF—EQUITABLE RELIEF.

1. If the plea be set down for argument by the complainant, without replying to it, the matter contained in it must be considered as true.

[Cited in Myers v. Dorr, Case No. 9,988.]

2. A verdict and judgment at law, is no bar to relief in equity, if an equitable ground of relief be laid, and that is not denied by the plea. If it be denied, the plaintiff may reply generally, and go into proofs to support the bill; and if he fail to make his proof, the plea will be a good bar, as if no replication had been put in.

[Cited in Wistar v. McManes, 54 Pa. St. 321.]

3. If a bill in equity contain no ground for relief, the defendant ought to demur.

4. When a bill of exchange is remitted to A, and the responsibility of the parties to it is released, by the neglect of A to give notice of its dishonour; although, as the bill was not remitted in payment to A, the claim against A being for damages, cannot be set off, yet it is a good ground for relief in equity against A.

To the bill of injunction filed in this cause [by Gallagher's executors], the defendant pleaded in bar, the verdict and judgment at law, and that the matters in issue before the jury, were the same as are now stated as the ground of relief, except as to the charge of management on the part of the defendant's counsel, and a slip on that of the plaintiffs', which is denied. The cause was set down to be argued on the plea.

Mr. Levy, for plaintiffs in equity, contended, that a verdict and judgment at law is no bar to relief in equity, unless the ground of relief is traversed in the plea. 1 Har. Ch. Pr. 361. Slip of the attorney at law good ground of relief. Prec. Ch. 233; 2 P. Wms. 425.

Mr. Hallowell, for defendant. The only ground of relief is, the management and slip which are denied in the plea. The ground of relief is not sufficient. 3 Abbt. 232.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

WASHINGTON, Circuit Justice. The plea not being denied by a replication, but set down for argument, must be considered as true; and therefore we must now take it as a fact that the management and slip, if material, did not take place, because the plea denies them. A verdict and judgment is no bar to relief in equity, provided the bill lays an equitable ground for relief, and the plea does not deny the ground laid. If it does, then the plaintiff may reply generally, and go on to suport the facts stated in the bill, to entitle him to relief. If he do so, and fail in his proof, the plea will be a good bar, as well as if he had set down the causé upon the plea; which would have admitted the truth of the plea. If the bill contain no ground for relief, the defendant ought to demur. But in this case, the bill lays a ground for relief, which is not denied—namely, that the amount of the bill remitted to the defendant, was lost to the plaintiff, by his neglect in not giving notice of the protest. This defence was deemed inadmissible at law; because as it did not appear that it was remitted as a payment, the claim of the plaintiff, for the improper conduct of the defendant, was for damages only, which could not be offset at law. But it is a good ground of relief in equity. We shall therefore overrule the plea, and let it stand for an answer, if the defendant wishes it.

[NOTE. See Gallagher v. Roberts, Case No. 5,195, and Roberts v. Gallagher, Id. 11,902.]

Case No. 5,195.

GALLAGHER v. ROBERTS et al.

[2 Wash. C. C. 191.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

PAYMENT — PRE-EXISTING DEBT — BILL OF EXCHANGE—NOTICE OF DISHONOR—DISCHARGE.

1. A bill of exchange is not, in general, to be considered as a satisfaction of a pre-existing debt, unless it be paid or accepted as such; nor if remitted conditionally, unless the debtor sustain injury by the laches of the creditor who received it.

[Cited in Baker v. Draper, Case No. 766; Westphal v. Ludlow, 6 Fed. 350.]

[Cited in Steman v. Harrison, 42 Pa. St. 55; Weakly v. Bell. 9 Watts, 273.]

[See Allen v. King, Case No. 226.]

2. The strict rules of law relative to the presentation, and notice of the dishonour of a bill of exchange, do not prevail in the same manner against a creditor, to whom the bill has been remitted in payment, as they do against the holder of a bill under other circumstances.

3. Although notice of the dishonour of a bill may not have been received by the person who remitted it, it will be sufficient to discharge the holder, if he did all in his power to convey the information of it to him.

[Cited in Jennison v. Parker, 7 Mich. 363; Glenn v. Smith, 2 Gill & J. 493; Kirkpatrick v. Puryear (Tenn.) 24 S. W. 1133.]

[This was an action at law brought by Gallagher's executors against Roberts, Cadman & Co.]

WASHINGTON, Circuit Justice. The case, from the bill, answer, and exhibits, appears to be as follows:—The testator, James Gallagher, being indebted to the defendants for goods shipped to him; remitted to them, in December 1793, a bill of exchange, at sixty days, for one hundred pounds sterling, drawn by Robert Morris, on Cazenove, Nephew, & Company, of London; which came to hand on the 24th of February 1794. The next day it was shown to the drawees, who declined accepting it at that time, but gave reason to think, that after hearing from Morris, they might do so. The bill was accordingly kept until the 24th of March following; when, the drawees still refusing to accept it, the bill was placed in the hands of a notary, who regularly protested it for nonpayment. The bill was retained by the defendants until the 7th of July 1794, when it was returned with the protest; previous to which, it is admitted, that notice of the hishonour of the bill, or of the drawees' refusal to accept, had not been given. This letter of the 9th of July, was put into the post-office at the time it was written. No evidence is given, in the cause, of the time when the drawer became insolvent, or indeed that he ever was so. But it is recollected by the court, that, on the trial at law, it was proved, and is so agreed by the parties, that Mr. Morris failed in the year 1794, or perhaps in 1795. No proof is given, that the above letter and bill ever came to the hands of Gallagher. It appears, by a letter from the defendants in 1796, that between 1794 and that period, he had frequently written to Gallagher, requesting payment of the debt due to him; to which letters no answer had been returned, nor remittances made. The defendants, at the same time, appointed an agent to call upon Gallagher, and collect this money; who, in 1798, informed them that they could do nothing with Gallagher, and that he insisted upon a credit for the above bill, supposing that it had been paid to Roberts.

A judgment having been recovered at law against the complainants, without the allowance of a credit for the above bill, relief is now sought for, on the equity side of this court, for the amount thereof. In the case of Clark v. Mundle [unreported], the doctrine is laid down in very broad terms, that a bill, given in payment of a precedent debt, is not considered as payment; unless it be part of the contract, that it be received in satisfaction; although the holder should have neglected to present it for payment, or to give notice of its dishonour. This doc-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

trine is clearly founded upon a general principle of law, that the bill, in such a case, not being of superior dignity to the pre-existing debt, could not extinguish it; and consequently the bill was considered only as a collateral security. Kyd, in his treatise on Bills, seems to consider this doctrine as no longer existing, in consequence of the statute of Anne; which declares, that a bill accepted in satisfaction of former debt, shall be accounted a full payment of such debt, if the holder do not take his due course to obtain payment of the bill, and on failure, make his protest according to the directions of this act. But Chitty attributes the change of this doctrine, not to the seventh section of the above act, which relates to the particular kind of bills mentioned in the fourth section; but to the change of opinion in the courts of justice. To whatever cause the doctrine of the present day may be attributed, we think the doctrine itself amounts to this: that a bill of exchange is not, in general, to be considered as a satisfaction of a precedent debt, unless it be paid, and accepted as such, or in case it be conditionally paid; unless it appear that an injury has resulted to the debtor, who pays the bill in consequence of the laches of the creditor, who receives it; as, for instance, if, in the mean time, the drawers fail; or if the recourse of the person from whom the bill is received, against the drawer, or the endorsers, be thereby lost. Neither would such a bill, if received as a payment, be in all cases good as such; should the same be unproductive, from the circumstance of the drawer having no right to draw, and perhaps from other circumstances, which show that the debtor knew the paper to be of no value. We do not think that the rule, which prevents the holder of a bill from recovering upon it against the drawer or endorsers, unless he has proceeded regularly to have the bill presented and protested, and to give notice; applies to the case of a creditor suing for his original debt, to which is opposed a payment by a bill or note; because, in the former case, the bill is received by the payee, and all others who become the holders of it, upon a condition that he will use such diligence; and, therefore, his failure to perform such condition, is fatal to his recovery. In the latter case, the bill is not strictly an extinguishment or satisfaction of the pre-existing debt; though, if by the neglect of the holder, the amount of the bill be lost, it is fair to presume that he took it as a satisfaction, and agreed to run the risk of it. Neither will we say, that, if the bill be retained by the person to whom it is remitted as a conditional payment, for an unreasonable length of time, a jury may not fairly make the same presumption; though the drawer should not become insolvent. In the case of Darrach v. Savage, 1 Show. 130, the bill was retained for two years.

In all the cases which we have met with on this subject, the debt was lost by insolvency. Judge Buller, in his Nisi Prius (182), lays it down, that if a note be endorsed by a debtor to his creditor for a precedent debt, and a receipt be given as for so much money when the note shall be paid, and the creditor neglect to apply to the drawer in time, and by his laches the note is lost, the precedent debt is extinguished. So in the case of Chamberlyn v. Delarive, 2 Wils. 353, the same principle is laid down. In the case of Ward v. Evans, 2 Ld. Raym. 930, the general rule is laid down, that a note is not a payment of a precedent debt; being presumed to be taken on condition, to be payment, if paid in a convenient time; but if it be kept up without demand, and insolvency take place, the receiver must lose it. If this be the law of the case, what is the ground of equity, on which the court ought now to relieve the complainant? It appears, clearly from the answer and exhibits, that this bill was remitted as a conditional payment, and was received as such. The return of it to the endorser, Mr. Gallagher, is conclusive upon this point. Although the refusal of the drawees to accept, was not regularly noted, yet the bill was promptly shown to the drawee; and the defendant states that he forebore to protest it for non-acceptance, from a hope, which was induced by the declarations of the drawee, that they might accept it after hearing from the drawer. Though notice of the protest was not given, in such time as would have enabled the defendants to have maintained an action upon it, yet the bill was returned to Gallagher during the solvency of the drawer; and no injury appears to have been sustained by him in consequence of the delay. It is true, that no evidence is given that the bill ever came to the hands of Gallagher. His neglect to answer the repeated letters addressed to him by the defendants, which afforded him an opportunity to assert his right to this sum, as a credit, upon the ground of the bill not having been returned; affords strong ground to believe that he had received it, notwithstanding his declaration to the contrary, in 1798. But, at all events, the defendants were not answerable for the miscarriage of their letter covering the bill.

Upon the whole, we are of opinion, that the complainant is not entitled to relief; and, therefore, that the injunction must be dissolved, and the bill dismissed.

[NOTE. See Gallagher v. Roberts, Case No. 5,194; Roberts v. Gallagher, Id. 11,902.]

GALLAGHER (ROBERTS v.). See Case No. 11,902.

GALLAGHER (UNITED STATES v.). See Cases Nos. 15,184 and 15,185.

Case No. 5,196.

GALLAGHER v. The YANKEE.

[Hoff. Op. 456.]

District Court, N. D. California. Jan. 17, 1859.[1]

MARINE TORT—DEPORTATION—DAMAGES.

[1. The forcible deportation of a citizen to a foreign country in an American ship, commanded by an American master, in pursuance or execution of a sentence of banishment of an illegal and self-constituted body of men, is a marine tort.]

[2. The master of the vessel who willingly and knowingly carries such sentence into execution is liable for exemplary damages.]

[3. No damages can be recovered in admiralty for injury to character, etc., by such sentence, or from protracted exile caused by fear to return.]

In admiralty.

J. B. Manchester, for libellant.

D. Lake, for claimant.

HOFFMAN, District Judge. The libel in this case is filed to recover damages for a marine tort. The facts are clearly established by the evidence. It appears that the libellant, who was a night watchman in the custom house, was, on the 25th May, 1856, seized by certain persons acting under the order of the vigilance committee, and conveyed to the rooms of the association, where he was held as a prisoner for about a week. During his confinement a kind of investigation with regard to his character and conduct was made by the committee. The investigation, called by them "a trial," was conducted in the absence of the prisoner, by examining such witnesses as were produced against and for him. The result of the examination was the conviction of the accused, not of any particular offense, so for as it appears, but of being a "disorderly character," "a pest to society, and a nuisance." He was, therefore, sentenced by the committee to "banishment from the state, never to return, under the severest penalties," i. e. under penalty of death. In pursuance of this "sentence," the libellant, with several others, was taken by an armed body of men from his place of confinement in this city, and put on board a steam tug, which conveyed him and his guard to the Heads. The bark Yankee, which was beating out to sea, was there overhauled, and the libellant, with two other persons under a similar sentence, were placed on board of her.

Much testimony was taken, with a view of showing the particular conduct and language of the libellant, when he was going on board the vessel. It does not appear that either he or the other prisoners made any very strenuous opposition to going on board. Such opposition, they no doubt were aware, would have been fruitless; and it is probable that they were happy to escape in any way from the power of a body of men at whose hands they had for so long a time been under daily apprehension for their lives. It was evident, however,—and the fact was not seriously denied at the hearing,—that the master of the bark was fully aware of the circumstances under which the libellant and the other prisoners were placed on board his ship, and that an arrangement had previously been made with him to receive and convey them to Honolulu. He undoubtedly endeavored to evade the responsibility he was incurring, by attempting to obtain from the prisoners some declarations or admissions that they were willing to go. But he must have been aware that they could, in no sense, be deemed voluntary passengers, and that the answer of Gallagher, to the effect "that he supposed he had no choice in the matter," truly described his situation and expressed his feelings. During the voyage, the libellant and his companions appear to have been treated with kindness, and after their arrival at Honolulu a not unfriendly intercourse was kept up between them and the captain. They appear to have considered, and perhaps not unreasonably, that the principal authors of their wrongs were the vigilance committee, by whom they had been arrested, imprisoned, and sentenced to banishment, never to return, under penalty of death, rather than the master, who had lent himself and his ship to carry out the "sentence."

The facts which have been detailed show, however, beyond a doubt, that the respondent has been guilty of a marine tort of a very grave charcter. So long as our country remains under the dominion of law, and so long as the great constitutional provision which secures the citizen his life, his liberty, and his property, until deprived of them by due process of law, are prized by the American people, and are enforced by the courts, the deportation of a citizen to a foreign country in an American ship, commanded by an American master, in pursuance or execution of a sentence of an illegal and self-constituted body of men, must remain a marine tort of a most flagrant character.

But in estimating the damages which should properly be awarded against the respondent, a serious difficulty is encountered. It is obvious that by far the greater part of the wrongs which the libellant has sustained are matters over which an admiralty court, having jurisdiction only of marine torts, has no cognizance. His arrest, his imprisonment, and the so-called "sentence," which fixed an ineffaceable stigma on his name, were matters occurring on land, and wholly beyond the jurisdiction of a maritime court. For the redress of these wrongs he must look to the tribunals of the state of which he is a citizen; and the jurisdiction and remedial power of this court must be confined within its legal and constitutional limits, unaffected by any considerations as to the ability of libellant to obtain justice in any other form.

[1] [Affirmed in Case No. 18,124.]

It is urged that the libellant was unable to return to this city for a very long period, and that he remained an exile from his country, destitute and degraded, until permitted to return by the revocation by the vigilance committee of his original sentence. But it is clear, from the bare statement of the case, that his protracted banishment cannot be attributed to the mere fact that he was conveyed by the respondent to the Sandwich Islands, and of that act alone this court has cognizance. If the ship had landed him on a desert island, from which escape was impossible, or had left him on some remote shore where opportunities of returning to his country rarely occurred, we might justly ascribe to the marine boat the protracted exile, which was its natural and direct consequence. But in this case it is impossible to close our eyes to the fact that the mode in which the libellant was conveyed to the Sandwich Islands in no degree affected willingness to return. The true reason of his omission to do so was the fact that the power of the illegal association which had condemned him to banishment, and denounced death as the penalty of his return, still remained unbroken; and he feared that their threat would be executed if he attempted to disobey their decree. The same result would have followed, had he escaped from their hands while a prisoner, and had they, in his absence, passed a similar sentence against him. It is clear, therefore, that for these wrongs, which were not the acts of the master of the ship, and which were not marine torts, the libellant cannot against this respondent and in this court, recover damages.

It has been suggested that the respondent may have been influenced by humane and just motives. That knowing the only choice presented to the libellant was between death and banishment, he may have reluctantly assisted to carry into effect the latter, in order to save him from the more dreadful alternative. But the facts of the case do not justify this charitable hypothesis. For, in the first place, it is clear that the master of this ship willingly and knowingly made himself and his vessel the instruments whereby the illegal sentence of banishment was carried into execution. And, secondly, it does not appear that if this respondent, and the masters and agents of all other vessels sailing from this port, had been faithful to the laws of their country, and had resolutely refused to allow their ships to be used for the consummation of such great wrongs upon their fellow citizens, more just and humane counsels might not have prevailed with the vigilance committee, and their prisoners be set at liberty. It is at least not clear that they would have been willing to hang those whom they had adjudged to be worthy only of banishment, simply because they found it impossible to execute the milder sentence.

The counsel for the libellant has dwelt with much force on the disgrace and permanent ignoring which the proceedings of the vigilance committee have established upon Gallagher. To have been arrested and imprisoned as a criminal; to have been expelled from society as a pest and a nuisance; to have been transported to a foreign country, never to return, under penalty of death; to be known and published to the world as a vigilance committee exile, whose crimes had rendered his presence incompatible with the safety of a great city,—must, to a man of common sensibility, and of respectable character, constitute an injury, compared with which all ordinary libels, slanders, or other injuries to reputation sink into insignificance. Ample opportunity was afforded at the trial to the counsel for the respondent to show what were the crimes, or what was the character, of the libellant. It would seem from the evidence that up to the period of his arrest his reputation was fair, except that he had been concerned in two fights or riots, the newspaper accounts of which were by one of the witnesses stated to have been grossly exaggerated. No attempt was made to show that on any occasion he had been concerned in frauds at elections, though it was testified by a number of the vigilance committee that he was convicted by that body of being a ballot-box stuffer, of interfering with elections (it is presumed fraudulently), and of general bad conduct. Several respectable witnesses affirm that his reputation was good; that they never heard of his being charged with election frauds, and that they never knew him to have been an inspector or tally clerk at any election. If his character had been so notoriously bad as is represented, the fact could have been shown beyond all doubt; and had his general reputation been that of a person concerned in election frauds, some witness could surely have stated where and at what elections he was reported to have committed them. It is but just to say, that the charge that the libellant's reputation was "notoriously bad"; that he was "always engaged in election rows" and ballot-box stuffing,—is not only unsustained by the evidence as to what his character was, but unsupported by any testimony as to particular acts which might justly have given him that character. But, as has been already observed, for injuries to his character occasioned by the "sentence" of the vigilance committee, this court, in this proceeding, can afford no indemnity; for they cannot properly be said to be the consequence of that portion of the torts committed upon him, of which alone a maritime court has cognizance, viz. his abduction and transportation to a place beyond seas.

But although the respondent cannot in this action be held liable for all the injuries the libellant has sustained, he is nevertheless responsible not only for the marine tort he has committed, but for its natural and nec-

essary consequences. By receiving on board his ship, and transporting to a foreign country, the libellant and his companions he has knowingly assisted in carrying out an alleged sentence, in violation of the most sacred rights of citizens, and has made himself a particeps criminis, so far as the execution of that sentence was concerned. It was not distinctly shown that the respondent was a member of the vigilance committee. It was testified by Carr that he had seen him in their rooms, and no proof was offered to show that he was not a member,—a fact which, if he were not a member, could have been established. But whether a member or not, it is clear that he must have known of their proceedings with regard to the libellant, and he willingly assisted in executing their decree. The libellant was brought on board the vessel to be transported to a foreign country, without money, and destitute of even a change of clothing. In this condition, and with disgrace attaching to him which was the necessary consequence of being put on shore under such circumstances, he was left at Honolulu to gain a subsistence as he could. The respondent must have been fully aware of the sufferings to which a man so landed in a foreign country,—destitute, without friends, with the brand of a criminal upon him, and brought there as a prisoner, unfit to reside in his own home,—must have been exposed; and if he, knowing these results to be the natural and inevitable consequences of the abduction, consented to commit it, the case is very different from that of abducting, or, as it is called, "shanghaiing," a seaman, who at the close of a voyage is left in no worse condition than when he commenced it. It has appeared to me that for a tort of this kind—high-handed and deliberate, in open and contemptuous violation of the hitherto supposed inviolable rights of the citizen—the court should award exemplary damages. It is of the last importance that masters and agents of ships should learn that, whatever be the power that in moments of popular excitement illegal bodies of men may usurp, and for a time exercise, and however important the local laws of a state may temporarily be found, yet, on American vessels on the high seas, the laws of the United States are still supreme; that the power of vigilance committees and similar bodies stop at least with the shore, and that the ocean is not to be the scene, nor American vessels the instruments, for the execution of their decrees.

I shall award to the libellant the sum of $3,000; for which, with costs, a decree must be entered.

[NOTE. An appeal was taken to the circuit court (Case No. 18,124), where the decree of the district court was affirmed.]

GALLAGHER (YANKEE, The, v.). See Case No. 18,124.

Case No. 5,197.

In re GALLAHER et al.

[See Case No. 5,192.]

Case No. 5,198.

GALLAHUE et al. v. BUTTERFIELD.

[10 Blatchf. 232; 6 Fish. Pat. Cas. 203; 2 O. G. 645; Merw. Pat. Inv. 340.][1]

Circuit Court, S. D. New York. Dec. 6, 1872.

PATENTS—VALIDITY—INFRINGEMENT—REISSUE TO COVER SEPARATE DEVICES—COMBINATION—NEW RESULTS—ABANDONED EXPERIMENT.

1. The claims of the reissued patent granted to Alpheus C. Gallahue, July 6th, 1869, (the original patent having been granted to him August 16th, 1853, and extended,) and of the reissued patent granted to said Gallahue, June 22d, 1869, (the original patent having been granted to him March 29th, 1859,) and of the patent granted to said Gallahue, August 26th, 1862, all for "improvements in machines for pegging shoes," considered.

2. A patentee, in his original patent, described a spring and a weight, acting conjointly to drive down an awl-carrier and a peg-driver. In a reissue of the patent, he claimed the use of the spring alone, for that purpose, without the weight. The defendant used, for the purpose, a powerful spring, equivalent to the spring and weight: *Held*, that the claim in the reissue was valid, and that the defendant infringed it.

3. A patentee, whose devices are new, is at liberty to claim each, by way of reissue, although he may have represented and claimed them originally as acting conjointly.

[Cited in Calkins v. Bertrand, Case No. 2,317; Gould v. Ballard, Id. 5,635; Holmes Burglar-Alarm Tel. Co. v. Domestic, etc., Tel. Co., 42 Fed. 224.]

4. It is not true of a machine, as such, that, because every one of its members performs in it the identical office which it would perform howsoever used, their conjoint action in the new combination may not produce a result useful and never before attained.

5. Where one or more of the parts are new, and the combination is, for that reason, made to produce a new result, in the greater rapidity and economy with which the work can be performed, there is something more than mere aggregation.

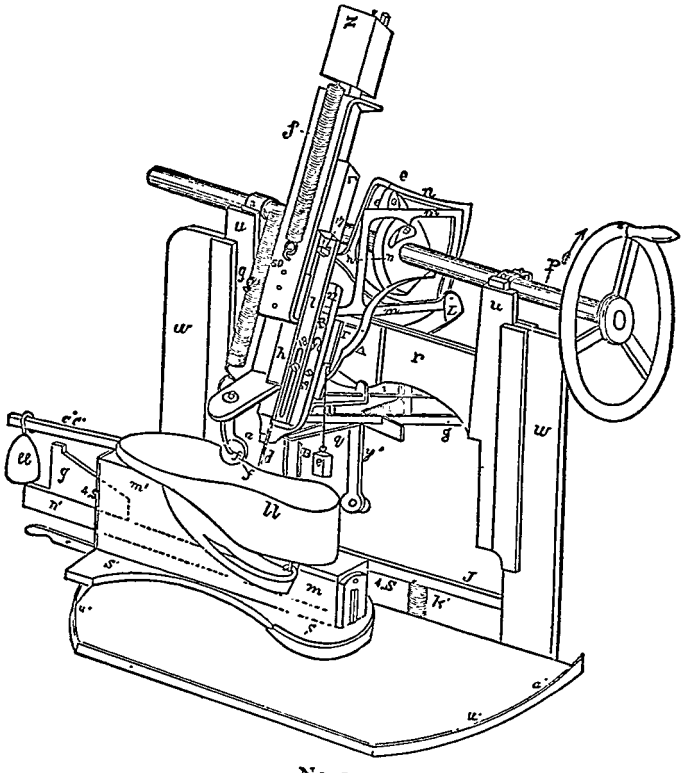
6. Where the patentee drove his awl-carrier by a spring made to operate automatically, and the use of such spring, for such purpose, was new, and could not be usefully employed without the use of a gauge for the edge of the sole to rest against: *Held*, that the combination of a gauge with an awl-carrier driven by a spring was a new combination, and not a mere aggregation, although the gauge and the awl-carrier were old, and operated, in relation to each other, in no new manner, in the new combination.

7. Where a machine, not brought into effective operation, was cast aside and taken apart, without any intention to reconstruct it, portions of it being appropriated to other uses, and the remaining parts being wholly useless for any purpose within the purview of a subsequent patent: *Held*, that, as an answer to such patent, such machine must be regarded as an abandoned experiment.

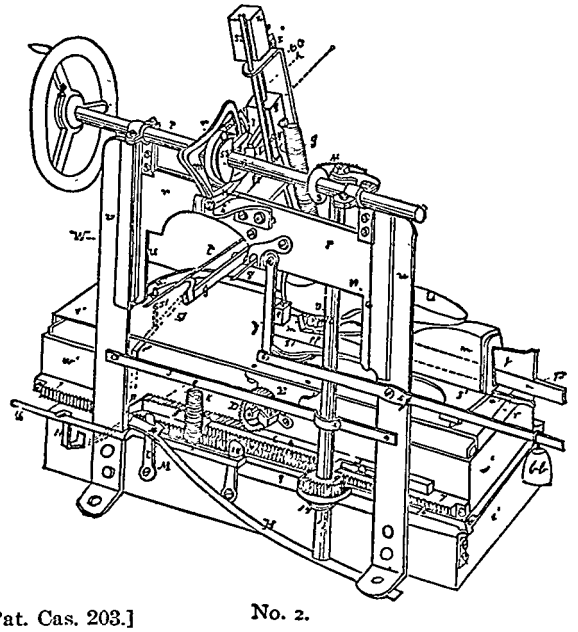
[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 10 Blatchf. 232, and the statement is from 6 Fish. Pat. Cas. 203; Merw. Pat. Inv. 340, contains only a partial report.]

[2][In equity. Final hearing on pleadings and proofs. Suit brought [by Alpheus C. Gallahue and Eli Bennet against William Butterfield] upon patent [No. 9,947] for "improved machine for pegging boots and shoes," granted A. C. Gallahue, August 16, 1853; extended seven years, and afterward reissued under date of July 6, 1869 [No. 3,533]; also, letters patent [No. 23,361] granted same, under same title, March 29, 1859, and reissued June 22, 1869 [No. 3,517]; also, letters patent [No. 36,292] granted same, under same title, August 26, 1862.

[The accompanying engravings represent the Gallahue machine, as shown in the reissue of July 6, 1869.



No. 1.



No. 2.

[2] [From 6 Fish. Pat. Cas. 203.]

[The specification states the nature of the invention to consist in—

["So constructing a machine that the punching of holes, cutting pegs, and driving them by percussion (not forcing) into the soles of boots or shoes, is performed at one operation; and that, instead of moving the machine over and around the work, which is attended with great complexity of machinery and expense, I am enabled to move my work under the operative portions of the machine, and, by simplifying the mechanism, greatly reduce the cost, and render practical the operation, as applied to all sizes and shapes of the sole, without any change being necessary, except that of substituting one of the ordinary lasts for another."

[In the engraving, ll represents the last of the ordinary form. It is provided with a staple o', for securing it on the block m', m', and at one end of this block there is a slight hollow to receive the toe, while the other end is flat to receive the heel of the last. S', S' represent a metallic plate, having uprights, 4s, 4s, between which the block m', m', is placed, it being secured by screws to S', S'. This plate forms a turn-table for the last, the pivot thereof being a shaft under the center of the heel, by which the ends of the shaft are reversed. The last is secured to the block and turn-table S' by a lever, n', passing entirely through m', m', and through slots in 4s, 4s, and having a hook for entering the staple O' in the last. By the driving of a wedge, q', in the slot 4s, the lever is depressed, and, drawing on the hook and staple, secures the last firmly on m', m'. x' x' is the base of the machine; w', a sliding table thereon, moving longitudinally by tongues and grooves, through the agency of racks and a pinion; v is a second table, vibrating back and forth on w'; u' is a rail supporting the turn-table S' and toe of the last. At each end of the rail is a square notch or stop, a', in which the spring-handle r of the turn-table drops on the alternate change in the position of the last in pegging each side. The straight portion of the rail on the edge of o supports the last-holder when the heel is being pegged. w, w are uprights secured to the base x', and are braced with a cross tie, J. u, u are sides of a sliding-gate, working in upright guides on w. r is a cross-head connecting u, u. P is the main or driving shaft, which, through a screw and cog-wheel operates the shaft 13. On the lower portion of shaft 13, slides a pinion, which has motion given it by a sliding key and slot in the shaft and pinion. Two racks, 6 and 7, one above the other, are extended horizontally, so that this pinion engages in one or the other, according as it is raised or lowered by a lever operated in connection with the helical spring k'. The raising of the pinion changes its gear in giving the table w' motion toward the right. After finishing the shoe, the table is returned by hand. The slight transverse motion of the table o, required on account of the inequality of width of the soles, is permitted by the extension and contraction of helical springs placed under v', one end being secured to the side of v', the other end to the side of w'. By means of these springs, the edge of the sole is always kept up to the gauge a, back of the awl d, under the peg-driver. The gauge a is made adjustable, so that by changing it, any desired number of rows can be pegged around the shoe, one after another.

[By the pinion D, on the horizontal shaft E, which carries a bevel-wheel, B, meshing in a second bevel-wheel F, on the upright shaft c, motion is given to the turn-table S', placed on the upper end of the shaft, when required in turning the last in pegging the heel. A lever, c' c', pivoted at 4f, and a pitman, y', attached to r, and a weight, bb, as a counterpoise to adjust the weight of the sliding-frame on the roller f, pressing on the sole, serves as a means of giving greater or less pressure to this frame. The lever 16 is held down by a catch, 3s, until it is relieved by the short projecting arm, 3t, striking against it when the spring k' lifts the lever 16 and pinion from rack 7 to rack 6. H is a flat spring secured to the base x', the upper end thereof resting upon the shoulder of the catch L. The pinion being now engaged with the rack, which slides by means of a slot therein on a screw z', projecting from the table w', carries with it the rack 5, and thus gives motion to the turn-table S'. The same arm, 3t, now is moved against the catch L, and throws it from under the spring H, which depresses lever 16, and throws the pinion out of rack 6 into rack 7. N is a trip-hammer secured to the front of the base x', and acts on the spring 50 and lever 51, placed under the spring-handle r', throwing said spring-handle out of the stop a', when the lever 16 is lifted by the helical spring k', and thus permits the turn-table to change the position of the last, while the pegs are being inserted in the heel after one side is finished; then the pinion 9, in gear with rack 7, continues moving the table w' and the last still further to the right, and finishes the shoe.

[The pegging portion is represented by h, a rod in Fig. 3; the lower end carries the awl d, and the upper end the head z. f' is a helical spring attached to the head, giving the awl-rod a quick stroke when released from the cam 53, Fig. 3. The arm having been lifted by an arm, 54, projecting from the square rod 52, is also connected with z. This cam also holds up the rod and awl while the peg is being inserted. The spring f' has its lower end secured by a staple to the ways 60, in which there is a series of holes for adjusting the staple up or down, and thus to regulate the tension of the spring so as to strike a heavier or lighter blow, as may be required. Y is a square hammer-head, sliding, in-

dependent of the peg-driver, on the awl-rod h, said rod moving in stationary ways 60. Its use is to drive the pegs into the sole, and it is lifted by the end of cam 2, acting on a projecting arm 1, being held up by this cam (a portion seen in dotted lines,) while the awl is in operation. g' is a helical spring, giving a quick descending motion to the hammer. i, Fig. 1, is the rod of the peg-driver, lifted by a stirrup n (connected at 17), and by the cam e, on the main-shaft P. It slides on the face of the peg-cutter R by means of a slot, 18, and screw. The lower part of i is rounded and reduced in size, so as to enter freely the tube below. The peg-wood passes through a slot in R, and stops against a spring gauge-plate, 10. At the mouth of this slot a knife is drawn upward, and splits the peg with the grain of the wood by the stirrup m, connected at 22, raising R, and forcing upward the wood against a stop pressing into a slot, in R, arrests it, and the peg is forced into the tube. This stop is adjustable, by a slot, to suit different lengths of peg-wood. T, the base-block, upon which all the sliding portions are secured, is swung to the frame-work by a screw, at its upper end, so as to admit of a slight change of position, to bring the peg over the previously punched hole in the sole, by means of the lever A, acted on by the side-cam o in its revolution. At g is the trough carrying the peg-wood, connected with this base. A finger forces up the peg-wood in g by the weight e, and cord passing over the stub on the side of T. L is a bent arm, on which the stirrups m and n are pivoted.

[The operations of the machine, and the advantages secured by it, are thus described in the patent. viz.:

["The last being turned toward the wheel and handle on shaft P, the toe thereof toward the right hand, the edge of the sole bearing against the gauge a, and the drop-bar r', in a', under the toe, the peg-wood supplied in strips in the holder g, turn the shaft P toward the right, or in direction of dart.

["The cam 53 raises the hammer z, and rod 52, by a projecting arm, 54, thereon, and the awl-rod h, sliding in ways 60, and awl d, on the arm, 54, being released from the cam, the spring f' quickens the descent of the awl, and drives it into the sole of the shoe.

["Then the cam e, through the stirrup n, lifts the peg-driver I sufficient to let the peg-wood under it against the gauge 10, and the cam o, Fig. 3, the peg-cutter, and the cam 2 lifts the arm 1 of the sliding hammer Y, keeping it until the awl is raised out of the way by the cam 53 again coming in play, and both hammers are kept up until the upper end of the lever A being moved to the right, in the revolution of the wheel carrying the cam o (see Fig. 5, where this change of position is shown), while the lower end of A, entering a hole in the lower end of the base-block T, carrying the peg-tube and driver, gives it and them a slight side movement, independent of the awl and awl-rod, for the purpose of bringing the charged tube and driver over the previously punched hole in the sole.

["By the turning of cam 2, the arm 1 is released therefrom, and permits the head Y sliding on the awl-rod h, moving in fixed ways of the frame 60, to give a quick descending stroke on the head of the peg-driver, and thus insure the perfect insertion of each peg successively into the sole of the shoe.

["It is obvious that, instead of using the hammer to operate the peg-driver, and attaching the spring g' to that, the spring may be applied direct to the peg-driver, the same as is done with the awl-carrier, either plan being used at will.

["By this method of constructing a machine, many advantages are gained over the machines heretofore made.

["In all machines of this class, as previously constructed, the shoe or boot, when being pegged, was simply moved forward in a straight line, and, instead of gauging the row of pegs, by having the edge of the sole bearing against a gauge, as I do, they had to use patterns, corresponding in size and form to the boot or shoe being pegged, to gauge and form the rows, and at every change in the size or form of the boot or shoe the patterns had to be changed also.

["By my plan the sole itself becomes the pattern, and thus my machine, without any change or alteration, will peg a boot or shoe of any size or form, and by simply adjusting the gauge so as to throw the last further in or out, successive rows may be formed in the same manner.

["In the previously made machines, where the shoe simply moved to and fro, they could only peg along the sides, leaving a space around both heel and toe unpegged, and which had afterward to be finished by hand.

["By my plan of pivoting the last-holder, so that it can be turned around, I am enabled to continue the pegging entirely around the heel, starting at the toe on one side, and continuing around to the toe on the opposite side, thus completing at one operation the entire pegging, with the exception of a small space at the toe, where it is usual to insert nails.

["By using a spring, and attaching it directly to the awl-carrier, or to the weight attached rigidly thereto (if a weight be used), I drive the awl by a quick percussive movement, and then, by using a cam to withdraw the awl, I make sure of overcoming any tendency of the awl to stick in the sole.

["I rely on the spring for driving the awl, and it is obvious that the spring may be used for this purpose, with or without a weight, as may be desired; and by regulat-

ing or altering the tension of the spring, the force of the blow can be adjusted to adapt the machine to the making of boots and shoes of any style, with soles light or heavy, thick or thin.

["I am aware that machines have heretofore been made in which a cam was used to force the awl and the peg into the sole, and a spring used to withdraw the awl, and therefore I do not claim broadly the use of a spring or cam in a pegging-machine."

[The other two patents are subsequent modifications of this machine by the same inventor.

[The decision of the court relates to some of the details of the machine, the nature of which are sufficiently indicated by the language of the court to render that portion of the decision intelligible without further explanation or description.][3]

C. M. Keller, for complainants.

G. L. Roberts, for defendant.

WOODRUFF, Circuit Judge. The bill of complaint herein is filed to restrain the alleged infringement of certain letters patent for machines for pegging shoes. A patent was granted to the complainant Gallahue, on the 16th of August, 1853, which was extended for seven years, on the 18th of February, 1867, and was afterwards surrendered and reissued under date of July 6th, 1869. Another patent was granted to the said complainant on the 29th of March, 1859, for another improvement, which was afterwards surrendered and reissued under date of June 22d, 1869. A third patent was granted to the said complainant on the 26th of August, 1862, for another improvement or improved machine. The other complainant claims as assignee of three-quarters of the right, title, and interest of the patentee in or to these letters patent. The bill alleges an infringement by the defendant of these several patents, and prays an injunction and an account of profits, &c. The answer does not deny the granting of the letters patent, or the extension and reissues alleged in the bill, but denies that Gallahue was the first inventor of the alleged inventions, denies that they were either new or useful, denies that they were granted "according to law," alleges that the inventions were never reduced to practice, denies that the complainants have any exclusive rights under the patents, and denies that the defendant has infringed, alleging that the machines which he has been, and is now, selling are constructed under various other patents, which are specified, and which were granted at various dates, from January 17th, 1854, to October 11th, 1864. The answer also alleges, that the inventions claimed by the complainants were described, before the date of Gallahue's invention, in a very great number of letters patent mentioned in the answer, and were known to a great number of persons, also named therein; and, finally, the answer alleges abandonment of these inventions, by the patentee, to the public.

The time which I have devoted to the examination and consideration of the voluminous testimony and documents put in evidence, and to the elaborate arguments of the counsel in an anxious endeavor to reach a just conclusion, and the numerous cases which are now before me awaiting examination and decision, both forbid that I should detain the parties longer in this court, for the purpose of doing more than state the conclusions to which I am brought; and the statement of those conclusions in brief must not suggest any failure to consider the points urged upon my attention, though not here separately discussed.

(1.) First, I do not consider the objections urged to the validity of the reissues set up in the bill of complaint, tenable. On the contrary, the improvements described in the reissues were included in, and shown by, the original record; and I find also that the invention was complete, and was reduced to practical use and adaptation to the pegging of boots and shoes.

(2.) Except so far as hereafter indicated, I find that the patentee, Gallahue, was not anticipated, in his invention, in any particular material to the decision which is below stated, and that the proof establishes that he was the first inventor of the devices secured by his patents, so far as such patents are found by me to be infringed by the defendant.

(3.) I find it unnecessary to enter into a detailed examination of the machine made by Amos Whittemore, of which parts were produced in evidence, to ascertain whether, or to what extent, it included a device or devices like those invented by Gallahue, because the proofs show, in my judgment, that nothing in its history is any impediment to the force, effect, and validity of the patent of the latter. It was an abandoned experiment, within the rule on that subject, not brought into effective operation, cast aside and taken apart, and, without any intention to reconstruct it, portions of its machinery were appropriated to other uses, and the remaining parts were wholly useless, as a machine, for any purpose within the purview of the invention of Gallahue.

(4.) The foregoing conclusions lead to the consideration of the specific claims in the complainants' patents, and to the question of infringement.

1st. The first claim in the reissue of July 6th, 1869, No. 3,533, is as follows: "The use, in a pegging machine, of a gauge arranged in relation to the part that supports the boot or shoe, to form a bearing for the edge of the sole, and thus insure the insertion of the pegs at a uniform distance from the edge of the sole, without the use of patterns, substantially as described."

If this claim should be construed to include any and every gauge which may be used, in

[3] [From 6 Fish. Pat. Cas. 203.]

a pegging machine, as a guide to which the edge of the shoe may be applied, to regulate the distance, from such edge, at which the pegs shall be inserted, then it is clear it could not be sustained. A gauge for that purpose had before been used, in the hand machine patented to John C. Briggs, October 9th, 1845, and a gauge performing a like office is also found in the machine made by Leander Lackey, which was invented earlier than that of Gallahue. Indeed, the counsel for the complainants, in substance, concedes, that, if such be the construction of the claim, it must be deemed invalid, for the reason stated.

But, it is insisted, that, when read in connection with the whole specification, this claim may and should be construed as meaning the use of an adjustable gauge, in connection with the automatic movable support of the boot or shoe, while subjected to the operation of the automatic movement of the awl and driver described in the specification. The fact, that, in the Lackey machine, the gauge operated on the edge of the shoe, to guide it, while it was held to receive the awl and driver, acting automatically, to insert the peg, necessarily reduces even this construction of the claim to some extent, and requires that it be held to apply to those cases in which the specific kind of gauge described by Gallahue in this patent is used, or in which substantially the same movable support is given to the boot or shoe in the process, or, at least, in which substantially the same pegging machinery is used, for the insertion of the peg. The specific gauge used by the defendant has more resemblance to the Lackey gauge than to Gallahue's, and the support of the shoe employed by the defendant is a different mechanical structure from the movable table described in this first patent of Gallahue; and, though it may bring the machine within the range of Gallahue's exclusive right under his subsequent patent, it cannot be deemed an infringement of the claim under consideration, if such movable table be included in that claim.

There remains, therefore, only the suggestion, that this claim embraces an adjustable gauge when used in connection with a movable support to the boot or shoe, and in connection with the pegging apparatus, that is, an awl-carrier and driver operated by a cam and spring or springs. In this aspect of the claim, it may properly be considered in connection with the other claims which more specifically relate thereto.

2nd. The next claim of this reissue, alleged to be infringed, is the third: "The combination of the awl-carrier and peg-driver, each separately lifted by a cam, and driven down by a spring, substantially as described." This I find to have been a new device, and, if the machines sold by the defendant are, in substance, the same, in this respect, as that of Gallahue, then of this claim the defendant is an infringer.

In the machine of Gallahue, as described in his original patent, there was, besides the springs, a weight co-operating therewith, to give greater efficiency to the blow; but the spring was there, also, acting, and the awl-carrier and peg-driver were raised by a cam. In the defendant's machine, the awl-carrier and peg-driver are raised by a cam; but the downward blow is given by the spring, without any additional weight. Hereupon, the questions arise, whether, when an inventor employed both spring and weight, in his machine, as originally constructed, he is at liberty to claim, in his reissue, the use of the spring alone, as included in his invention, and whether another person may use the spring alone without liability as an infringer. My conclusion, in this case, is, that the defendant was not at liberty to use the spring, and, by increasing its power, render it practically equivalent to both spring and weight, as originally described. How far such a change, with a corresponding change in the details of the arrangement, may be an improvement, to which the defendant, or those whom he represents, have title, may depend upon the patentee's right to claim the spring separately, in his reissue; but, in my judgment, even if an improvement, it is an infringement. It is an appropriation of a substantial part of the actual invention shown in the original record. Nor do I perceive any sound objection to allowing the inventor, in his reissue, to claim the action of the spring alone. It is shown in the record of his patent; and, surely, a patentee, whose devices are new, is at liberty to claim each, by way of reissue, although he may have represented and claimed them originally as acting conjointly. In respect to this claim, therefore, I deem the machines sold by the defendant an infringement.

3d. The next claim in this reissue, of which infringement is averred, is: "The combination, in a pegging machine, of a gauge for the edge of the sole to rest against, and an awl-carrier driven by a spring, substantially as herein described."

It was not claimed, by the complainants' counsel, on the hearing, that, if this claim be regarded simply as a claim to "combination," as such, it was valid; and for this reason—a gauge operated in the same manner, and produced the same effect, by whatever means the awl-carrier was driven, and the awl-carrier driven by a spring operated in the same manner, and produced the same effect, by whatever means the boot or shoe was brought to the proper position for receiving the peg. In such case, (mere "combination" being the subject of the patent), the doctrine proceeds upon the ground, that the parts are old, and that nothing new results from their contiguous or contemporaneous action, which is due thereto. But, where one or more of the parts are new, and the combination is, for that reason, made to produce a new result, in the greater rapidity

and economy with which the shoe can be pegged, as, where the use of the new device of driving the awl-carrier by the spring made to operate automatically, or, in the terms of the claim, "substantially as described," cannot be usefully employed without the gauge, then there is something more than mere aggregation, in the sense above stated. Then there is a new result, due to the employment of the awl-carrier, driven by a spring, and operating automatically, in connection with a gauge, without which it could not be operated to produce the advantageous results contemplated and, in fact, attained, by the use of both. All machines are, in a certain sense, combinations; but it is not true of machines, as such, that, because every one of its members performs in it the identical office which it would perform howsoever used, the conjoint action in their new combination may not produce a result new and useful, and never before attained. In this view, I deem this claim valid, and hold it infringed by the defendant.

4th. The next claim is: "Making the gauge, (a,) against which the edge of the sole bears, adjustable, for the purpose of enabling the shoe to be so adjusted as to have two or more rows of pegs inserted therein."

The Briggs hand machine had, as already stated, an adjustable gauge; but, it was only adapted to one change. This enabled the workman to insert two rows of pegs only; and it was not adjusted in the same manner as was that of Gallahue. The former was attached to the machine by a screw, which, being loosened, permitted it to be turned, so as to present to the edge of the shoe, first, its longer, and then, its shorter, end. The gauge of Gallahue was attached by a screw, which, being loosened, permitted the gauge, (in which was a slot, through which the screw was inserted,) to be drawn forward, or pushed back, so as to regulate the insertion of pegs at any desired distance, nearer or more remote, from the edge of the sole. But, this construction of a gauge was not novel, and the circumstance that it was here applied to a pegging machine, and guided the shoe, so that any number of rows of pegs could be inserted, does not make it patentable, except when used with other devices, so as to constitute either a new machine or a new and patentable combination. In such machine or combination, it may be a part of the complainants' invention, but, the making of the gauge adjustable not being new, the mere application of it to a new use is not separately and independently patentable. Others of the claims of the patent may embrace all to which the patentee is entitled in respect to the use of the gauge, but, the claim to the mere making of the gauge adjustable, as expressed in this claim, I think, cannot be separately sustained.

5th. The remaining claim in this reissue is: "The combination, in a pegging machine, of a gauge for the edge of the sole to bear against and a rotating last-holder or support, substantially as described."

I cannot find that this claim is infringed by the defendant, unless I should hold that it embraces every combination in which a gauge is used, for the edge of the sole to bear against, with a rotating last-holder. If I were so to hold, then I must find, from the evidence, that Lackey anticipated the complainants; and, if I hold that the claim is limited to the special device by which Gallahue effected the rotation, then I must find, from the evidence, that the defendant does not infringe. In either case, the complainants cannot prevail, in this case, upon this claim.

6th. The only infringement of the reissue of June 22d, 1869, relates to the second claim therein. The complainants insist that the last-holder connected with the machines sold by the defendant, though widely different in form, does, by the use of merely mechanical equivalents, embrace, in principle and mode of operation, the substance of this second claim of Gallahue to his last-holder. That claim is: "Pivoting the plate or frame, (g,) that supports the last, at or near its centre, and so arranging it, that it may turn on said pivot, during the operation of pegging, thereby so adjusting the boot or shoe as to present the various portions of the sole in the requisite position to the awl and peg, as the sole moves along, substantially as described."

The specific details of the arrangement by which this result is automatically produced, are, some of them, the subject of other claims in this patent, but it is not claimed that these details are copied in the defendant's machines. It is claimed, that supporting the last on a plate or frame pivoted at or near its centre, so as to allow an oscillating or vibratory motion of the last, and to present the uneven and curved surface of the sole in proper position to the awl, at the very place of its descent, so that it shall pass in the proper direction into the leather, was new and a patentable device, and that, in this particular, though without copying the supplemental means of moving the last forward and backward, by which such moving was automatically effected, the defendant has infringed the patent. It will be perceived, that the pivoting here claimed is entirely irrespective of the question, by what means, whether mechanical, or by the hand of the workman, the shoe resting on the holder is brought or held under the awl and peg-driver, and alike independent of the means by which it is moved along, so as to be pegged, from heel to toe, or from toe to heel, and it has no necessary connection with the instrumentality by which the shoe is to be rotated, so as to be pegged on both sides, and around heel and toe. All these are necessary to the full performance of the pegging, but they are not embraced in this claim. It is the raising and depressing of

heel and toe alternately, and the oscillation side-wise, so that the surface, at the point where the peg is to be inserted, may receive the awl and peg in the right direction, which this claim contemplates. Gallahue's device consists in placing his last-holder on pivots passing through an arm on each side, so that either end, by the oscillation of the holder on the pivot, raises or depresses either end of the last, as it is moved forward or backward. The sidewise vibratory motion is effected in like manner, by pivoting the bed of the last-holder at each end, so that it may be turned towards or from the awl, and so change the plane of the surface of the shoe lying thereon. In short, by this combination of pivots, something resembling a universal joint is produced, or, perhaps, more exactly, an arrangement like the usual mode of suspending a mariner's compass. Such an arrangement, applied to a pegging machine, was new in its operation and effect, in the art of pegging shoes, and its utility cannot be deemed doubtful, upon the proofs herein. The last-holder used in the machines sold by the defendant has the same operation, and in substantially the same mode. It is true, that some of the proofs would, at first view, indicate that the latter is not the equivalent of the complainants' device, but such evidence includes in its scope more than the claim now under consideration, as above explained. As it respects the applying of the shoe to the gauge, and holding it in contact, the hand and power of the workman is required. As it respects the moving of the shoe forward, and turning it around the heel and toe, the serrated instrument or feed, co-operating with the power of the workman applied to the last-holder, are necessary. But, as already remarked, these are not the features which are the subject of this claim. The vibratory and oscillating motion of the last, by the means of what is, in substance, a universal joint, is what this claim contemplates and provides for.

It is urged, that, by the defendant's machine, operated, in this respect, partly by hand, the operation is more perfectly performed, that is, the surface of the shoe, at the point of the insertion of the peg, is more exactly at right angles to the line of the motion of the awl. That may, perhaps, be true, but that is due to the guiding power of the workman, employed instead of the automatic motion produced in the complainants' machine, and it is not those which are embraced in this claim. No prior machine had the capacity here in question. The Lackey machine moved the shoe in the arc of a circle, but had not two combined motions, producing the result referred to. Several last-holders, called "jacks," had been contrived, but none had this important feature, as I think the evidence fully establishes. This claim must, therefore, be held infringed by the defendant.

7th. The other and remaining claim of which the complainants insist that infringement is shown, is in the patent dated August 26th, 1862. That claim is: "Cutting off the pegs laterally from a strip of peg wood by the movable knife, (e,) being brought against the surface of v, figure 3, as set forth."

It is clear, I think, upon the evidence, that this was an original invention by Gallahue. Laying out of view, for reasons already stated, the machine of Whittemore, no evidence is produced of any prior device like that of Gallahue. All previous devices for cutting the strips of peg wood into pegs operated upon the edge of the strip, so as to split it, and, the grain of the wood being irregular, the split would follow the grain of the wood, and the pegs were of uneven and irregular form. By Gallahue's device, the knife, actuated by a lever, was made to bear upon, and penetrate, the strip of peg wood sidewise, and divide it into pegs of even, regular, and uniform size and form. By the like device in the machine sold by the defendant, operating substantially in the same manner, the pegs are cut evenly and regularly, without being affected by irregularity or obliquity in the grain of the wood. If there were any doubt in regard to other particulars, the infringement by the defendant in this seems to me clear.

I have not overlooked or failed to consider the objections urged to these conclusions, in the very able argument of the defendant's counsel. The failure to notice them herein in detail is not due to a want of appreciation of the industry and ability displayed in their presentation. Having reached the conviction expressed in the foregoing, I have no alternative but to say, that the complainants are entitled to a decree in conformity therewith.

GALLATIN, The (DELANO v.). See Case No. 3,751.

Case No. 5,199.

GALLATIN et al. v. The PILOT.

[2 Wall. Jr. 592; 2 Am. Law Reg. 697.][1]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1853.[2]

LIEN OF PART-OWNERS FOR SEAMEN'S WAGES — EFFECT OF SHERIFF'S SALE ON IT.

1. The lien for wages of a seaman, who is himself a part-owner of the vessel on which he serves, is discharged by a sheriff's sale of her, on execution against her owners. And this, although as a general principle, a sheriff's sale of a vessel does not discharge the sailor's lien upon her.

2. The decision of the case by the district court, reported as Foster v. The Pilot [Case No. 4,980], deciding otherwise, is not law, and is here overruled.

[1] [Reported by John William Wallace, Esq.: 2 Am. Law Reg. 697, contains only a partial report.]

[2] [Reversing Case No. 4,980.]

[Appeal from the district court of the United States for the Western district of Pennsylvania.]

The steamer Pilot, navigating the western rivers, was the property of Gallatin, Wood, and several other persons. The boat was navigated for joint profit; Gallatin acting as first mate, and Wood as second mate—it being quite a common custom on the western rivers, for part-owners to assist in navigating their own vessels. As part-owners and quasi partners in the transactions of the boat, they became indebted to several persons, who recovered judgment at common law, in the state courts, against them; and on one of these, the vessel was sold at sheriff's sale as their joint property. While the vessel was under execution, Gallatin and Wood, who are the plaintiffs in this suit, libelled her in the admiralty for wages, as part of the crew; they having, as already stated, acted as her mates. And the case coming on, after the sheriff's sale, to be heard, the purchaser at that sale intervened, and, conceding the existence of the services, denied the right of the libellants thus to recover on their lien; which right was the question now before this court. Notice had been given by the libellants, at the sheriff's sale, of their claim to have a lien. No exhibition was made here of the state of accounts as between the owners of the Pilot.

Messrs. Shaler, Stanton, and Hamilton, for the purchaser, admitting fully the law as stated in Taylor v. The Royal Saxon [Case No. 13,803], that as a general principle, the lien of sailors' wages is not discharged by a sheriff's sale, submitted,

I. That part-owners have no lien for wages, as mariners; or, at most, that it could exist only inter sese, and could not be exerted adversely to creditors or third parties.

II. That by the sheriff's sale, all the interest of Gallatin and Wood, the libellants, whether as owners or by special lien for wages, had passed to the purchaser at sheriff's sale, and that against him the court would not set up a claim for wages.

Mr. Penny, contra. The navigation of the western rivers by steamboats, being attended with unusual risk, it is usual for capitalists building or owning boats to unite with them as part-owners, one or more persons known to be skilful and trustworthy mariners, whose interest in the vessel, though generally small, is sufficient to ensure a vigilance, which could not be expected of mariners bound to duty only by the prospect of ordinary wages. It is an excellent public policy, calculated to elevate the character of mariners, both in its requirements and its effect. And it does no harm to creditors, since it adds nothing to the wages which must be necessarily incurred in the voyage, the practice, therefore, deserves encouragement from the court. And why shall it not be encouraged? Is a seaman less a seaman, if he works the vessel, because he has some property; or because that property is an interest in the boat he navigates? Why is his lien as against other persons, less sacred than the lien of his fellow sailor, who has no such interest? Third persons know, as of course, that the vessel is bound for all seamen's wages. Why introduce an exceptional case? no policy of law, no motive of natural justice calling for it. The owners had liens inter sese. Doddington v. Hallet, 1 Ves. Sr. 497, decided by Lord Hardwicke, settled that. The chancellor there gave one party, who had paid the debts of the boat, a lien against the share of his deceased associate owner. The consequence of doing otherwise, he said, would be, that while one partner had paid all the creditors of the boat, other creditors of the other partner, "would run away with what the plaintiff laid out and expended, which the court would avoid and prevent." Independently, therefore, of a maritime lien for seamen's wages, Gallatin and Wood had liens on the vessel, as respected the other owners, for money due them in account for services. A sale of any kind for value, without notice, we may concede, would discharge such a lien; but here there was an express notice of a claim of lien: and the claimants still have their equity to be paid. In a recent Ohio case (McDonald v. Black, 20 Ohio, 198), the supreme court of that state were inclined to say, that the better opinion, as well as the weight of authority, was in favour of the lien. It is not true, that the libellants, Gallatin and Wood, were liable for all the debts incurred by the other owners of the ship. Persons navigating a ship, are tenants in common, and not joint-tenants or partners. This is the law as laid down by Chancellor Kent, in the leading case of Nicoll v. Mumford, 4 Johns. Ch. 522.

Reply. I. As to the lien inter sese. Doddington v. Hallet, decided by Lord Hardwicke, was overruled, after much consideration, in Ex parte Young, 2 Ves. & B. 242, and Ex parte Harrison, 2 Rose, 76 (and see Ex parte Gibson, 1 Mont. Partn. 102, note, and Ex parte Parry, 5 Ves. 575), by Lord Eldon; who decided that part-owners of a ship are tenants in common, not joint-tenants; and therefore that no lien on the share of one, a bankrupt, who had been managing-owner, freight, &c., was due to the others: and Chancellor Kent, in Nicoll v. Mumford, reviewing the law on this point, presents Lord Eldon's as the true view. Not being partners, therefore, there could be no lien inter sese. And if there was such a lien in law, it don't appear by any facts shown in this case, that on a settlement of joint account, the balance would have been in favor of the libellants. Whether or not, certainly a sheriff's sale on execution against all the owners, must discharge any lien one has against the other.

II. As to the absence of liability in solido. This position is fatal to the former

one of lien inter sese, which could arise only among partners. The doctrine of Ex parte Young and of Nicoll v. Mumford, decided by Lord Eldon and Chancellor Kent, and which establish tenancy in common, as distinct from joint-tenancy or partnership, overrules Doddington v. Hallet, which established lien inter sese only as a consequence of previously establishing that the owners are partners. The two positions assumed on the other side, cannot therefore co-exist.

III. But whatever may be the relation of the owners of vessels, strictly speaking, this boat was navigated for joint interest, and the debts arose from the transactions of the boat in these voyages. Certainly as to her voyages, the owners were partners, whatever they might have been as to the boat herself. In fact none of the points considered in the three cases cited, properly arise here; for the vessel was sold on an execution against all parties. The bare question is, whether the owners of a vessel can take her away from their own creditors? Whether, by mortgaging her to themselves, they can defeat the claims of those who are entitled to all their property?

GRIER, Circuit Justice. How far one owner might claim a lien against the share of another, for advances made, labour done, or any balance of account as between themselves, when the other partner sells his share, or becomes bankrupt; or whether, in such a case, this court will adopt the doctrine of Lord Hardwicke, Doddington v. Hallet, 1 Ves. Sr. 497, who decided that he has, or the doctrine of Lord Eldon, Ex parte Young, 2 Ves. & B. 242, who overruled Lord Hardwicke, and decided he has not, are questions not arising before me; for the accounts of the partnership, or how the balance stood among the partners, makes no part of the case.

A sale by the sheriff confers all the title which the defendants in the execution have, and is equivalent to their own deed with special warranty. The case then, presents this bare proposition—can a vendor for a consideration paid, retain a lien against property which he has thus sold and delivered, in the hands of his vendee: and that, too, for a debt due by himself to himself? Certainly he cannot; for where a chattel is sold and delivered to the vendee, the vendor has neither jus in re, nor ad rem; neither property in nor lien on the thing sold. Admitting that there was, as between the partners, a balance in favor of the libellants, and that it would have been a lien inter sese, how could we maintain such a lien on a boat sold by themselves with special warranty? A tailor who makes a coat for customers who furnish the cloth, has a lien upon the coat while in his possession, for the price of his labour: but assuming the lien to continue even after a change of possession, it would be an absurd application of the doctrine, to say, that where A. & B. are in partnership, and A. furnishes the cloth and B. makes the coat, and both join in a sale of the coat, that B. has a lien for his labour as a mechanic, on the joint property sold.

The assumption that part-owners, when navigating a boat for their joint interests, are not liable personally, or in solido, for repairs, wages, provisions, &c., furnished to the vessel while trading, or earning freight for their joint profit, is entirely without foundation in law. Fland. Shipp. § 381. The dictum of Chancellor Kent to the contrary, if he ever made one to the contrary, in Nicoll v. Mumford, 4 Johns. Ch. 522, has been overruled by the chancellor himself. The libellants, we think, therefore, cannot, to suit their purposes, shift their characters as mariners and owners, so as to retain a claim on their own vessel for their own wages, after they have sold it for value; or, what is the same thing, the sheriff has sold it for them. They cannot sell their joint property, and charge the purchaser with a balance of accounts between themselves as co-tenants or co-partners. Decree reversed, and now made in favor of defendants, with costs.

GALLATIN, The ALBERT. See Case No. 140.

Case No. 5,200.

GALLEGO v. CHEVALLIE.

[2 Brock. 285.] [1]

Circuit Court, D. Virginia. Nov. Term, 1826.

WILLS — CONSTRUCTION—ADVANCEMENT TO HUSBAND — LEGACY TO WIFE — PAROL EVIDENCE—RELINQUISHMENT OF HUSBAND'S RIGHTS TO LEGACY—SUIT IN EQUITY BY WIFE.

1. A court of equity will sustain the bill of a married woman, suing by her next friend, to recover a legacy bequeathed to her, where the husband has transferred all his marital rights in the legacy to his wife.

2. A legacy, until it is recovered, is a chose in action, and the marital right of the husband to his wife's legacy does not attach, until it is reduced into possession. He may, indeed, sue for it, and reduce it into possession, but so long as it continues a chose in action, it is the property of the wife.

[Cited in Percy v. Cockrill, 4 C. C. A. 73, 53 Fed. 881.]

[Cited in Wheeler v. Moore, 13 N. H. 482; Westervelt v. Gregg, 12 N. Y. 208.]

3. A relinquishment by the husband, of his marital right to a legacy bequeathed to his wife, is valid as to the creditors of the husband, and a court of equity will not interpose its authority to compel the husband to reduce the legacy into his possession, for the purpose of subjecting it to their claims.

4. Parol evidence is not admissible to affect the construction of a will, but it is admissible where its introduction is required by considerations extrinsic of the will, and which, necessarily, depend upon such evidence.

[1] [Reported by John W. Brockenbrough, Esq.]

5. Where the testator advanced money in his lifetime to a husband, whose wife was a relation, and would be, at his death, an heir and distributee of the testator, and directed that the husband should be debited with the amount, that it might be deducted, after the testator's death, "from the share coming to the family;" and the testator afterwards made his will, bequeathing a legacy to the wife: Non constat, that the testator designed that the advance made to the husband should be deducted from the legacy bequeathed to the wife. The whole legacy was decreed to be paid to the wife, without discounting the husband's debt.

[This was a bill in equity, brought by Manuela Grivignie Y. Gallego, wife of Henry Newman, by her next friend, against Peter J. Chevallie, surviving executor of Joseph Gallego, deceased.]

MARSHALL, Circuit Justice. The plaintiff, who resides in Spain, claims a legacy bequeathed to her by Joseph Gallego, deceased. The executor admits assets, and submits the question to the court, whether the plaintiff, as a married woman, can properly demand this legacy? The demand is supported by an instrument of writing, executed by the husband, in which he transfers all his marital rights in this legacy to his wife, and gives her full authority to receive it. Under these circumstances, the course of a court of equity is, to sustain the bill of a married woman, brought by her next friend, and to decree that the legacy shall be paid to herself. But, admitting her right to sue, the executor contends that her husband was indebted to his testator, and that this debt ought to be deducted from the legacy. He also says, that a creditor of the husband has attached a part of this money in his hands in the court of the state, and he submits it to the court to say, whether he is not bound to retain a sum sufficient to answer this demand?

This defence makes it necessary to inquire into the right of the husband to a legacy bequeathed to his wife, and into the rights of the creditors of the husband to such legacy. The common law of England identifies the wife so entirely with her husband, as scarcely to tolerate the idea of her separate existence while they live together. She cannot acquire personal property by a direct conveyance to herself. Her interest is, by act of law, almost in every instance, transferred to her husband, and becomes vested in her. But this rule does not apply to personal estate to which a female is entitled before marriage, and which has not been reduced to possession. This remains her property, and does not vest in the husband by the marriage. The marital right does not extend to the property while a chose in action, but enables the husband to reduce it to possession, and thereby acquire it. The property becomes his, not upon the marriage, but upon the fact of his obtaining possession. The right of the legatee does not originate in the common law, and is not governed by the old rule, which disables the wife from taking for her own benefit. It is a right which cannot be asserted at common law, and can be sustained only in a court of equity. The personal estate of the testator vests in the executor for the payment of debts, who is a trustee for the legatee, after the primary trust for creditors shall be satisfied. As courts of equity grew up under the control of civilians, they have adopted the principles of the civil law, which views the rights of married women with much more liberality than the common law. Legacies, therefore, bequeathed to a married woman, have never been classed with conveyances at common law, but with choses in action, and vest an equity in the wife herself, in which the husband participates, so far only, as to assert her title in a court of equity. The property does not become his, nor is it subject to the liabilities which attach to that which is his, until it shall be reduced to possession. Till then, his creditors have no claim to it. If he dies, living the wife, before reducing it to possession, his power is not transmissible to his representatives, but dies with him. Since the claim of the creditor extends only to the property of the debtor, it cannot reach a legacy until it becomes his property. It follows, then, not only because mere rights cannot be taken in execution without the aid of some special legislative provision, but because, also, there is no title in the husband to the thing itself, that a legacy not reduced to possession, is not liable for his debts. Can a court of equity subject it to them?

The books furnish no case in which this naked question has been brought before the court. This is, of itself, a strong, we think, conclusive argument, against the right. That a creditor has never applied to a court of chancery to interpose in his favour, and subject the choses in action, or the equitable rights of the wife, to his claim against the husband, demonstrates the universality of the opinion, that equity affords no aid in such a case. It is true, that the assignees of a bankrupt are permitted to assert this right. But it is equally true, that they represent the bankrupt, as well as his creditors, and that all the marital rights of the husband are transferred to them. When they come into a court of equity, asserting a claim on the equitable interests of the wife, they exercise the marital right to reduce those interests to possession, not any pre-existing right of the creditors. In such a case, the court grants its aid, on such conditions as its own rules prescribe, and will never permit the husband, or his assignees, to receive the property of the wife, but on such terms, on making out of it for herself and children such provision, as, on a view of all the circumstances of the case, may be deemed equitable. This uniform course of a court of equity, would be incompatible with a previously existing right in the creditors. This rule has never been recognized, so far as we

are informed, in the courts of Virginia, but it has never been denied, and we can conceive no principle on which it should be denied. That those who ask equity should do equity, is a fundamental rule of that court, which enters into, and mingles with, all its decisions; and that the property of a married woman should not be taken from her, without making some provision for her, is as equitable in Virginia, as elsewhere.[2] Our statute of distributions, does not, we think, alter the case, by making the husband a purchaser of equitable interests which may come to the wife during marriage. We can find no case in which a husband has been considered a purchaser of the equitable interests, or choses in action of the wife, without some specific agreement by which he becomes so; and the act of assembly contains no declaration to that effect. It would be unreasonable to put this construction on it by implication, because the consideration supposed to be given by law for her estate, remains in the power of the husband. The court of chancery will not enable a freeman of London [3] to obtain the personal estate of his wife, without a settlement on her. Suits have been brought to assert the marital right of reducing her property into possession, but in no case that we have seen, has her equitable right to a maintenance been doubted. Were this a suit by the husband and wife for her legacy, the court would, certainly on the application, in England, without such application, direct a reasonable provision for her maintenance. As the case stands, the husband has relinquished his marital rights in this subject, and the question is, whether a court of equity will disregard or control this relinquishment in favour of creditors. As a general question, we can find no precedent for doing so. The husband has no interest in the legacy; he has only a power to make it his by reducing it to possession. Till this power is exercised, the property remains hers. We can find no case, in which creditors have required the aid of the court, to compel the husband to reduce it to possession, or in which a court has restrained the effect of a previous relinquishment of this marital right on the part of the husband. As a general proposition, we should consider this relinquishment valid against creditors; and if it is not so on the present occasion, its invalidity must be produced by the particular circumstances of the case.

[2] The English books abound with cases establishing this rule of equity, and the principle has very generally been adopted in this country. See Ex parte Beresford, 1 Desaus. Eq. 263; Howard v. Moffatt, 2 Johns. Ch. 206; Glenn v. Fisher, 6 Johns. Ch. 33; Kenny v. Udall, 5 Johns. Ch. 464; Udell v. Kenney, 3 Cow. 606; Fabre v. Colden, 1 Paige, 166; Carter v. Carter, Id. 463; Mumford v. Murray, Id. 620; Smith v. Kane, 2 Paige, 303. This rule is adverted to and commented on by Green, J., in Gregory's Adm'r v. Marks' Adm'r, 1 Rand. (Va.) 372.

[3] Adams v. Peirce, 3 P. Wms. 11.

What are those circumstances? In August, 1814, Henry Newman, the husband of the plaintiff, drew bills on Joseph Gallego, the testator, for $2000, and at the same time, addressed a letter to him, soliciting his acceptance of them, and promising repayment. These bills, with the letter of Mr. Newman, were presented to Mr. Gallego, in Baltimore, in June, 1815, who accepted them, and made arrangements for their payment in Richmond. He communicated the transaction to Mr. Poiton, his partner in this place, in a letter which contains this sentence: "Be so good as to debit Mr. Henry Newman, senior, to notes payable, for the sake of form, and that the amount may appear against him or his heirs, when I am no more, to be deducted out of the share coming to the family." It also appears, that this debt was charged to Newman on the books of the testator, and remained on his books till his death. His will was made in the year, 1818. Some objection was made to the admission of the letter from Mr. Gallego to Mr. Poiton, the plaintiff considering it as irrelevant, since parol and extrinsic testimony, cannot affect the construction of a will. It is undoubtedly true, that this letter cannot affect the construction of the will, nor does the court look into it with that view. If it has any bearing on the question under consideration, it is on an entirely distinct part of it.

Although the legacy given to the wife does not become the property of the husband, unless reduced to possession, yet he has a right to reduce it to possession, and may demand the aid of a court of equity for that purpose, which aid will be furnished as of course, unless the court be restrained from affording it, by considerations which are never disregarded. These considerations are extrinsic of the will, and depend on parol testimony. Such testimony must be admitted for this purpose. In cases where the husband does not voluntarily relinquish his claim to a legacy bequeathed to his wife, but asserts that claim in equity, if a distinct claim be also asserted for the wife, the court does not, as a matter of course, settle the whole on the wife as her separate property, but secures the whole, or part of it to her, according to circumstances. Where, as in this case, the husband voluntarily relinquishes his marital rights, the court will, undoubtedly, sustain that relinquishment, unless it be made in fraud of the rights of others.

In this case, there is reason to believe, that the husband is insolvent, and that he has relinquished to his wife that she may receive and enjoy the legacy bequeathed to her, secured from his creditors. In this, there is no injustice; his creditors trusted to his own resources for payment of their claims, and had no right to count on the fortune of Mr Gallego. Creditors, generally, therefore, can not compel him to reduce the legacy of his wife to possession for their benefit: but the application of this rule to a creditor, who is

in rightful possession of the legacy, and has probably trusted the husband in the confidence that the means to secure repayment are in his own hands, is very much questioned. The relinquishment of the husband, and the consequent separate claim of the wife, may be considered as parts of the same transaction, and if the relinquishment was iniquitous, the claim, so far as it depends on that relinquishment, cannot be supported. If it was perfectly clear that the testator, at the time of making his will, or at the time of his death, intended this advance to the husband to be set off against the legacy to the wife, the court would feel great difficulty in disappointing such intention. But this is not perfectly clear; the debt is due from Newman, the legacy is given to his wife. The debt, therefore, may still exist, and yet not be a set-off against the legacy. Had the money been advanced subsequent to the date of the will, there would have been more reason for considering it as satisfaction in part for the legacy, but even then, it would not necessarily be so considered.[4] But this advance being made anterior to the will, gives countenance to the opinion that the testator did not intend it as a deduction from the legacy. The will being subsequent, and to a different person, furnishes probability to the opinion, that if a provision for the debt had been in the mind of the testator, his will would have given some indication of his intention respecting it. It is also a consideration not to be disregarded, that the fund out of which this legacy is to be paid, does not comprehend the debt due from Newman. The circumstances of the parties, and, indeed, the two letters introduced into the cause, lead to the opinion that the testator made frequent advances to his relations, and that this particular advance might not be in his mind, when his will was made.

The court does not perceive in the case, any satisfactory evidence that equity ought to restrain the full operation of the instrument by which Henry Newman relinquishes his marital right in this legacy to his wife, and is, therefore, of opinion, that it ought to be allowed its full effect.

NOTE. The decree rendered in this cause, directed the defendant, Chevallie, to pay to the plaintiff her legacy, without discounting therefrom the $2,000, due from the plaintiff's husband to the defendant's testator, but left open for future consideration the remaining question in the cause, whether the sum of $1,600, stated in the defendant's answer, to be attached in his hands to satisfy a debt due, or claimed to be due, from Newman, the plaintiff's husband, by process of foreign attachment, pending in the superior court of chancery in the state of Virginia, at Richmond, be, or be not, justly liable to such attachment for such debt? In January, 1829, the court of chancery at Richmond made a decree in favour of the plaintiff in the foreign attachment, above referred to, directing Chevallie, executor of Gallego, to pay him the whole amount of his claim out of the legacy to Mrs. Newman, thus affirming, as it seems, that a creditor of the husband may subject a legacy to the wife to the payment of his debt, before it has been reduced into possession by the husband. The chancellor seems, too, not to have regarded the act of relinquishment of Newman, the husband, as of any validity. At the May term of this court, 1829 [case unreported], (present, Marshall C. J., and Hay, J.,) the cause was finally disposed of, and a decree was rendered, which, after reciting the above decree of the chancellor in the state court, and that the plaintiff had admitted by her counsel that she had received the whole amount of her legacy, except the portion which had been attached in the hands of the executor, directed the plaintiff to dismiss her bill, which was done accordingly.

[4] 2 Atk. 516.

Case No. 5,201.

GALLEGO et al. v. UNITED STATES.

[1 Brock. 439.] [1]

Circuit Court, D. Virginia. May Term, 1820.

NONINTERCOURSE ACT — REMISSION OF FINE BY SECRETARY OF THE TREASURY—CONSTRUCTION.

1. The power conferred on the secretary of the treasury, by the act of congress of the 2d of January, 1813 [2 Stat. 789], to remit any fine incurred by any importer of goods, wares, and merchandise, from Great Britain, which were shipped between the 23d of June and the 23d of December, 1812, if it appeared to the satisfaction of the secretary, upon petition by the claimants, that the property was, bona fide, owned by a citizen or citizens of the United States, extended to the case of a joint interest, between citizens of the United States and Great Britain, and might rightfully be exercised in favour of such joint owners, being citizens of the United States.

2. The construction of that law, was the peculiar province of the secretary of the treasury. The duty of the court was, simply to institute an inquiry into the facts of the case, and to transmit a certified statement of them, with the petition, to the secretary; and the court, in which the prosecution originated, had no authority to revise the acts of the secretary, done in execution of it.

Appeal from the district court [of the United States for the district of Virginia].

The ship John and Adam, Thomas Drake, master, arrived in the port of Norfolk, in Virginia, on or about the 21st day of October, 1812, from the port of London, whence she sailed, early in the August preceding, with a cargo of British goods, wares, and merchandise. The ship and her cargo, were seized by the collector of the customs for the port of Norfolk, and on the 19th day of December, 1812, the attorney for the United States, filed a libel in the district court of Norfolk, against the said ship, her tackle, apparel, and furniture, and her cargo, reciting these facts, and praying the court to condemn them, as forfeited to the United States. The appellants, citizens of the United States, and merchants, carrying on trade at Richmond, Virginia, presented their petition to the district judge of the United States at Norfolk, stating, that they had, for several years past, had large transactions with John Gilliat of London; and that in November, 1811, a correspondence com-

[1] [Reported by John W. Brockenbrough, Esq.]

menced between them, for the importation of goods and merchandise, to be purchased by him in England, some on joint account, and some on the sole account of the petitioners, and shipped to the petitioners in Virginia, as soon as free intercourse between the two countries should be lawfully restored. That the said Gilliat subsequently purchased the goods and merchandise, composing the cargo of the John and Adam, but before the news of the declaration of war was received in England, and that the said goods were shipped, and did depart from the port of London, between the 23d day of June and the 23d day of December, 1812, in the John and Adam, for the port of Richmond, Virginia, and that John Gilliat, and the petitioners, were joint owners of her cargo: that the shipment of the said goods and merchandise, was nearly completed, before information of the war was received in England: that the said ship sailed from the Downs, on the 9th day August, 1812; and having arrived at the port of Norfolk, the ship and cargo was seized by the collector of the customs, and libelled by the attorney for the United States, in the district court of Norfolk, as forfeited to the United States, for an alleged breach of the laws, interdicting commercial intercourse between the United States and Great Britain: that process of monition and attachment had been issued in the said libel, by virtue whereof, the said goods and merchandise, had been attached and taken into the custody of the marshal, and had since been surrendered to the petitioners, upon giving bonds in the usual form for their appraised value, duties, &c.: that the petitioners conceived themselves entitled to the benefit of an act of congress, of the 2d of January, 1813, entitled "An act directing the secretary of the treasury to remit fines, forfeitures, and penalties in certain cases," and prayed that the judge would cause an inquiry to be made into the matters aforesaid, and that the facts as they appeared upon such inquiry, might be stated and annexed to the petition, and transmitted to the secretary of the treasury, to the end, that such relief might be extended to them, as the law in such case provided. In the statement of facts, transmitted by the district judge, to the secretary of the treasury, with the petition, it was certified, that the petitioners were citizens of the United States, that the goods, &c., composing the cargo of the John and Adam, at the time of their shipment at the port of London, were the joint property of the petitioners, and John Gilliat, and that the same were shipped, and did depart from the port of London, between the 30th day of July, and the 9th day of August, 1812, and that they were not purchased on account of the petitioners, and the said Gilliat, after war was known to exist between the United States and Great Britain. The secretary of the treasury directed the remission of the fines, &c. which had been incurred by the petitioners, upon their several shares thereof, or interest therein, upon payment of costs, charges, and duties. The district court of Norfolk, after reciting that the secretary of the treasury had decided to remit the forfeiture of the goods, so far only as related to the interest of Gallego, Richard & Co., on the motion of the attorney for the United States, directed the libel to be dismissed, as to the interest of the said firm, but inasmuch as the exact extent of that interest could not be otherwise ascertained by the court, ordered the parties to file with the clerk, the entire correspondence between themselves and Gilliat, touching the purchase, shipment, &c. of the goods in question, the invoice thereof, and a statement, verified by oath, showing in detail, what part of the goods, &c. were shipped on the sole account of Gallego, Richard & Co., and their respective interest, in those shipped on joint account. The appellants having failed to comply with this order, the court, at a subsequent term, set aside the order dismissing the libel, as to them, and decreed, ordered, and adjudged, that the whole cargo of the John and Adam be forfeited to the United States, as the property of John Gilliat, or some other person or persons, subjects of Great Britain, and as such, liable to forfeiture, and condemnation to the United States. From this decree [case unreported] Gallego, Richard & Co. appealed to this court.

MARSHALL, Circuit Judge. A complexion unfavourable to the appellants has been given to this case, by their refusing, or failing, when required, to exhibit to the district court, any testimony, whatever, establishing the extent of their interest in the cargo of the John and Adam. This conduct is well calculated to impress on the mind, a suspicion that their interest was, in truth, less than the moiety which they now claim. If, when at the time sentence of condemnation was pronounced, this inquiry was open for the district court, the judge had certainly a right to expect, and it was his duty to require, full satisfaction upon it. If that subject was closed, then no inquiry ought to have been instituted; and the sentence of condemnation ought to have extended to that part of the cargo only, which was not comprehended in the remission of forfeiture, made by the secretary of the treasury, in pursuance of the act of congress of the 2d of January, 1813,—2 Story, Laws, c. 149, p. 1283 [2 Stat. 789, c. 7],—the extent of which, in that view of the case, must be ascertained by the instrument itself. Upon examining the act of congress, I felt much doubt whether it applied to any case of a joint interest, between American citizens and British subjects. The case described by the act is, "goods, wares, and merchandise, owned by a citizen, or citizens of the United States"; not, "goods, &c. owned in whole, or in part

by a citizen." The act then speaks of the time of shipment, and adds—"and the person or persons, interested in such goods, &c., or concerned in the importation thereof, have incurred any fine, &c." "on such person or persons, petitioning for relief, &c." "in all such cases, wherein it shall be proved to his satisfaction, that said goods, wares, and merchandise, at the time of their shipment were, bona fide, owned by a citizen, or citizens of the United States, &c." the secretary of the treasury is directed to remit, &c. It might well be doubted, whether the power of the secretary of the treasury, is extended to any case where the specific articles are not wholly owned by citizens of the United States. But the language of the act is not free from ambiguity, and it refers to an act passed the 3d of March, 1797,—1 Story, Laws, c. 67, p. 458 [1 Stat. 506, c. 13],—which, in express terms, applies to any interest the petitioner may have. In construing the act, no reason can be perceived, for distinguishing between the interest of an American citizen, when joint and when sole; and it is an act intended for the protection of the citizen, which ought to be construed liberally, so as to effect that intention. In addition to these considerations, the act has already been construed by the district judges, I presume, from the proceedings in this case, and certainly by the treasury department, to embrace cases where American citizens are jointly concerned with British subjects. The construction put on the act by the department, entrusted with the power of remission, ought to be respected by the court. I shall, therefore, consider it as comprehending this case.

I am now to inquire, whether the secretary of the treasury has remitted any ascertained portion of the cargo of the John and Adam, or has remitted an undefined interest in that cargo, leaving it to the court to ascertain its extent. The act of 1813, directs the same proceedings on the petition of the party applying for relief, as are directed by the act of 1797. That act, directs the district judge, to inquire into the circumstances of the case, and to "cause the facts which shall appear on such inquiry, to be stated and annexed to the petition, and direct their transmission to the secretary of the treasury of the United States, who shall thereupon, have power to mitigate or remit," &c. By this act, the court is to put the secretary in possession of all the facts of the case, with the petition, before he exercises the power given him by congress. The act of 1813, enacts—"and on the facts being shown on inquiry had by such judge or court, stated and transmitted as by said act," (the act of 1797,) "is required; in all such cases, where it shall be proved to his satisfaction, &c."—"the secretary of the treasury is directed to remit all fines, penalties, and forfeitures, that may have been incurred," on certain conditions in the act expressed, and to direct the prosecution to cease. The legislature seems to have intended, that the act of the treasury department, should be final and conclusive, and that all the facts should be placed before him, before he performs that act. Those articles, the forfeiture of which is remitted, are of course restored to the proprietor. The prosecutions, if instituted, are to cease. It would seem to be a part, and an essential part, of the duty of the secretary, to define the articles on which this remission operates; or if it be only on a certain interest on those articles, to define that interest. If the statement of facts made by the court, did not enable the secretary to ascertain this interest, it would seem to be his duty, to require a more full statement; and the case should go back to him for a final decision. It seems to be a part of his duty, not only to say, that the forfeitures shall be remitted, but to define, with precision, the objects on which this remission shall operate. If this view of the law be correct, it would seem to follow, that the remission granted by the secretary of the treasury, ought to be construed to dispose entirely of the subject, if it can fairly be so construed. Let the remission itself, with the papers to which it refers, be considered, for the purpose of determining, whether it ascertains its own extent, or refers that point to the court.

The petition states an application on the part of the petitioners, to John Gilliat, a merchant of London, to ship goods, some on the sole account of the petitioners, and some on joint account; and that, in consequence of this application, the cargo in question was purchased, which the petition avers to have been the sole property of Gilliat, and the petitioners. The statement, transmitted by the judge with this petition, asserts, "that the said goods, wares, and merchandise, at the time of their shipment at the port of London, in the kingdom of Great Britain, were the joint property of the said Joseph Gallego, John Richard, Michael Benedict Poiteaux, and John Gilliat." The secretary of the treasury, after reciting this petition and statement, says: "and whereas, it has been proved to my satisfaction," (How proved? Certainly by the statement. The instrument refers to no other testimony, nor does the law authorize him to receive any other,) "that part of the goods, &c., were, bona fide, owned by citizens of the United States, &c.:" "Now, therefore, know ye, that I, &c., do hereby remit to the petitioners aforesaid, all the fines, &c., incurred as aforesaid, on their several shares thereof, or interest therein, upon the costs and charges," &c., being paid. "And do, also, direct the prosecution, or prosecutions, if any shall have been instituted for the recovery thereof, to cease on payment of the costs," &c.

There is nothing in the statement of facts, which shows any right in the petitioners, to any separate part of the cargo. The words,

therefore, "their several shares thereof, or interest therein," must refer to their individed shares or interests, not to any distinct property, they might possibly hold in severalty. The remission is to take place, not on their ascertainment of their interest or shares, but on their paying charges and duties; and the prosecutions are to be discontinued, not on their proving to the court, the extent of their interest, but on paying the costs. These circumstances, as well as the view I have taken of the duty of the treasury department, lead to the opinion, that the secretary considered the extent of the interest of the petitioners, as already established, and did not mean to institute a new inquiry into that subject. It was considered as established in the statement submitted to him by the court, which represents them to have been jointly concerned with Gilliat. Suppose the law to have required, that the prosecution should have been instituted in one court, and the petition and statement to have passed through another. Could the court in which the prosecutions were depending, have proceeded to an investigation of the extent of the interest of the petitioners, after receiving this instrument of dismission from the treasury department? I believe it could not, if by any construction, the statement of the district court, and the act of remission, could be understood to define the extent of the remission. The whole subject passes, it is true, through the same court; but that court is to exercise different powers, in different stages of the proceeding, All which relates to the property, is to be completed before the statement is submitted to the secretary of the treasury. The secretary acts on that statement, and his acts cannot be revised by the court. Sentence reversed as to a moiety.

GALLIER (ROBINSON v.). See Case No. 11,951.

Case No. 5,202.

In re GALLINGER.

[1 Sawy. 224;[1] 4 N. B. R. 729.]

District Court, D. California. July 18, 1870.

BANKRUPTCY—CREDITOR'S PETITION MAY BE AMENDED.

Where the proofs disclose acts of bankruptcy not averred in the petition of the creditor, the petition may be amended so as to conform to the proofs.

[In bankruptcy. In the matter of A. B. Gallinger.]

W. H. Rhodes, for petitioning creditor.

A. Rosenbaum, for alleged bankrupt.

HOFFMAN, District Judge. A petition having been filed against the above named party, praying that he be adjudged an involuntary bankrupt, the matter was referred to the register, to take proofs, and report the same, with his opinion, to the court. The report has accordingly been made, and the case now comes up on exceptions filed on behalf of the alleged bankrupt.

The facts, as disclosed by the proofs, seem sufficiently plain. Towards the end of the year 1868, Gallinger, who was a wholesale dealer in wines and liquors, in the town of Oroville, procured from various persons in this city, goods to the amount of $10,000. What representations he made as to his means of payment, does not appear; but he admits that he stated that he had $10,000 in notes due to him from Chinamen. He denies that he said they were good, but unless he meant it to be so understood, it is difficult to imagine his motive for making any statement on the subject.

Towards the end of December, he wrote to his creditors in this city that he was unable to meet his liabilities, and advised them to send to Oroville to collect what they could. His whole stock of goods remaining in his store at this time was worth only $4,000, including the furniture and fixtures. On the thirtieth or thirty-first of December, an attachment was levied, on behalf of Wurmser, one of his San Francisco creditors, on this stock. On the same day, at an earlier hour, an attachment had been levied on the same goods, for a small sum, at the suit of one Brock, a creditor in Oroville. At the solicitation of Brock, who admits that he was apprehensive that his lien might be defeated by proceedings in bankruptcy, he signed a paper which is not produced, but which authorized a judgment to be entered up against him at once and before the time for answering had expired or his default was due. The goods were subsequently sold under this judgment and that obtained by the San Francisco attaching creditor.

The only account given by Gallinger of the proceeds of the goods bought by him in San Francisco is, that he paid to one Kasel, $3,000; to Marks, about $1,000; to Raymond, about $1,750, and to other persons, from one to two hundred dollars. He also sold to Marks some book accounts, admitted to be good to the amount of $200. Both Kasel and Marks are brothers-in-law of the alleged bankrupt. He asserts that the debts due them were for money loaned. But these debts were not entered in his books. They were noted, as he says, in a memorandum book which he has lost. Nor is Marks able to produce the books in which the amounts loaned to Gallinger or paid by him are entered. The notes due from the Chinamen seem to be nearly worthless.

The respondent does not deny that he is now hopelessly insolvent, and he admits that his pecuniary condition has not altered since the time when he made the payments above referred to, and certain transfers or sales of real estate spoken of in his deposition.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

The facts of the case thus seem to be that he has converted into cash the greater part of the goods obtained by purchase in this city, and applied the proceeds to the payment of certain alleged debts due to creditors in Oroville, who were to a considerable extent his relatives. That at the time he made these payments he knew himself to be insolvent, and that he intended to protect them at the expense of his other creditors is, I think, apparent.

As far as can be ascertained, the payments were made in the months of October, November and December, and up to the very time of the attachments. He could not have failed to know what was the probability of his obtaining the payment by the Chinamen of the notes held by him, and which with his stock of goods comprised nearly the whole of his available assets; and when he devoted the proceeds of so large a part of his stock of goods, for which he was indebted to the amount of $10,000, less only the sum of $50 which he had paid, to the payment of the debts said to be due to his relatives and friends, he must have been aware that he was giving those creditors a preference in direct violation of the bankrupt act [of 1867 (14 Stat. 517)].

The attachment by Wurmser he admits that he not only suffered, but procured—for it was levied at his suggestion and in consequence of letters advising his San Francisco creditors of the state of his affairs. But this information he did not see fit to give them until after he had paid some $6,000 to his preferred creditors in Oroville. He denies that the attachment by Brock was procured by him.

If the word "suffer," in the thirty-ninth section, has any meaning or operation beyond that of the word "procure," it is clear that the bankrupt in this case suffered his property to be taken by Brock on legal process. In re Black [Case No. 1,457]; In re Craft [Id. 3,316]; In re Sutherland [Id. 13,638]; In re Dibblee [Id. 3,834]; In re Schick [Id. 12,455]; In re Haugton [Id. 6,223]; In re Craft [Id. 3,317].

But at all events the confession of the judgment by the bankrupt, when he knew himself to be insolvent, and with the intent to enable Brock to secure his debt, by converting his lien by attachment into a lien by judgment, execution and levy, and thereby obtain a preference over other creditors, was clearly an act falling within the terms and spirit of the bankrupt law.

The sale of book accounts to Marks would seem also to be an act of bankruptcy. It was not done in the ordinary course of business, but, as he says, to obtain money to pay debts—and this at a time when he knew himself to be insolvent. The money obtained from Marks he must have applied to the payment of creditors, whose claims he preferred and satisfied, in clear violation of law.

The facts, as developed by the proofs, were evidently imperfectly known to the creditor, by whom the petition was filed. I think, however, that the second and third specifications are sustained. If necessary, the petition may be amended; for it is the duty of the court, when acts of bankruptcy are clearly established, and especially in a case like this, where something more than a mere technical violation of the law may be suspected, to allow such amendments and further allegations to be made as may be necessary to sustain the proceedings.

The exceptions to the report of the register are overruled. The petitioning creditor has leave to amend his petition, by alleging further acts of bankruptcy, and on his doing so, an order, adjudging the respondent an involuntary bankrupt, may be entered.

Case No. 5,203.

In re GALLISON et al.

[2 Lowell, 72;[1] 5 N. B. R. 353.]

District Court, D. Massachusetts. Oct., 1871.

BANKRUPTCY—PROVABLE DEBT—JUDGMENT AFTER ADJUDICATION—EFFECT OF DISCHARGE—CONDITIONAL JUDGMENT—OPPOSITION TO DISCHARGE.

1. A creditor who obtains judgment for his debt after an adjudication of bankruptcy has issued against his debtor, and takes out execution, cannot prove his debt in bankruptcy; and the judgment will not be affected by the certificate of discharge.

[Cited in Bourne v. Maybin, Case No. 1,700; Re Stansfield, Id. 13,294; Re Swift, Id. 13,693.]

[Cited in Gilman v. Cate, 63 N. H. 280; Bowen v. Eichel, 91 Ind. 25; Boynton v. Ball, 105 Ill. 630.]

2. Such a creditor, therefore, cannot oppose the bankrupt's discharge. The decisions on this point considered.

3. Where a creditor prosecutes his suit merely for the purpose of ascertaining the amount due, he should cause that fact to appear of record, and the judgment should be modified to correspond with the fact.

4. Where such a creditor proved his debt, and afterwards obtained an unconditional judgment, and took out execution, and appeared to oppose the discharge, no one having moved to expunge his proof,—*Held*, he would be heard against the discharge on filing a stipulation to cancel his judgment if the discharge should be granted.

Objections to bankrupts' discharge. The debtors' petition was filed Dec. 31, 1867; and their application for discharge, Jan. 21, 1871; and was opposed by S. Klous & Co., creditors, who had proved their debt, and had afterwards obtained judgment and taken out execution in a suit which was pending at the time of the bankruptcy. There were assets.

E. Avery, for creditors.

J. M. Baker, for bankrupts.

LOWELL, District Judge. The creditors have not taken the ground that the applica-

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

tion for discharge should have been made within a year after the adjudication. The decision of Nelson, J., in Re Greenfield [Case No. 5,773], that the limit applies only to cases in which there are no assets, has been followed by me for the sake of uniformity of practice, until the circuit court here should pass upon the question, and has been accepted elsewhere; though as an original question its soundness is more than doubtful.

The debtors maintain that S. Klous & Co. are not interested in the question of their discharge; because they have obtained a judgment since the proceedings were begun, which will not be affected by the result. It has been one of the vexed questions of the law, whether a discharge in bankruptcy or insolvency will operate on a judgment obtained after the date to which the discharge relates, but before it is actually issued; that is, pending the bankrupt proceedings. In Maine and Massachusetts it has been held that the judgment merges the original debt, and cannot be proved in the bankruptcy, and will not be affected by the certificate. Holbrook v. Foss, 27 Me. 441; Fisher v. Foss, 30 Me. 459; Pike v. McDonald, 32 Me. 418; Sampson v. Clark, 2 Cush. 173; Woodbury v. Perkins, 5 Cush. 86; Faxon v. Baxter, 11 Cush. 35. See Wolcott v. Hodge, 15 Gray, 547.

On the other hand, in New York and Vermont the decision has been, that the judgment may be looked into; and, if it is found that the debt was one that would be discharged, the judgment will be barred. Harrington v. McNaughton, 20 Vt. 293; Downer v. Rowell, 26 Vt. 397; Dresser v. Brooks, 3 Barb. 429; Fox v. Woodruff, 9 Barb. 498; Clark v. Rowling, 3 N. Y. 216. A similar difference of opinion has already appeared in connection with the act of 1867 [14 Stat. 517]. In re Williams [Case No. 17,705]; Bradford v. Rice, 102 Mass. 472; In re Brown [Case No. 1,975]; In re Crawford [Id. 3,363].

The argument for the side which the defendant assumes in this case appears to me much the stronger. It is not only the technical doctrine of merger which is involved, but the defendant has had his day in court and one opportunity to plead this defence; and I take it to be a rule of the highest importance, that a defence which might have been made to the original cause of action can never be made to the judgment. Now, the bankrupt act provides most carefully for a stay of suit until the defendant's discharge is passed upon; giving, by fair implication, a power to the district court even to enjoin actions in the state courts, contrary to the general practice. All this is for the very purpose of enabling the bankrupt to plead his discharge. If he does not choose to avail himself of this right, what possible ground is there for saying that the judgment shall not bind him? Are we to inquire in each case why his plea was not set up, or why it was overruled? It may be that the state court was of opinion that the discharge, if granted, would be no bar. We cannot impeach their decision collaterally. It may be that the bankrupt intended not to set up the discharge against this creditor. We cannot authorize him to reconsider this determination. It may be that he was surprised. If there were any failure of justice in the particular case, the remedy must of course be found with the tribunals of the same jurisdiction. Until they have reversed or set aside the judgment, it operates as a new contract; and cannot be barred by a discharge which distinctly relates, as does this, to a date two years earlier

Coming to the decisions, we find that the two leading cases in New York both contain dissenting opinions of great ability, by Allen, J., in 3 Barb. 429, and Bronson, J., in 3 N. Y. 216, besides decisions and dicta of inferior courts of that state, against the doctrine finally established there. I consider these dissenting opinions well worthy of examination, and refer to them as able statements of what I consider the true doctrine; and they cannot but weaken the force of these authorities. But the conflict is really explained by the difference of practice in the several states. In Massachusetts, the bankrupt could always obtain a continuance to enable him to plead his discharge; while in New York he could not. This difference is pointed out in Haggerty v. Amory, 7 Allen, 458; and is confirmed by the remarks of the learned judge who delivered the opinion of the court in 3 N. Y. 224, where, in commenting on a remark of the chancellor at 11 Paige, 535, that the defendant ought to have pleaded his discharge at law, he says: "And this may be conceded where the defendant has an opportunity for that purpose, which was not the case of the defendants in this suit." In consideration of this concession, it may well be doubted whether the decision would have been the same under a law which gives the most ample "opportunity for that purpose," as ours does.

In truth, this is the source of the whole difficulty. It is seen to be unjust that a creditor should push his debt to judgment against a bankrupt who is using due diligence to obtain his discharge, and who has surrendered all his property. The early English practice gave the creditor an election to prove in bankruptcy or prosecute his action; and, if he obtained judgment and execution, he could dispute the validity of the proceedings in bankruptcy, by seizing the property in the hands of the assignees,—a practice which led to a vast amount of litigation and uncertainty. He might, instead of seizing property, take the debtor in execution. But it was enacted, as early as 1730, that, if a creditor did obtain such a judgment and take the debtor in execution, or detain him in prison, after he had received his certificate, he should be discharged on

motion. St. 5 Geo. II. c. 30, § 13. And this was continued in force until 1869. The English practice has had an undue weight in some of the decisions in this country. See the arguments in Dresser v. Brooks, 3 Barb. 429. The law was so in England; but it was the statute itself which provided for the case, and not any general rule in bankruptcy. It is easy to see, by studying the English cases, that this practice was established by statute to meet the very difficulty which our statute meets by granting a stay of actions until the question of discharge is determined. The statute of 1869 will work an entire change of the practice in England, and bring it to the true position. It gives the court of bankruptcy full power to stay actions; and no summary motion will hereafter be made, nor any judgment be obtained in that country, excepting such as will not be discharged by the certificate.

By our law—section 21 (Rev. St. § 5106)—an action may, by leave of the court in bankruptcy, proceed to judgment for the purpose of ascertaining the amount due; and that judgment may then be proved, but execution shall be stayed. This exception strengthens the argument for the general rule; because it implies that an ordinary judgment, procured after the proceedings in bankruptcy are begun, cannot be proved in the bankruptcy. It is clearly the intent of the proviso, that it should appear of record that the suit is prosecuted only for the particular purpose of establishing the amount of the debt, and that the court in which the suit is pending should modify its judgment as may be necessary to meet this state of facts, and should take care that no execution shall issue; and, if the discharge should afterwards be granted, that court ought undoubtedly to vacate or discharge the judgment in some proper way, and I hold it to be the duty of the creditor to see that the record is rightly made up. This provision is useless if an ordinary judgment, not obtained by virtue of this proviso, can be proved in the bankruptcy. The objecting creditor here did not apply for leave to prosecute; did not record the fact that he intended to prove his judgment; did not stay his execution, but took it out, and now holds and intends to enforce it. It was argued in his behalf that the superior court may yet set it aside. But he cannot be heard to set up this possibility, when he himself is still relying on the judgment, which was obtained by his own act, and the validity of which he intends to maintain if he can.

For the reasons given and upon a careful examination of the decisions, I am of opinion that a judgment obtained after the adjudication in bankruptcy, creates a new debt which cannot be proved in bankruptcy; and that the judgment creditor cannot oppose the discharge, because he has no provable debt, and because the discharge will be no bar to the judgment.

These creditors proved their debt before they obtained the judgment, and have a standing in court which no one has undertaken to destroy by a motion to expunge. I hold it, therefore, within my power to say that they may keep their proof if they will file a stipulation to release their judgment, in case the final decision in bankruptcy should grant the bankrupt his discharge. This will meet the exact justice as well as the law of this case. If they shall do this within a week, I will hear the case further. If not, the objections will be dismissed.

Order accordingly.

GALLOWAY (ALEXANDER v.). See Case No. 167.

GALLOWAY (BANK OF COLUMBIA v.). See Case No. 868.

GALLOWAY (BARR v.). See Case No. 1,037.

GALLOWAY (BRADBURY v.). See Case No. 1,764.

GALLOWAY (BROWN v.). See Case No. 2,006.

Case No. 5,204.

The GALLOWAY C. MORRIS.

[2 Abb. U. S. 164; [1] 7 Phila. 572; 3 Am. Law T. Rep. U. S. Cts. 137; 27 Leg. Int. 204; 2 Leg. Gaz. 201.]

Circuit Court, E. D. Pennsylvania. June 20, 1870.

MERCHANT SEAMEN—LIEN FOR WAGES—"STALE."

1. A seaman claiming a certain sum for wages due him, was refused payment of a portion of it, unless he would sign a receipt in full against the schooner and her owners, and look to the captain for the balance. *Held*, that his receipt, signed under such circumstances, was good only for the sum actually paid.

[Cited in The Montauk, Case No. 9,717; The Sirocco, 7 Fed. 600; The International, 30 Fed. 376; The L. L. Lamb, 31 Fed. 34.]

2. Where there has been no change of ownership in a vessel, forbearance by a seaman to enforce his lien on it for wages due, until after twenty-one months' continuous service, does not render his claim stale.

[Cited in Southard v. Brady, 36 Fed. 561.]

3. What is a stale claim,—considered.

Appeal from a decree of the district court [of the United States for the Eastern district of Pennsylvania.]

In admiralty.

J. W. Coulston, for appellant.

R. P. Kane, for respondent.

McKENNAN, Circuit Judge. By the settled principles of maritime law, mariners' wages are secured by a specific lien upon the ship and freight, and by the personal liability of the master and of the owner. Priority is given over all other liens, and they are treated with the most liberal favor. In The Mary [Case No. 9,186], Livingston, J., says:

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

"Few claims are more highly favored and protected by law than those for seamen's wages. They are hardly earned, and liable to many contingencies, by which they may be entirely lost, without any fault on their part. When they become due, the vessel, owners, and master, are generally all responsible until satisfaction be obtained. The liability of a vessel for wages may be considered as the law of every commercial nation." They take precedence of bottomry bonds, and in the language of Sir William Scott, they are "sacred liens, and as long as a plank remains, the sailor is entitled as against all other persons to the proceeds as a security for his wages."

These are familiar principles of maritime law, and they are restated here only to indicate the footing of preference, on which claims like the one in suit are placed, and the indulgent liberality with which courts ought to deal with them.

The libelant in this case has proceeded in rem against the schooner Galloway C. Morris, to recover his wages, as cook and steward, during several coastwise voyages, beginning about January 28, 1868, and ending October 28, 1869, which were prosecuted under William Artis, as master. His service was continuous during the whole of the period within these dates, but he now claims his stipulated compensation for the time only when Artis was in command, allowing credit for different payments made to him.

The amount of his claim is but feebly contested, but his recovery is resisted on two grounds:—1. That he agreed to release the vessel and its owners, and look to the master alone for his compensation. 2. That his claim is stale, and its lien upon the vessel has therefore been lost.

Of the first defense, it is sufficient to say that it is without any foothold by which it can stand. It rests upon the assumed effect of a receipt given by the libelant to John Clendeniel, the ship's husband, on September 7, 1869. He was then entitled to forty-two dollars and fifty cents for current service on a single trip of the vessel, and although he then asserted his claim to a larger sum for arrears of wages, he was refused payment for what was confessedly due him, unless he "would sign a receipt in full against the schooner and her owners, and look to Captain Artis for the balance." Under such circumstances the receipt is good only for the sum actually paid to the libelant. A court of justice will not sanction or enforce a concession which has no other consideration than a refusal to pay a debt confessedly just and owing.

The second ground has been more earnestly pressed, and therefore demands a fuller notice. Staleness is not susceptible of a precise definition of uniform application. It is predicable of the peculiar circumstances of each particular case. It does not operate to discharge the debt, but to deny to the creditor the enforcement of some security or form of liability, which the law holds him to have lost by laches. Simple forbearance does not constitute it; but the reason on which it rests is, that the creditor has unreasonably delayed the collection of his debt, so that some special equity or interest would be injuriously affected by the allowance of his claim. Hence it is, that it has been generally, if not always, interposed to protect a purchaser of a vessel, or a person having a like equity, against the lien of debts previously existing, the collection of which had been so long delayed as to justify a presumption that they had been paid, or at least, that the privileged hypothecation of the vessel for their security had been waived. "If a claim of this kind be not seasonably prosecuted, and the vessel become the property of another for a fair consideration and without notice, it seems reasonable that those who have been negligent should suffer, and not an innocent purchaser. Some rule of this kind appears the more necessary in a case where it is so difficult, if not impossible, to ascertain either the existence or the extent of demands of this nature. But however reasonable such a rule may appear, none has yet been adopted, either in England or this country, which requires a seaman to assert his lien in any given time, or which will justify the court in saying, that if he does not proceed by libel the very first opportunity which is afforded him, he shall forfeit all right of obtaining satisfaction in that way, unless the vessel shall still belong to the same person." The Mary [supra]. And in The Bolivar [Case No. 1,609], Judge Betts says: "By the marine law there is no fixed period of time within which mariners must proceed to enforce their lien for wages; yet such lien will become extinct or barred by unreasonable delay, if the vessel passes into the hands of a bona fide purchaser ignorant of such a claim." 3 Kent, Comm. 196. Judge Ware remarks: "It is not doubted that a seaman may lose his lien by lying by for a length of time, and suffering the vessel to be sold to a person ignorant of his claim, without giving him notice." The Eastern Star [Case No. 4,254].

It is certainly in harmony with the doctrine of all the cases referred to, to hold that, in a case when the ownership of the vessel has not been changed, and no appreciable injury has resulted to the owner, forbearance by a seaman to demand and collect his wages, will not be attended by a loss of his specific remedy against the vessel.

In this case the beginning of the service for which the libelant seeks compensation, is not more than about twenty-one months before the filing of his libel, November 2, 1869, and this service was rendered in different voyages along the coast of the United States, down to October 28, 1869, when he was discharged. The ownership of the vessel was substantially unchanged, and

nearly every one of the libelant's voyages was begun or ended at Philadelphia, where the ship's husband and most of her owners resided, and the ship's papers were easily accessible to any of them. We are unable, under such circumstances, to say that the owners have any equity, which ought to subject the libelant to a forfeiture of his lien upon the vessel, and to the probable loss of his just wages, by reason of his pecuniary inability to pursue another remedy for them.

It is urged, however, that the ship was sailed on shares, and that the libelant's forbearance has operated injuriously to the owners. It is too well settled to admit of controversy, that the lien of seamen for their wages is not affected by a contract between the master and owners in reference to the sailing of the vessel. The Canton [Case No. 2,388]; Skolfield v. Potter [Id. 12,925]. The only aspect in which such a contract can be considered here, is as a reason for requiring greater promptitude on the part of the seaman in prosecuting his claim for wages, than it might otherwise be his duty to observe. Where, however, the owners had frequent opportunities, by examination of the ship's muniments, to ascertain the posture of the libelant's claim; where demand was actually made upon them for its payment a month before his discharge; where it does not appear that any settlement with the master, upon the supposition that these wages had been paid, was made, it is difficult to see how, in any aspect, such a contract can be used to affect the libelant.

In our judgment, the libelant is entitled to recover his wages, as stated in the schedule exhibited with his libel, to wit, five hundred and forty-nine dollars and seventeen cents, with interest from the filing thereof, and with his costs to be taxed, and a decree will accordingly be entered therefor.

Case No. 5,205.

GALPIN v. PAGE.

[1 Sawy. 309.] [1]

Circuit Court, D. California. Sept. 13, 1870.[2]

JUDGMENT SALE VALID, THOUGH JUDGMENT REVERSED—JURISDICTION OF SUPERIOR COURTS PRESUMED—RECORD SILENT — RECITAL CONCLUSIVE —SERVICE BY PUBLICATION—CONSOLIDATED ACTIONS—JURISDICTION—EXECUTION BEFORE JUDGMENT ROLL MADE UP— DECREE IN ABSENCE OF INDISPENSABLE PARTIES.

1. A sale of lands regularly made under a judgment of a court of record, valid upon its face, is valid; and a subsequent reversal of the judgment, on appeal, will not defeat the title acquired by a stranger through such sale.

2. On a collateral attack upon a judgment of a superior court, the court will be conclusively presumed to have acquired jurisdiction, unless the record, on its face, affirmatively shows a want of jurisdiction.

3. If the record of a superior court is silent as to the proof of a jurisdictional fact, on a collateral attack, due proof of the fact will be presumed in support of the judgment.

4. The recital of a jurisdictional fact, there being nothing to the contrary in the record, is conclusive evidence, in a collateral proceeding, of the determination of the fact upon sufficient evidence, although the evidence does not appear in the record.

5. Where the statute authorizes service of a summons issued by a court of record, to be made with respect to a specific subject matter, by publication, the court issuing the summons has jurisdiction to determine the fact, whether the service has been properly made; and the determination is conclusive, when collaterally brought into question.

6. Where two actions are consolidated, in one of which the court has jurisdiction of all the parties, and the action in which the court has acquired jurisdiction, requires precisely the same decree and sale as is entered in the consolidated action; the decree and sale thereunder will be valid, as a decree and sale in the action in which the court has acquired jurisdiction, although the court failed to acquire jurisdiction in the other action.

7. Under the practice act of the state of California, an execution may be issued and executed as soon as the judgment is entered, and before the judgment roll is actually made up.

[Cited in Blaisdell v. Pray, 68 Me. 273.]

8. When a court proceeds to a decree, in the absence of an indispensable party, without objection from any source, and the decree is not reversed or set aside, and a sale of real estate is had under the decree, whether said decree and sale is valid as to the parties before the court, discussed, but not decided.

[This was an action of ejectment by Philip G. Galpin against Lucy B. Page.] A jury having been waived, the cause was tried by the court. The following facts necessary to understand the points decided, are condensed from the findings filed by the court:

Franklin C. Gray died intestate in the city of New York, July 15, 1853, seized of the lands in question, leaving a widow, Matilda C. Gray, who, subsequently, gave birth to a female child, Franklina C. Gray, the lawful issue of said Franklin. The said Matilda C. and Franklina C. Gray, under the statutes of California, were the heirs at law of the said Franklin, and, as such, succeeded by inheritance to the interest of said decedent in said premises. The said Matilda C., and Franklina C. Gray have always been citizens and residents of the state of New York, having never been in the state of California. On February 15, 1854, William H. Gray commenced a suit in the Fourth district court for the state of California, by filing therein a complaint against Cornelius J. Eaton and Joseph C. Palmer, as administrators of said Franklin C. Gray, deceased, and the said Eaton, individually, as claiming some interest in his own right in the estate of said deceased, and said Matilda C., widow, and James Gray, father, of said Franklin, as his heirs at law, in which com-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

[2] [Reversed in 18 Wall. (85 U. S.) 350.]

plaint he alleged a partnership between himself and the said Franklin, during the life time, and at the time of the decease of the latter, the former having one third, and the latter two thirds interest therein; that said partnership embraced all transactions of said Franklin, both commercial and in real estate; that the business was carried on in the name of said Franklin alone, and all property, real and personal, was bought and sold in his name, but that all property, real and personal, a schedule of which is annexed to the complaint, including the locus in quo standing in the name of said Franklin, at the time of his decease, was partnership property, and held in trust for said firm. He prayed that the property might be adjudged to be partnership property; that an account might be taken, the affairs of the firm settled up, and that one third of the proceeds of the partnership property be adjudged to him, and the whole partitioned between the said William H. Gray, and the defendants, according to their respective interests. On June 27, 1854, said William H. Gray, complainant, filed a supplemental complaint, in which he alleges the birth of the said Franklina C. since the commencement of the action; that she is entitled to share in the estate as heir at law; and that she resides with her mother at Brooklyn, N. Y. He prays that she be made a party, that a guardian ad litem be appointed, that service by publication of summons may be had in pursuance of the statute of the state of California, upon said Matilda C. and Franklina C., and for the same relief prayed in the original complaint. An order for publication was made, as to both mother and child, and that a copy of the summons and complaint be sent through the post office addressed to said infant, care of her mother at Brooklyn, N. Y. The publication was made, and the copy of complaint and summons sent to said defendants Matilda C. and infant, Franklina C. as prescribed by the statute, and said order of the court. October 9, 1854, said defendant, Matilda C., by her attorney, Henry S. Foote, appeared, and filed her answer in said cause. December 16, 1854, complainant, William H. Gray, filed his petition, stating the infancy and non-residence of said Franklina C., that due service of summons had been made by publication, and asking the appointment of a guardian ad litem in pursuance of the statute on the subject. On the same day the court regularly appointed said Henry S. Foote, the attorney of defendant, Matilda C., as guardian ad litem of said infant defendant, Franklina C. The said H. S. Foote, as guardian ad litem, of said infant, filed January 2, 1855, an answer on her behalf, denying all the allegations of the complaint. The said administrators, Eaton and Palmer, having been duly served, also appeared, and filed their answers as such administrators, denying the allegations of the complaint. The said Cornelius J. Eaton, also, on his own behalf, answered, denying the allegations of the complaint, and denying that the schedule annexed was a true statement of the property. He then, as new matter, entitling him, in his individual character to affirmative relief, alleged on his own behalf, that he was a partner with the said Franklin C. Gray in his life time, and, at the time of his decease, and that all the property was partnership property; that since the decease of said Franklin, he had been in possession of the same, both as surviving partner and as administrator; and that he had other demands against said Franklin. He annexes a schedule of the partnership property, also, including the locus in quo, and prays that he may be adjudged a partner, that an account be had, the partnership affairs settled, and a partition made.

The issues of fact on plaintiff's complaint in this action, were tried on the days from the sixteenth to the twentieth of January, 1855, inclusive, the said infant defendant appearing by her said guardian ad litem, H. S. Foote, and all other defendants by their counsel, and a general and special verdict on the issues was returned in favor of complainant, William H. Gray. A motion for a new trial was made and denied, and, an appeal from the order denying the motion having been taken to the supreme court, the appeal was dismissed October 1, 1855. No judgment was entered on said verdict till after the following proceedings were had. April 14, 1855, the said Cornelius J. Eaton commenced a suit in his own behalf in the same court, against said Joseph C. Palmer, as administrator, and said Matilda C. and Franklina C. Gray, as heirs at law of said Franklin C. Gray, by filing a complaint in which he alleged a partnership, etc., substantially the same as in his individual answer, setting up an affirmative cause of action, filed in the said suit of William H. Gray v. Eaton et al., before mentioned. He sets up a claim to one-fourth interest as partner with said Franklin C., in all the property held by said Gray at the time of his decease, annexing a schedule thereof including said premises. He alleges the heirship of said Matilda C. and Franklina C.; the infancy of the latter, and prays that a guardian ad litem may be appointed for her; that he be adjudged a partner; that an account and settlement of the partnership affairs may be had, and the assets partitioned, etc. He afterward amended the complaint, making said William H. Gray a party defendant, alleging that he claims some interest in the partnership property. April 16, 1855, a summons was duly issued in said cause. Afterward an affidavit of the book-keeper in the office of the San Francisco Herald was filed, showing a publication of summons for three months in the said San Francisco Herald, but there are not now found in the record, or on the files, of this action, any affidavit for an order of

publication of summons, nor any order for service by publication, or any affidavit showing a deposit in the post office of any copy of the summons and complaint addressed to said Franklina C. or her mother, the said Matilda C. Gray, at their place of abode. Upon filing the said affidavit of publication of summons in the Herald, September 3, 1855, said complainant filed a petition praying the appointment of said Henry S. Foote as guardian ad litem, and a consent of said Foote to act. The petition states the proper facts, and among others, "that the service of summons in the said action upon the said infant defendant has been completed upwards of ten days," and, thereupon, on the same day, the court made an order with the proper recitals, appointing said Foote guardian ad litem for said infant, and in said order, it is among other things recited, that it appears to the court "that the service of the summons in said action upon her" (said Franklina C. Gray) "has been completed upwards of ten days." Conceding the service of summons to have been properly made, this order was regularly made. September 15, 1855, said Foote, as guardian ad litem of said infant, filed an answer, denying all the allegations of the complaint. The said defendant, Matilda C. Gray, mother of said infant, also, by her attorney, the said Henry S. Foote, appeared and filed her answer, also denying the allegations of the complaint. The said Palmer, administrator, and said William H. Gray, also, filed similar answers.

On October 23, 1855, all the said parties in the said two actions, other than said infant, by their attorneys of record, and the said infant by the said Foote, as guardian ad litem, filed a stipulation in writing, duly signed by said attorneys and guardian ad litem, to consolidate said two actions into one. On October 27, 1855, the court made, signed, and filed in said consolidated actions, a judgment or decree, in which it was adjudged that said Franklin C. Gray, deceased, and Cornelius J. Eaton, were partners in business from January 1, 1851, till the decease of said Franklin in 1853, and that said partnership embraced all the property, real and personal, of said parties; and each of them, the said Franklin C. having three fourths, and said Cornelius J. Eaton one fourth interest therein, and adjudging to said Eaton one fourth interest; also, adjudging that there was a like partnership existing between the said Franklin C. and William H. Gray, but that said last partnership was subject and subordinate to said partnership between said Eaton and said Franklin C. Gray; that is to say, that said Franklin C. and William H. Gray were partners in the three fourths interest in the said partnership of said Franklin C. Gray and Cornelius J. Eaton, held in the name of said Franklin C., the said William H. Gray holding one third and the said Franklin C. two-thirds of said three fourths interest in said partnership between said Eaton and Gray, and adjudging such interest to said William H. Gray; also adjudging that said Matilda C. and Franklina C. Gray were each entitled to one half the interest which said Franklin C. would have if living. The judgment or decree ordered an account to be taken and stated, and appointed a commissioner to state the accounts of the said partners and to make sales of the property, real and personal, in pursuance of the directions of the judgment, or of any further judgment or order that might be made by the court. On March 25, 1856, the commissioner made a report, stating the several accounts and showing the partnership property on hand, real and personal, which included the premises in question. April 7, 1856, the court entered an order confirming said report, and directing a further judgment or decree to be entered in pursuance therewith. On the same day the court made, signed and filed in said consolidated action a further and final judgment or decree in pursuance of said order, in which, among other things, the commissioner before appointed was directed to proceed and sell said partnership property, in pursuance of the directions in the said prior judgment, receive the proceeds, and pay over portions of the proceeds and divide the remainder in a specified manner. The said judgment so signed and filed was regularly entered in the judgment book of said court as required by the statute. Afterward, May 3, 1856, the said commissioner in pursuance of the direction of said two judgments or decrees, after duly advertising the sale, sold the said real property, as directed by said two judgments, or decrees, including the premises in question. The commissioner having reported the said sale, the same was confirmed by the court, May 14, 1856. The premises in question were sold at their full value, and conveyed by said commissioner to Gwyn Page, and the title thus acquired has become vested in the defendant, Lucy B. Page. At the time of said sale, the said commissioner, for the purposes of said sale had in his possession the said original final judgment made and filed April 7, 1856, also, a certified copy thereof. He inadvertently failed to return said original to the files of the court, but retained it in his possession for nine years thereafter, when it was found and returned to the files, but the judgment had been duly entered, and was of record in the judgment book, as required by statute. The clerk neglected to attach together the proper papers and make up the judgment roll in said consolidated action as prescribed by the statute, till November 24, 1856, long after said sale, and at the time of making up said roll at said last named date, the said original judgment, made and filed on the said 7th of April, 1856, was in the possession of said commissioner, and not in the custody of said clerk, and was, consequently, not at-

tached to said roll. No other evidence of a due service, or want of service of summons on said infant defendant in said case of Eaton v. Palmer et al., is now found in the record or the files of the case, than is hereinbefore, and in the opinion of the court stated. Subsequent to said sale and conveyance, an appeal to the supreme court of California from said decrees in said consolidated actions of Gray v. Eaton & Palmer, Administrators, et al., and Eaton v. Palmer, Administrator, et al., was taken by said defendants, Matilda C. and Franklina C. Gray, and upon said appeal, at the April term, 1858 [9 Cal. 616], the judgment, or decree in said cause of Eaton v. Palmer et al. was reversed, so far as it affected the rights of said infant defendant, Franklina C. Gray, on the ground that there had been no sufficient service of summons, but not reversed, as to the other parties, and as to the other action of Gray v. Eaton, Palmer et al., the judgment was reversed, as to both the defendants Matilda C. and Franklina C. Gray, on the ground of insufficiency of evidence to justify it, and the cause remanded for further proceedings.

The statute in force at the time when the actions were commenced, and the decree or judgment rendered, by virtue of which the premises were sold, provided for service on non-resident defendants as follows, to-wit:

"When the person on whom the service is to be made resides out of the state, * * * and the fact shall appear by affidavit, to the satisfaction of the court, or a judge thereof, or a county judge, and it shall, in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons.

"The order shall direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least, once a week; provided, that publication against a defendant residing out of the state, * * * shall not be less than three months. In case of publication where the residence of a non-resident * * * is known, the court or judge shall, also, direct a copy of the summons and complaint to be forthwith deposited in the post-office directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the state, shall be equivalent to publication and deposit in the post-office.

"In either case, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

"Proof of the service of the summons shall be as follows. In case of publication the affidavit of the printer or his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited."

The plaintiff has acquired such title as Matilda C. and Franklina C. Gray had to the premises in controversy, after the sale and conveyance made under said judgment, and the defendant has the title derived under said sale. The other facts necessary to comprehend the points decided are stated in the opinion.

J. B. Harmon, for plaintiff.

Williams & Thornton, for defendant.

SAWYER, Circuit Judge. If the decree, or "judgment," as the statute of California terms it, in the consolidated actions of Gray v. Eaton, Palmer et al., was upon its face a valid decree or judgment, and if it authorized the sale under which defendant claims, at the time it was made, the sale is valid, and it passed the title; and the subsequent reversal of the decree by the supreme court of California on appeal, did not invalidate the title thus acquired, while the decree was in force. This is settled by the case of Gray v. Brignardello, 1 Wall. [68 U. S.] 633-637, in which this identical sale was under consideration. The question, then, is, was there a valid decree, or judgment, authorizing the sale in force at the time the said sale was made?

By some oversight, in the case of Gray v. Brignardello, only the interlocutory decree of the 27th of October, 1855, was introduced in evidence, and the supreme court, finding only this decree in the record, necessarily assumed that there was no other, and held that this decree, being interlocutory, only, did not authorize a sale. The sale was held to be void on the ground that there had been no final decree entered authorizing it. In the present case, as shown by the findings, it appears, that the commissioner on the 25th of March, 1856, made his report as required by the said interlocutory decree of October 27, 1855; that his report was duly confirmed, and a final decree in accordance therewith directed by order of the court, on the 7th of April, 1856, and on the same day, in pursuance of such order, a final decree was drawn up, signed by the judge, filed in the case, and afterward duly entered in the judgment book; and that the commissioner had the original decree so signed and filed, in his possession for the purposes of the sale, at the time of making said sale. The said decree of the 7th of April, 1856, in terms empowers the commissioner to sell. If these several decrees were valid, at the time of the sale, the sale under them is valid, and the title to the property has passed to the defendant, Lucy B. Page. Although the same title is in question, the ground upon which Gray v. Brignardello was reversed, is obviated in this case, by the introduction of the

decree therein omitted, and the decision must depend upon other points not determined in that case. The question now is, whether it appears upon the face of the record, that the court had no jurisdiction to make a decree that should be binding upon all, or any, of the defendants, for, as expressed in a very old case, "the rule of jurisdiction, is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which especially appears to be so." Peacock v. Bell, 1 Saund. 74. The record in the consolidated action is here attacked collaterally, and, not on appeal, or in a direct proceeding of any kind to reverse, set aside, or vacate the decree. The rule is different in the two cases. When attacked collaterally, it is not enough, that the record does not affirmatively show jurisdiction, but on the contrary, it must affirmatively show that the court did not have jurisdiction, or the decree will be valid until reversed on appeal, or vacated in some direct proceeding taken for that purpose. Hahn v. Kelly, 34 Cal. 391; Grignon's Lessees v. Astor, 2 How. [43 U. S.] 319, 340, 341, 343; Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 449, 471–473, 475; Sargeant v. State Bank of Indiana, 12 How. [53 U. S.] 384–386; Huff v. Hutchinson, 14 How. [55 U. S.] 588; Ex parte Watkins, 3 Pet. [28 U. S.] 193; Town of Huntington v. Town of Charlotte, 15 Vt. 46; Foote v. Stevens, 17 Wend. 483; Granger v. Clark, 22 Me. 128. If the decree under which the sale in question was made is void, it is on the ground that it appears on the face of the record, that there was no service, in any mode recognized by the statute, upon the infant defendant, Franklina C. Gray, who was, at the time, a resident of the state of New York, and the court failed to acquire jurisdiction of her person. Since the trial of other cases in this court involving titles derived under the same sale, the subject of the validity of judgments obtained upon publication of summons on a collateral attack, has undergone, in the case of Hahn v. Kelly, 34 Cal. 391, a more thorough investigation in the supreme court of the state of California than it had ever before received in that court. After an elaborate discussion of the whole question, prior decisions, upon some points, were somewhat modified, and the law upon the subject, so far as this state is concerned, was finally settled. This decision has been repeatedly affirmed by subsequent decisions, both before and since the change in the constitution of the court, and as it settles the law of California upon the subject, I regard it as binding upon this court, which, in the present action, is only administering the laws of the state of California.[3] Besides, I am satisfied that the decision rests upon sound and well established legal principles, often recognized by adjudications of the supreme court of the United States. Under the decision in Hahn v. Kelly, I have no doubt that upon the face of the record in the consolidated actions of Gray v. Palmer, Eaton, et al., and Eaton v. Palmer et al., when presented in a collateral proceeding, the court must be held to have acquired jurisdiction of the person of Franklina C. Gray, for the purposes of determining her rights in the subject matter of those actions. In the former case, there is no room for doubt. Besides, in that very case, on appeal from the decree now under consideration, the very question was directly presented to the appellate court, whether there was a valid service on said infant, under the laws of California; and it was held on said appeal to be a valid service, but the decree was reversed on other grounds. Gray v. Palmer, 9 Cal. 616, 637. Thus, the question whether there was a valid service, under the statutes of California, was directly determined in the affirmative by the highest court in the state on appeal, wherein the question was directly made and decided. But it was held on the same appeal, that there was no sufficient service on the said infant, Franklina C. Gray, in the other case of Eaton v. Palmer, and the decree as to that case was for this error reversed only "so far as it affects the rights of the infant, Franklina C. Gray," and was not disturbed as to any of the other defendants. Id. 641. But this was after the sale in question, and the question on appeal is a very different one from the question presented when the judgment is attacked collaterally, as is the case now in hand; and it does not follow that the decree was not valid at the time of the sale, as to the infant, on a collateral attack, because it was afterward reversed on appeal on the ground stated. At the time of the sale, a purchaser was entitled to rely on the validity of the decree, unless it affirmatively appeared on the face of the record that the court had no jurisdiction of the infant. Does a want of jurisdiction so appear? I think not. Certainly not under the principles established by the supreme court of California in the case of Hahn v. Kelly, supra, and subsequent cases affirming it.

The provisions of the statute in force, at the time of the pendency of the action respecting service on non-resident defendants, who were necessary parties to actions, and respecting judgments, and judgment rolls affecting the question, are found in the finding of facts, and need not be repeated here. The statute, it will be perceived, does not provide what shall be done with the orders of publication, or the affidavits upon which they are based. They do not constitute any part of the judgment roll, as was held in Hahn v. Kelly, 34 Cal. 404, 429. We can only look to the judgment roll in a collateral attack, for that, and that only, is the record. Id. 404, 425, 429. Upon the same point, the

[3] "This construction of a state law upon a question affecting the title to real property in the state by its highest court, is binding upon the federal court." Williams v. Kirtland, 13 Wall [80 U. S.] 311, decided since the decision of this case.

supreme court of California, in Sharp v. Daugney, 33 Cal. 512, 513, says:

"The order of publication, and the affidavit on which the order was based, were also in evidence, but as neither the one nor the other constituted any part of the proof of service, they were both foreign to the record, by which, in a collateral attack upon the judgment, we can only be advised concerning the jurisdiction of the court to pronounce it. The circumstance that papers not belonging to the judgment roll are found commingled with it, or attached to other papers that do belong to it, can create no embarrassment. The case is one of mixture and not of fusion, and the papers not falling within the statute definition of a 'judgment roll,' must be treated as of no effect."

The record imports absolute verity, and cannot be impeached from without. See 34 Cal. 422 et seq. The statute in force when the judgment or decree in question was rendered, provided—Firstly, that the judgment should be entered in the judgment book; secondly, that "immediately after entering the judgment, the clerk should attach together and file the following papers, which shall constitute the judgment roll: (1) In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum endorsed on the complaint that default of defendant in not answering was entered, and a copy of the judgment; (2) in all other cases, the summons, pleadings and a copy of the judgment, and any orders relating to a change of parties."

Taking the view most favorable to plaintiff, and regarding the judgment in question as one by default, although there was a guardian appointed and an answer filed, and examining the papers which constitute the judgment roll, or the record, and we find an affidavit of the printer showing publication of summons. This is all we would expect to find in that affidavit. The printer's affidavit never covers any fact other than the publication of summons. That branch of the proof is fully covered. The affidavit of deposit of a copy of the complaint and summons in the post office, or of the statutory substitute, personal service of a copy at the residence of defendant abroad, covers a separate and independent fact, and is always made by a different party. In this case, no affidavit now appears on the record as to deposit in the post office, or personal service abroad as a substitute. The record, therefore, is simply silent on the subject. It does not affirmatively appear by the record, or by evidence on file, or otherwise, what was done, or that anything was done upon this point; nor does it appear that nothing was done. The record is simply silent. Nor does it appear by the record that the residence of the infant was known to the plaintiff, unless it can be inferred from the fact that because the plaintiff in the other case of Gray v. Palmer [supra] was aware of her residence, that Eaton must, also, have been aware of it. But, in a collateral attack upon the judgment, we are not authorized to arrive at conclusions in this mode, although this is the way the supreme court of California seems to have arrived at its conclusions on appeal. It does not appear, therefore, that it was a case requiring a deposit, or if it does, it does not affirmatively appear that the deposit in the post office was not made. The record is simply silent on the subject. It neither appears in the judgment roll nor record, nor even in the files or minutes of the court, so far as they have been presented in this case, whether there was a deposit in the post office; or a personal service abroad, as a substitute, or not. There is simply nothing on the subject, except what is shown by the findings. It is notorious that at that time papers were carelessly kept, and much negligence prevailed in making up judgment rolls. In this very case, the papers were not attached together and filed as a judgment roll, until November 24, 1856,—long after the time prescribed by the statute, and of the sale; and, even then, a copy of the final judgment was omitted from the roll, although the judgment itself had been duly entered in the judgment book. At that time, and for a long time afterward, the original draft of the judgment signed by the judge, and filed in the case, was in the hands of the commissioner, and, doubtless (though it does not so affirmatively appear), for the purpose of the reference, all the papers were, from time to time, also in the hands of the commissioner. Ample opportunity for loss was afforded, and no little neglect occurred. Some of the papers may have been lost during that time, and for that reason may have been omitted. If so, the rights of parties purchasing cannot be affected by the carelessness of the clerk in performing the manual duty of keeping and attaching together the proper papers designated by the statute as constituting the judgment roll. Lick v. Stockdale, 18 Cal. 223; Sharp v. Lumley, 34 Cal. 614. In this case, during the long delay in attaching together the papers to form a judgment roll, some were mislaid, and others may well have been lost. But however this may be, the court is a superior court, and under the authorities cited, when the records of such court is silent, all intendments are in favor of the judgment. In such cases, that is to say, when the record is silent, it certainly does not show affirmatively a want of jurisdiction. Looking to the judgment roll alone, in this case, a want of jurisdiction is not disclosed by the record. The most that can possibly be said is that it does not affirmatively show a service on the infant in any mode recognized by law; but as we have seen, this is insufficient to invalidate a judgment on a collateral attack.

If it is admissible to go outside of the judgment roll to the files and minutes of

the court for the purpose of impeaching the record,—but it is not; Hahn v. Kelly, supra,—we find nothing more in this case of an affirmative character tending to impeach the judgment. We simply find the same absence of the material facts, that is found in the roll or record. But, upon looking at the order appointing a guardian ad litem in the case of Eaton v. Palmer [supra], in which the defective service exists, if anywhere, we find a recital in the order, that, "it appearing to the satisfaction of the court, from the said petition and consent (consent to act as guardian), and the other papers and certificates on file in said action, that the said infant defendant, Franklina C. Gray, is under the age of fourteen years; that she is a necessary party to the complete determination of the controversy in the said action; and that the service of the summons in the said action upon her has been completed upwards of ten days, it is, on motion of Glassell and Leigh, attorneys for the said plaintiff, ordered that Henry S. Foote be, and he is hereby appointed guardian ad litem," etc., etc. This is an express adjudication that there was a service, and the court, certainly, had jurisdiction to determine this question. The evidence upon which it acted may have been subsequently lost. The record certainly contains nothing to contradict it. And this adjudication is of itself sufficient to sustain the judgment when collaterally attacked, if we can look outside the judgment roll at all. Sargeant v. State Bank of Indiana, 12 How. [53 U. S.] 384, 385; Grignon's Lessees v. Astor, 2 How. [43 U. S.] 319, 340, 341; Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 472, 473; Erwin v. Lowry, 7 How. [48 U. S.] 181; Landes v. Brant, 10 How. [51 U. S.] 370, 371; Lick v. Stockdale, 18 Cal. 223; Hahn v. Kelly, supra. In Erwin v. Lewis, the court say, "We hold that wherever a judgment is given by a court having jurisdiction of the parties and of the subject matter, the exercise of jurisdiction warrants the presumption, in favor of the purchaser, that the facts which were necessary to be proved to confer jurisdiction were proved." 7 How. [48 U. S.] 181. In Sargeant v. State Bank of Indiana, 12 How. [53 U. S.] 384, the recital was, "It appearing to the court now here, that proper legal notices having been given of the motion, it is by the court ordered," etc.; and the court say (page 385), "the real, veritable record informs us that legal and sufficient notice was given to the heirs of Samuel Sargeant, but whether by this paper (a paper found among the files) or in what other mode (except that it was legal and sufficient), we are not told, and are not at liberty in this case to indulge in inferences against the verity of the record. It is a principle well settled, too, in judicial proceedings, that whatever may be the power of a superior court in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not acting in the exercise of appellate power. To permit the converse of this principle in practice, would unsettle nine tenths of the rights and titles in any community, and lead to infinite confusion and wrong." The syllabus in Grignon's Lessees v. Astor is: "It was for the court to decide upon the existence of the facts, which gave jurisdiction; and the exercise of jurisdiction warrants the presumption, that the facts which were necessary to be proved, were proved." 2 How. [43 U. S.] 319. And the court say: "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they exist or not, is wholly immaterial, if no appeal is taken; the rule is the same, whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns." Id. 340.

In Voorhees v. Bank of U. S. land of a non-resident debtor was sold under a proceeding in attachment. It was "contended by counsel for plaintiff in error, that all the requisitions of the law are conditions precedent; which must not only be performed before the power of the court to order a sale, or the auditors to execute it can arise, but that strict performance must appear on record." 10 Pet. [35 U. S.] 471. But the court say on this point, "The process which they adopted was the same as prescribed by the law; they ordered a sale, which was executed, and on the return thereof, gave it their confirmation. This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which henceforth proves itself, without referring to the evidence on which it has been adjudged.

"In this case the court issued an order of sale, agreeably to law, which having been returned by the auditors, and 'being inspected, the court grant judgment of confirmation thereon.' It is, therefore, a direct adjudication that the order of sale was executed according to law. They had undoubted authority to render such a judgment; and there is nothing on the record to show that it was not rightfully exercised. If the defendants' objections can be sustained, it will be on the ground that this judgment was false;

and that the order of sale was not executed according to law, because the evidence of its execution was not of record. The same reason would equally apply to the non-residence of the defendant within the state, the existence of a debt due the plaintiff, or any other creditor, which is the basis on which the whole proceeding rests. The auditors are equally silent on the evidence upon which they reported that debts were due by the defendant, as on the evidence and notice of due publication; but no one could pretend that the judgment that the debts reported were due, shall be presumed to be false. Though the able and ingenious argument of the defendant has not been directed at this part of the judgment of the court of common pleas, the grounds of objection are broad enough to embrace it; for, in resting their case on the only position which the record leaves them, they necessarily affirm the general proposition that a sale by order of a court of competent jurisdiction, may be declared a nullity in a collateral action, if their record does not show affirmatively the evidence of a compliance with the terms prescribed by law in making such sale. We cannot hesitate in giving a distinct and unqualified negative to this proposition, both on principle and authority too well and long settled to be questioned." Id. 472.

And in Lick v. Stockdale, 18 Cal. 223, the recital of service was held conclusive, even when the question was presented on appeal from the judgment. The court say: "Several assignments of error are made: 1st. That the judgment roll does not show that the court ever acquired jurisdiction over the person of Stockdale, one of the defendants; but the finding of the court is that the defendant was duly served with process, and this recital is sufficient to show that the court had jurisdiction. The judgment does not depend upon the performance of the clerical duty of making up the judgment roll, or the preserving of the papers. It is enough if the facts exist which are required to give jurisdiction to the court; and the finding in this case is that they do exist, though the summons and returns—the usual evidence—may have been lost or mislaid."

In Hart v. Seixas, 21 Wend. 40, the court went still further, probably too far, when the case is on appeal. So in the case in hand, the appointment of a guardian ad litem, the recital of the service of process in the order (or whether recited or not), the subsequent proceeding ordering a sale, confirmation of sale, etc., are as much an adjudication that the proper proceedings had been taken, as the several proceedings referred to were adjudications upon a similar point in the cases cited, and in several of those cases the defendants were non-residents. And there is nothing in the record, or even in the files, or other evidence introduced, outside the technical record, inconsistent with the adjudication. There is simply a failure to state in the record, as it now exists, what the evidence as to one particular upon the question of due service was, and under the authorities cited, and especially in the case of Hahn v. Kelly [supra], the presumption that the court had the necessary evidence and properly adjudicated the question, must prevail in this collateral attack.

It has been earnestly urged that this presumption in favor of the record does not prevail when it appears that the party to be served resides out of the state, and beyond the territorial jurisdiction of the court; that it only applies when the party resides, or is presumed to reside, within the territorial jurisdiction of the court; that when the record shows, as in this case, that the party to be served is not within the territorial jurisdiction of the court, the presumption is changed, and that the record must affirmatively show the performance of all acts necessary to give jurisdiction of the person in such an action, and this was once so held by this court. But aside from that case, I do not find this position thus broadly stated sustained by the authorities, and with deference to the opinion in the case referred to, I can find no substantial ground for making this distinction. The authorities cited by plaintiff's counsel do not appear to me to sustain the position. They are cases depending upon different principles, in actions purely and strictly personal, which will be briefly alluded to in the course of this opinion, but which, it appears to me, have no application to this case, or to the class of cases to which this belongs. The presumption in favor of the validity of judgments of superior courts in cases where there is a mode provided by law for acquiring jurisdiction for the purposes of the action, are not made to rest on the fact that the parties to the proceeding reside within the territorial jurisdiction of the court, but upon the character of the courts themselves, and the great principles of public policy which require that some confidence should be reposed in the proceedings of the higher judicial tribunals of the land. The law of California, as of most other states, provides means by which jurisdiction of the parties in certain cases may be acquired, both when they reside within and without the territorial jurisdiction of the court. The means in the case of residents may be, and they usually are, different from those prescribed in cases of non-residents. But the court can no more acquire jurisdiction of a resident without pursuing the course prescribed by law to acquire jurisdiction of such resident, than it can acquire jurisdiction of a non-resident, without pursuing the course prescribed for acquiring jurisdiction of such non-resident, and, in the latter case, it as clearly has jurisdiction to determine for itself whether it has acquired jurisdiction, as in the former. In determining that question it exercises the same kind of judicial func-

tions as it would in determining whether it has acquired jurisdiction of a resident, and having jurisdiction to determine the question, and having determined it, in a case where the law provides for acquiring jurisdiction of a non-resident, is not the adjudication entitled to the same credit, and are not the same presumptions as to the correctness of the determination to prevail, in the one case, as in the other? Are not the same principles of public policy as applicable to one as to the other? If not, why not? It rests upon those who maintain a different doctrine to present some solid reason for making the distinction. In Hahn v. Kelly, 34 Cal. 426, 427, one of the justices observes on this point:

"The court exercises the same functions and the same jurisdiction in determining whether there was a service, whether personal, and the evidence is the certificate of the sheriff, or affidavit of a party competent to serve the process, or by publication, and the evidence is by the affidavit of the printer. And I see no reason why the same presumption should not arise in one case as in the other. It is a record in either case, for the statute makes it so in one case as well as in the other. And the record must be tried by itself alone. There is no new jurisdiction, either as to the person or subject matter conferred on the court by the statute authorizing service by publication of summons. The service is made in cases involving the ordinary process of the court. Only the mode of serving process is modified in certain cases within its ordinary jurisdiction.

"In some of the states a service was formerly, and, doubtless, now is, made by leaving a copy of the summons at the residence of the defendant, with some person of suitable age and discretion, or at his last known place of residence. I am not aware that any different rule of presumptions in courts of record was applied to the record of a domestic judgment on a service of this kind, from that applied to a service upon the party himself. Yet this can no more be called a personal service than a service by publication. The only question at last is, was there a service in any legal mode? and the court has jurisdiction to determine that question. If the court determining the question is a court of record, the judgment record imports absolute verity, and whatever that says must be taken as true. If the record in fact does not speak the truth, the only remedy of the party is to attack it directly on appeal, or in the court of which it is a record, if under the circumstances it can there be corrected, or by some direct suit or proceeding known to the law to vacate it." See, also, Id. 415; and Coit v. Haven, 30 Conn. 199 Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 469; Sargeant v. State Bank of Indiana, 12 How. [53 U. S.] 385,—which were cases of non-residents and absentees.

I will now notice some of plaintiff's authorities on the points before discussed. In the case of D'Arcy v. Ketchum, 11 How. [52 U. S.] 166, cited by plaintiff, the record stated affirmatively that there was no service. In Hollingsworth v. Barbour, 4 Pet. [29 U. S.] 466, the party "did not claim as locator" (Id. 473), and the case was not within the statute authorizing a service by publication. The whole proceeding was unauthorized, as the court was not empowered to obtain jurisdiction in the mode attempted. Id. 474–476. In Boswell's Lessees v. Otis, 9 How. [50 U. S.] 348, the court did not have jurisdiction of the particular subject matter in controversy, in the mode of procedure adopted, and there was no authority under the statute to proceed against the person, or against the land without a service on the person. The case of Harris v. Hardeman, 14 How. [55 U. S.] 334, was not a case of collateral attack. The court below upon a direct attack while the proceedings were still, "as it were, in fieri," by motion as a substitute for a writ of error coram vobis or audita querela, had set the judgment aside. Id. 345, 346. This action was thereupon affirmed upon writ of error. Besides the record disclosed what the service was. The court say, also, that there is "less show of objection to such action on the part of the court, as it affects the rights of no third parties, but is limited in its consequences to the parties to the suit only." Id. 346. And even in this case, it is worthy of remark, that three of the justices of the supreme court dissented. The inapplicability of the other cases cited on this point by plaintiffs, upon examination will be found to be equally obvious. They are, with but few exceptions, cases strictly personal, wherein judgments for money have been rendered against non-residents where there was no possibility of a personal service, and where, also, there was no provision of law whatever for procuring a constructive service; and the question has arisen in a subsequent suit between the same parties, upon the judgment, in the state where the defendant resides. The question is presented when the transcript of the personal judgment is offered in evidence in the foreign jurisdiction, and constitutes the very basis of a new action. In such cases it has been held that the judgment may be attacked collaterally on the ground of want of jurisdiction of the person, and this, even when the record affirmatively shows a personal service in due form—that the fact of service may be inquired into without regard to what appears in the record. In short, no force at all is given to the record on the question of jurisdiction beyond mere prima facie evidence. And in that class of cases, where the courts have gone so far in disregarding the record of a foreign judgment, it is not surprising that, on the issue, as to whether jurisdiction of the person has been acquired, proof that the defendant did not reside within the territorial

jurisdiction, should be regarded as raising a presumption that there was no personal service sufficient at least to require the record to rebut it by an affirmative showing of service.

This would be but a reasonable presumption, and especially so, since the law of the state provided no mode of acquiring jurisdiction by even a constructive service. In such cases it has been held that the fact of an appearance, as well as a service, affirmatively shown by the record, may be disproved against the record. It is apparent that the ordinary rules relating to records do not apply at all to this class of cases. Those cases clearly depend upon a different principle from that involved in the case in hand, as was said in Granger v. Clark, 22 Me. 130; and this is the class of cases in which the presumption insisted on by the plaintiff has been indulged. The case of Borden v. Fitch, 15 Johns. 121, is one of the exceptions. The judgment in that case was for a divorce obtained in Vermont by publication. It was held invalid in New York, for want of personal service within the territorial jurisdiction of the court. But this decision would scarcely be regarded as law at this day.

The established doctrine now is, as I understand it, in cases of divorce, that the decree is regarded as acting upon the status of the parties. It is substantially treated as in the nature of a proceeding in rem, the status of the parties corresponding to the rem in proceedings in rem; and now, I believe, decrees of divorce upon service by publication against absent and non-resident parties in states where constructive service, in this mode, is authorized by statute, are, upon the principle indicated, regarded as valid in other states. If they are not, then thousands of citizens, at this day, must occupy very perilous positions. Besides, the question is a very different one, when arising between the same parties, upon the presumption of the record in evidence as the foundation for the recovery of a new judgment for the amount of money recovered by the old judgment, from that which arises when the judgment has been executed by a sale, and the question is, whether within the same territorial jurisdiction, a third party has acquired a title to land by virtue of such judgment and sale. In the first case, the question is, does the defendant in the judgment owe the money to the plaintiff? It is the old matter in litigation over again. If the demand is just, it may be established in some other mode; if unjust, a recovery certainly ought not to be had. In the other case, it is whether a stranger is entitled to consider the judgment of a superior court to be what it appears to be? May he repose any confidence in the action of courts? May he act on the presumption that a superior court has discharged its duty, and properly determined the question of its own jurisdiction, or must he deal with its judgments at his peril? But when a domestic judgment, even of the class referred to, is presented between the same parties, as a basis of a recovery in another action, the record cannot be contradicted, nor can its validity be impugned, unless the want of jurisdiction affirmatively appears on the face of the record itself. Town of Huntington v. Town of Charlotte, 15 Vt. 48; Granger v. Clark, 22 Me. 128; Coit v. Haven, 30 Conn. 199; Cook v. Darling, 18 Pick. 393.

It is insisted by plaintiff, that the decree in which the sale in question took place was purely against the person, and that no valid judgment against the person can, in any case, be had without personal service within the territorial jurisdiction of the court. While I admit that the proceeding is not strictly a proceeding in rem, I also think it is not strictly a proceeding against the person. The subject matter of the controversy was a partnership. The object was to establish a partnership, alleged to have existed within the territorial jurisdiction of the court, which had become dissolved by the death of one of the partners, to take an account of the partnership business, wind up and settle the affairs of the concern, and distribute among the parties interested the assets, which assets were also within the territorial jurisdiction of the court. The non-resident defendants were not themselves partners, but only interested as heirs of the deceased partner. The property claimed to belong to the partners consisted of both personalty and realty. There was no decree asked or made against the persons of the defendants, or affecting any property other than the alleged partnership property within the territorial jurisdiction of the court. The proceeding is quasi in rem, as it only operates upon specific property, like an attachment proceeding; a proceeding to foreclose a mortgage; or to quiet title to real estate. In Boswell's Lessees v. Otis the court say: "Jurisdiction is acquired in one of two ways; first, as against the person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant, within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. It is immaterial whether the proceeding against the property be by an attachment, or bill in chancery. It must be substantially a proceeding in rem. A bill for the specific execution of a contract to convey real estate, is not strictly a proceeding in rem in ordinary cases, but where such a procedure is authorized by statute on publication, without personal service of process, it is substantially of that character." 9 How. [50 U. S.] 348.

These observations are applicable to the case in hand. It is substantially, though not strictly or technically, a proceeding in rem. It is one of that class of cases wherein it is necessary to acquire jurisdiction of non-resi-

dent parties interested, for the purpose of affecting the status of the parties with reference to other parties, and to specific property, and the specific property itself, in some other mode than by personal service. Unless a constructive service could be obtained valid for the purpose, it would be impossible to wind up a partnership through the medium of courts by proceedings as to some of the parties in invitum, when the partners reside in different states. It is one of a class of cases everywhere recognized as proper for acquiring jurisdiction by constructive service, when the laws in terms authorize it. The statute of California provided for acquiring jurisdiction by publication of summons, and, I have no doubt, that when the statutory mode is pursued in such a case, the judgment or decree of the court disposing of the property is binding, as to the property, upon the non-resident parties. Jurisdiction is thus acquired for the purposes of the case in a lawful mode, although a party is absent. Whereas, in the case before referred to, of a purely personal judgment, there was no possibility of acquiring jurisdiction of the parties by any kind of service known to the law. In a collateral attack upon the judgment in such a case as that now under consideration, the question of jurisdiction must be determined upon the same principles as are applied when the question is, whether jurisdiction has been acquired of the person of a resident defendant. In the case of Hahn v. Kelly [supra], so often referred to, the defendant, Jones, in the action to foreclose the mortgage, was in Washington, D. C., at the time of the service, or attempted service, by publication. That case settles the law for the state of California; and, I believe, upon solid principles. From knowledge derived from a large experience, judicial and otherwise, in the state of California, I very much doubt, whether, under any rules less favorable to the sanctity of judgments of our superior courts, when presented for review in collateral proceedings, than that established in Hahn v. Kelly, a judgment could be found in the state, rendered during the first ten years of its judicial history, upon service by publication, that would stand the test of judicial scrutiny. And yet, owing to the transitory character of our population, during that time, the titles to vast amounts of real estate now depend upon the validity of just such judgments. Public policy demands that some confidence should be reposed in the judgments of our highest tribunals, and titles derived through sales sanctioned by judicial decrees, should not, years afterward, be lightly declared invalid. To adopt a different rule in this court from that established as the law of the state, would be to make the rights of the parties depend upon the particular court administering the laws within the same territorial jurisdiction in which the action is brought, and not upon the laws of the state of California, which we, in cases of this kind, are supposed to administer. Although this court may be regarded, as in some sense, a different jurisdiction from the state courts, yet it has the same territorial jurisdiction, and administers the same general laws as the state courts, and the judgments of the latter, in the said actions of Gray v. Palmer and Eaton v. Palmer, must be regarded in this court, for the purpose in hand, as domestic, and not foreign judgments. Since the decision in Hahn v. Kelly, it has not only been affirmed by the supreme court of the state in numerous instances, but it has also been heretofore followed in this court. Prieto v. Wells [Case No. 11,420].

That the papers constituting the judgment roll under the statute were not attached together by the clerk till long after the sale, and that a copy of the final judgment or decree was then omitted by the clerk cannot affect the rights of the parties. The law required the judgment to be entered in a book to be called a judgment book, and a copy to be annexed to the judgment roll. I take it that the original judgment, so entered in the judgment book is, at least, a record of as great solemnity as the copy attached to the judgment roll. Under the statute, the judgment is in a condition to be executed as soon as entered, and before the papers are attached together to form a roll, and before docketing. So held in Sharp v. Lumley, 34 Cal. 614, and other subsequent cases. See, also, Gray v. Palmer, 28 Cal. 419, 420. The latter case is an appeal from the final judgment of the district court dismissing the case involved in this controversy after the reversal of the judgment in question. But the appeal was not taken in time, and the question as to the propriety of dismissing the action could not be determined.

There is nothing in plaintiff's point that the commissioner's deed is void, because the sale is recited to have been made under the decree of October 27, 1855, when it was in fact made under the decree of April 7, 1856. In point of fact, strictly speaking, the recital in the deed is only that "James D. Thornton was appointed commissioner to sell," etc., under said decree, and this is strictly true. It was under that decree that he was appointed commissioner to sell. By the terms of that decree, he was directed to sell in pursuance of the directions in that decree, and of such further directions as the court should give.

And again in the final judgment, or decree, of April 7, 1856, the commissioner was directed "to proceed to sell all the property, real and personal, of the said partnerships, as directed in the former decree of this court"; and it was "further ordered" in said final decree "that in all things not otherwise herein provided the said commissioner do observe and obey the former decree herein rendered"; that is to say, the decree of October 27, 1855. The commissioner, therefore, did sell under the decree of October 27, 1855, as well as under the decree of April 7,

1856, for the latter decree so directed him to do, and referred to the earlier decree for specific directions. He in fact sold under both decrees, although he was "appointed" under the first. In selling under either he, also, necessarily, sold under the other. The deed does not in terms show under what he sold, but only by what he was appointed. In advertising the commissioner stated that he should sell under both decrees, expressly referring to both in terms, and the report of the sale embraced, as a part of the report, the advertisement containing said recitals of both decrees. The report, therefore, shows a sale under both decrees. The report of sale was confirmed, and the deed made in pursuance of the said sale. There is no contradiction of the recitals in the deed.

Another view, which seems to me to be entirely tenable, leads to the same result as to the title of the land in question. Conceding, for the purposes of this view, that the judgment or decree is invalid upon its face, as to the case of Eaton v. Palmer et al., I do not see why the decree and sale thereunder are not valid as a decree and sale in the case of Gray v. Palmer, Eaton et al. Although the two actions were consolidated for the purpose of a decree, after a trial of the main issues, in Gray's case, the decree is by no means joint. The claims of William H. Gray and Eaton are not joint, but several and adverse, and the portions of the decrees applicable to each are severable. In the case of Gray v. Palmer, Eaton et al., there can be no doubt as to jurisdiction of the infant on the face of record, and, as we have before seen, this was so held by the supreme court of this state on appeal. There was, then, in that case, jurisdiction of the subject matter, and of all the parties for the purpose, of that action. Eaton was a defendant in that action, and he set up in his answer as a defense in part, against Gray's action, and as a basis for affirmative relief, the same facts which are alleged in his complaint in his own action, and it was indispensable to ascertain all the facts as to his rights, in order to determine the rights of the plaintiff Gray, and decree the relief to which he was entitled; and it is by no means clear that, under the system in force in California, Eaton was not entitled to obtain his relief in that action. But, however this may be, in that case it was found that the partnership of W. H. Gray and Franklin C. Gray, was subordinate to the partnership of Eaton and Franklin C. Gray, and it was impossible to determine the rights of the plaintiff Gray, in the action of Gray v. Palmer, Eaton et al., without ascertaining all the facts, and taking the several accounts, precisely as they were ascertained and taken in the consolidated actions. It was also necessary to make the sale in order to distribute to plaintiff Gray, his share of the partnership assets in the same way it was made. So the findings, statement of the accounts and decree for a sale, are precisely as they necessarily would have been in order to afford William H. Gray the relief to which he was entitled, if Eaton had never commenced the suit of Eaton v. Palmer et al., or having commenced it, it never had been consolidated with the other. If there is anything wrong in the decree, the wrong does not consist in the statement of the accounts in determining the share belonging to Gray; or in ordering a sale and directing the share of Gray in the partnership assets to be paid to him; for all this would necessarily have been done in his own separate action, just exactly as it was done (the pleadings in that action required all this to be done), but it consists in erroneously distributing the balance after Gray received his share; and in this Gray had no concern whatever. He was only bound to look to his own rights, and having ascertained and secured them, he was not responsible for the disposition which the court might make of that part of the funds which belonged to others.

The facts determined, then, so far as Gray is concerned, and the decree of sale are precisely such as were necessary in the action of Gray v. Palmer, Eaton et al., and such as they would have been if the action of Eaton v. Palmer had never been connected with it. No good reason is perceived why the judgment and sale were not entirely valid as a judgment or decree and sale in that action. If the balance of the proceeds of sale, after setting apart to Gray the amount belonging to him, was improperly distributed, that was no concern of Gray's, or of the purchasers under the sale. They were not bound to look to the application of the proceeds. It is enough that the rights of Gray required just such a decree and sale, and that there was, in fact, such a decree as was necessary to afford him the proper remedy, and a regular sale in pursuance of the decree.

The decrees, in fact, were treated as several in the supreme court of California on appeal. In Gray v. Palmer et al. the entire decree was reversed on the ground of insufficiency of evidence to sustain it; and in Eaton v. Palmer it was only reversed as to the infant, for error in appointing a guardian ad litem before a service of process, and, as we have seen, the exigencies of the case of Gray v. Palmer et al. required the sale of all the property and a determination as between Gray and the other parties of all the other matters adjudged in the decree.

There was, then, a valid decree and sale in the suit of Gray v. Palmer. Just such a decree and sale as would have been necessary had there been no consolidation, and no such suit at all as Eaton v. Palmer.

Defendant's counsel, also maintain that as the court had jurisdiction of all the parties in Gray v. Palmer, by the consolidation of that action by the consent of the parties to it, with the other action of Eaton v. Palmer, the court acquired jurisdiction of the parties

in both, and cite Bustard v. Gates, 4 Dana, 436, to sustain the proposition. They also insist, that, although an infant be not served, yet, if a guardian ad litem be in fact appointed, and he appears and defends the action, the judgment is erroneous only, and not void; and the cases of Bustard v. Gates, 4 Dana, 430–437, U. S. Bank v. Cockran, 9 Dana, 395, and Benningfield v. Reed, 8 B. Mon. 106, appear to sustain this proposition, but, upon the view taken in this case, it is unnecessary to decide these points.

If wrong on the main proposition, as to the validity of the entire decree, at the time of the sale, the defendant claims, that, at worst, it was valid as to all parties except the infant, Franklina C. Gray, and that the sale passed the title to Mrs. Gray's half of, or interest in, the property; that defendant, therefore, has the title to one half the premises in controversy, and in any event the recovery must be limited to one undivided half. All the parties appeared in both actions except the infant, and there was a valid service and appointment of guardian ad litem, and appearance by said guardian in the case of Gray v. Palmer; and the other action of Eaton v. Palmer, in which, if in either, there was no service, the judgment was never reversed as to any of the defendants except the infant. The judgment in that case still stands as to all others. Is the judgment necessarily void as to all, because it did not affect the rights of one of the parties? Or was the judgment and sale valid as to the parties over whom the court had jurisdiction? If the latter is the true state of the law, then the title to the interest of all the parties, except the infant, passed by the sale, leaving the rights of the infant unaffected. In that case, she became a co-owner of the property with the purchasers instead of with her mother, and such a change in no way affects her legal rights to the property. It is legally a matter of no moment to her, who her co-owners are.

Evidently the supreme court of California, did not regard the judgment as void, as to all the parties because it was irregular as to the infant, for if this had been its view, the judgment when found to be void as to all, because irregular as to one, would have been reversed as to all. But it was not so reversed. It was only reversed as to the infant, and it stands to-day as to all the other parties, and this action of the court recognizes its validity. Does not this adjudication become the law of this case, whatever the rule may be as to others? Ex parte Watkins, 3 Pet. [28 U. S.] 206.

It is claimed on the part of the plaintiff, that the infant was a necessary or indispensable party to the action, and that being a necessary or indispensable party, the court had no jurisdiction to make a decree that would affect any of the parties without first acquiring jurisdiction as to such infant. There are many cases to the effect that the court will not proceed to a decree in the absence of a necessary party, but so far as they have been brought to my notice, the question in every case was raised somewhere in the progress of the cause, whereupon the court declined to proceed to a decree, or upon appeal from the decree. But assuming the infant to be a necessary party, the court in this case, did, in fact proceed to a decree, without any objection being made for want of parties, or want of service on the infant, and the decree was finally executed by a sale. No case has been called to my attention, in which it was held, that, as to those who were parties, such a decree is void, when called in question collaterally, or, that the parties, who were before the court, and permitted the court, in fact, to proceed to a decree, and the decree to be executed by a sale, without objection, were not bound by the sale. The rights as between them, or their successors, and the absent parties may not have been effectually determined, but why is it not sufficient to substitute the purchasers to the rights of those who were parties? Story, in his work on Equity Pleadings, states the rule as to when the objection for want of parties may be taken, and the consequences of not bringing the proper parties before the court, thus:

"If the proper parties are not made, the defendant may either demur to the bill, or take the objection by way of plea or answer; or (subject to the considerations above suggested), when the cause comes on to a hearing, he may object that the proper parties are wanting; or the court itself may state the objection, and refuse to proceed to make a decree; or, if a decree is made, it may, for this very defect, be reversed on a rehearing or on an appeal; or if it be not reversed, yet it will bind none but the parties to the suit, and those claiming under them, so that all the evils of a fruitless or inadequate litigation may sometimes be visited upon the successful party in the original suit, by leaving his title still open to future question and controversy." Section 75. If a decree is, in fact, made, and not reversed for want of necessary parties, there is no intimation here, that it would not be binding upon those who were parties, and suffered the decree to be made without objection. On the contrary, the inference is plainly the other way, for the learned author says, "it will bind none but the parties to the suit, and those claiming under them," and that the evils of a fruitless and inadequate litigation may be visited upon the successful party by leaving it open to future controversy. Had he supposed the parties brought in were not bound in any degree whatever, he would certainly have said so here, for the occasion called for it, whereas, what he did say, plainly indicates that he regarded the rule to be otherwise. The rule as thus stated is substantially repeated in sections 236 and 541. See, also, to the same effect, 1 Daniell, Ch. Pr.

341; Hickock v. Scribner, 3 Johns. Cas. 317; and cases cited in note 4 to section 236.

Judge Story further observes that, "the mere non-joinder of a proper party cannot avail the defendant in a bill of review, unless it appears to his prejudice; and there is the more reason for this rule, because the absent person is not barred by the decree, but may in another suit vindicate his rights." The case of Whiting v. Bank of U. S., 13 Pet. [38 U. S.] 14, cited, fully sustains the note. If the court would not sustain a bill of review on the application of one of the defendants, on the ground of error in proceeding to a decree in the absence of a party, it certainly ought not to be regarded as void as to those who are parties. In the case now in hand, suppose the absent party had chosen to acquiesce in the decree as originally entered, and had never attempted, or should never attempt, to reverse it, or set up any claim against it, in what particular would Mrs. Gray, or the other parties, who claim nothing in privity with the infant, have been injured or interested? They had their day in court, and their rights were disposed of; other parties succeeded to their interest, who thereby became jointly interested with the infant in their stead. In Whiting v. U. S. Bank, supra, the court say: "Breckenridge, the absent party, is not barred in the original decree, because he is no party thereto, and, therefore, his interest cannot be prejudiced thereby. But if they were, he, and he alone, has a right to complain, and to seek redress from the court; and not the plaintiffs, who are not his representatives, or intrusted with the vindication of his rights. Breckenridge has made no complaint, and sought no redress." These remarks would seem to apply as well to the position of the parties to this suit, and the infant defendant.

While I incline to the view that the sale is valid, as to all the other parties interested, even if void as to the infant, yet upon the view taken upon the main propositions involved, it is not necessary to decide the point now, and for that reason, I have not fully examined the authorities, and I do not desire to be understood as expressing a positive opinion upon it. I only allude to the point for the purpose of calling attention of plaintiff's counsel and the appellate court more particularly to it, in case the cause should be taken to the supreme court for review, and my view upon the main proposition be found erroneous.

My conclusion is, that the title to the premises in controversy appears to be in the defendant, Lucy B. Page, and that she is entitled to judgment. Let judgment be entered for defendant, with costs of suit.

[This judgment was reversed by the supreme court,—18 Wall. (85 U. S.) 350,—and the cause remanded to the circuit court for a new trial (Case No. 5,206), where judgment was entered for the plaintiff, with costs.]

Case No. 5,206.

GALPIN v. PAGE.

[3 Sawy. 93;[1] 3 South. Law Rev. 712; 1 Am. Law T. Rep. (N. S.) 523; 1 Cent. Law J. 491.]

Circuit Court, D. California. Aug. 31, 1874.

UNITED STATES COURTS—STATE LAWS—RELATION OF NATIONAL COURTS TO STATE COURTS — PRESUMPTIONS IN FAVOR OF JUDGMENTS—PERSONAL JUDGMENTS ON SERVICE BY PUBLICATION—SERVICE BY PUBLICATION — HAHN V. KELLY DISAPPROVED—SUITS IN REM—INFANTS.

1. The courts of the United States are not bound by the decisions of the state courts upon questions of general law. It is only decisions upon local questions which are peculiar to a state, or adjudications upon the meaning of the constitution or statutes of a state, which the courts of the United States adopt as rules for their judgments.

2. Whilst the courts of the United States are not foreign courts in their relation to the state courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them. In all cases the jurisdiction of a state court may be inquired into when its judgment is made the foundation of a claim in the circuit court, but the inquiry can proceed no further; the jurisdiction existing, the merits of the controversy involved are not open to examination.

[Cited in Embry v. Palmer, 107 U. S. 10, 2 Sup. Ct. 31; Swift v. Meyers, 37 Fed. 43.]

3. There is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised.

4. There can be no personal judgment upon constructive or substituted service by publication against a non-resident of a state, except as a means of reaching property situated at the time within the state, or of affecting some interest therein, or determining the status of the plaintiff with respect to the non-resident party.

[Cited in Seaverns v. Gerke, Case No. 12,595.]

5. When constructive or substituted service by publication in a personal action is authorized by statute in place of personal citation, the statute must be strictly pursued.

[Cited in Cissell v. Pulaski Co., 10 Fed. 893; Martin v. Barbour, 34 Fed. 708.]

6. The case of Hahn v. Kelly [34 Cal. 391], decided by the supreme court of California, examined and disapproved.

7. Classification of suits in rem, and service of process upon infants of tender years, considered.

[Cited in Pennoyer v. Neff, 95 U. S. 743.]

This was an action [by Philip G. Galpin against Lucy B. Page] to recover possession of a lot situated within the city of San Francisco, and was tried by the court before Mr. Justice FIELD, without the interven-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

tion of a jury. The court found the following facts and conclusions of law:

A jury having been waived by a stipulation of the parties in writing, duly filed, and the cause having been tried by the court without a jury, after hearing the testimony and argument of counsel, the court being sufficiently advised, finds the followings facts and conclusions of law, viz.:

First. On the fifteenth of July, A. D. 1853, Franklin C. Gray died in the city of New York, intestate, and seised and possessed at the time of his death of the premises in controversy.

Second. Said Franklin C. Gray left surviving him his widow, Matilda C. Gray. In December, 1853, said Matilda C. Gray gave birth to Franklina C. Gray, who was the lawful issue of said Franklin C. Gray; and under the statutes of California the said Matilda C. Gray and said Franklina C. Gray inherited the premises in controversy as heirs-at-law of said Franklin C. Gray, in the proportion of one-half thereof to each.

Third. At the time of the death of said Franklin C. Gray, and since then to the present time, said Matilda C. Gray, and since her birth, the said Franklina C. Gray, have both been citizens and residents of the state of New York, and neither of them was in the state of California in the years 1853, 1854, 1855, or 1856, and at the commencement of this suit, and ever since, the defendants have been citizens and residents of the state of California, and the plaintiff has been a citizen and resident of the state of New York.

Fourth. At the commencement of this suit, and on the first day of April, 1868, plaintiff was, and he now is, the owner in fee of the premises in controversy, through proper mesne conveyances and proceedings in the probate court of the city and county of San Francisco, state of California, from said Matilda C. Gray and Franklina C. Gray, except in so far as the right, title, and interest of either of them of and to said premises were divested from them by virtue of a sale made by James D. Thornton, commissioner, on the third day of May, 1856, under a decree of the Fourth judicial district court of the state of California, hereinafter-mentioned, at which sale Gwyn Page became the purchaser of the premises in controversy, and a deed thereof was executed to him by said commissioner, under said decree, on the twenty-third day of May, 1856; and thereafter the interest of said Page in one-half of the premises sued for passed by proper conveyances from him to Joseph B. Crockett, and from him to defendant, Lucy B. Page, June 20, 1863, and the interest of said Page in the other half of the premises passed under his will to, and is now vested in, the defendant, Lucy B. Page.

Fifth. The plaintiff demanded possession of the premises of defendants before the commencement of this suit, and was refused by defendants; and defendant, Lucy B. Page, was in possession when demand was made and suit brought.

Sixth. The value of the demanded premises, which constitute water lot number seven hundred and fifty-nine, as designated on the map of the city of San Francisco, is ten thousand dollars. From six to eight months prior to the commencement of the suit, the lot in question was covered with the waters of the bay of San Francisco of considerable depth, and not in a condition to use. About eight months prior to the commencement of the suit, the defendant, Lucy B. Page, commenced filling the lot, and continued to fill it till it was completed—about the time of the commencement of this suit. It was filled with solid earth and thereby reclaimed from the sea, and made fit for use and put in a condition to rent, and the expense of such filling was paid by the defendant Lucy B. Page. Prior to the said filling and reclamation from the sea, the monthly value of the rents and profits of the premises was nothing. Subsequent to said filling and reclamation, that is to say, since the time of the commencement of this suit, April 17, 1868, the value of the rents and profits has been thirty dollars per month.

Seventh. The filling in of said lot for the purpose of reclaiming it from the sea and rendering it fit for use, is a permanent and valuable improvement, and the value of such improvement is fourteen hundred and ninety dollars. The said defendant, Lucy B. Page, has also paid street assessments assessed upon said lot to the amount of three hundred and seventy-five dollars and twenty-five cents; and the said street improvement is a permanent improvement, beneficial to said lot. Said defendant has also paid taxes, state, city and county taxes, on said lot, to the amount of five hundred and seventy-one dollars.

Eighth. That on or about the twenty-third day of January, 1854, Jos. C. Palmer and Cornelius J. Eaton, then residents of the city of San Francisco, were appointed administrators of the estate of Franklin C. Gray, deceased, by the probate court of the city and county of San Francisco, and thereafter duly entered upon the duties of their trust as such administrators.

Ninth. That subsequently, in February, 1854, William H. Gray, a brother of the decedent, brought a suit in equity in the Fourth district court of the said state against said administrators, said Matilda C. Gray, and one James Gray, and subsequently the complainant added Franklina C. Gray as a party defendant. The bill in the suit alleged that a copartnership had existed between the complainant and decedent since 1848, and that it embraced all their business operations and all their purchases of real property, although the titles were taken in the individual name of the deceased, and that the interest of the complainant extended to one-third of

all acquisitions of every kind and description of both copartners. The object of the suit was to settle up the affairs of the alleged copartnership and to obtain a decree for the one-third claimed by the complainant.

Tenth. That in January, 1855, said Cornelius J. Eaton, who had been a clerk of the deceased, resigned his trust as administrator, as aforesaid, and brought suit in equity in the same district court against Palmer, the remaining administrator, and against the widow Matilda C. Gray, and the infant Franklina C. Gray. The bill in this suit alleged that a similar partnership, from January, 1851, had existed between himself and the deceased, embracing all the real and personal property of both, and all their business, and that his interests in the partnership extended to one-fourth of the property possessed at the time, and of all future acquisitions. The object of the suit was to settle up the affairs of the alleged partnership, and to obtain a decree adjudging to the complainant one-fourth of the estate claimed.

Eleventh. That on the twenty-third day of October, 1855, upon the stipulation of the guardian ad litem, who had previously been appointed for the infant, and the attorney for the other parties who had appeared, the two actions were consolidated into one, and that four days thereafter a decree was entered in the action thus consolidated. Appended to this decree is the following statement, signed by the district judge.

"When the above decree was signed, it was stated to me in court, by the attorneys or some of them, that the above decree was by the consent and agreement of all the parties thereto. I think Governor Foote and Gwyn Page, Esq., were present when the statement was made. John S. Hager, District Judge. November 29, 1857."

By the decree it was adjudged that a partnership had existed between Eaton and the deceased which embraced all the property, real and personal, and all the business of both; that this partnership commenced in 1851, and that in it Eaton had an interest of one-fourth; that a similar partnership had co-existed between William H. Gray and the deceased, in which William H. Gray had an interest of one-third; that this latter partnership was subject to the partnership of Eaton, and that he should first take one-fourth of the property, and Gray one-third of the remaining three-fourths, and that the other two-fourths should be equally divided between the widow and the child. And by the decree James D. Thornton was appointed a commissioner to take and state an account of the business, profits and property of the two copartnerships, to make report thereof to the court, and, upon confirmation of the sale, to execute proper conveyances to the purchasers. On the first day of March, 1856, the said commissioner made his report of the accounts taken, showing that the deceased was largely indebted to each of his alleged copartners. By a decree of the court made on the seventh day of April, 1856, the report of the commissioner was confirmed, and a sale of the entire property, real and personal, of the alleged copartnership was ordered. The property was accordingly sold by the commissioner at public auction, and Gwyn Page purchased, as above-mentioned, and received from the commissioner a deed for the same.

Twelfth. That neither in the suit of William H. Gray, nor in the suit of Cornelius J. Eaton, above set forth in findings eighth and ninth, was there any personal service of original process on the infant Franklina C. Gray, nor did she ever appear in either of said actions; that an attempt was made in both actions to obtain service on the infant by a publication of the summons in a newspaper; that there was no affidavit made in either case as a basis for an order of publication, and in the action of Eaton against Palmer and others there was no order of publication. Afterwards a guardian ad litem was appointed for the infant in each action upon petition of the claimants therein. The other defendants in the two actions, except defendant James Gray, appeared by attorney, and answered the bills of complaint filed against them. The defendant, James Gray, was never served with process nor appeared in the action in which he was named as defendant.

Thirteenth. That in the fall of 1857, the widow Matilda C. Gray and the child Franklina C. Gray, took an appeal to the supreme court of the state of California, from the decree in the action consolidated as aforesaid, and thereafter, in April, 1858, the decree was reversed on the ground that no sufficient service of summons was made upon the infant Franklina, under the statute, in the case of Eaton against Palmer, and that until such service no guardian ad litem could be appointed for her; and on the further ground that the evidence presented had not established a copartnership between William H. Gray and the deceased, and the cause remanded to the district court for further proceedings.

Fourteenth. That after the cause was remitted to the district court, that court ordered, after hearing counsel for the respective parties, a new trial of all the issues as to all the parties; and upon this order the same remained on the calendar for trial until April, 1861, when the district court entered judgment for the defendants therein, dismissing the two suits consolidated as aforesaid for want of prosecution.

Fifteenth. That Gwyn Page, the purchaser of the premises in controversy at the commissioner's sale, was the attorney-at-law of William H. Gray, the plaintiff in one of the suits consolidated, and J. B. Crockett was his law partner, and the conveyance of the latter, of his interest to the defendant Page, was made after the reversal of the decree in the consolidated suit.

Sixteenth. That the action against the defendant, J. B. Crockett, was dismissed previous to the former trial, by consent of parties, and the action thereafter proceeded against the defendant Lucy B. Page alone.

And as conclusions of law from the above facts, the court finds: 1st. That the proceedings in the two suits of Gray and Eaton, and the decree rendered in the consolidated action, were void as to the infant Franklina C. Gray, for want of due and sufficient service of original process upon her; and that the ruling of the supreme court of the state, on appeal from that decree, was an adjudication that the jurisdiction of the district court over the infant never attached. 2d. That the title acquired by the purchaser, Gwyn Page, he being one of the attorneys of the plaintiff Gray, and that of his law partner Crockett, fell upon a reversal of the decree, and that the defendant, having acquired her interest after such reversal, possessed no valid title as against the plaintiff, the grantee of the original owners. 3d. That the value of the rents and profits of the premises to which the plaintiff is entitled are offset by the value of the permanent and valuable improvements made on the premises by the defendant; and, 4th. That the plaintiff is entitled to judgment for the possession of the premises described in the complaint against the defendant Lucy B. Page.

John B. Harmon, for plaintiff.

Williams & Thornton, for defendant.

FIELD, Circuit Justice. The material questions presented for consideration in this case have already been determined by the recent decision of the supreme court of the United States. It is unnecessary, therefore, to repeat at large the facts of the case; they are given in the report of the decision in 18 Wall. [85 U. S.] 350. It will be sufficient to state here its general features. The action is ejectment for the possession of certain real property situated within the city of San Francisco, both parties deraigning title from the same source, Franklin C. Gray, deceased, who died in the city of New York in July, 1853, intestate, seised of the premises in controversy. The plaintiff claims through conveyances executed by direction of the probate court of the city and county of San Francisco, which administered upon the estate of the deceased. The defendant claims under a purchaser at a commissioner's sale, had under a decree of a district court of the state, having jurisdiction in that city and county, rendered in a suit brought to settle the affairs of alleged copartnerships between the deceased and others. The case turns upon the validity of this decree and the commissioner's sale had under it.

The suit in which that decree was rendered was one into which two suits, brought by different parties, had been consolidated. One of them was brought in 1854, by William H. Gray, a brother of the deceased; the other was brought in 1855 by Cornelius J. Eaton, who had been at one time a clerk of the deceased. Each of these complainants alleged a separate, distinct and dormant copartnership between himself and the deceased, which embraced the commercial business in which the latter was engaged and all his real estate transactions. Gray alleged that his interest in the business and property of the copartnership formed between him and the deceased was one-third. Eaton claimed that his interest in the business and property of the copartnership formed with him was one-fourth. Each of these complainants, alleging a universal and dormant copartnership between himself and the deceased, denied, one of them under oath, any copartnership of the deceased with the other. Subsequently, however, they consented to a consolidation of their suits; and four days afterwards, a decree was entered, and it would seem from the certificate of the judge appended to the decree that it was by consent of the parties, adjudging that each had been a copartner with the deceased as alleged by him, and that both of these copartnerships, dormant and unknown to each other as they were, embraced all the property and all the business of the deceased.

By the decree a reference was ordered to a commissioner to take an account of the business, profits and property of the two copartnerships, with directions, upon the confirmation of his report, to sell all the property, real and personal, of both copartnerships, and to execute proper conveyances to the purchasers. At the sale which subsequently took place, one of the attorneys of the complainant, Gray, became a purchaser of the premises in controversy. He afterwards conveyed an undivided half to his law partner, and devised the other undivided half to the defendant. His law partner some years later transferred his interest also to the defendant.

The deceased, Franklin C. Gray, left surviving him a widow, Matilda C. Gray, of whom a posthumous child was born in December following, named Franklina C. Gray. By the law of California the estate of the deceased vested in the widow and child in equal shares; and they both were made parties to the suits of Gray and Eaton; in the first suit the child being made a party by a supplemental bill. Both were non-residents of the state of California and residents of the state of New York; and their absence from this state and residence in New York were averred in the pleadings. Constructive service upon them, by publication under the statute, was therefore attempted. The widow appeared; and upon representation that service had been made upon the infant, a guardian ad litem was appointed for her, and he consented to the consolidation of the two suits, and, it would seem, to the decree rendered.

Subsequently, upon appeal to the supreme court of the state, the decree of the district court in the consolidated suit was reversed, on the ground that no sufficient service of summons had been made upon the infant Franklina in the case brought by Eaton; and that, until such service, no guardian ad litem could be appointed for her; and on the additional ground that the evidence presented had not established a copartnership between William H Gray and the deceased. The case was accordingly remanded to the district court; and subsequently the two suits, after being on the calendar for trial for nearly a year, were dismissed. The plaintiff acquired his interest and brought the present action after this dismissal.

When the case was originally here [Case No. 5,205], the circuit court decided that the record in the suits of Gray and Eaton, in the district court, did not show that due service of summons by publication had not been made upon the infant Franklina, and as the district court was a superior court of general jurisdiction, it must be presumed to have had jurisdiction of the subject-matter and of the parties in those suits;. and that, in consequence, the sale and conveyance under the decree, notwithstanding its subsequent reversal on the grounds stated, passed a good title to the purchaser; the court holding that where a record of a judgment of a superior court of general jurisdiction was assailed collaterally, it was not enough that the record did not affirmatively show jurisdiction, but that it must affirmatively show that the court did not have jurisdiction, or its judgment would be valid until reversed on appeal or vacated in some direct proceeding taken for that purpose. And so the court said that "at the time of the sale, a purchaser was entitled to rely upon the validity of the decree (in the consolidated suit) unless it affirmatively appeared on the face of the record that the court had no jurisdiction of the infant."

But the supreme court of the United States [18 Wall. (85 U. S.) 350] took a different view of the case, and held that the adjudication of the supreme court of the state, that no sufficient service of summons was ever made upon the infant Franklina, and that until such service no guardian ad litem could be appointed for her, was an adjudication that the jurisdiction of the district court over her had never attached, and that this adjudication was conclusive and binding upon the circuit court and every other court, when brought before it for consideration. Into its soundness the circuit court could not look; for it possessed no revisory power over the decisions of the supreme court of the state. The adjudication constituted the law of that case, and settled, for all possible controversies, the character of the decree of the district court. Rendered without jurisdiction, that decree was always void, so far as it affected the rights of the infant Franklina, and unavailing to support any proceedings under it affecting her title.

But the supreme court of the United States in its decision went still further, and held that the rule stated by the circuit court, as to the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction, was subject to many exceptions and qualifications and had no application to the case at bar; that such presumptions were limited to jurisdiction over persons within the territorial limits of the courts, persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common law. In these latter particulars, the decision was in affirmation of doctrines asserted by the circuit court in an elaborate and carefully considered opinion, delivered in 1865, in the case of Gray v. Larrimore [Case No. 5,721], which grew out of the sale under the same decree of the district court which is now before us. The doctrines there asserted were followed in the subsequent case of Gray v. Murphy [Case No. 5,725], and, until the decision of this case by the present circuit judge, were not regarded as open to contestation in the circuit court. In this case they were overruled by him upon the supposed obligation of the court to follow a decision of the supreme court of the state in Hahn v. Kelly, rendered in 1868 (34 Cal. 391). And to that case, frequent reference has been made by counsel on the present trial, and some of its positions have been pressed with great earnestness, as though they were decisive of the points now under consideration. That case was cited to the supreme court of the United States. Extracts from the opinion in the case constituted the principal argument before that court of one of the counsel of the defendants; and if its positions were not expressly mentioned in the opinion of that court, it was not because they had not been carefully considered.

That case was brought to quiet the title to a tract of land in Alameda county, and to restrain its sale. The plaintiff asserted title to the premises by virtue of a sale under a judgment recovered for the deficiency remaining of a mortgage debt, after application of the proceeds received upon a sale of the property mortgaged. The suit in which the mortgage was foreclosed and judgment for the deficiency rendered, was prosecuted without personal service upon the defendant, upon publication of summons; and the validity of the judgment was assailed upon the alleged ground that the attempted service of the summons by publication was defective and void. The decree, however, recited that it appeared to the court that the summons and complaint had been "duly served on the defendants according to law and the order of the judge of the court;" and the supreme court of the state held that this recital was a direct adjudication upon the point and was as conclusive upon the parties as any other

fact decided, provided it did not affirmatively appear, from other portions of the record, that the recital was untrue. As there was no direct contradiction of the recital, and as no other objection than the one mentioned was taken, this ruling as to the effect of the recital disposed of the case and necessitated a reversal of the decree below. The court, however, in its opinion, did not confine its consideration to this point, but proceeded to lay down certain general rules as to the presumptions of jurisdiction attendant upon the judgments of superior courts of general jurisdiction, and to declare what constitutes the record in this state of such judgments, and the conditions upon which they may be collaterally assailed. Among other things, it is asserted in substance, and so far as anything in an opinion can be deemed an adjudication, which is not necessary to the decision, it adjudged:

1. That a judgment of a court of general jurisdiction could not be attacked collaterally, except for matters apparent upon its record; that it was not necessary that the jurisdiction of the court should affirmatively appear upon the record, but that, in the absence from the record of matters affirmatively disclosing a want of jurisdiction, either over the subject-matter of the action or the person of the defendant, such jurisdiction would be conclusively presumed; and that this conclusive presumption prevailed in all cases without reference to the character of the proceedings, or the residence of the parties against whom they were taken.

2. That in this state such record of the court consists only of the papers and proceedings which compose what is designated in the Code of Procedure as the judgment-roll; and, where jurisdiction is exercised over persons without the territorial limits of the court by constructive service upon them by publication of summons, and judgment by default is rendered upon such service, the record need not contain certain material proceedings, without which jurisdiction cannot attach, or any recital or evidence of such proceedings, because the legislature has not directed such proceedings to be incorporated in the so-called judgment-roll.

We do not regard the case at bar as one where any collateral attack is made upon a judgment of a superior court of general jurisdiction. The decree in the consolidated suit of Gray and Eaton is not here attacked collaterally in any proper meaning of that term. The adjudication of the appellate court in the same case upon the character of that decree is not offered by way of collateral attack; it is the exhibition of the result of a direct proceeding with reference to that decree had on appeal. When we speak of a collateral attack we refer to the presentation of grounds of invalidity other than those which have been established by the prosecution of a writ of error or an appeal or some other direct proceeding to vacate the judgment. We will nevertheless examine the positions advanced by the supreme court of the state in the case named.

Before proceeding, however, to this examination, it is proper to say a few words respecting the light in which the ruling of the state court in that case is to be regarded in this court, and the right of this court to look into the jurisdiction of a state court when its judgment is produced in evidence.

In the first place, the ruling of the state court in Hahn v. Kelly [supra], except so far as it gives a construction to the statute of the state, is not binding upon this court. In all that relates to the presumptions which attend the acts of the superior courts and the circumstances under which they may be assailed, it stands like the ruling of any other court, entitled to respect and consideration for the learning and ability of its members, but possessing no obligatory force. "Where private rights," says the supreme court of the United States, in Chicago City v. Robbins, 2 Black [67 U. S.] 429, "are to be determined by the application of common law rules alone, this court (and the same is true of the circuit court), though entertaining for state tribunals the highest respect, does not feel bound by their decision." "It is undoubtedly true in general," says the same court in another case (Olcott v. Supervisors, 16 Wall. [83 U. S.] 687), "that this court does follow the decisions of the highest courts of the states, respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind, that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt as rules for their own judgments." The ruling of the state court in Hahn v. Kelly, except so far as it gives a construction to the state statute, relates to matters of general law, and not to questions of a local character peculiar only to the state. If the ruling of the court be correct, it applies not merely to judgments of the superior courts of general jurisdiction existing in California, but to the judgments of such courts existing in all other states.

In the second place, whilst the courts of the United States are not foreign courts in their relation to the state courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them. And it is well settled, that neither the constitutional requirement, providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," nor the acts of congress providing for the mode of authenticating such acts, records and proceedings,—May 26, 1790 [1 Stat. 122],

—and declaring that, "when thus authenticated, they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which the records are or shall be taken," precludes an inquiry into the jurisdiction of the court in which the judgment was given, or the right of the state to exercise authority over the parties, or the subject-matter of the judgment. As was said in Christmas v. Russell, 5 Wall. [72 U. S.] 305, the judgments of the courts of one state are not foreign judgments in another state under the constitution and act of congress, nor are they domestic judgments in every sense; because they are not the proper foundation of final process, except in the state where they were rendered; and they are open to inquiry as to the jurisdiction of the court and notice to the defendant.

The act of congress goes, perhaps, further than the constitutional requirement, which relates to the faith and credit to be given in each state to the public acts, records and judicial proceedings of every other state, inasmuch as it declares the effect of the records and judicial proceedings of the states when authenticated, as provided "in every court within the United States," thus making its provisions applicable to the national courts, as well as to the courts of the states. The power of congress to prescribe the manner in which the records of the states shall be proved in the national courts, and the effect which shall be given to them, is independent of the constitutional provision. Still the law is to have the same construction in its application to the national courts as to the state courts. It leaves untouched the general principle that the jurisdiction of every court is open to inquiry, when produced in the courts of another sovereignty.

The circuit court of the United States for the district of California has the same authority to examine into the jurisdiction of a state court of California, when its judgment is produced, as the circuit court of the United States for the district of New York has, when the same judgment is produced before that tribunal. All the circuit courts of the United States have the same relation to the state courts; and each will take notice of and administer in proper cases the laws of the states. This court, for example, will take notice of, and, in a proper case, administer the law of New York, just as it will take notice of and administer the law of this state. In all cases the jurisdiction of a state court may be inquired into; but the inquiry can proceed no further; the jurisdiction existing, the merits of the controversy involved are not open to examination.

We recur now to the rulings in Hahn v. Kelly [supra]. The first position, that when a judgment of a court of general jurisdiction is produced in evidence, it can only be collaterally attacked for matters apparent upon its record, and that, in the absence of such matters, the jurisdiction of the court must be conclusively presumed, is with certain qualifications and exceptions undoubtedly correct. These qualifications and exceptions arise where the proceedings or the parties against whom they are taken are without the ordinary jurisdiction of the court, and can only be brought within it by pursuing special statutory provisions. As we had occasion to observe in a previous case, "All courts, even such as are designated courts of superior or general authority, are more or less limited in their jurisdiction; they are limited to a particular kind of cases, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as may arise upon the high seas; or to the use of particular process in the enforcement of their judgments." Norton v. Maeder [Case No. 10,351]. When we speak of a court of general jurisdiction in civil cases, we do not mean one which has jurisdiction over all subjects and all persons and of all process; but we mean one which exercises a general jurisdiction in law or equity, according to the well-established principles known to those departments of jurisprudence, over subjects and persons within certain defined territorial limits. When a judgment of such a court is produced, relating to a matter falling within the general scope of its powers, the jurisdiction of the court will be presumed, even in the absence of the formal proceedings or steps by which the jurisdiction was obtained; and such jurisdiction cannot ordinarily be assailed except on writ of error or appeal, or by some other direct proceeding. But when the judgment of such a court relates to a matter not falling within the general scope of its powers, and the authority of the court over the subject can only be exercised in a prescribed manner, not according to the course of the common law; or the judgment is against a party without the territorial limits of the court, who was not served within those limits and did not appear to the action, no such presumption of jurisdiction can arise. The judgment being as to its subject-matter or persons out of its ordinary jurisdiction, authority for its rendition must appear upon the face of its record. In other words, there is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised. This doctrine is an obvious deduction from principle, and is sustained by adjudged cases almost without number in the highest courts of the several states, and in the supreme court of the Unit-

ed States. There is running all through the Reports the emphatic declaration of the common law courts, that a special authority, conferred even upon a court of general jurisdiction, which is exercised in a mode different from the course of the common law, must be strictly pursued, and the record must disclose the jurisdiction of the court. On this subject the cases speak a uniform language, with scarcely a dissentient voice.

The tribunals of one state have no jurisdiction, and can have none, over persons or property without its territorial limits. Their authority is necessarily circumscribed by the limits of the sovereignty creating them. Any exertion of authority beyond those limits would be deemed, as stated in D'Arcy v. Ketchum, 11 How. [52 U. S.] 174, in every other forum an illegitimate assumption of power, and be resisted as mere abuse.

But over property and persons within those limits the authority of the state is supreme, except as restrained by the federal constitution. When, therefore, property thus situated is held by parties resident without the state, or absent from it, and thus beyond the reach of the process of its courts, the admitted jurisdiction of the state over the property would be defeated, if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, in lieu of personal service, is allowed by statute in nearly all the states, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. In this state, the statute, in terms, allows a constructive or substituted service in all cases, whether upon contract or for torts, where the person on whom the service is to be made is a non-resident of the state or is absent from it, whether the action be directed against property within the state, or merely for the recovery of a personal judgment against the defendant. But so far as the statute authorizes, upon such substituted service, a personal judgment against a non-resident except as a means of reaching property situated at the time within the state, or affecting some interest therein, or determining the status of the plaintiff with respect to such non-resident, it cannot be sustained as a legitimate exercise of legislative power. A pure personal judgment, not used as a means of reaching property at the time in the state, or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the state, not having been personally served within its limits and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the state as to the liability of a party over whose person and property they had no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the state is brought under the control of the court subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the state.

Aliens at peace with the United States are allowed access to the courts of the states, and unless the statute be limited in its application as stated, we must accept the conclusion that personal judgments for torts by one alien against another, neither of whom has ever been within our borders, may be recovered without personal service, by publication, and subsequently enforced against any property belonging to the defendant, that may by chance be brought into the country. It would certainly be a strange application of the statute if an inhabitant of Asia could recover in that way in our courts a personal judgment for an alleged tort committed against him in his own country by one of his countrymen.

An attachment of the property of a non-resident is allowed by the law of this state in all actions upon contracts, express or implied. This remedy, with the ordinary power of a court of equity to enforce mortgages and other liens, and to take property into its custody where there is danger of its removal beyond the state or of being wasted, and the information imparted to third parties by filing a notice of lis pendens where an interest in real property is the subject of the litigation, affords sufficient protection to citizens of the state without the assumption of any territorial jurisdiction over non-residents. Be this as it may, any such assumption can find no support in any principle of natural justice or constitutional law.

"Where a party is within a territory," says Mr. Justice Story in Picquet v. Swan [Case No. 11,134], "he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment in personam, for the plain reason that, except so far as the property is concerned, it is a judgment coram non judice. * * * The principles of the common law (which are never to be lost sight of in the construction of our own statutes), proceed yet further. In general, it may be said that they authorize no judgment against a party, until after his appearance in court. He may be taken on a capias and brought into court, or dis-

trained by attachment and other process against his property to compel his appearance; and for non-appearance be outlawed. But still, even though a subject and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice and regular personal appearance in court."

"Jurisdiction is acquired," says the supreme court in Boswell's Lessee v. Otis, 9 How. [50 U. S.] 348, "in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by attachment or a bill in chancery. It must be substantially a proceeding in rem."

A substituted service is usually made in the form of a notice published in the public journals, as in this state. "But such notice," says Cooley (page 404), in his treatise on Constitutional Limitations, "is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one in rem, but when the res is disposed of, the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits and therefore under the control of the state; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another state or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. Where a party has property in a state, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

In Cooper v. Reynolds, 10 Wall. [77 U. S.] 308, similar doctrines are laid down by the supreme court of the United States. In that case, the plaintiff had sued the defendants in Tennessee for false imprisonment, and upon the return of the sheriff that none of them were to be found in his county, sued out a writ of attachment against their property. Publication was ordered by the court, notifying them to appear and plead, answer or demur, or that the suit would be taken as confessed, and proceeded in ex parte as to them. Publication was had, and the defendants having made default, judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession, the original owner brought ejectment for the premises. In considering the character of the attachment suit, the court, speaking through Mr. Justice Miller, said: "Its essential purpose or nature is to establish, by the judgment of the court, a demand against the defendant, and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand.

"But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not.

"If the defendant appears, the cause becomes mainly a suit in personam, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

"That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publica-

tion may have been duly made and proven in court."

The writer of the present opinion thought some of the objections taken to the preliminary proceedings in the attachment suit referred to were well founded, and dissented from the judgment of the court; but in the doctrine laid down in the above citation he always has concurred. It is, in our judgment, the true doctrine, and the only doctrine which is consistent with any just protection to the citizens of other states. Such is the constant intercourse between citizens of different states at the present time that the greatest insecurity to property would exist, if purely personal judgments obtained ex parte, without personal citation, upon mere publication of notice, which, in the great majority of cases, would never be seen by the parties interested, could be made available for the seizure of property afterwards brought within the state. That law would be intolerable, if valid, which would permit citizens of another state to come into this state and recover personal judgments for all sorts of torts and contracts, upon mere service by publication against citizens of different states who have never been within the state or possessed any property therein. If such judgments could be upheld they would become the frequent instruments of fraud in the hands of the unscrupulous, and be sprung on the property of the unsuspecting defendants when the transactions giving rise to the judgments have passed from their memory, or the evidence respecting the transactions has perished. We do not think it within the competency of the legislature to invest its tribunals with authority having any such reach and force; certainly no presumption in favor of their jurisdiction can arise when a judgment of this character is produced against a non-resident who has never been within the state, and did not appear to the action. 1 Hare & W. Notes to Smith, Lead. Cas. p. 838; Picquet v. Swan [Case No. 11,135]; Monroe v. Douglass, 4 Sandf. Ch. 182.[2]

The second position laid down in Hahn v. Kelly, requires us to consider what papers and proceedings constitute the record of a court of general jurisdiction, which may be looked into when a judgment of that court rendered against a person without the territorial limits of the court, upon constructive service by publication, is assailed collaterally for want of jurisdiction. In that case, it is held that such record consists only of the papers and proceedings which compose what is designated in the Code of Procedure as the judgment-roll; and that it need not contain the affidavit of the party and the order of the court, without which constructive service of the summons by publication cannot be made.

The statute authorizing constructive service by publication of summons upon non-resident and absent parties, requires certain facts to be presented by affidavit to the court in which the action is pending, or to a judge thereof, or to a county judge. If it appear upon such presentation to the satisfaction of the court or judge that the facts exist, an order may be made for the publication of the summons, and such order must prescribe the period and designate the paper in which the publication is to be made; and if the residence of the defendant be known, the order must also direct a copy of the summons and complaint to be forthwith deposited in the post-office directed to him at his place of residence. The service of the summons is deemed complete at the expiration of the time prescribed by the order for publication.

The statute, in the same title which treats of the manner of commencing civil actions, after stating the manner in which service shall be made in case of personal service, and in case of service by publication, provides in sections almost immediately following, that "proof of the service of summons shall be as follows: 1. If served by the sheriff, his certificate thereof. 2. If served by any other person, his affidavit thereof. 3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and on an affidavit of a deposit of a copy of the summons in the post-office, if the same has been deposited."

[2] In Oakley v. Aspinwall, 4 Comst. [4 N. Y.] 520, Mr. Chief Justice Bronson, in delivering the opinion of the court of appeals of New York, said: "When the courts of any state render a judgment against one who was not a citizen of that state, and was not brought into court, the judgment is held absolutely void everywhere else, although it may have been expressly authorized by the legislature of the state where it was rendered. I doubt whether such a judgment is of any force in the state where it was rendered. Under our form of government it is questionable, to say the least, whether the legislature can, in any case, without an express license from the people, authorize a judgment which shall operate in personam against a defendant who neither appeared nor was in any way served with process. The state must not boast of its civilization, nor of its progress in the principles of civil liberty, where the legislature has power to provide that a man may be condemned unheard." In Webster v. Reid, 11 How. [52 U. S.] 459, it appeared that the legislature of the territory of Iowa had directed that suits might be instituted against the owners of half-breed lands lying in Lee county in that territory, and notice be given to the owners through the Iowa Territorial Gazette. Suits having been instituted by notice in that way, and judgments recovered, the supreme court of the United States declared that they were nullities. "These suits," said Mr. Justice McLean in delivering the opinion of the court, "were not a proceeding in rem against the land, but were in personam against the owners of it. Whether they all resided within the territory or not, does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case, there was no personal notice nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

In another part of the same statute, in a different title and chapter, treating of a different subject, "the manner of giving and entering judgment," it is provided that immediately after entering the judgment, in case the complaint be not answered, the clerk shall attach together the summons with the affidavit or proof of service, and the complaint with a memorandum indorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment; and that these papers shall constitute the judgment-roll in the case.

Now, it is evident that the language of the statute in the first title mentioned, declaring what shall be proof of service of the summons, must be limited to the action of the persons making the service or publication, of which the sections immediately preceding in the same title speak; as if the language were as follows: "Proof of the service of summons by the sheriff or other person, or by a publisher of a newspaper, as above provided, shall be as follows." The obvious meaning intended is, that the proof of service, which the parties performing the particular duty prescribed must furnish, shall be the certificate or affidavit designated. It does not mean that such certificate or affidavit shall be all that is required on the subject of service, but only all that is required of those particular persons. Any other construction would lead to this absurd result, that an affidavit could be used to establish conclusively a fact to which it makes no reference. Publication of a summons in a newspaper is not service of the summons, nor is an affidavit of such publication proof of service. The publication, to be of any avail, must be in a paper designated, and for the period prescribed by the order of the court or judge. The terms of such order must therefore be connected with the affidavit, or the proof will amount to nothing. The affidavit by itself is only a portion of the proof, a solitary link in the chain required. The printer is not supposed to know anything of the order, and is not called upon even to refer to it in his affidavit.

When, therefore, the record of the judgment comes to be made up, it must necessarily include the order of the court, or it will disclose no proof of service. And when the statute requires the clerk to attach with other papers the proof of service, it means not merely the affidavit which the publisher may furnish as part of such proof, but the order also, without which the affidavit establishes nothing. It is in giving to the provision, declaring the proof which the officer or person making personal service or the printer publishing the summons shall furnish of their acts, the effect of a declaration that no other proof of the service was necessary, that error in our judgment was committed in Hahn v. Kelly [supra].

That the ruling in that case left the judgment-roll a defective and imperfect record, seems to have been felt by the court, for it says: "In our judgment, it would have added to the completeness of the record to have made the proof of service by publication include, also, the affidavit of the party, and the order of the court directing publication to be made, for, in point of law, they constitute a part of the mode; but the legislature has not seen proper to do so, and we can no more add to their will than we can take from it."

For the reasons we have stated, we do not admit that the statute sanctions any such defective record; but, on the contrary, we are clear that, properly construed, it requires full proof of the jurisdictional facts to be incorporated into the judgment-roll.

If, however, we are mistaken, and the order, which is the foundation of and the only authority for the publication, is no part of such roll, or, if not mistaken, we are bound to accept as correct, the construction of the statute given by the state court, then inquiry into the jurisdiction of the court cannot be limited, on a collateral attack, to the contents of the roll. The remaining record of the proceedings would be of equal authority and verity, and could be equally relied upon. The record at common law, which imported absolute verity, was a history of all the acts and proceedings in the action, from its initiation to final judgment, enrolled upon parchment for a perpetual memorial and testimony. These rolls were called records of the court, and were, in the language of Blackstone, "of such high and supereminent authority, that their truth was not to be called in question." A record, professedly embracing only a portion of such acts and proceedings, cannot be entitled to similar implicit credit, and cannot equally close the door against collateral attack. The use of the same designation to indicate a different collection of acts and proceedings, cannot, of course, carry with it the same import. If the legislature should declare that only that portion of the proceedings in an action, which constitutes the judgment itself, should be enrolled, it would not be any less illogical to insist that to that enrollment parties should be confined when questioning the jurisdiction of the court, than it is that they shall be confined to any other defective record of the proceedings in the action.

When constructive service by publication in a personal action is authorized by statute in place of personal citation, the rule prevailing in all courts is, that the statute must be strictly pursued. We are not aware that this doctrine has been denied in any state court. It has been repeatedly asserted by the supreme court of this state in the most emphatic manner. "A contrary course," said that court in Jordan v. Giblin, in 1859, "would encourage fraud and lead to oppression." 12 Cal. 100. "A failure to carry out the rule thus prescribed," said the court, speaking through Mr. Justice Sanderson, in Ricketson v. Richardson, 26 Cal. 149, "in any

particular is fatal where it is not cured by an appearance." In Forbes v. Hyde, 31 Cal. 342, decided in 1866, the same doctrine is recognized. There the objection to the insufficiency of an affidavit made to obtain an order of publication, was allowed on a collateral attack to the judgment under which the plaintiff claimed title in ejectment. As the statute only requires certain facts to appear by affidavit to the satisfaction of the court or judge, we should be inclined, in the absence of this decision, to hold that defects in the affidavit could be taken advantage of only on appeal, and could not be urged collaterally. We cite the case, however, not only because it reiterates the rule of strict construction, but because of the special reason it gives for its enforcement in this state, in the observation that there is probably "no state in which so many have waited and are still waiting for their adversaries to depart in order that suit may be brought and judgment obtained against them on publication without actual notice." "It may be important," continues Mr. Justice Sawyer, in delivering the unanimous opinion of the court, "to the interests of those who suppose they have acquired rights under this class of judgments, that they should be upheld. But it is equally important that the interests of parties who have only been constructively served with process, and who, in many instances, have had no actual notice till they have been condemned unheard, should be protected. If a judgment is void for want of jurisdiction, all those who have acquired interests under it have done so in full view of the condition of the record; while, on the other hand, a defendant is liable to have an unjust judgment rendered against him without any knowledge of the pendency of the action till it is too late to protect himself. An appeal is no adequate remedy where a party has no notice; for the time to appeal is very brief, and may expire before actual notice is obtained. In the language of the court in Smith v. Rice, 11 Mass. 512, 'The very grievance complained of is, that the party had no notice of the pending of the cause, and of course no opportunity to appeal.'"

Now, if the rule in Hahn v. Kelly be correct, we have this singular result: that whilst the statute must be strictly followed before jurisdiction can be acquired over the person, a party against whom a judgment is rendered is precluded from examining the proceedings, by which alone it can be seen whether the statute has been followed. In other words, the court says no jurisdiction is acquired by the court if the requirements of the statute be not pursued, but the record of the proceedings taken shall always be a closed book.

If the order of the court is no part of the judgment-roll it cannot be brought before the court on appeal, unless a statement or bill of exceptions be made up; and either of these proceedings supposes the presence of the parties or counsel. If any other direct proceedings are taken they might result in vacating the judgment; but under the ruling in the case cited, the record being regular on its face, the purchaser, if a third party, would be protected, and the wronged defendant be left to the doubtful chances of recovering the value of his property by action against the plaintiff.

From the examination we have thus been able to give to the case of Hahn v. Kelly, we do not find in it sufficient reasons to depart from the old and well-established rules formerly recognized in the supreme court of the state, the observance of which, as we are more and more impressed every day, is essential to the protection of the rights of all citizens, whether resident or non-resident of the state.

The proceedings for constructive service by publication, which the statute authorizes, are, as stated by Mr. Justice Sanderson in the case of Ricketson v. Richardson [supra], "in derogation of the common law"; that is, they are not in accordance with the course of the common law.

It was the boast of that law that it condemned no one in his person or his property without his day in court. That there must be citation before hearing, and hearing, or opportunity of being heard, before judgment, was a cardinal principle which pervaded all its judicial proceedings. And when the articles of compact contained in the ordinance of 1787, for the government of the Northwest Territory declared that its inhabitants should always be entitled "to judicial proceedings according to the course of the common law," it was believed by them that they had in that guarantee the assurance of full protection to all their private rights; and that the language was not used "mainly for ornamental purposes," having a certain "rotundity of sound which is pleasing to the ear" but leaving "no definite impression upon the understanding."[3] Hahn v. Kelly, 34 Cal. 411. The common law recognized no such proceeding as a personal judgment without the appearance of the party, and probably in no other case than Hahn v. Kelly were proceedings to outlawry ever

[3] In speaking of these terms—"proceeding according to the course of the common law"—the court, in Hahn v. Kelly, uses this language: "Some words are used to express ideas, and others to ornament them. The more we turn this expression over, and examine it by the light of reason, for the purpose of determining to what use it has been put, the more we are inclined to the opinion that it has been used merely from force of habit, or mainly for ornamental purposes. It has a certain rotundity of sound which is quite pleasing to the ear, but leaves no definite impression upon the understanding. It is simply equivalent to a knowing look or a solemn shake of the head, and doubtless it was first used in that sense. When first employed, its use was harmless, for there was then no mode of procedure except such as the common law prescribed, but its continued use where the modes of the common law have been superseded is mischievous."

cited as a mode "amounting or equivalent to constructive service," by which a common law court obtained jurisdiction. "By the strict rules of the common law," says the supreme court of New Jersey, in Hess v. Cole, 3 Zab. [23 N. J. Law] (116) 123, "it was necessary in every suit, not only that the defendant should be served with process, but that his appearance to the action should be effected. Every student is familiar with the cumbrous machinery and complicated process by which the courts sought to compel the appearance of the defendant. He is familiar also with the principle, that if the defendant was contumacious and refused to appear to a mere civil action, the proceedings were at an end. No judgment could be rendered. Every common law record shows upon its face that the defendant was either in custody, or was summoned or attached to answer to the action. And however inconvenient may have been the strictness with which the principle was applied, and the extent to which it was enforced in ancient common law proceedings, the principle itself is by no means peculiar to the common law. It pervades, in fact, every code of law and every well-regulated system for the administration of justice."

The opinion in Hahn v. Kelly is not only singular in its reference to proceedings to outlawry for want of appearance of a party, but the citations from Blackstone, to show that the courts of chancery would proceed to judgment upon a constructive service of process at all analogous to service by publication, establish nothing of the kind; and only seem to do so because they are detached from their context in the volume. They relate to proceedings to compel the appearance of parties after service of the subpoena, which is the original process in chancery, as any one will see who will read the whole page in Blackstone from which the citations are taken.

Service of the subpoena could indeed be made by leaving a copy at the actual residence of the defendant, as well as by delivering a copy to him personally. And in special cases where an absent or absconding defendant had appointed a person to act as his agent in the matter litigated, substituted service upon such agent in lieu of the principal was, upon application to the court, sometimes allowed. Adams' Eq. 324; Hobhouse v. Courtney, 12 Sim. 140. But it was not until the statute of 5 Geo. II. c. 25, that proceedings could be taken by publication without service in one of the modes indicated. That statute authorized proceedings by proclamation published in the London Gazette, and read in the parish church, and posted in the Royal Exchange, where a defendant had absconded to avoid service. It did not apply to a citizen or subject of another government who had never been in the realm.

Passing from Hahn v. Kelly, we proceed to consider the other positions taken by the defendant to defeat a recovery. It is contended by her counsel: 1. That the cases of Gray and Eaton were suits in rem, and that the decree in the consolidated suit bound the property without reference to the defective service of summons upon the infant. 2. That the district court had authority to appoint a guardian ad litem for the infant without previous service upon her; and 3. That the decree in the consolidated suit was not reversed as to the widow Matilda.

1. Suits in rem may be divided into four classes: 1st, those which are directed primarily against particular property, and are intended to dispose of it without reference to the title of individual claimants; 2d, those which are instituted to determine the status of particular property or persons; 3d, those which are, in form, personal suits, but which seek to subject property brought by existing lien or by attachment, or some collateral proceeding, under the control of the court, so as to give effect to the rights of the parties; and 4th, those which seek to dispose of property, or relate to some interest therein, but which touch the property or interest only through the judgment recovered. Proceedings in admiralty for the forfeiture of the vessel or goods are instances of the first kind; the suit is there brought against the vessel or goods directly, without reference to the rights of persons, and all parties are notified to appear by a designated day and assert their claims, or the property will be condemned. Proceedings in the probate court upon the validity of a will are instances of the second kind; the judgment, when rendered, operating directly upon the status or condition of the instrument, determining its validity or invalidity. Proceedings by attachment against the property of debtors, or to foreclose a mortgage, or other lien upon property, or to partition real estate, are instances of the third kind. Proceedings to compel the execution or cancellation of a conveyance of real property in the state and proceedings to wind up and dispose of partnership property are instances of the fourth kind. The third and fourth classes mentioned are not strictly proceedings in rem; but so far as they affect property in the state, they are treated as substantially such proceedings.

In proceedings in rem notice of some kind is required, but as all property is supposed to be in the possession of its owner, either in person or by agent, a seizure of property is, of itself, considered to impart notice of the proceeding to the owner. Therefore, where the property is, at the outset, taken into the custody of the court, the law is less strict in requiring further notice, either generally by proclamation to all persons, or specially to the reputed owner. But where the property to be affected is not thus at the outset taken into custody, there is no constructive notice given by the proceeding; and the same notice, as provided by law,

must be given to the defendant, as in actions where a personal judgment for damages is alone sought. "A proceeding," says the supreme court of Vermont, in Woodruff v. Taylor, 20 Vt. 65, where the law on the subject of suits in rem is stated with great clearness, "professing to determine the right of property where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It will be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

The suits of Gray and Eaton were partly in personam, and were, at the same time, intended to subject property in the state to the disposition of the court; but as the property was not taken into custody at the outset, there was no constructive notice given to the owners or claimants by the proceeding, and the absent and non-resident defendants could only be brought before the court by publication of summons, as provided by statute, and this, as the supreme court held, was never done, so far as the infant Franklina was concerned.

2. As to the authority of the district court to appoint a guardian ad litem for the infant without previous service upon her, it is sufficient to observe that the supreme court of the state on appeal decided that no such authority existed. The statute requires service of summons on all infants, before a guardian ad litem can be appointed, and makes no difference in this respect between an infant of a few months, and one nearly attaining his majority, and the service can no more be dispensed with in the one case than in the other. Besides, there is wisdom in the provision requiring service even upon an infant in its cradle, for the papers, through its nurse or relatives, would almost be sure in such case to find their way into hands of parties who would look after the interests of the child. Be this as it may, it is the proceeding required by the legislature before the jurisdiction of the court can attach; and as Chief Justice Taney said of a mere formal objection which was insisted upon in the supreme court, nothing is unimportant or to be disregarded which the legislature has prescribed as a condition for exercising the jurisdiction of the court. Where personal service cannot be made by reason of the non-residence in the state or absence of the infant, service must be made by publication as in other cases. Such publication is the prescribed condition to the exercise of jurisdiction over the infant.

3. The objection that the decree of the district court in the consolidated action was not reversed as to the widow Matilda, is not founded upon fact. There was but one decree, though the court speaks in its opinion as though there were two separate decrees before it. This is an evident inadvertence in the language of the court, arising from the fact that the objections to the validity of the decree were taken to the separate proceedings had before their consolidation. The case was remanded for further proceedings; and on filing the remittitur, the question evidently arose as to what proceedings should be had, and after hearing counsel for the parties, the court ordered a new trial on all the issues as to all the parties. Upon this order the case remained on the calendar of the district court for trial for over a year, and was then dismissed. The order of dismissal was entered in the consolidated suit, and it would appear for greater caution in the separate suits also.

The decree as to the infant Franklina being void for want of jurisdiction in the district court over her; all proceedings founded upon such decree, so far as her rights are concerned, necessarily partake of the same infirmity. The purchaser of the premises being one of the attorneys of the plaintiff Gray, the law, as held by the supreme court, imputes to him knowledge of the defects in the proceedings which were taken under his direction and that of his partners. The conveyance of the undivided half to his law partner was made after the reversal of the decree, and the latter also took his interest with similar knowledge of the defect. Independently of this fact, their title fell with the reversal of the decree. On this subject we can add nothing to what was said in the opinion of the supreme court, except that the doctrine of Reynolds v. Harris [14 Cal. 667] was reaffirmed in the late case of Reynolds v. Hosmer, reported in 45 Cal. 617.

As to the claim for rents, we are of opinion that the cost of filling up the water lot, which was a valuable and permanent improvement, is a just offset to the rents received or which might have been received by the defendant.

It follows from the views we have expressed that the plaintiff is entitled to judgment for the possession of the premises; and such judgment will be entered upon the findings filed, with costs.

GALVESTON (HITCHCOCK v.). See Cases Nos. 6,532-6,534.

Case No. 5,207.

GALVIN v. BOUTWELL.

[9 Blatchf. 470.] [1]

Circuit Court, S. D. New York. March 8, 1872.

REMOVAL OF CAUSES—CITIZENSHIP—ALIEN AS PARTY.

A case was removed into this court, under the 12th section of the act of September 24, 1789 (1 Stat. 79), on the allegation that the plaintiff was a citizen of New York, and the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

defendant a citizen of Massachusetts. The plaintiff moved to remand the cause, on the ground that he was an alien. That fact was not denied: *Held*, that the motion must be granted.

[Cited in Heath v. Austin, Case No. 6,305; Mackaye v. Mallory, 6 Fed. 751.]

[This was a suit by Bartholomew C. Galvin against George S. Boutwell. Heard on motion to remand the cause to the state court.]

Joseph J. Marrin, for plaintiff.
Noah Davis, for defendant.

BLATCHFORD, District Judge. As it is not denied, on this motion, that the plaintiff is an alien, I think the case ought to be remanded to the state court. It was removed here under the 12th section of the act of September 24, 1789 (1 Stat. 79), on the allegation that the plaintiff was a citizen of New York, and the defendant a citizen of Massachusetts. I do not think it falls within the principle of Dennistoun v. Draper [Case No. 3,804], and Wood v. Matthews [Id. 17,955]. If the question of the alienage of the plaintiff were seriously contested, it would be proper to retain the case for a trial of that question, on the merits, on formal issues in the cause. There can be no doubt of the power of this court to remand the cause, if it sees that there is no jurisdiction. Witetiqui v. D'Arbel, 9 Pet. [34 U. S.] 692, 701. The exercise of that power at this stage of the cause is a question of discretion; and, in this case, I think a proper exercise of such discretion requires that the case be remanded. The motion is granted, on condition that the plaintiff stipulates that the defendant have thirty days' time to answer the complaint, after a certified copy of the order herein shall have been filed in the state court.

Case No. 5,208.

GALVIN v. BOYD.

[4 Wkly. Notes Cas. 288; 25 Pittsb. Leg. J. 14.]

Circuit Court, E. D. Pennsylvania. July 21, 1877.

BANKRUPTCY—PAYMENT OF DEBT AFTER PROCEEDINGS BEGUN.

[Where a note is given in payment of a book account, after a petition in bankruptcy is filed against the payee, but before the adjudication, and the note at maturity is paid to a bank which holds the same, this is a discharge of the maker, and the assignee in bankruptcy cannot maintain a suit against him for the amount of the note.]

Rule for judgment for want of a sufficient affidavit of defence. Assumpsit by the assignee in bankruptcy of A. Benton & Co. upon a book account and promissory note, copies of which were filed. Upon January 31, 1877, the petition in bankruptcy was filed, and in March, 1877, the firm of A. Benton & Co. were adjudicated bankrupts. In re Benton [Case No. 1,333]. The book account contained charges for goods sold and delivered during August and September, 1876. The note for like amount was dated February 26, 1877, after the petition had been filed. The affidavit of defence alleged that the note was given in payment of the book account, and that a few days before its maturity the defendant was notified by the Union National Bank that it held the note and demanded payment, and that he paid the note at maturity, and now had it in his possession.

Prichard & Purves, for the rule.

This whole transaction took place after the filing of the petition, which is notice to all the world. The assignee is entitled to recover. Mays v. Bank, 14 P. F. Smith [64 Pa. St.] 74; Fluck v. Hope, 1 Wkly. Notes Cas. 42; Baird v. Adams, Id. 144; Turner v. Shenkmeyer, Id. 266.

Mr. Stover, contra.

CADWALADER, District Judge (orally). The case of Mays v. Bank, supra, was decided on the authority of Wickersham v. Nicholson, 14 Serg. & R. 118, which is not law here, because not founded on the present bankrupt act [Act March 2, 1867 (14 Stat. 517); amended by Act June 22, 1874 (18 Stat. 178)]. Rule discharged.

GAMBLE (LEE v.). See Case No. 8,189.

Case No. 5,209.

GAMBLE et al. v. MASON.

[7 Am. Law Reg. 178; 42 Hunt, Mer. Mag. 589.]

Circuit Court, D. Maryland. Nov. Term, 1858.

CUSTOMS DUTIES—TARIFF ACTS OF 1842 AND 1857—ARTICLES NOT ENUMERATED—ACTIONS AGAINST COLLECTOR—COMPLIANCE WITH STATUTORY REQUIREMENTS.

1. The 20th section of the tariff act of 1842 [5 Stat. 565] is still in force, and is embodied in the act of 1857 [11 Stat. 192].

[Approved in Field v. Schell, Case No. 4,772.]

2. That whether an article imported into the country, and which is not specifically enumerated in the schedule of the act, bears a similitude in material, quality, texture or use, to one which is enumerated, is a question which a jury must determine.

3. In order to maintain an action against the collector of the port, the plaintiff must satisfy the jury that he has fully complied with all the requirements of the statute, both as to form and substance.

This was an action on the case brought by the plaintiffs to recover of the defendant $187. The plaintiffs [Joseph C. Gamble and David Gamble] are aliens and citizens of England, and the defendant [John T. Mason] is collector of the customs of the United States, at the port of Baltimore. On the 16th of April, 1858, D. McIlvain, as consignee and agent of the plaintiffs, entered at the custom house in Baltimore one

hundred barrels of caustic soda, valued at $1,700. The defendant assessed and levied on the said caustic soda a duty at the rate of fifteen per cent. ad valorem; the consignee contending that caustic soda was liable, under the tariff act of 1857, to but four per cent. ad valorem, paid the above assessment of fifteen per cent. under protest in writing, and took the goods; the assessment, as paid, amounted to $255. Afterwards, on the 24th of April, 1858, McIlvain addressed a letter to the defendant, setting forth the grounds on which he protested against the said assessment of fifteen per cent., and the reasons why he considered that caustic soda was liable to a duty of but four per cent.; the defendant, still adhering to his decision, McIlvaine, as agent and consignee of the plaintiffs, on the 13th of May, 1858, appealed from his decision to the secretary of the treasury, and the secretary of the treasury on the 18th of May, 1858, notified McIlvaine that he had affirmed the decision of the defendant. The plaintiffs thereupon, on the 16th day of June, 1858, instituted the present suit.

The act of congress, approved March 3, 1857 [supra], being the latest tariff act, embraces eight separate schedules, designated by the letters of the alphabet from A to H inclusive; each of said schedules contains a list of enumerated articles, all articles in the same schedule being assessed at the same rate, and a different rate being assessed in each of the different schedules. Schedule I contains all articles that are free of duty. The act of 1857 also, provides that all articles imported from abroad into the United States, and not enumerated in said schedules, shall pay a duty of fifteen per centum. The act of 1857 is similar in its provisions to the tariff act of 1846 [9 Stat. 42], which was the tariff act next preceding the act of 1857, with the exception that the rates of duty are different in the two acts, and some changes made in the latter as to the relative position of some articles in different schedules. The 20th section of the tariff act of 1842, is in these words,—"That there shall be levied, collected and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the uses to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles, paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

The plaintiffs admitted that caustic soda was not enumerated in any of the before mentioned schedules of the act of 1857, but they contended that under the 20th section of act of 1842, caustic soda bears a similitude to soda ash either in material, quality, texture, or the uses to which it may be applied, and of all the articles enumerated in the different schedules of the act of 1857, it most resembles soda ash; and inasmuch as soda ash is made liable to pay but four per cent. by said act, (being embraced in Schedule H) that therefore caustic soda is properly chargeable with but four per cent., and having paid fifteen per cent. under protest on that entered on the 16th of April, 1858, that they are entitled in this action to recover the difference between fifteen per cent. on $1,700, and four per cent. on the same sum.

The defendant contended, 1st, that caustic soda is liable to pay a duty of fifteen per cent. as an unenumerated article under the act of 1857. 2d. That it bears no similitude either in material, quality, texture, or the uses to which it may be applied to soda ash, and that it does not most resemble soda ash of all the articles enumerated in the several schedules of the act of 1857; that therefore it is not properly chargeable with the same duty as is levied upon soda ash.

J. Mason Campbell and Bernard Caxter, for plaintiffs.

W. Meade Addison, U. S. Dist. Atty., for defendant.

HELD BY THE COURT (GILES, District Judge): 1st, that the 20th section of the tariff act of 1842 was still in force, and must be considered as embodied in the tariff act of 1857.

2d. That if caustic soda bears a similitude to soda ash, either in material, quality, texture, or the uses to which it may be applied, and most resembles soda ash of all the articles enumerated in said tariff act of 1857, that then caustic soda was under said act chargeable with but four per cent. ad valorem, and that whether or not caustic soda bears the said similitude to soda ash, and most resembles it as aforesaid, is a question for the jury to determine.

3d. That if caustic soda more nearly resembled carbonate of soda than it does soda ash, in the particulars mentioned in the said 20th section of act of 1842, which is a question for the jury to determine, then that caustic soda was liable to a duty of eight per cent., that being the rate of duty with which carbonate of soda is chargeable, under the act of 1857.

4th. That in order to maintain this action against the defendant, the plaintiffs must

show, to the satisfaction of the jury, in addition to the other matter which they are required to show, that within ten days after the decision of the collector in this matter, they gave notice to him of their dissatisfaction with his decision, and set forth distinctly and specifically therein the grounds of objection thereto; and did within thirty days after the date of such decision, appeal therefrom to the secretary of the treasury, and did within thirty days from the date of the decision of the secretary of the treasury in this matter, institute this suit.

The jury rendered a verdict in favor of the plaintiffs for one hundred and eighty-seven dollars, $187, (the amount claimed by the plaintiffs) and $6.88 interest from the 16th of April, 1858, making in all $193.88.

[A writ of error sued out by the plaintiff was dismissed by the supreme court for want of jurisdiction. 21 How. (62 U. S.) 390.]

GAMBLE (SPAIN v.). See Case No. 13,199.

GAMBRILL (CARROLL v.). See Case No. 2,454.

GAMECOCK, The. See Cases Nos. 122 and 123.

GAMES (DUNN v.). See Cases Nos. 4,176 and 4,177.

Case No. 5,210.

GAMMELL v. SKINNER.

[2 Gall. 45.] [1]

Circuit Court, D. Massachusetts. May Term, 1814.

PRACTICE IN ADMIRALTY — VERIFICATION OF ANSWER—SUIT FOR WAGES—SPECIAL INTERROGATORIES—INTEREST.

1. In causes on the instance side of the admiralty, the answer of the claimant should be verified by oath; [2] and in a suit for wages, the libellant may compel the adverse party to answer special interrogatories.

[Cited in The David Pratt, Case No. 3,597; Hutson v. Jordan, Id. 6,959.]

2. In suits for wages, interest is allowed from the time of a demand proved; and if no demand is proved, from the commencement of the suit.

[Cited in The Elizabeth Frith, Case No. 4,361; The Grapeshot, Id. 5,703; The Swallow, Id. 13,665; Burdett v. Williams, 30 Fed. 698.]

[Cited in Mahurin v. Bickford, 6 N. H. 572; McIlvaine v Wilkins, 12 N. H. 481.]

This was a libel for mariners' wages. Some questions arose as to the practice in causes on the instance side of the court, and particularly in causes of this nature.

Mr. Selfridge, for libellant.

Mr. Townsend, for defendant.

STORY, Circuit Justice. In causes on the instance side of the court, the answer of the claimant should be verified by his oath. This is the general practice both of courts of equity and courts of admiralty; and indeed of all courts proceeding according to the course of the civil law. 2 Browne, Civ. & Adm. Law, 416; Clerke, Praxis Adm. tit. 14, 24; Marr. Forms, 363. In suits for mariners' wages the libellant may compel the adverse party to answer special interrogatories, which are filed under the direction of the court, and are like the interrogating part of the bill in chancery. And in point of convenience this practice should be adhered to, for it brings distinctly before the court the points, on which the defence is intended to be rested. As to all facts denied, the burthen of proof lies on the plaintiff, except in the special case of the shipping paper and log book, as provided for in the statute regulating seamen in the merchants' service. Act July 20, 1790, c. 29, § 6 [1 Stat. 133].

Mr. Selfridge, for libellant, inquired, whether interest would be allowed on the amount of the wages due from the time of a demand made.

STORY, Circuit Justice. There is no difference in this respect between the practice of our courts of common law, and that of the admiralty. In the latter, interest is generally allowed from the time of a demand made for the wages; and if no special demand is proved, from the time of the commencement of the suit.

[1] [Reported by John Gallison, Esq.]

[2] See Dunl. Adm. Pr. 209.

GAMMON (GRAHAM v.). See Case No. 5,668.

Case No. 5,211.

GANNON v. DONN.

[1 Hayw. & H. 346.] [1]

Circuit Court, District of Columbia. Oct. 30, 1848.

JUSTICE OF THE PEACE — JUDICIAL AND MINISTRIAL ACTS—NEGLIGENCE—SUPERSEDEAS TAKEN ON SUNDAY.

1. A justice of the peace is not liable in damages for judicial acts, and for ministerial acts only in case of intentional or gross negligence.

2. Sunday is not a day on which a supersedeas can be given.

3. But taking it as a judicial act, and the justice is not liable, though taken on a Sunday and from a minor.

At law. Action [by James P. Gannon] against [Thomas C. Donn] a justice of the peace for negligence or omission in the discharge of his duty under section 4 of the act of 1823 [3 Stat. 743]. The plaintiff had a fieri facias on a justice's judgment issued by defendant and laid on Gannon's horse after dark on Saturday; the legality of which levy being doubted, it was agreed the horse should be placed in the livery stable of the

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

plaintiff until the judgment should be superseded. On the following day (Sunday) the recognizance was entered into before the defendant, and antedated on the preceding Saturday. The superseder was under twenty-one; but wanted only six or seven months of being of age. His appearance indicated full age. The horse was delivered to Gannon on the certificate of supersedeas. His residence was in Maryland, and afterwards he went to Mexico, but was seen in the District on the horse after the expiration of the time of the supersedeas. It was not shown that he had any other property. The surety in the recognizance refused on the ground of non-age, and no steps were taken thereon or on the original judgment. The plaintiff, representing to the defendant that he had lost his debt by his conduct, said: "Sooner than you shall lose it I will pay it." Upon this evidence the plaintiff seeks to recover against the defendant under section 4 of the act of 1823 for negligence or omission in the discharge of his duty.

Mr. Lenox, for appellant.
Mr. Giberson, for appellee.

MORSELL, Circuit Judge. This is the first instance of a suit under this section. The terms are general and might comprehend any degree of negligence or any omission of duty; but the third and fourth sections of the law must be taken together, and the general expressions of the latter limited by the former. The expression in the fourth section is that "if any justice shall omit to keep a docket, or be guilty of any other negligence or omission, whereby the plaintiff, having obtained a judgment before such justice, shall lose his debt," the justice shall pay the same. The keeping of a docket is purely a ministerial act, and the general terms must be limited to acts of the same character, and cannot be extended to acts done or omitted in his judicial capacity. A justice is not answerable for his judicial opinions, though erroneous, and as to his ministerial acts there must be proof of intentional violation of duty or gross negligence.

"The acts complained of are: 1. That the recognizance was taken on a Sunday and antedated. 2. That the surety was a minor. Sunday is not a day for legal proceedings. 2 Inst. 264. But in taking the supersedeas the justice was acting in his judicial character, and might have supposed the consent of the parties had been given to consider it as done on Saturday. As to the age of the surety the justice might well be deceived by his appearance, and there was nothing to awake suspicion. Notice need not be given to the plaintiff of the time and place of taking the recognizance, nor is there proof that the debt has been lost by any other act or omission of the defendant. His promise is not obligatory on him. The plaintiff is not entitled to recover.

Case No. 5,212.

GANT v. PEASLEE.

[2 Curt. 250.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

CUSTOMS DUTIES—DUTIABLE VALUE—PORT OF SHIPMENT.

Where merchandise was shipped from Smyrna to the United States, via Liverpool, where it was to be, and was transferred to another vessel, it was *held* that an estimated freight from Smyrna to Liverpool, could not be added to the market value, and charges at Smyrna, to make up the dutiable value. In such a case, Smyrna, and not Liverpool, is the place from whence the merchandise is imported into the United States.

[Cited in Forman v. Peaslee, Case No. 4,941; Millar v. Millar, Id. 9,546.]

[This was an action at law by James Gant against Charles H. Peaslee.]

Mr. Griswold, for plaintiff.
Mr. Hallett, Dist. Atty., contra.

CURTIS, Circuit Justice. This is an action for money had and received, to recover of the collector of the port of Boston, money alleged to have been illegally exacted, in payment of duties on merchandise imported into that port by the plaintiff. The evidence showed that a parcel of figs, admitted to be the produce of Turkey, were shipped at Smyrna by the plaintiff, on board a steamer called the Melita, under a bill of lading, which made them deliverable in Boston. The Melita belonged to the British and North American Mail Steamship Company, and was one of a line plying between Liverpool and Smyrna, and other ports in the Mediterranean, in connection with the line of British steamers which ply between Liverpool and Boston and New York. And the bill of lading contains a memorandum, to this effect, that the goods are to be forwarded to Boston by the first British and North American Royal Mail Steamship Company's steamer, at shipper's risk, and company's expense. The freight stipulated is twelve pounds sterling per ton, for the entire transportation from Smyrna to Boston, via Liverpool. When the goods were entered at the custom-house, the defendant added to the charges shown by the invoice, the estimated cost of freight from Smyrna to Liverpool, at three pounds per ton, which amounted to $435.60, and on this amount, a duty was assessed. The plaintiff protested in writing, before payment, against paying a duty on the freight from Smyrna to Liverpool, and brings this action to recover it back. These duties were assessed under the tariff act of July 30, 1846 (9 Stat. 42), but the question now before me, depends upon the provisions of a subsequent law, of March 3, 1851 (9 Stat. 629, § 1), in conformity with which, the dutiable value of merchandise was required to be ascer-

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

tained. The law directs that there shall be added to the appraised value or price of the merchandise "all costs and charges, except insurance, and including in every case a charge for commissions, at the usual rates, as the true value at the port where the same may be entered, upon which duties shall be assessed."

The first question is, whether a charge for freight from Smyrna to Liverpool, could lawfully be added, as being one of the "charges" within the meaning of this act. The direction to add "charges" to the cost of the goods, to arrive at their dutiable value, was first given by the act of January 29, 1795 (1 Stat. 411), was repeated in the collection act of 1799, § 61 (1 Stat. 673), and in many laws on this subject since that date (3 Stat. 732, § 5; 4 Stat. 273, § 8; Id. 591, §§ 7, 15; 5 Stat. 563, § 16; 9 Stat. 42, § 8). And it has been uniformly held and practised by the treasury department, under all these laws, that freight was not a dutiable charge. It is so stated in terms by the circular of the secretary of the treasury of the 27th of March, 1851, which is found in 1 Mayo, p. 45, of Treasury Circulars. This practical construction placed on former laws, on this subject, and which had continued for more than half a century, when the act in question was passed, must be considered as known to, and silently adopted by congress, when it used in this law the same phraseology, employed in the former laws thus construed. I consider it, therefore, too late now to contend for the general proposition that freight is a dutiable charge within the meaning of the act of 1851. If so, it would seem difficult to maintain, that an estimated freight, pro rata itineris, is a dutiable charge, when the merchandise, instead of coming by the most direct route from the country of its production, and from which it is actually exported to the United States, comes by a more circuitous route, passing through a port of another country. For in such a case, it is still freight, paid for the transportation of the merchandise, to the United States.

The argument on the part of the collector is, that the act of 1851, has made it the duty of the collector, to ascertain the market-value, at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported into the United States, and to add thereto all costs and charges; that in this case England was the country from whence the figs were exported into the United States; that consequently, their market value there, and the costs and charges there, were to be ascertained; that if it was not lawful to add the cost of freight from Smyrna to Liverpool, as one of the costs or charges, yet that the expense of bringing the figs to England must have embraced their value in Liverpool, and that it is immateral to the plaintiff, whether that expense goes into the dutiable value in the form of costs, or charges on the figs, or as part of their market value in Liverpool. This is an ingenious view of the defendant's case, and seems to be the best which it admits of; but I am of opinion it is not consistent with the law.

If it were conceded that, in this case, England was the country of exportation, it could not be maintained that the freight paid for carrying the figs to England, was one of the costs or charges within the meaning of this act of 1851. Because, in that case, the act requires the market value in England to be ascertained, and the costs and charges added; now the cost of carrying the figs to England necessarily enters into and affects their market value in England, and is included, when that market value is ascertained; and, of course, is not to be again added as one of the costs or charges. Besides, there is no legitimate mode of ascertaining the amount of such a charge. No freight was agreed on, in this case, for transporting the property from Smyrna to Liverpool. The actual freight was paid, for the transportation to the United States; and when the collector added £3 per ton for freight to Liverpool, he did not add an actual charge, paid by the importer, but a supposed sum, estimated by himself, as being what it would have cost to carry the property to Liverpool, if that had been, as it was not, its place of destination.

Nor can it be admitted that the other position is tenable, that, the market value in England being the object of inquiry, it is immaterial whether the cost of carrying the property there is included in that market value, or is added to the invoice in order to ascertain it. It is obviously true that the cost of carrying the property to England, enters into and affects its market value in that country. But it by no means follows, that at any given date this cost of transportation enhances the value there precisely to the amount of the freight. Market value is affected by many causes, the chief of which is supposed to be the extent of the supply, compared with the demand; and it is plain, that to take the invoice cost and charges at Smyrna, and add to them the cost of transportation to Liverpool, would not be a legitimate mode of ascertaining the market value of figs, in Liverpool. So that conceding England to be the country whence the figs were exported, to the United States, the market value there was not ascertained, nor attempted to be ascertained. The collector undoubtedly treated the market value in Smyrna, as shown by the invoice, to be the true market value, and added £3 per ton as one of the charges, or costs, at Liverpool, which was the last port of departure to the United States.

But I am satisfied that there is another defect in the position assumed by the defendant's counsel. I do not think England, the country from which these figs were imported into the United States, within the meaning of the Act of 1851. They were

purchased at Smyrna, and there shipped for the United States, under a consignment to the plaintiff's agent in Boston. When they left the country of their production, they were destined for the United States. It was not intended that they should enter any other market, or become part of the merchandise of any other country than the United States. When the figs left Symrna, if the question had arisen, to what country have they been exported, the answer must have been, to the United States. It would no more have been true, in point of fact, that they were exported to England, than that they were exported to Malta, or Trieste, or any other port, where the steamer, which carried them, might stop, as she came down the Mediterranean. Their going to Liverpool, and being transshipped there, affected only the route and means of their transit, not their place of departure, or destination. It is well known that large importations are made into the United States from Germany and Switzerland. Merchandise, the product or manufacture of those countries, is purchased in their markets, invoices made, and the property brought by land, or interior navigation to the coast, and there shipped. It appears by the treasury circular already referred to, that contemporaneously with the passage of this act of 1851, an interpretation was put on it by the department, under which the country of production was, in these cases, deemed the country whence the merchandise was imported into the United States. In my opinion, this interpretation was sound. It assumes that, though the merchandise passes through different countries, and the vehicles for its transportation are changed, and though it arrives in the United States in a vessel on board which it was placed in France or Belgium; yet if it was bought by the market of the country of production by the importer, and was sent by him thence to the United States, it was imported into the United States from the country of production, within the true meaning of this act; and I apprehend it can make no difference, in this particular, whether the change of the vehicles of transportation, is from one steamship to another, or from land to water carriage.

It may be urged however, and I suppose this is the ground, upon which the practice complained of in this case, has been adopted, that when merchandise is purchased in the country of its production, and transported to the sea-coast and there shipped, the cost of the carriage to the sea-coast is added, as one of the costs and charges. I suppose this is the practice, under this law, and I do not question its correctness. Viewing the subject logically merely, it might be difficult to distinguish those costs and charges of transporting merchandise from Geneva, for instance, to Havre, from the cost of transportation from Smyrna to Liverpool. So, reasoning a priori, it would be difficult to show that marine freight was not a cost or charge, which enhanced the dutiable value of merchandise, at its place of destination. But the law has made a distinction between freight for transporting property on the sea, and other charges; and while it requires these to be included, it requires that to be excluded; and whether the voyage be one passage only, or several passages between different ports, beginning at the place of exportation, and ending at the place of importation, and whether it be performed in one or two bottoms, what is paid for the whole transportation on the sea, is freight, and is not to be included as a dutiable charge, whether it be incurred in one port or another, or the whole of the voyage of importation. In the case of Grinnell v. Lawrence [Case No. 5,831], Mr. Justice Nelson had occasion to consider a similar question arising under the tariff act of 1842 (5 Stat. 548). Though not identical with this case, it has a strong bearing on it, and has materially aided me in coming to a conclusion concerning it.

In conformity with the agreement of the parties, a verdict is to be directed for the plaintiff, for the amount paid, on account of duties assessed on the charge for freight.

Case No. 5,213.

GANTT v. JONES.

[1 Cranch, C. C. 210.] [1]

Circuit Court, District of Columbia. Dec. Term, 1804.

BILLS AND NOTES — NOTICE TO JOINT INDORSERS —PAYMENT BY ONE—SUIT AGAINST THE OTHER.

1. Where there are two joint indorsers notice must be given to both.

2. If one of the joint indorsers pay the note, he cannot recover a moiety from the other indorser unless he was liable to pay the note.

3. Quaere, as to interest on money had and received.

One joint surety having paid the whole, sues the other surety for a moiety. Assumpsit for money paid for the defendant's use; and money had and received by the defendant for the plaintiff's use.

Case stated. The material facts of this case are, that the plaintiff and defendant being joint payees of Suter's note, dated 16th of June, 1800, payable twenty-four months after date, indorsed and passed it away. That the note being unpaid, and the plaintiff being arrested upon a joint writ, against him and the defendant, issued upon said note, eight months after it became payable, paid the full amount with interest and costs, being $452.60, to the holder, and took up the note. That he had before paid the defendant $250, for the purpose of paying half the said note, which defendant had not applied to that use. That the note was given and indorsed by the plaintiff and defendant, for a debt due from Suter

[1] [Reported by Hon. William Cranch, Chief Judge.]

to D. Happart, to whom the plaintiff and defendant indorsed and delivered it. That on 21st June, 1802, a notary-public demanded payment of the note at the last place of abode of Suter, and received for answer that he had sailed for the East Indies, and left no funds to take up the note, whereupon it was protested and returned to the holder. That the defendant, Jones, always did live and still lives within six miles of Georgetown, where the note was given. That F. J. Gantt returned to this country about the 15th of February, and the writ was served on him the 22d of February, 1803, when he paid the money. That the first writ was served on C. C. Jones, the defendant, on the 18th of December, six months after the note was payable. That Jones had not, in any manner, accounted with the plaintiff for the $250. Upon this statement of facts the plaintiff prayed the court to instruct the jury that plaintiff has a right in this suit to recover of the defendant the sum of $250, with interest thereon, from the 8th October, 1802, and also the further sum of $226.30, with interest thereon to be computed from the 22d of Feb ruary, 1803.

Whereupon THE COURT instructed the jury that, upon the above statement of facts, the plaintiff is entitled to recover the abovementioned sum of $250, with interest thereon, from the 8th day of October, 1802, upon the count for money had and received by the defendant to plaintiff's use. But that he is not entitled, upon either count in the declaration, to recover the other sum of $226.30, nor any part of it, for the moiety of the amount of the note so paid by the plaintiff, as aforesaid. Plaintiff took a bill of exceptions, but did not prosecute a writ of error.

The grounds of this opinion, as stated by THE COURT, were, that it did not appear that the plaintiff and defendant were liable at the time the plaintiff paid the money; and no assent of defendant to the payment made by the plaintiff is stated. That in order to make the plaintiff and defendant liable upon their indorsement upon the note, the holder must have given due notice to them of the nonpayment by the maker. That notice to Gantt, eight months after the note was payable, (although it should be proved to be given instantly on his return to this country,) was not due notice, the other joint indorser being a resident six miles only from Georgetown—nor was the service of the writ upon Jones, six months after the note became payable, reasonable notice.

Quaere, as to interest upon the $250 on the count for money had and received. See Tappenden v. Randall, 2 Bos. & P. 467; where the court held, that in an action for money had and received, nothing but the net sum advanced, (without interest,) could be recovered.

GAPETE (CATHERWOOD v.). See Case No. 2,513.

Case No. 5,214.

GARBER v. GLOBE MUT. LIFE INS. CO.

[4 Ins. Law J. 307; 5 Bigelow, Ins. Cas. 221.]

Circuit Court, E. D. Missouri. Sept., 1874.

LIFE INSURANCE — WAIVER OF CONDITIONS AS TO PLACE OF RESIDENCE AND PAYMENT OF PREMIUMS.

[1. Breach of a condition in the policy as to place of residence is waived when, with knowledge thereof, the officers or agents of the company who have transacted all the business relating to the policy accept premiums and issue renewal certificates.]

[2. Prompt payment of premiums on the date when due is waived by a previous course of dealing in respect to the particular policy, and to other policies generally, by which 30 days' time has been habitually allowed.]

[3. Where prompt payment of the premium has not been waived, the payment of a premium 11 days after it is due, and the issuance of a renewal certificate, without disclosure of the fact that the insured is then dangerously ill, will not effect a renewal of the policy.]

[This was an action by Eliza Garber against the Globe Mutual Life Insurance Company to recover the amount of a policy issued in plaintiff's favor upon the life of her husband, Charles H. Garber.]

DILLON, Circuit Judge (orally charging jury). On the 5th day of November, 1869, the defendant issued at its St. Louis agency the policy now sued on, by which it insured the life of the plaintiff's husband for her use, on certain conditions, for the sum of $5,000. The company defends the action brought to recover this sum upon two special grounds: 1. Because Mr. Garber resided within the prohibited district of country, contrary to the terms of the policy. 2. Because the premium which fell due on November 1, 1872, was not paid when it fell due. It is undisputed upon the testimony that Mr. Garber was taken sick in New Orleans about the 6th or 7th day of November, 1872, and died of yellow fever on the 11th day of November of that year, about 11:30 o'clock a. m. In the latter part of October, 1872, the agency of the company at St. Louis received from the home office of the company a notice, directed to Mr. Garber, that the premiums on the policy would become due on the 1st day of November, and there is evidence that on the last day of October, or the 1st day of November, the agents of the defendant at St. Louis directed this notice to the assured at New Orleans, and Mrs. Garber testifies that this notice was received there by her on or about November 4th, at New Orleans. On the 10th day of November a telegram was sent by Mrs. Garber from New Orleans to a Mr. Warne at St. Louis, directing the latter to go to the company's agency in St. Louis, (at which the policy was issued, and which had collected all the previous premiums,) and pay the premium. Accordingly, on the morning of the 11th day of November Mr. Warne called at the office

of the company, and about 9 o'clock a. m. paid the premium and received a renewal receipt, renewing the policy for a year from November 1, 1872. Mr. Warne did not know that Mr. Garber was then sick, and did not, of course, state that fact to the company. On the other hand, the company at the time it received the premium did not make any inquiries concerning the health of the assured. In a short time the agents at St. Louis became aware of the death of Garber, and the circumstances, and communicated them by letter to the home company, and before hearing from it, the agents included the amount in their semi-monthly report to the home company of November 15th. Before this report reached the home company, the latter had telegraphed the St. Louis agency to return the premium and demand a surrender of the renewal receipt. Shortly afterward the agency here tendered to Mr. Warne the amount of the premium and demanded a return of the renewal receipt, but the tender was not received nor the receipt returned.

With this brief reference to some of the undisputed facts in the case, we now come to instruct in reference to the law as to the two special defences relied on by the company. First, as to the residence within the prohibited district. The policy provides that if between the first of July and the first of November the assured shall reside south of the 33d degree of north latitude without the consent of the company given in writing, the policy shall be null and void. The plaintiff admits that Garber did reside in New Orleans between July 1 and November 1, 1872, without the written consent of the company. This is a complete defense, and the plaintiff cannot recover unless the provision of the policy was waived by the acts of the company or its authorized agents. If you believe, from the evidence, that the officers of the company, transacting all the business of the company respecting this policy, knew that Mr. Garber had been and was residing in New Orleans from July to November, 1872, in violation of the condition of the policy as to place of residence, and received the premium on the 11th day of November with such knowledge, and issued a renewal receipt, then this ground of defense fails. But if the company received this premium without knowledge that the policy had been violated in this respect, then this defense is made out and the plaintiff cannot recover. Bliss, Ins. (2d Ed.) 344. Second, as to the defense arising out of the non-payment of the premium on the 1st day of November. It is admitted that payment of the premium was not made until November 11th; but the plaintiff also claims that this condition was waived by the company; she claims that the company, by its general course of dealing in giving thirty days' time in which to pay the premiums generally, and by its practice in respect to this particular policy—that the company waived payment of the premium to a period beyond the time when it was actually paid. Evidence has been given to show that the company's agency in St. Louis were in the habit of giving parties thirty days in which to make payment of their premiums. Whether this is satisfactorily established to be the general practice of the company in this respect at St. Louis, is for you to determine. As respects this particular policy, evidence has been given to show that the premium due November 1, 1871, was paid by note, and the premium due November 1, 1871, was paid by a note, December 14, 1871, which note was collected by the St. Louis agents of the company from Garber at New Orleans in July, 1872. In respect to the premium due November 1, 1871, a letter has been introduced in evidence from the company's officers at St. Louis, addressed to Mr. Garber at New Orleans, dated St. Louis, November 3, 1871, calling attention to the premium due on the first day of that month, requesting payment, and concluding with these words: "Please reply at once, as receipts can be held only thirty days, and then at risk of the assured." If you find from all the evidence that the company by its general course of dealing, and by its particular course of dealing with Mr. Garber, waived prompt payment of the premium, and led him to believe that he could have thirty days after the 1st of November to pay, then having received the premium within the thirty days, this ground of defense fails. Bliss, Ins. (2d Ed.) 299 et seq. If, however, there was no such waiver of prompt payment, then the payment on the 11th would not be effectual to renew the policy if Garber was then dangerously ill with yellow fever, and this fact was not disclosed to the company's agents to whom the premium was offered.

Verdict for plaintiff.

GARBER (WARREN v.). See Case No. 17,196.

GARCIA (McKAY v.). See Case No. 8,844.

Case No. 5,215.

GARCIA v. UNITED STATES.

[Hoff. Land Cas. 157.] [1]

District Court, N. D. California. June Term, 1856.

MEXICAN LAND CLAIM—GRANT.

A mere permission to search for and take possession of land did not bind the Mexican government to make a title: consequently, the United States are not required under the treaty to recognise this claim.

[Cited in Dodge v. Perez, Case No. 3,953.]

[See note at end of case.]

This claim [against the United States, for nine leagues of land in Mendocino county]

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

was rejected by the board, and appealed by the claimant [Rafael Garcia].

E. L. Goold, for appellant.

William Blanding, U. S. Atty., for appellees.

Before HOFFMAN, District Judge.

In support of his claim the appellant exhibits an order of Micheltorena, dated Nov. 15th, 1844, which is as follows: "According to your memorial of the fourteenth instant, you ask for the grant of a passport to penetrate into the points of the coast on the northern line of this country, with the object of locating a tract of land of the extent of eight to nine leagues, since that which you now occupy, with your personal property, is so limited. By this order you are empowered to appear before the military commanding authority of that frontier, in order that after an examination you may proceed to your research after the tract of land you ask for as a recompense for the services rendered by you to the nation. If you should happen to select any tract of land, you are empowered to occupy it with your said property, and to take possession of it while the usual procedure is being prosecuted, presenting the requisite sketch. God and Liberty. Manuel Micheltorena. Monterey, Nov. 15th, 1844. To Don Rafael Garcia, at his Rancho."

Availing himself of the permission thus granted, the claimant appears to have selected a tract of land, and to have occupied and improved it to some extent. No steps, however, were taken by him to obtain a title until March 4th, 1846, when Garcia addressed a petition to Gov. Pico, in which, after referring to the order of Micheltorena, he solicits a grant of the land. Gov. Pio Pico, by a marginal order dated April 7th, 1845, referred the petition to the alcalde of San Rafael for the usual informe. On the twenty-ninth of April, 1846, the alcalde reported that the land did not belong to any private individual.

The foregoing constitutes all the evidence of title produced by the claimant. It is not pretended that any grant was ever issued for the land, or that any further action whatever was taken by Pio Pico on receiving the alcalde's informe. Whether he determined not to grant the land, or whether he omitted to do so in consequence of the distracted condition of public affairs, we are ignorant; one fact is clear—no grant was obtained by the claimant.

It is contended that the permission given by Micheltorena to search for a suitable tract, and to occupy it if found, "while the usual procedure is being prosecuted," gave to the claimant an equity which, when coupled with subsequent occupation, this court is bound to respect. But the permission in this case is widely different from the concessions or warrants of survey which in the Louisiana and Florida cases were held to constitute inchoate or equitable titles.

A brief reference to the mode of granting public lands in Louisiana and Florida, as compared with that established by the colonization laws, will show that the decisions applicable to inchoate titles under the former system can have no application to the present case.

In Louisiana and Florida, the granting officer, on receipt of the petition, issued a concession to the party, authorizing him to have his land surveyed by the official surveyor. If the surveyor found the land to be vacant, and that it would not interfere with the rights of others, he returned a plat or figurative plan, and the party thereupon obtained an absolute grant. The preliminary concession was, as its name imports, a grant, and usually conceded, as in Glen's Case, 13 How. [54 U. S.] 258, the land to the petitioner and his heirs. To these concessions conditions were commonly annexed, that a mill should be erected within a specified time, that the land should be cultivated, that the party should levee and ditch the river front in Lower Louisiana, etc. Where, then, a party had obtained a concession, but had omitted to procure the subsequent absolute title on the completion of the survey, the title acquired by the concession was held to be inchoate and imperfect, and the real equity of the claimant was deemed to consist in the performance of the conditions or contract specified in the concession. The implied promise or assurance contained in the concession, that the title should issue provided the party performed the conditions, was deemed obligatory on the conscience of this, as well as the former government, and the claims in such cases were confirmed.

Under the Mexican system no preliminary concession or warrant of survey issued to the party. The final and absolute title was, by the regulations of 1828, the first and only document which the petitioner received, and conditions subsequent were introduced into the final grant, by which, on their nonperformance, the estate of the grantee could be divested. A mere petition to search for land, such as that given to the present claimant, finds no place in the Mexican system; nor can a naked authority to take possession be likened to those preliminary concessions, under and on the faith of which the land was surveyed and the conditions fulfilled in Louisiana and Florida.

The application of Garcia to Micheltorena was for a passport to enable him to search for land. In granting this, and also the permission to put his cattle upon the tract he might select, Micheltorena in no respect bound himself or his successors to issue a final title. Such seems to have been the view of Pio Pico and the claimant himself, for a petition, accompanied by the usual diseño, is formally presented to that officer and by him referred for information as in other cases.

Had the order of Micheltorena contained any

words which might be construed to import a present grant, the case might be different. But none such are to be found. If this claim is to be confirmed, every provisional license or permission temporarily to occupy land must be held to constitute an equitable title, provided the claimant has availed himself of the permission—a ruling which would astonish no one more than the old inhabitants of the country, by whom the importance of obtaining a "title" from the governor was well understood. For aught we know, Pio Pico, when the petition was subsequently presented, found it inexpedient to grant the land; and if the claimant, under a mere permission to occupy it with his cattle, has a house upon it, and for two years omitted any effort to procure a title, he must attribute the loss of the land to his own neglect.

Such was the view taken of this claim by the board, by whom it was unanimously rejected, and in that decision I concur.

[NOTE. The board of commissioners unanimously rejected the claim, from which decision Garcia, the claimant, appealed to the district court. There the judgment of the board was reversed on a division of opinion, Hoffman, District Judge, concurring with the board as above, and McAllister, Circuit Judge, deciding in favor of the claimant, and a decree was entered confirming the claim, from which an appeal was taken to the supreme court, where the decree of the district court was reversed, and the court below directed to dismiss the petition, Mr. Justice Catron delivering the opinion. 22 How. (63 U. S.) 274.]

GARCIA (UNITED STATES v.). See Case No. 15,186.

Case No. 5,216.

GARD et al. v. DURANT et al.

[4 Cliff. 113.] [1]

Circuit Court, D. Rhode Island. June Term, 1869.

REMOVAL OF CAUSES—THE APPLICATION—RIGHTS OF CORPORATIONS—MEMBERS.

1. By section 12 of the judiciary act [1 Stat. 93] certain causes pending in the state courts can be removed into the circuit court for trial within the same district, and the act provides that the causes shall then proceed in the same manner as if they had been brought by original process.

2. By section 3 of the act of March 2, 1833 [4 Stat. 633], federal officers, or other persons, against whom any suit or prosecution was commenced in a state court, for or on account of any act done under the revenue laws of the United States, or under color thereof, or on account of any title or authority set up or claimed by such officer, under such federal law, might transfer the cause into the circuit court of the United States in and for the district in which the defendant was served with process.

3. Section 2 of the act of July 27, 1868 [15 Stat. 227], provides "that any corporation or any member thereof, other than a banking corporation organized under a law of the United States, which suit at law has been, or may be, commenced in any court other than a circuit or district court of the United States, for any liability, or alleged liability, of such corporation, or any member thereof, as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States."

4. Application for such removal must be by petition, and the petition may be filed either before or after issue joined, and must state that defendants have a defence under or by virtue of the constitution, or some treaty or law of the United States, and must offer sufficient surety for entering in such court, on the first day of the next session, copies of all process, pleadings, testimony, and other proceedings, and for doing such other appropriate acts as are required by the act to which that of July 27, 1868, is supplementary.

5. Considered grammatically, the word "which," in the clause, "any corporation, or member thereof, against which a suit has been or may be commenced," should refer only to the corporation; but the statements required to be made in the petition, as to the nature and character of the defence, which would justify the removal, indicate that such was not the intention of congress.

6. The clause in question cannot be admitted to apply to suit against any such corporation for any liability, or alleged liability, of any member of it.

7. The right of redress for acts of any member of a corporation is not founded upon any liability of the member, but upon the original liability of the corporation, which is created by the acts of the member in their behalf.

8. The word "which," in the clause referred to, must be considered as the antecedent of the word "member," as well as of the word "corporation," and the whole section be construed distributively, so that the several provisions respecting the removal of the suit shall be equally applicable, whether the suit removed be one against the corporation, or one where a member of the corporation is sued as liable for the debt or other obligation of the corporation.

9. When the corporation is defendant, the petition for removal is filed in their behalf; when the suit is against a member, on the ground that he is personally liable, he may file the petition, and claim to have the cause removed.

10. The true meaning of the alternative clause of the sentence is, that a member of a corporation, when sued as such for the debt of the corporation, has the same right of removal of the cause as the corporation would have had if they had been sued.

11. It would be contrary to any analogy, that a suit brought against a corporation could be removed by a member, not otherwise a party to the suit, without the consent of the corporation, and merely because he was such member.

12. The defendant in this case, not being sued for any liability as being a member of the Union Pacific R. R. Co., but for his alleged misuse of the funds of the company, and for his fraudulent acts as vice-president of the company, and not by reason of his membership of the corporation, his petition under the act of congress referred to makes no case for removal, and petition was denied.

In equity. Petition for removal of two suits [by Isaac P. H. Gard and others against Thomas C. Durant and others], from the supreme court of Rhode Island to the circuit court, under the act of July 27, 1868.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

These suits were commenced in the supreme court of the state, and Thomas C. Durant, the first named respondent, having duly entered his appearance in that court, claimed that he had a right to remove the said causes into the circuit court of the United States for this district, because as he alleged in his petition addressed to that court, the respective suits were commenced against him for an alleged liability of the Union Pacific Railroad Company, which was not a banking corporation, and was organized under a law of the United States, and also for an alleged liability of the petitioner as a member of said corporation, or as an officer thereof, and that he had a defence to said suits arising under and by virtue of the constitution of the United States, or of a treaty or law of the United States in that behalf made and provided. The pendency of the suits was not controverted, nor was it denied that the petition was duly verified by oath, nor that it was in all other respects in due form. Sufficient surety was offered by the petitioner for entering in such court, on the first day of its then next session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suits, and for doing such other appropriate acts as are required by law in such cases; and the prayer of the petition was that the court would pass an order accepting such surety, and proceed no further in said suits. But the supreme court of the said state refused to grant the prayer of the petition, and placed their refusal chiefly upon the ground, that some of the respondents did not concur in making the request. The application was filed in this court on the 19th of November, 1868. The respondent corporation objected to the removal of the causes as prayed for by the petitioner. The respondents in the first bill of complaint were the petitioner, the Union Pacific Railroad Company, and the Credit Mobilier, a corporation created by the legislature of the state of Pennsylvania.

Among other things the bill of complaint alleged that the petitioner was the vice president of the railroad company, and that he was the original managing agent and officer thereof, and that he controlled the funds and business of the corporation; that he was also president of the Credit Mobilier, and that he also controlled the funds and the business of that corporation; that certain officers of the said railroad company paid him, as such vice-president, large sums of money, and that he, as such vice-president, disbursed the same as if for the railroad company, but really for himself and in fraud of the corporation; that he, as an officer of said railroad company, also invested in the Credit Mobilier, in his own name, the moneys so received by him, and which belonged to the said railroad company; and that said company ought of right to have the stock in the Credit Mobilier which the petitioner purchased with their money in his own name; that the railroad company neglected and refused to prosecute these claims against the petitioner, and that he, the complainant, being a large stockholder in both of those corporations, was obliged, in order to obtain redress, to proceed against the petitioner in his own name, making the said corporations parties respondents as allowed in equity suits. The prayer of the bill of complaint was, that the petitioner might account to the corporation for all the moneys so received by him belonging to the railroad company, and fraudulently converted by him to his own use, and that he might be decreed to hold the said shares in the Credit Mobilier, so purchased by him for the railroad company, and for an injunction. The parties respondent in the second bill of complaint were the petitioner, the Union Pacific Railroad Company, the Credit Mobilier, and certain persons, parties, to ascertain contract made with the railroad company for the benefit of the stockholders of the other corporation; that the Credit Mobilier earned large profits in that contract, which were paid in money and in the stock and bonds of the railroad company, standing in the name of the petitioner; and that the Credit Mobilier, and the complainant as one of its stockholders, were entitled to a lien upon that stock and the said bonds; and that they were entitled to a decree to that effect, to prevent the misapplication of the fund, and for an account and for an injunction.

Charles Tracy, for defendant and petitioner.

CLIFFORD, Circuit Justice. Provision was made by section 12 of the judiciary act for the removal of certain causes pending in the state courts into the circuit court for trial within the same district, and the directions were that the cause should then proceed in the same manner as if it had been brought there by original process. 1 Stat. 93.

Federal officers, or other persons also, against whom any suit or prosecution was commenced in a court of any state, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, title, or authority set up or claimed by such officer or other person under any such federal law, might also, by section 3 of the act of March 2, 1833, transfer the same into the circuit court of the United States in and for the district in which the defendant in such suit or prosecution was served with process, in the manner and through the proceedings therein mentioned and described. 4 Stat. 633.

Special provision is also made by section 2 of the act of July 27, 1868, "that any corporation, or any member thereof, other than a banking corporation organized under a law of the United States, and against which a suit at law or equity has or may be commenced in any court other than a circuit or district court of the United States, for any lia-

bility or alleged liability of such corporation, or any member thereof, as such member, may have such suit removed from the court in which it may be pending to the proper circuit or district court of the United States." 15 Stat. 227.

Strangely expressed as the section is, it is matter of some doubt as to what congress intended, and what they have accomplished by the provision. Nothing contained in section 1 affords any aid in ascertaining the meaning of section 2, as section 1 merely provides that the United States may prosecute writs of error from the circuit court to the district court, and appeals from the district court to the circuit court, without giving security, as previously provided in respect to writs of error and appeals returnable to the supreme court. 12 Stat. 657.

Application for such removal must be made by petition; but the petition may be filed either before or after issue joined, and it must state that the defendants have a defence arising under or by virtue of the constitution, or some treaty or law of the United States, and the defendants must offer good and sufficient surety for entering in such court, on the first day of its then next session, copies of all process, pleadings, depositions, testimony and other proceedings in said suit, and for doing such other appropriate acts as are required to be done by the act to which this one is supplementary. 12 Stat. 657.

Much of the difficulty in the case arises from the first clause in the section under consideration, which enacts that any corporation, or any member thereof, against which a suit has been or may be commenced, &c., may have such suit removed. Evidently the petition for removal must be filed by the defendant in the suit, but the question is whether the defendant is either the corporation or any member thereof, or only the corporation organized under a law of the United States. The language of the act is "any corporation, or any member thereof, against which a suit has been or may be commenced." Does the word "which" refer only to the organized corporation, or does it refer both to the corporation and to any member thereof, as the language, taken literally, seems to imply?

Considered grammatically, the word "which" should be restricted to the corporation, and yet the latter clause of the section pretty clearly indicates that such was not the intention of congress, as appears from the statements required to be made in the petition as to the nature and character of the defence which would justify the removal, as well as from the nature and character of the suit. By the language of the section, the suit must be one for a liability or alleged liability of the corporation or "any member thereof" as such member, and the defence must be one arising under or by virtue of the constitution or any treaty or law of congress.

No one doubts that a suit may be prosecuted against a corporation for its own liabilities, but it is past comprehension how a suit can be sustained against a corporation for the liability of one of its members.

Laws which subject a corporation to accountability for the conduct and acts of its members, as such, make the corporation itself liable, and a prosecution therefor would not be based on any liability of the member, but upon the liability of the corporation arising from the conduct and acts of the member as the agent of the corporation. Viewed in the light of these suggestions, it cannot be admitted that the provision in question was intended to apply to suits against any such corporation, for any liability or alleged liability of any member of the corporation.

Incorporated companies are made accountable for the acts and conduct of their members, when the members are acting on behalf of the corporation and by its authority, because their acts in that state of the case become the acts of the corporation itself. Redress for such acts, against the corporation, however, is not sustained, and does not depend upon any liability of the member, but upon the original liability of the corporation, created by the acts and doings of the member in their behalf.

Consonant with these views, the word "which" must be considered as the antecedent of the word "member," as well as the antecedent of the word "corporation," and the whole section must be construed distributively, so that the several provisions respecting the removal of the suit from the state court to the proper circuit or district courts shall be equally applicable, whether the suit pending in the state court be one against the corporation described in the section, answering for its own liabilities, or one where a member of such corporation is sued upon the ground that he is personally liable for the debt or other obligation of the corporation. When the corporation is the defendant, the petition for the removal must be filed in their behalf, but when the pending suit is brought against a member of the corporation upon the ground that he is personally liable for the debt of the corporation, he, as the defendant in the suit, may file the petition and claim to have the cause removed.

Statutes making the members of a corporation liable in certain contingencies for the debts of the corporation, in whole or in part, are familiar to the courts in all the states, and the true meaning of the alternative clause of the sentence is, that any member of the corporation, when sued as such member for the debt of the corporation, may have the same right to remove the cause into the proper circuit or district courts as the corporation would have had if they had been sued for the same debt. Construed in this

way, the provision is a reasonable one, but it would be contrary to any analogy of the law to hold that a member of a corporation, by reason of his membership, might remove a suit brought against a corporation, without their consent, to which he was not otherwise a party than as a member of the incorporated company.

Control belongs to the corporation by the general rules of law, and it is believed that no example can be found where a legislature ever authorized a single member of an incorporated company to take the management of a suit against the company out of the hands of the corporation and of its directors, unless it were in pursuance of a decree in chancery, or other regular judicial proceeding. Such a rule of law, if admitted, would be productive of such great injury and wrong to the other members of the corporation and other parties interested, that the construction ought not to be adopted unless it is compelled by the most direct and positive language of the legislative department, which certainly is not the case in the provision now under consideration; on the contrary, the succeeding clause of the same sentence, "or any member thereof, as such member," affords a strong ground to conclude that such was not the intention of congress. Omit these words from the section, and it would read "any corporation or any member thereof . . . against which a suit at law or equity has been or may be commenced . . . for any liability or alleged liability of such corporation . . . may have such suits removed in the manner therein prescribed." If such had been the terms of the section, it is plain that it would have authorized any member of a corporation, as well as the corporation, to file the petition for the removal of the suit, but the words "any member thereof, as such member," are superadded to that clause of the sentence which describes the nature and character of the suit or suits to be removed, and it is quite clear that the sentence, taken as a whole, indicates that more than one description of suit is embraced in the provision, and that the intention of congress was not such as is supposed by the petitioner in the case.

Examined in the light of these suggestions, the better opinion is, that congress intended that suits against a corporation should be controlled by the corporation, but that any member of a corporation, when sued, as such member, in a state court for any liability or alleged liability of the corporation, might himself petition and have the suit removed into the proper circuit or district courts of the United States.

Guided by this construction of the provision in question, it will only be necessary to recur to the nature and character of the alleged liability of the petitioner, as set forth in the respective bills of complaint to show what disposition must be made of the petition. He is not sued, in either suit, for any liability or alleged liability by reason of his being a member of the Union Pacific Railroad Company. Neither of the claims, as alleged against him by the respective bills of complaint, is as a member of that corporation, but both are for his own alleged misconduct, and mismanagement of the funds of the company as an agent and officer of the same; and his liability as therein set forth is by reason of his own fraudulent conduct in his position as vice-president of the company, and not by reason of the fact that he is a member of the corporation. Assuming the true construction of the act to be as before explained, he does not present his case, as exhibited in his petition, as falling within the provisions of the act of congress on which he relies, and the petition makes no valid case for the removal of the suits.

Suppose that the facts were otherwise, and that the claims against the petitioner, as set forth in the respective bills of complaint, are for an alleged liability on his part as a member of the corporation, still the result in this case must be the same, as the petitioner is the only defendant requesting the suit to be removed, who under any circumstances could file such a petition, as the Union Pacific Railroad Company refuses to join in the petition, and protests against the removal of the suits. Undoubtedly the petitioner might claim to have the suits removed if he was the sole defendant, but he is joined with the railroad company, which protests against the removal, and with the Credit Mobilier, a corporation created by the state of Pennsylvania, and consequently it is not a corporation organized under the laws of the United States. 15 Stat. 227.

Such being the facts, the circuit court here has no jurisdiction of the case presented in the petition, as only one of the defendants requests the removal.

Causes pending in the state courts could never be removed by the defendants into the circuit courts, unless all the defendants joined in the request, except as provided in the act of July 27, 1866, which it is conceded has no application to the case before the court. 14 Stat. 306.

Prior to that act of congress, the rule was fully established that the removal of a suit from a state court to the circuit court could not be ordered unless all the defendants joined in the petition for the removal, and there is nothing contained in the second section of the act under consideration which can afford any justification for a departure from that well-established rule.

The express ruling of the court in the case of Beardsley v. Torrey [Case No. 1,190], was that the circuit court could not take cognizance of a suit, in a cause removed from a state court, where it appeared that one of the defendants had not joined in the petition

for the same, into the circuit court, for the reason that it was not competent for one defendant to remove the cause without the consent of all the others. Precisely the same doctrine was laid down in the case of Smith v. Rines [Id. 13,100], and in the case of Ward v. Arredondo [Id. 17,148],—which cases are sufficient to show that the practice under the judiciary act was all one way. Kitchen v. Strawbridge [Id. 7,854].

Convenience is the principal argument in support of the opposite theory; but that argument was urged upon the court in the case of Beardsley v. Torrey [supra], and the reply then given to the argument is all that need be given at the present time, which was that the judiciary must execute the laws as they were passed, and the court cannot proceed upon the grounds of expediency.

Prayer of the petition for removal denied.

GARDEN, ETC., AIR-BRAKE CO. (WESTINGHOUSE v.). See Case No. 17,450.

Case No. 5,217.

GARDEN CITY MANUF'G CO. v. SMITH.

[1 Dill. 305.] [1]

Circuit Court, D. Nebraska. 1871.

REMOVAL OF CAUSES — SUBSEQUENT MOTION TO DISCHARGE ATTACHMENT—PRIOR HEARING IN STATE COURT.

1. After a cause is removed from a state court to the circuit court of the United States, the latter court has the power, where such a practice is authorized by the state law, to entertain a motion to dissolve an attachment or discharge the attached property.

2. The circuit court may, in such case, in the exercise of a sound discretion and in furtherance of justice, hear such a motion, although a similar motion was made and overruled in the state court, prior to the removal of the cause.

[Cited in Claflin v. Steinberg, Case No. 2,777; Bates v. Days, 11 Fed. 530.]

This action was originally brought in one of the state courts, and removed here by the plaintiff under the act of March 2, 1867 (14 Stat. 558). The action was commenced by the attachment of goods pursuant to the statutes of the state. The ground of the attachment was an alleged fraudulent disposition of his property by the defendant. In the state court and under the practice therein (authorized as counsel conceded by the statutes of the state) the defendant had, prior to the application for the removal, made a motion to dissolve the attachment and discharge the attached property from the levy under the writ. Upon this motion both parties took testimony at large in the form of affidavits, and the motion was thereon submitted to the state court and overruled. Copies of these affidavits are on file and entered with the other papers pertaining to the case. The plaintiff subsequently removed the cause to this court, and has on file a motion for a continuance till the next term, based upon the absence of material witnesses to prove its corporate character and the justice of its demands. The defendant resists the motion for a continuance (because the suit ties up a large amount of property) unless the court will consider a motion he makes here, and which is in effect the same motion made in the state court, viz.: "to dissolve the attachment and discharge the attached property." He renews the same motion made in the state courts, and offers to submit it either upon the affidavits taken therein or upon new or additional affidavits to be produced by the parties. It is this motion which was argued to the court. The plaintiff contended that the court had no power to entertain it. The defendant maintained that the court had the power, and, under the circumstances, ought to exercise it.

Mr. Wakely, for plaintiff.

Mr. Redick, for defendant.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. This cause was removed by the plaintiff to this court under the act of March 2, 1867 (14 Stat. 558), amendatory in terms of the act of July 27, 1866 (Id. 306). It was commenced in the state court by a writ of attachment issued pursuant to the statutes of the state and by rule adopted in this court. Prior to the transfer, the defendant had moved to have the attachment dissolved or property attached discharged; upon this motion both parties took all the testimony they deemed essential, and submitted the question to the decision of the state court. This question was one of fact, viz: whether the defendant was guilty of the fraudulent act or purpose charged against him as the ground for the attachment. The court denied the motion, and subsequently the cause was transferred to this court, where the same motion was renewed, or a new motion of a similar character made, which the defendant offers to submit, either upon the former affidavits, or upon new, or upon additional affidavits, as the plaintiff may elect, or the court may order.

The first question made by counsel is whether this court, after a cause is removed to it, has the power in any case to entertain such a motion. If so, the next question made is, whether, under the circumstances, it ought to exercise it in this case.

That the court has the power to entertain such a motion, does not, it seems to me, admit of reasonable doubt, it being conceded that such a motion may be rightfully made in the state court, under the state practice, which by adoption is also the practice of this court. By the express provision of the act of congress, the cause is to proceed in the same manner as if it had been originally

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

brought here; the attachment is to hold "in the same manner as by the laws of the state it would have been holden to answer final judgment, had it been rendered by the court in which the suit was commenced." And the power of the circuit court to "set aside or dissolve" an attachment, injunction, or other restraining process, is recognized, and the right of the opposite party to indemnity obligations filed in the state courts, expressly declared.

The intention of these provisions manifestly is to put this court, in administering such remedies, in the place of the state court and clothe it with its powers. Conceding that such a motion is authorized by the state law and practice, there can be but little doubt, under the abovementioned acts of congress and the rules of the court adopting the state statutes relating to attachments and to practice, that if no such motion had ever been made in the state court, and could have been made there had the cause remained, it could equally be made here upon its removal. Hence the right to make, and the power to hear, such a motion may exist after the cause has been transferred.

Assuming the power to exist, ought it in this case to be exercised? This is a matter which rests in the sound discretion of the court, under the special circumstances of the particular case. A decision on a motion in a pending suit is not res judicata so as to conclude the parties and the court from again re-opening the matter, in a subsequent stage of the cause.

As the parties were fully heard upon the merits of the motion in the state court, certainly there ought to be some good reason why this court should listen favorably to an application for a new hearing. I should myself in such a case feel a strong disinclination to sit in review upon the decision of the state court, when it was proposed to submit the matter upon the same evidence and no other.

Considering the special circumstances of this case, among which is one that the plaintiff removed the action after it stood for trial in the state court, thus causing delay, and is now asking for a continuance; that he has a large amount of property attached, to the great inconvenience and probable damage of the defendant, who is ready for trial. the court will make this order on the pending motion, to-wit: If the plaintiff is ready for trial at this term, the defendant's motion to discharge the attached property will be denied; otherwise it will be entertained, and both parties will be at liberty to produce additional affidavits, and be heard de novo upon the merits of the motion.

Ordered accordingly.

That suit commenced by attachment may be removed and attachment remain in force, see Barney v. Globe Bank [Case No. 1,031]; Clarke v. Chase [Id. 2,845]; McLeod v. Duncan [Id. 8,898].

Case No. 5,218.

GARDENER v. WAGNER et al.

[Baldw. 454.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1830.

WILLS—CONSTRUCTION—PERMISSION TO "OCCUPY AND DWELL" IN A HOUSE—RENTS, ISSUES, AND PROFITS.

1. In construing a will we must first look to the particular clause in question, at the same time taking into our view the whole instrument, endeavouring to give meaning and effect to every part of it.

2. Testator devised to his daughter G. two houses and lots, "she permitting, at the same time, her mother to occupy and dwell in the better of them for and during her natural life." This is not a grant of the beneficial interest in the house to the mother, so that she may either occupy it herself or let it to another, receiving from it the rents it produces. It is a permission to her to live and reside in the house, and entitles her to no other use and enjoyment of it.

3. The executors of the mother were ordered to account for the rents, issues and profits received by her from the house, allowing her for expenditures for repairs, &c., and provided that the account should not extend back beyond six years from the filing of the bill.

[Cited in Taylor v. Benham, 5 How. (46 U. S.) 263.]

This suit [brought by Grace Gardener, a citizen of Louisiana, against William Wagner and Jacob Wagner, citizens of Pennsylvania, executors of Grace Wagner, deceased] arose on the will of Jacob Wagner, in the following words:

"In the name of God, amen. I, Jacob Wagner the elder, of the city of Philadelphia, cooper, being very sick and weak in body, but of perfect mind and sound memory, thanks be to God, calling to mind the mortality of my body, and knowing that it is appointed for all men once to die, do make and ordain this my last will and testament; that is to say, principally, and first of all, I give and recommend my soul into the hand of Almighty God that gave it, and my body I recommend to the earth, to be buried in decent Christian burial, at the discretion of my executors, nothing doubting but at the general resurrection I shall receive the same again by the mighty power of God. And as touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, devise and dispose of it in the following manner and form: Unto my eldest son, Jacob, I do give and bequeath my two lots on Cherry alley, with the arrearages of ground rent due on the same, as also that one of my lots on Wagner's alley, which adjoins a certain lot now in the tenure of Henry Nagel. Unto my two eldest daughters, Elizabeth and Mary, that certain three story brick house in which I now live, and the lot or lots thereunto belonging, being twenty-eight feet in front on Moravian alley,

[1] [Reported by Hon. Henry Baldwin, Circuit Judge.]

with all the appurtenances, to hold jointly. Unto my son George Washington, my houses and lot next adjoining the aforesaid, with all the appurtenance thereunto belonging, together with my cooper shop, tools and utensils of my trade. 'Unto my daughter Grace, my two houses and lots situate in German street in the district of Southwark, she permitting at the same time her mother, Grace, to occupy and dwell in the better of them for and during her natural life.' Unto my youngest son, Peter, that certain corner house situate on the corner of Sassafras street and Wagner's alley, with the lot on which it stands; also two of my lots on Wagner's alley, and one of the two vacant lots on Sassafras street. Unto my youngest daughter, Margaret, that certain house and lot adjoining the aforesaid house on Sassafras street, the remaining vacant lot on Sassafras street, and the two remaining vacant lots on Wagner's alley. Excepting always, nevertheless, that my wife, Grace Wagner, receive one-third part of the profits and rents issuing out of all and every the aforesaid estates for and during the space of her natural life; and also that she receive the whole and all of the rents and profits issuing out of each child's estate, until such child shall have arrived at the age of twenty-one years, for the maintenance of my children and in lieu of her dower. Also, it is my will, that should any of my children unluckily die before they shall have arrived at the age of twenty-one years, then their share shall be divided in an equal proportion amongst the surviving children. Further, it is my will that my house and lot on Third street, my loan office certificates, my stock and my outstanding debts, be applied to the purpose of paying and discharging my debts, and the residue, if any, to be paid to my wife. Lastly, I do hereby appoint my beloved brother, John Wagner, and my faithful relative, Peter Knight, my executors, and my beloved wife, Grace, my executrix. In witness whereof, I have hereunto set my hand and seal, this thirtieth day of November in the year of our Lord one thousand seven hundred and ninety."

Demurrer.

The case was argued on the following agreement: "It is agreed that upon the pleadings in this case, the question to be submitted for the opinion of the court is, whether under the will of Jacob Wagner, who devised two houses in German street to his daughter Grace, 'she permitting, at the same time, her mother, Grace, to occupy and dwell in the better of them, for and during her natural life,' the executors of the mother, Grace, who did not herself live in the house designated in complainant's bill, but rented it to others, are liable to account for the rents she may have received. If the court shall be of the opinion that she had the right to receive the rents, then judgment to be entered, on the demurrer, for the defendants. If they shall be of opinion that the executors are bound to account, then the demurrer to be withdrawn, and the defendants to be at liberty to answer the bill. April 26th, 1831."

Mr. Wheeler, for complainant.

The mother had only a right of occupation. If she did not occupy the house, she had no right in it. 2 Bl. Comm. 157; Co. Litt. §§ 325, 328, 329; Crickmere v. Paterson, Cro. Eliz. 146; Wheeler v. Walker, 2 Conn. 201; 5 Serg. & R. 375.

Mr. Kittera, for respondents.

This part of the will is a devise in fee to the daughter of the testator, but to that devise a condition is annexed, "she permitting her mother," &c., but to the estate given to the mother no condition is annexed; conditions must be clearly expressed. The estate of the daughter could be defeated by a breach of the condition; but no intention appears in the will to restrict the estate of her mother, the widow of the testator. One-third of the profits and rents of all the estate is given to the widow for her life, and she is also to receive the whole of the rents and profits of each child's estate, until such child shall arrive at the age of twenty-one years, for the maintenance of the children. The clause in question was intended for the benefit of the widow; there is no reason why the condition now contended for should be imposed upon her. The words of the will are, "to occupy and to dwell." "And" may be construed conjunctively or disjunctively, so as to carry into effect the intention of the testator. To occupy, does not mean to live in the house, to reside in it, but to have possession of it, by yourself, or by another for you and under your will and right. If it was a condition, there must be an entry to defeat the estate; if a limitation, it expires of course. Plowd. Comm. 542, tit. "Occupancy" defined; 8 Petersdf. 320. The mother did make her choice between the two houses. If Grace permitted her mother to receive the rents and profits of the house, it was a permission to occupy; and in case of the death of Grace, it would go subject to this incumbrance. If Grace's license was necessary, the intention might be defeated, as she might survive her mother. 4 Kent, Comm. 114, tit. "Doctrine of Conditions."

Mr. Wheeler, in reply.

If the daughter refused, the mother could have enforced her right; she has the fee, subject to her mother's right of occupancy. Her only remedy is to claim possession. Did not the testator clearly intend that his widow might elect which of the two houses she would occupy herself? she would live and dwell in? Is it necessary to change "and" for "or," to give effect to the intention? The occupancy of the house is given to herself, not to her and her assigns. The daughter is to permit the mother to occupy and dwell,

&c. This may make her a trustee for her mother. If the daughter should forfeit by refusal of this permission, the only effect would be that the mother could enjoy at once, and there would be a reversion to the heirs of the whole estate. Hamilton v. Elliott, 5 Serg. & R. 384; 2 Conn. 201; 2 Chit. R. 529. No election was made by the widow.

HOPKINSON, District Judge. The question in this case arises on the following devise in the will of Jacob Wagner. After giving certain lots to his son Jacob, and a house and lot to his two eldest daughters Elizabeth and Mary, the testator devises as follows: "Unto my daughter Grace, my two houses and lots, situate in German street, in the district of Southwark, she permitting, at the same time, her mother Grace, to occupy and dwell in the better of them, for and during her natural life." The mother of the devisee is now dead; and the devisee sets forth in her bill of complaint, "that she (the devisee) came of age on the —— day of October 1800; since which time, until her decease, which took place on the 1st of March 1829, the said Grace Wagner (her mother), under colour of right, under the first clause of the said Jacob, the father's will, as above recited, claimed and received the rents, issues and profits of the easternmost house, and deforced the complainant of the said house, without ever residing in the said house or either of them at all." The bill prays for a decree, ordering the executors of the said Grace Wagner deceased, to "file an account, stating what rents, issues and profits the said Grace Wagner received from the said house, and disclose what estate she left," and that the estate which she left may be made liable for the payment of the claim of the complainant; and that the said executors may be compelled to pay her the net amount of the rents, issues and profits received from the said house.

We must observe, that other houses and lots than those above mentioned are given and devised to other children of the testator; and after all, there is the following clause in the will, "excepting always, nevertheless, that my wife Grace Wagner receive one-third part of the rents and profits issuing out of all and every the aforesaid estates, for and during the space of her natural life; and also that she receive the whole and all of the rents and profits issuing out of each child's estate, until such child shall have arrived at the age of twenty-one years, and in lieu of her dower." To this bill the defendant has demurred, which, together with an agreement of the parties, submits the question to the court, whether, on the facts stated, and the true construction of the will of Jacob Wagner, the complainant is entitled to the relief she prays for. The rules adopted, in equity and at law, for the interpretation of wills, are well settled, and entirely consistent with justice and common sense. We must look for the intention of the testator in the particular clause in question; at the same time taking into our view the whole instrument, with a reasonable endeavour to give meaning and effect to every part of it. In this case the inquiry is, whether the permission, enjoined upon Grace, the daughter, and attached to her legacy of two houses, to be given to her mother to occupy and dwell in the better of them, is a grant of the beneficial interest in the house to the mother during her life, so that she might, at her pleasure, either occupy and dwell in it herself, or give the occupancy to another, and receive in lieu of it, the rents and profits it would produce; or whether it is to be taken strictly as a permission to her to reside in the house, and to be entitled to no other use or enjoyment of it.

We first look at the terms of the grant—the expressions which the testator has chosen to manifest his intention. The houses are devised, in fee, to his daughter; but it is a condition, or rather an appendage to the gift, that she shall permit her mother to occupy and dwell in the better of them. There seems to be no ambiguity here. If the testator had used only the word "occupy," which signifies "to possess," the uncertainty would have been greater; but he adds, as if explanatory of his meaning, "and dwell." To dwell, is to inhabit; to live in a place; to reside; to have a habitation. It is then as if the testator had said, "she permitting her mother to live in the house—to have a habitation there." Could there have been any doubt if these terms had been used? The defendant is entirely conscious that this is the proper meaning of the clause as it stands in the will, and endeavours to avoid it by changing the phraseology, and turning "and" into "or;" or rather by expunging the one and introducing the other into its place. But what right have we to do this? It is true it may be done when it is necessary to carry into effect the clear and manifest intention of the testator. How does this necessity appear here? There is nothing incongruous or unreasonable in the plain and ordinary interpretation of the words as they now stand. To say that the intention was different, would be to go directly in opposition to the language he has adopted to express his intention—indeed it would be to assume the very matter that is in controversy.

In looking to other parts of this will, we not only find them in full accordance with this construction of the clause in question, but truly not reconcilable with any other. After making all the devises we have mentioned of houses and lots to his children, the testator limits the fullness of these gifts by excepting that his "wife, Grace Wagner, receive one third part of the rents and profits issuing out of all and every the aforesaid estates for and during the space of her natural life." This provision includes the two houses given to his daughter Grace, now in

question. What do we collect to be the clear and consistent meaning of the testator from both clauses in his will? What was his design? Assuredly this: my wife shall have a third part of the rents and profits of all and every part of my real estate; but, as to one of the houses, if she shall choose to live or dwell in it, she shall be permitted so to do, and, in this manner, have the whole use or enjoyment of it; but if she shall decline this permission or privilege, then the offer of it becomes inefficacious, and she must resort to the other part of the will which gives her one-third of the rents of all and every of the houses and lots before devised to the children. She may take or reject the permission or privilege as it is offered, but she cannot alter or enlarge it. The construction contended for by the respondents would make the testator say, as to the house in question, that he gives his wife all the rents and profits issuing from it, or one-third of them, at her option, which is incongruous and absurd. To say to her, you may live in a certain house, or take one-third of the rents and profits it may produce, is intelligible; but to say, you may take all the rents, or one-third of them, at your election, is senseless, or so nearly so that it should not be imputed to a sane testator, if we can escape from it.

On the 26th of December, 1831, this cause came on for hearing on bill of demurrer and plea, and the court, after hearing the arguments of counsel, do award and decree, that the defendants account for the rents, issues and profits received by the said Grace Wagner from the house mentioned in the complainant's bill, subject to the payments and expenditures made by her for repairs or otherwise in relation to the same. And they further direct, that it be referred to the master to report an account to this court, provided, however, that said account shall not extend back beyond six years from the filing of the bill.

NOTE. Before the above order and decree was made, the following agreement, signed by the counsel of the parties respectively, was filed of record: "It is agreed, that if the court shall be of opinion that the testatrix had not a right to receive the rents of the house, in the complainant's bill mentioned, to her own use, but was bound to account to her daughter, they shall also decide for what period of time her executors are bound to account; and under their opinion the case shall be referred to the master of the court to take and state an account between the parties touching and concerning the rents, issues and profits received by the Grace Wagner from the house mentioned in the complainant's bill, and the payments and expenditures made by her for repairs or otherwise in relation to the same; and that the said master report the balance which, on said account, shall be found due from either party to the other; and that the said master have power to examine the parties and witnesses on oath, and to compel the production of books, documents and papers; and that further proceedings be reserved until the coming in of the said report."

GARDINER (GOODYEAR DENTAL VULCANITE CO. v.). See Case No. 5,591.

Case No. 5,219.

GARDINER et al. v. HOWE.

[2 Cliff. 462.] [1]

Circuit Court, D. Massachusetts. May Term, 1865.

PATENTS—INFRINGEMENT ON HIGH SEAS — AMERICAN VESSELS.

Where the defendant, an American citizen, had, without license, used the patented improvement of the plaintiff, on the high seas, on board an American vessel, *held*, that the plaintiff was entitled to recover damages for such use of his invention the same as if it had taken place within the territory of the United States.

This was an action on the case [by Charles L. Gardiner and others against Thomas Howe] to recover damages for the alleged infringement of a patent right. At a previous term the parties went to trial upon the pleadings in the case, and the jury, under the instructions of the court, returned a verdict in favor of the plaintiff. At this time the defendant moved for a new trial, and alleged the following reasons: First, because of the misdirections of the court. Second, because the verdict was against the evidence, and the weight of evidence in the case. The patent was on an improvement in the sails of vessels. The defendant was owner of the bark Robert, and the master applied the patented improvement to one of the sails of the vessel, on her passage from Liverpool to New York. She was an American vessel, and commanded by an American master. The evidence showed that the improvement was applied to the sail on the high seas, and without the jurisdiction of the United States. Some of the statements of the witnesses tended to show that the master used the improvement but once, and never after the vessel arrived within the jurisdiction of the state of New York, but other statements of the same witnesses showed that the sail, with the patented invention still on it, remained on the vessel, and in a condition for use, even after the voyage was terminated, and while the vessel was at the wharf in her port of discharge. Evidence was also introduced to show that the defendant authorized the master to use the invention on his vessel, and clearly showed that he suffered the same to remain on the sail, after he had knowledge of its use, without giving any directions that it should be removed. The defendant contended that the plaintiff was not entitled to recover, even if he proved the use of the patented improvement as alleged, because the case showed that the use was only on the high seas, and consequently, that it was not prohibited by the patent law. At the trial the court gave

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

the two following instructions to the jury: First, that if the jury found that the use was continued into the port of destination, then the reasoning of the defendant would not apply. Second, that the position, in any view of the evidence, could not be sustained if they found the use was without license, as it was on an American vessel bound to an American port.

Samuel Snow, for plaintiffs.
F. A. Brooks, for defendant.

CLIFFORD, Circuit Justice. Reference is made by the defendant to the cases of Brown v. Duchesne [Case No. 2,004], and Id., 19 How. [60 U. S.] 183; but these cases do not apply where, as in this instance, the vessel where the act of infringement took place was American. Were it to be held that in cases like the present the plaintiff is not entitled to recover, patents for improvements in the tackle and machinery of vessels, or in their construction, would be valueless. The patent laws of the United States afford no protection to inventions beyond or outside of the jurisdiction of the United States; but this jurisdiction extends to the decks of American vessels on the high seas, as much as it does to all the territory of the country, and for many purposes is even more exclusive.

The motion for a new trial is entirely without merit, as the evidence shows that the plaintiff is clearly entitled to recover. Motion overruled. Judgment on the verdict.

Case No. 5,220.

GARDNER v. ANDERSON.

[22 Int. Rev. Rec. 41.]

Circuit Court, D. Maryland. 1876.

PRIVILEGED COMMUNICATIONS—PUBLICATION.

Official communications, passing between officers of the government, are privileged from disclosure on the ground of public policy. Neither the sending of such an official communication, nor retaining a copy thereof, amounts to a "publication" within the meaning of that term as used in the law of libel.

[This was an action of libel by Thomas H. Gardner against Ephraim F. Anderson.]

A. H. Hobbs, for plaintiff.
A. Stirling, Jr., U. S. Dist. Atty., George C. Maund, and Geo. H. Chandler, for defendant.

Before BOND, Circuit Judge, and GILES, District Judge.

Communications in writing passing between officers of the government, in the course of official duty, relating to the business of their offices, are privileged from disclosure, on the ground of public policy, and the production will not be compelled by courts of law or equity. Neither will secondary evidence of their contents be admissible, whether in the form of copies or of oral statement of witnesses who have read and recollected the same. Consequently, an official letter from an appraiser of merchandise to the secretary of the treasury, recommending a person for appointment as clerk in the appraiser's office, in place of one whose removal is recommended for inefficiency and bad conduct, is a privileged communication within the rule, and cannot be admitted in evidence to sustain an action for libel brought against the appraiser by the person whose removal is recommended. The mere sending to the secretary of the treasury by an officer of the customs, in the course of official duty, of a communication reflecting upon the character and conduct of a subordinate, is not such a publication as is essential to maintain an action for a libel.

The plaintiff in this case, who had been a clerk in the office of appraiser of merchandise, and was removed from office in June, 1873, brought an action of libel in a state court against the defendant, who was appraiser, alleging that he wrote to the secretary of the treasury a letter recommending the plaintiff's removal from his clerkship, and reflecting upon his official qualifications and conduct in such a way as to show malice, per quod he lost his office and suffered great damage. The suit was by the defendant removed upon a writ of certiorari to this court under section 643 of the Revised Statutes, and the plaintiff made an unsuccessful motion to remand the case to the state court for want of federal jurisdiction. Plea, not guilty, under the general issue.

Previous to the trial, the plaintiff, to prove the sending of the alleged libellous letter and its contents, issued a commission to examine at Washington the secretary of the treasury and the appointment clerk, who were summoned to produce before the commissioner the original letter or copy. The secretary declined to appear before the commissioner or to produce any paper or copy, and sent a letter to him to that effect. The appointment clerk who attended and was examined, by direction of the secretary, declined to produce any paper or to speak of the contents of any. Upon the return of the commission, to which the secretary's letter above mentioned was attached, the plaintiff took out a subpoena duces tecum for the secretary and the appointment clerk to appear at the trial. The secretary declined to attend, and directed the district attorney (who had assumed the defence of the case) to state his reasons to the court. Thereupon the plaintiff moved for a writ of attachment against the secretary for a contempt in not obeying the subpoena. This the court declined to grant, but advised the plaintiff to apply to the secretary for a copy of the alleged letter, and, for this purpose, the case was postponed for a few weeks. Subsequently, the trial being resumed, and the jury sworn, the plaintiff, to lay the foundation for secondary evidence, produced a let-

ter from the secretary in reply to his application for a copy of the alleged communication which was the cause of action.

The secretary's letter stated that, at the date of the alleged letter, the defendant was appraiser of merchandise, and any communications from him to the department were official in their nature, confidential and protected from disclosure, and he, the secretary, was not at liberty to furnish a copy of the same to enable the plaintiff to maintain an action against a late appraiser, whose defence the government had assumed. The plaintiff then called as a witness a clerk in the appraiser's office who had charge of the official letter-copying book in June, 1873, who testified that about that time he wrote, at the dictation of the defendant, a letter to the secretary of the treasury relative to the removal of the plaintiff from office. The letter was signed by the defendant as appraiser, and copied in the letter-book. It was not there now; a leaf was missing from the book, probably that containing the letter. Witness said he thought he could state the substance of the letter, and on being asked by the plaintiff to do so, the defendant objected, first, because the witness was not sure he could state the whole substance, and second, because the letter was a privileged communication, and protected from disclosure on grounds of public policy.

After full argument, the court decided that the witness' recollection was not sufficient, as the jury was entitled to have the whole letter repeated to them, if any, and the part omitted might qualify or explain the part repeated. And further, that the communication was in its nature an official communication, relating to public business, which it was sought to prove by means of a witness whose only knowledge of it was derived from his official employment, which was contrary to public policy and not to be permitted. The plaintiff then sought to prove by his own testimony that he saw the letter in question at the treasury department after his removal, by permission of the secretary, and could state its contents; but further offered to prove by a witness who was at one time a clerk in the appraiser's office, that while he was such clerk he read a copy of the said letter from the official letter-copy book in the office, and could repeat its contents. The court ruled that neither the sending of such a letter to the secretary, nor retaining a copy thereof in a letter book kept in the appraiser's office, amounted to a "publication" within the meaning of that term as used in the law of libel; that as the communication was official and confidential, written in the discharge of a public duty, it could not be said to be published by the defendant, by merely sending it to the officer to whom it was addressed, and if there was no evidence of publication beyond such sending, the plaintiff must fail at the outset of his case, and no evidence of the contents of the alleged libel can be admitted until after proof of technical publication. The plaintiff not being prepared with such proof, took exceptions to these rulings, and there was a verdict for defendant.

GARDNER (BABBEL v.). See Case No. 692.

Case No. 5,221.

GARDNER v. BAILEY.

[Codd. Trade-Marks, 131; Cox, Manual Trade-Mark Cas. 206.]

Circuit Court, D. Pennsylvania. 1871.

TRADE-MARK—INFRINGEMENT.

[A trade-mark for seamless bags, consisting of the word "Stark" over a semicircular arch with the letter A below, is infringed by a like device, except that the word "Star" is substituted for "Stark."]

The plaintiffs, owners of the Stark Mills, manufactured seamless bags bearing the word "Stark" over a semicircular arch with the letter A below. The defendants made and sold similar goods with the word "Star" over a semicircular arch with the letter A below.

THE COURT enjoined the defendants, and a jury subsequently gave a verdict in favor of the plaintiffs for damages.

GARDNER (BEATTIE v.). See Case No. 1,195.

Case No. 5,222.

GARDNER v. BIBBINS et al.

[Blatchf. & H. 356.] [1]

District Court, S. D. New York. Feb. 5, 1833.

SEAMEN — INSUBORDINATION — PUNISHMENT—IMPRISONMENT—SEPARATE DEFENSES IN ACTION FOR JOINT TORT.

1. Where a seaman openly manifests insubordination, it is the duty of the master to apply such correction as may be required to subdue him; and, if there does not appear to have been any cruelty or needless severity, the court will not undertake to measure the degree of punishment which was necessary.

2. An action against a mate by a seaman, for false imprisonment, will not lie, where the imprisonment was ordered by the master through the advice and request of the mate.

3. Where, in an action against two parties, for a joint tort, the respondents put in separate answers, each respondent must rely for his defence upon his own answer and the proofs, without reference to the answer of the other respondent; but, unless the answers are excepted to by the libellant, for insufficiency or uncertainty, they will be liberally construed.

4. A single act of insubordination on the part of a seaman, particularly if it be only a refusal to give himself up to be imprisoned, cannot be considered as mutinous, or as justifying the imprisonment itself.

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

This was a libel in personam, by a seaman [Garrett S. Gardner] against [Anson Bibbins and Samuel Hurry] the master and mate of the schooner Nestor. As the Nestor was getting under weigh in the port of Gibraltar, the libellant was ordered by the master to let go the studding-sail halyards, but he let go another rope. The master, thereupon, asked him, if he did not know the studding-sail halyards yet; and the libellant replied, in an insolent manner, that he did, and had known them before he came on board that vessel. Thereupon, as the libel alleged, the mate, who was near, seized a handspike, and aimed a blow at his head, which was avoided by his dodging under the bow of the long-boat, but he received a severe blow from it on his shoulder, which fractured the bone. This charge was explicitly denied by the mate. The master then struck the libellant with a rope, and the libellant declared, that if he struck him again, he would knock him down. The master, thereupon, continued the chastisement until he had inflicted a number of blows. To a further charge of false imprisonment in the port of Laguna, the answer of the master alleged, that one of the seamen, by the name of Jay, had caused disorder and disturbance on board the vessel; that the master went on shore to consult the consul, and to obtain soldiers to assist in quelling the disturbance and compelling subordination; that, when the master returned on board, he ordered Jay and the libellant to come up out of the forecastle, which they both refused to do, saying they would not come up unless compelled by the soldiers; that the soldiers then came forward and ordered them up, and into the boat, and they were taken on shore; and that the master and mate, on account of such mutinous conduct, deemed it necessary, for their own safety and that of the crew, that these men should be removed from the vessel. The answer of the mate to this charge, set forth disorderly and mutinous conduct on the part of the libellant, during the absence of the master from the vessel to procure the soldiers on shore to remove Jay, and justified, upon this ground, his advice to the master to remove the libellant together with Jay. The evidence is sufficiently set forth in the opinion of the court.

Henry M. Western, for libellant.
Walter Edwards, for respondents.

BETTS, District Judge. The only instance in which both of the respondents united in committing any of the torts charged in the libel was at Gibraltar. The assault charged in the libel is denied by the answers, and the proofs upon this point are as contradictory as the pleadings. The deposition of Jay, one of the seamen on board the schooner, supports the allegations of the libel in every material particular. He says that he saw two blows given by the mate with the handspike, and saw the libellant stagger under them against the boat, and saw the master fall upon him before he had recovered himself, and flog him severely with a gasket. On the other hand, two other seamen, Clark and Stewart, support the representation of the occurrence which is given by the answers. Clark says, that the libellant replied to the master, on being chided for not knowing his duty, "I know more than you do about reeving studding-sail halyards, and you can't tell me anything about it"; that the master thereupon came forward and gave him two or three blows with the gasket, whereupon the libellant said, that if he struck again he would knock him down; and that the master then continued flogging the libellant till he had given him seven or eight blows. Both of these witnesses say, that the mate did not strike the libellant at the time, and Clark says, that the long-boat was not on deck, but was overboard. It is also to be remarked, that Matthews, another witness for the libellant, does not, in the version he gives of the affray, support Jay or the libel. He was standing by, and, if he did not see the whole affair, the account he gives of what passed in his presence stands in contradiction to the representations of Jay. He says, that after the libellant's answer to the master's reproof, the mate turned around and asked the master if he heard what reply the libellant had given him, and added: "If I was you, I would give him a flogging"; upon which, the master came forward and took a gasket and flogged the libellant; that the mate stood by with a heaver in his hand, and said to the libellant, "If you attempt to strike the captain, I will knock you down directly," but the witness did not see him strike or make a blow with the heaver; that the libellant said to the master, whilst being flogged by him, "If you strike me again, I will let you have it"; and that the master made a motion to strike him again, and the libellant to go towards the master, as if for fight, when the mate seized him by the shoulders to prevent his advance upon the master, and tore his shirt.

The testimony of Jay thus stands contradicted by the answers of both of the respondents, and by the testimony of three witnesses, who had the same opportunity to see the affray that he had. Upon this proof, I must consider the charge against the mate, of having struck the libellant with a handspike, as entirely discredited and overthrown.

This court has too frequently recognised the principle, that no unnecessary severity or oppression, by officers towards seamen, will receive countenance here, to render it necessary now to enlarge upon the subject. Still less, will the court interfere with the prompt and efficient exercise, on the part of the officers, of every power necessary to enforce strict discipline and subordination on ship board. In the use of this power, occa-

sional excesses are no doubt committed. Men give way to transports of passion, or, forgetful of the rights of those under their authority, and of their own responsibility, gratify their resentment or pride of power by punishing without reason or commiseration. For occurrences of that character, this court will exercise, with an energy equal to the exigency, its corrective and remedial powers. It will punish the wrong and remunerate the injured, with a free and strong hand. The transaction at Gibraltar was, according to the decided preponderance of proof, no abuse of authority on the part of the master. The Agincourt, 1 Hagg. Adm. 271. The court will not attempt to adjust the degree of correction which the impertinence and contumacy of the libellant to the master's reproof deserved. Thorne v. White [Case No. 13,989]. There is no evidence that it was harsh in manner or excessive in degree, and both its continuance and its severity were justly provoked by the libellant, in threatening to knock the master down. After that open manifestation of insubordination, and of a disposition to commit violence upon the master, it was his duty to apply a correction of sufficient vigor to subdue the refractoriness or mutinous spirit of the libellant. No more than that appears to have been done, and both of the respondents are therefore acquitted of this charge.

The remaining charge is that of false imprisonment at Laguna. Neither the testimony nor the allegation in the libel connects the mate with that, so far as to render him liable to an action. It will not be necessary to consider how far one person may be made answerable for acts of violence committed by another at his instance or instigation, when he does not personally apply force or threats, inasmuch as, in this case, the instigation, if any, was from an inferior to a superior officer; and the suggestion of the mate merely led to an order or command from the master, to which the libellant quietly submitted, without the exercise of force or constraint. The subsequent detention of the libellant at Laguna, and not the act in which the mate participated, was the forcible restraint which constituted false imprisonment, so far as the case made by the pleadings and proofs affects the mate. But the mate could have had no power in the matter after the libellant left the vessel, and it must have depended solely upon the master, whether his confinement should be continued, or whether he should be received on board again. It seems to me, that this branch of the libel makes no case against the mate; and, without adverting to the answer and the proofs adduced in support of it, and which supply a full defence in this particular, I must pronounce for a dismissal of the libel, in all its parts, as to the mate, with costs.

The next consideration is, how far the master is affected by this charge. The pleadings and the testimony of the different witnesses give a somewhat entangled statement of the circumstances leading to the taking of the libellant away from the vessel. It is difficult to discriminate the parts of this answer which the master gives upon his own knowledge. The answer is so drawn as to leave it somewhat indistinct, whether the relation of the transactions is exclusively that of the mate, or whether the master is also to be understood as concurring in the statement of what occurred after he returned on board with the soldiers. It does not appear whether the libellant manifested any spirit of insubordination in presence of the master. Jay asserts, that he and the libellant went peaceably and directly into the boat, and ashore, when ordered by the soldiers. The master is not alleged to have interfered at all, further than to bring the soldiers on board. Matthews says, that the master ordered the soldiers to take both the libellant and Jay ashore. Stewart says, that the master went for the guard on account of Jay; that, as he was shoving off from the vessel, the libellant called out to him, "If you take one, you will take both of us," meaning himself and Jay; that, when the soldiers came on board, the mate ordered the men up out of the forecastle, but both said they would not come for him, unless the soldiers came for them; and that the soldiers went below, and had difficulty in getting them out, but, at last, they both came up, and went directly into the boat; and, as they pushed from the vessel, took off their hats and gave three cheers. Clark says, that the libellant called out to the master, as he was going on shore, "If you take one, you will take both"; that, when the guard came on board, and took Jay, the libellant again made the same remark, and thereupon the guard took him also; and that it was his own notion, and he went ashore of his own accord. This witness says he did not hear the master tell the guard to take the libellant, and did not understand that the master intended to send him ashore.

Although the testimony of the witnesses seems to make the leaving the ship the voluntary act of the libellant, without any constraint on the part of the master, yet the answer puts it on a different footing. That assumes that he was sent on shore by the master, in consequence of his insubordinate and mutinous conduct, either as witnessed by the master or as related to him by the mate. It must, accordingly, be considered, that the libellant was not merely permitted to go on shore with his comrade, but that he was forcibly sent out of the vessel, under arrest, and in charge of a guard of soldiers. The inquiry, then is, whether it was proper, for the support of discipline and subordination on board the ship, to resort to this measure. The answer of the mate cannot be read on the part of the master, and the matters therein set up by the mate solely, which might afford a justification, cannot be

regarded as in proof on this branch of the case. We must, accordingly, look to the individual answer of the master and to the proofs, to ascertain what justification he had for his proceedings. As before observed, the answer is rather indistinct in this particular; but, as it was the right of the libellant to compel the master to give an exact and specific answer to the matters charged in the libel, and, as he has acquiesced in that filed by the master as sufficient, the court will be disposed to give all reasonable effect to it, by a liberal construction of its terms. Under this principle, I shall consider every fact alleged to have occurred, where the master might have witnessed it, to be averred by him on his personal knowledge, equally with the mate. The broad allegation upon which the imprisonment is justified is, that the master, in consequence of the mutinous conduct of the libellant and Jay, deemed it necessary to remove them from the vessel, for his own safety and that of the crew. The acts which constituted that mutinous conduct, so far as the libellant was concerned, consisted of what the mate states, of his own knowledge, was done by the libellant whilst the master was gone for the soldiers, and his refusal, together with Jay, after the master returned, to come up out of the forecastle, when ordered to do so, until compelled by the soldiers. The master was on board at this last occurrence, and it is to be intended that it passed under his notice. Still, a single instance of a neglect to obey an order of this character, the purpose of which must have been well understood by the party, can hardly be deemed mutinous or culpably insubordinate. It was not a call to the ordinary duty of a sailor, but a command to place himself in the custody of soldiers, to be imprisoned in a foreign port and under foreign authority. Reluctance, or a refusal to yield willingly to such an order, does not, in my judgment, amount to mutinous conduct, or present a case where the master is justified, by the conduct or declarations of the man, in considering the vessel or crew in danger. Nor can the libellant's conduct, if he was disobedient and disorderly while undergoing punishment, be brought up in justification of the punishment itself. He was not put under arrest for refusing to come on deck, but he was ordered on deck for the sole purpose of being delivered over to the soldiers. Besides, it is very plainly inferable, from all the proofs put in, that the master did not proceed against the libellant so much on account of conduct in his own presence as upon the information and charge of his mate. He so stated unqualifiedly in his declaration before the consul, to obtain the detention of these men, and all the testimony he offers goes to show that nothing transpired before him demanding a punishment of the severity of that which was imposed. I am constrained, therefore, to say, that no facts are in proof, or even pleaded by the master, which exculpate him on this head of the complaint. He forcibly removed the libellant from the vessel, and shows no adequate reason for so doing, and is, accordingly, answerable in damages in this action for that injury. The wrongful act also includes all consequences which directly flowed from or were dependent upon it. Such was the imprisonment of the libellant in the common jail of Laguna.

The master fails in proving any threats of personal injury to himself, or of a mutinous character which can excuse his leaving the libellant at Laguna. The evidence of the libellant's declarations is loose and unsatisfactory; and if, in terms of irritation and passion, he did use improper and menacing language respecting the master, it appears to have excited no alarm at the time, and the man continued on board and perfomed a long voyage, after the threats are supposed to have been made, without any exhibition of hostile or disorderly conduct. Neither is this cause for the detention of the libellant stated by the master in his deposition before the consul. He produces the evidence of a laborer, to prove that the libellant was in possession of a slung-shot on shore, which might have been used as a dangeous weapon, and also the deposition of Matthews, the cook, as to the libellant's threat on board; but he does not pretend, in his own deposition, that he ever regarded those circumstances as importing any danger to him or to the vessel. The general declaration of an apprehension of danger, subsequently made, and repeated in the consular certificate, is founded on the facts sworn to in the depositions of those witnesses, and not on any other particulars within the knowledge of the officers or crew of the vessel. It results, therefore, that the master improperly imprisoned the libellant, and also left him in confinement at a foreign port, without justifiable cause; and I decree damages against him, on account of these acts, in the sum of $100. Decree, $100, and costs.

Case No. 5,223.

GARDNER v. COLLINS.

[3 Mason, 398.] [1]

Circuit Court, D. Rhode Island. June Term, 1824.

DEED—DELIVERY—STATUTE OF DESCENTS — HALF BLOOD.

1. A delivery of a deed may be inferred from circumstances, and need not be proved by positive testimony.

2. Under the statute of descents of Rhode Island of 1822, brothers and sisters of the half blood inherit equally with those of the whole blood.

[Cited in Clark v. Sprague, 5 Blackf. 415; Cliver v. Sanders, 8 Ohio St. 506.]

[See note at end of case.]

3. A court is not bound to give an opinion upon a point of law, which the evidence does not raise.

[1] [Reported by William P. Mason, Esq.]

Ejectment for lands in Rhode Island by the demandant [William C. Gardner], described in the writ as a citizen of Virginia, against the tenant, described as a citizen of Rhode Island. Plea, not guilty. At the trial the plaintiff to support his case, gave in evidence a certain deed-poll made by the said John A. Collins to George Collins Gardner and Mary Collins Gardner, dated April 3d, 1810, and duly proved the execution of the same, which deed included the land in controversy. The plaintiff then stated, that the said George Collins Gardner had since deceased, whilst a minor, and without issue, and therefore his share of the demanded premises descended to and vested in the said Mary Collins Gardner, his sister and heir at law, their father and mother having both, previously, deceased. That afterwards said Mary C. Gardner deceased, to wit, in the month of December, 1822, a minor, and without issue. Which statements were admitted by the defendant to be correct and to be received as evidence. The plaintiff further stated, that the said Mary C. Gardner was his sister of the half blood, that Samuel F. Gardner was also brother to the said Mary C. Gardner of the half blood, that Mary Clarke and Eliza G. Phillips were sisters of the said Mary C. Gardner of the half blood, which statements were also admitted by the said defendant to be correct and to be received as evidence. The plaintiff further produced and offered in evidence a certain deed-poll made to him by Audley Clarke and his wife the said Mary Clarke, the said Samuel F. Gardner and the said Eliza G. Phillips, not having date of any particular day, but acknowledged the 16th day of May 1823, and recorded as of that date. And to prove said deed the plaintiff produced the subscribing witnesses thereto, namely, Benjamin B. Mumford and W. A. Clarke. That said Mumford testified, that he saw said Audley Clarke and Mary Clarke, said Samuel F. Gardner and Eliza G. Phillips sign and seal said deed, that the plaintiff was not present at the execution thereof, nor any one in his behalf to his the witness' knowledge, that the deed when executed was delivered to the said Audley Clarke. The said W. A. Clarke testified to the same effect. The plaintiff also produced as a witness Charles Gyles, the town clerk of Newport and the register of deeds therein, who testified, that said deed was delivered into his office to be recorded by said Samuel Fowler Gardner. This witness further stated, that this deed remained in his office till the commencement of this action, when it was applied for by Richard K. Randolph, Esquire, (the counsel of the plaintiff,) to whom it was delivered. Upon being further interrogated upon whose behalf said Randolph applied for the deed, he answered, in Mr. Audley Clarke's, he supposed, but that said Randolph did not state in whose behalf he applied, and that he (the witness) delivered it without any order from any one, and on his own responsibility. The plaintiff also produced as a witness William Marchant, Esquire, who testified, that he had known the said Samuel F. Gardner to be the agent of his brother, the plaintiff, for a number of years last past, and as such agent to transact business of various kinds to a large amount for the plaintiff on his behalf. The plaintiff's counsel further produced and offered in evidence a letter of attorney made by the plaintiff to the said Samuel F. Gardner, dated the ninth day of October, 1817, appointing him his general agent. On the part of the said defendants, and in defence against said action it was stated, that at the date of the execution of said deed of Audley Clarke and wife, and Samuel F. Gardner and Eliza G. Phillips to the plaintiff, he, the plaintiff, was settled at Alexandria, in the District of Columbia, as a merchant, doing business there, and that previous to the execution of said deed there existed a controversy, as to the demanded premises, and conflicting claims of ownership thereto between the said John A. Collins on the one part, and the said Audley Clarke and wife, Samuel F. Gardner, Eliza G. Phillips, and the plaintiff, on the other part; which statements were admitted by the plaintiff's counsel to be correct, and to be received as evidence.

Hunter and Robbins, for tenant, contended in defence against said action, 1st, that there had been no delivery of said deed of said Audley Clarke and wife, said Samuel F. Gardner and Eliza G. Phillips to the plaintiff. 2dly. That the deed was a deed in trust, made for the purpose of giving said court a colourable jurisdiction of said case, when it had no real jurisdiction, it being a controversy between citizens of Rhode Island, and not between parties who were citizens of different states. 2 Dall. 431. And 3dly. That the plaintiff and the said Mary Clarke and Samuel F. Gardner and Eliza Phillips were not the heirs at law to the said Mary Collins Gardner.

Searle & Hazard, for demandant, argued è contra.

STORY, Circuit Justice (summing up to the jury). The first question is, whether there has been any delivery of the deed of Clarke and others to the demandant, or for his use. It is certainly not necessary to prove a positive, formal delivery. It may be inferred from circumstances. The execution of the deed by the grantors is fully established. It was then delivered to Clarke, one of the grantors, by the consent of the other grantors; it was subsequently found in the possession of S. F. Gardner, the demandant's agent, and by him placed in the registry for record. It is now found in possession of the demandant's counsel; and its due execution and delivery are not contested by any person, who was a party to it; but the objection is taken by a mere stranger. Under such circumstances I have no doubt, that the evidence is competent

in point of law, from which the jury may presume a delivery to, or for the use of, the demandant; and I shall leave it as a question of fact to them accordingly.

As to the second objection, there is no pretence to say, that it presents any point as to the jurisdiction of the court. The demandant is described in the writ as an inhabitant of Fairfax county, and "a citizen of the state of Virginia." The tenant is a citizen of Rhode Island, and so described also in the writ. If the tenant meant to deny the allegation of the citizenship of the demandant, he should have done it by a plea in abatement, and brought the matter directly in controversy before the court. By pleading over to the merits, he admits the description in the writ to be true. It is not matter relevant or proper under the general issue. It has no tendency to prove the guilt or innocence of the tenant. Nor have I heard any evidence which shows that the demandant is not a citizen of Virginia. He claims the whole land in controversy; but admitting the deed is void, if his title by heirship is maintained, he is certainly entitled to recover his moiety, or one fourth part, as one of the heirs of Mary C. Gardner. To this extent, therefore, his writ is at all events good, since his citizenship has not been put in issue, and the controversy is between citizens of different states. The second point is therefore narrowed down to the consideration of that portion of the premises claimed by the demandant under the deed of the other asserted co-heirs. Whether a deed executed for the sole purpose of giving jurisdiction to the court, and without which it could not be maintained, be void or not, is a point upon which I do not feel myself called upon to deliver an opinion under the present state of the evidence. Not that I have any objection to stating my opinion, but I think it wrong to travel beyond the points which the evidence brings before the court. I cannot perceive any sufficient evidence in this case to raise the question. The onus probandi lies on the party taking the objection. Where is the evidence of any purpose of founding jurisdiction by this deed? Where is the evidence of witnesses or others, that the consideration in the deed was not paid, or that the purchase was not bona fide made by a party having perfect confidence in the title. Though controverted by the tenant, it does not follow, that it was matter of any legal doubt. Until therefore some evidence is introduced to lay a foundation for the presumption of the deed's being collusive, I do not feel myself called upon to express an opinion.

The more important point is that, which respects the heirship of the demandant and those, under whom he claims. It depends upon this, whether by the law of Rhode Island brothers and sisters of the half blood are entitled to inherit by descent in default of lineal descendants of the intestate. The statute of distributions of Rhode Island of 1798 (Dig. 1798, pp. 287, 288) declares, that where there are no children of the intestate, all the right, title, and interest in his real estate "shall vest in and be divided equally amongst the next of kin in equal degree, and those, who shall represent them, if any of them be dead, computing according to the degrees of the civil law." Upon this statute there would seem to be no room for legal doubt. By the civil law, brothers and sisters of the half blood are equally next of kin with those of the whole blood. This construction was put upon the statute of distributions of 22 & 23 Car. II. c. 10, which is far more general in its language, more than a century ago in Crooke v. Watt, 2 Vern. 124, and has ever since been adhered to in England. The same construction, at least as far as my knowledge extends, has been generally adopted in America. Hillhouse v. Chester, 3 Day, 166; Preston v. Hoskins, 2 Yeates, 545; Sheffield v. Lovering, 12 Mass. 490.

But the present case is not governed by the act of 1798. It has arisen since the general revision of the statutes in 1822, and is to be settled by an appeal to the text in that digest. The statute of distributions of 1822 contains a detailed enumeration of the succession of heirs, and in the fourth paragraph declares, that "if there be no father, then to the mother, brothers and sisters of such intestate, and their descendants, of such of them as there may be." The question then is, whether brothers and sisters of the half blood are not within the purview of this clause. No intention is shown on the face of this statute to alter the rule of the act of 1798, as to the half blood; and unless the court can say, that brothers and sisters of the half blood are not brothers and sisters in the general sense of law, it is impossible to doubt the title in this case. The statement of the proposition carries its own answer. Brothers and sisters of the half blood are recognized by law as of kin in the degree of brothers and sisters, and as the act contains no qualification as to whole or half blood, the words must be taken in their common and usual sense.

Verdict for the demandant for the whole of the premises. Judgment accordingly.

[NOTE. This cause was taken to the supreme court on certificate of division of opinion of the judges in the circuit court, and was heard on questions certified. The supreme court, Mr. Justice Story delivering the opinion, decided in favor of the plaintiff, holding that the words "of the blood" comprehend all persons of the blood, whether of the whole or half blood; and that the words "come by descent, gift, or devise from the parent or other kindred, etc.," mean immediate descent, gift, or devise, and make the immediate ancestor, donor, or devisor the sole stock of descent. The cause was certified back to the circuit court; the supreme court adjudging that the plaintiff and those under whom he claims the estate in controversy are heirs at law of Mary C. Gardner, intestate, and as such heirs are by the statutes of descent of Rhode Island, A. D. 1822, entitled to the same estate upon the facts agreed in the case, and that the judgment ought to be given for the plaintiff in this cause. 2 Pet. (27 U. S.) 58.]

Case No. 5,224.

GARDNER v. COLUMBIAN INS. CO.

[2 Cranch, C. C. 473.] [1]

Circuit Court, District of Columbia. May Term, 1824.

MARINE INSURANCE—VALUED POLICY—COST—CONSTRUCTION.

1. In an action upon a valued policy on a cargo, the defendants will not be permitted to give evidence of its actual cost.

2. The policy was on a voyage "at and from Rio Janeiro to Santos, and two ports in South America, and at and from either of them to a port of discharge in the West Indies, or Europe, or the United States," upon goods "at and from Rio Janeiro," "until they shall be safely landed at Santos, &c., &c.," "valued at the sum insured," (viz. $3500,) "on her cargo of salt, and on the proceeds, as interest may appear." These words do not justify an inference, on the part of the underwriters, that the goods were to be laden on board at Rio Janeiro.

3. The cargo was lost between Rio Janeiro and Santos, and the plaintiff recovered for the loss, although the cargo was laden at Cadiz.

This was an action [by Richard Gardner] upon a policy for $3,500, on a cargo of salt in the brig Manufactor. The terms of the policy are stated above in the marginal note.

Mr. Taylor, for defendants, contended, that, by the terms of the policy, the salt was to be taken on board at Rio Janeiro, whereas it was laden on board at Cadiz, in Spain; which fact was not disclosed to the underwriters; and that this was a material misrepresentation, which vacated the policy. He also contended, and offered evidence to prove that the cargo cost, at Cadiz, only $450, whereas it was valued in the policy at $3,500; and that this was so gross an over-valuation as to authorize the defendants in considering it as an open policy.

But the court (nem. con.) refused to admit evidence of the actual value at Cadiz.

As to the first misrepresentation, Mr. Taylor cited Marsh. Ins., 321, 322; Murray v. Columbian Ins. Co. of N. Y., 11 Johns. 302.

Mr. Mason, for plaintiff, contended that the words of the policy did not imply that the salt was to be taken on board at Rio Janeiro; and every person trading to that port knows that salt cannot be taken on board there, by an American ship, and carried to Santos, which would be a prohibited coasting trade. The defendants were bound to know the laws and usages of the trade. Bell v. Hobson, 3 Camp. 272, 16 East, 241; Phil. Ins. 169.

THE COURT (nem. con.) was of opinion that the words of the policy did not justify an inference on the part of the defendants that the goods were to be laden on board at Rio Janeiro, and that the salt was covered by this policy, although not laden, nor bulk broken, at Rio.

[See Case No. 5,225.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

Case No. 5,225.

GARDNER v. COLUMBIAN INS. CO.

[2 Cranch, C. C. 550.] [1]

Circuit Court, District of Columbia. April Term, 1825.

MARINE INSURANCE — OFFER OF ABANDONMENT—VALUED POLICY—EVIDENCE OF OVERVALUATION.

1. An offer to abandon the insured vessel, made as soon as the assured obtains the preliminary proofs of loss, to be laid before the underwriters, is not too late.

2. Upon a valued policy, evidence of overvaluation is not admissible unless in support of an allegation of fraud.

This was an action [by Richard Gardner] upon a policy on the brig Manufactor, at and from Rio to Santos, valued at $3,200. The defendants, at the trial, contended that the vessel was fraudulently overvalued, and that the offer to abandon was too late. The policy was dated 20th November, 1821. The loss was known here on the 24th of November. On the 26th of December, the protest and offer to abandon were sent to the office of the defendants, and the offer to abandon was repeated in writing on the 23d of January. The master arrived in Philadelphia on the 12th of December. There was no evidence of the arrival of any authentic proof previous to that date.

THE COURT (THRUSTON, Circuit Judge, absent) said the offer to abandon was not too late. They also said that evidence of overvaluation could be given only in support of the allegation of fraud. That overvaluation is not, per se, evidence of fraud, but was a circumstance proper for the consideration of the jury in considering the question of fraud; and that if they should find that the vessel was fraudulently overvalued, the plaintiff could not recover, even the value of the property, for the fraud would invalidate the contract altogether. Verdict for the plaintiff, $3,200.

[See Case No. 5,224.]

Case No. 5,226.

GARDNER v. COOK.

[7 N. B. R. 346] [2]

District Court, D. Rhode Island. Nov. 4, 1872.

BANKRUPTCY — RECOGNITION OF LIENS BY ASSIGNEE—COSTS AND CHARGES FOR CUSTODY AND CARE OF PROPERTY.

1. The assignee in bankruptcy must recognize as a preferred claim any valid lien, even the costs of an attachment, if such costs are a lien by the state law.

2. The costs and charges against a bankrupt for care or custody of his property prior to the filing of a petition in bankruptcy, by or against him, under contract with him, express or implied, are debts of his, provable against his

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reprinted by permission.]

estate as debts simply, not as preferred claims. For care and custody of property from the date of proceedings in bankruptcy to the taking possession thereof by the messenger or assignee, the assignee is accountable, as for expenses of like kind incurred by him after his appointment, having regard, of course, to their necessity and utility, and the reasonableness or exorbitancy of the charges therefor.

[Followed in Re Archenbrown, Case No. 503. Cited in Re Hatje, Id. 6,215.]

In bankruptcy.

I. E. Spink, for claimant.

Mr. Cook, pro ipse.

KNOWLES, District Judge. Upon a certain issue raised before Mr. Register Clark, and by him adjourned into court, I would now announce my conclusions upon the facts, as presented at the hearing, and the arguments submitted and authorities cited by the learned counsel of the parties. Those parties are—J. A. Gardner, a sheriff's deputy, petitioner or claimant, on the one side, and Lorin M. Cook, the assignee of A. B. Horton, a bankrupt, on the other; and the question presented is, to state it in brief, is an assignee in bankruptcy, who takes possession of a stock of goods which a creditor had attached upon process from a state court, bound to pay as a preferred debt the accrued costs incident to the attachment suit, taxed as they legally might have been had the attaching creditor's suit been prosecuted to final judgment against the bankrupt?

This question, which it is believed is now, for the first time, distinctly and pointedly presented for adjudication in this district, has, it appears, arisen elsewhere; and to the rulings upon it of several of my brethren of the bench, as well as to the language of the bankrupt act, my attention has been directed by the learned counsel of the respective parties. To these, as well as to the arguments of counsel, I have given due consideration, arriving at conclusions which it seems to me not at all necessary on this occasion to vindicate by elaborate argument, that would, of necessity, be substantially but a repetition of what has been repeatedly uttered by my brethren of other districts.

A satisfactory answer to the question is found, I think, when it is conceded, as it must be, that a sheriff under the laws of Rhode Island acquires no lien, in the true sense of that word, upon the goods he attaches. He is simply the agent and employee of the plaintiff in the action, who can, at any moment, discontinue his suit, and thus discharge the attachment. For his lawful costs, fees, custody, charges and expenses, his claim is against the plaintiff, not against either the defendant or the property attached. So far as regards the question at issue, I am unable to see that it matters at all whether the suit be discontinued and the attachment be dissolved by the plaintiff's order, or by an adjudication of bankruptcy against the defendant, as provided in section 14 of the bankrupt act. When, by the law of a state, a sheriff, by attaching goods, acquires a lien upon the goods specifically, (as it seems is the fact in New York, if nowhere else,) the question under consideration would, of course, be answered in the affirmative, as it was by the learned judge of the New York district, in Re Housberger [Case No. 6,734],—the case cited and mainly relied on by the learned counsel of the claimant Gardner. In consistency with this view, I must hold and rule that the claim of Gardner to a lien upon the goods is without foundation; and that having no lien upon the goods, his claim of costs, as for a preferred debt, the assignee cannot rightfully allow and pay.

Nor can it be conceded, as claimed in argument by counsel, in view of the law or of the authorities, that the plaintiff in an attachment suit in Rhode Island, acquires by attachment a lien upon his debtor's goods, which that debtor's assignee in bankruptcy must or can recognize. He acquires but an inchoate right to a lien, conditional upon his obtaining a final judgment; and the conclusive answer to any argument in his behalf is that the bankrupt act [of 1867], § 14 [14 Stat. 517], provides that all attachments on mesne process made within four months next preceding the commencement of proceedings in bankruptcy, shall be dissolved as soon as an assignee of the bankrupt shall have been appointed and qualified, and an assignment of the debtor's property been made to him by a register.

There are some propositions concerning which little or no doubt is now expressed, or intimated, by commentators upon the bankrupt act. One of these is, that a chief merit of this act is its tendency and efficiency in checking and preventing over-trading, by preventing, so far as possible, the giving of preference by the insolvent debtor, and the obtaining of preference by his creditor. Says Cadwalader, J., in Re Woods [Case No. 17,990]: "In this respect its operation will be gradual, but must be highly beneficial. When relations and friends of a debtor, and when capitalists, who, without affection or friendship, would make profit from his embarrassments, learn that they cannot be secured by a preference out of the wreck of his affairs, they will not furnish him the means of over-trading. So long as he could, by securing advances and accommodations, obtain them, the temptation to attempt to retrieve his losses, by doubling his investments, was before the enactment of the bankrupt law irresistible; and the system of business was that of mere gambling adventure. But when a debtor who suffers losses knows that he cannot prefer his relations and friends, and when capitalists know that they cannot, without risk, assist him to the injury of other creditors, he will stop his business in season, to give a fair dividend to all his creditors, and thus make a fair settlement with them in the court of

bankruptcy, or, much oftener, out of it. Thus, in the course of time, few judicial bankruptcies will occur.

Now, an attachment of the effects of an insolvent debtor, it is obvious, is an endeavor on the part of a creditor to obtain a preference—nothing more, nothing less; and the bankrupt law, as I construe it, wisely and consistently prescribes that the creditor who, in this mode, seeks to defeat or delay the operation of the act, shall, out of his own pocket, pay the expenses of his experimental proceedings. If for a period of four months the debtor and his other creditors refrain from interference, very well; if not, then not so well for the attaching creditor. He must pay the bills of his sheriff and his attorney without hope of reimbursement from the bankrupt's estate.

Of the intent of the framers of the law, I can entertain no doubt, when it is remembered that the insolvent law of Massachusetts, of which the bankrupt law is in many particulars substantially a transcript, contains a provision securing to a creditor his costs of attachment as a preferred debt, when he chooses to prove his principal debt against the insolvent's estate, and when it is seen that the bankrupt act contains no analogous provision. In re Fortune [Case No. 4,955]. Says Judge Fox, of Maine, in Re Stubbs [Id. 13,557]: "The court in bankruptcy cannot allow a party the expenses incurred by him in the attempt to defeat the provisions and operation of the bankrupt law." This, it is true, was a ruling upon a claim of an assignee under a state law for his outlays and charges, prior to the filing of a petition in bankruptcy against the assignor; but I unhesitatingly adopt the proposition as applicable to the case under consideration, having regard to the facts before me as agreed by the parties.

The question under discussion, it seems, has never yet been passed upon either by the supreme court or any one of the circuit judges; but in more than one of the district courts it has been a subject of allusion or of special consideration. And in view of the act itself, and of the commentaries upon it, which have come under my observation, the reasonable and just conclusions in regard to this question and its cognates, are these: First. A valid lien upon property the assignee in bankruptcy must recognize as a preferred claim—even the costs of an attachment, if such costs are by the state law truly a lien, as in New York—otherwise not. Second. The costs and charges against a bankrupt for care or custody of his property prior to the filing of a petition in bankruptcy by or against him, under contract with him, express or implied, are debts of his, provable against his estate as debts simply—not as preferred claims. Third. For care and custody of property from the date of proceedings in bankruptcy to the taking possession thereof by the messenger or assignee, the assignee is accountable, as for expenses of like kind incurred by him after his appointment—being bound, of course, to have regard to the necessity and utility of all outlays and services, and the reasonableness or exorbitancy of the charges therefor.

The result of my inquiries is, that the petition of the claimant Gardner must be dismissed, but without prejudice to any claim which the plaintiffs in the attachment suit (Griffin & Co.), after they shall have proved their debt against the bankrupt's estate, shall see fit to prefer against the assignee as just claims for outlays or services, beneficial to the estate, from and after the filing of the petition against the bankrupt Horton. When such a claim shall have been presented by them, the circumstances under which their attachment was made will appear, and the character and value of such services and outlays be ascertained and considered; and it is to be presumed justice be done, if not by the assignee, by the register; if not by the register, by this court; if not by this court, by his honor the circuit judge in the exercise of his revisory powers.

Among the reported cases other than those already cited, to which reference may profitably be made, as bearing upon the question under consideration, are the following, viz.: In re Stevens [Case No. 13,392]; In re Cohn [Id. 2,966]; and In re Preston [Id. 11,394].

Case No. 5,227.

GARDNER et al. v. GARDNER et al.

[3 Mason, 178.] [1]

Circuit Court, D. Rhode Island. June Term, 1823.[2]

WILLS — CONSTRUCTION — DEVISE CHARGED WITH PAYMENT OF DEBTS—NOTICE—PROCEEDS.

1. Where a testator devised to one of his sons in fee two third parts of a certain farm, "he paying all my just debts out of said estate," it was *held* that the debts were not a mere charge on the devisee, but a charge on the land devised also; but the charge being for the payment of debts generally, a bona fide purchaser from the devisee, who has paid the purchase money, is not bound to look to the application of it.

[Cited in Sands v. Champlin, Case No. 12,303; Patterson v. Gaines, 6 How. (47 U. S.) 584.]

[Cited in Andrews v. Sparhawk, 13 Pick. 401; Pickering v. Pickering, 15 N. H. 290; Tilden v. Tilden, 13 Gray, 107; Tilton v. Tilton, 41 N. H. 485; Frampton v. Blume, 129 Mass. 156; Amherst College v. Smith, 134 Mass. 546; Nudd v. Powers, 136 Mass. 277; Munson v. Cole, 98 Ind. 510; Lovejoy v. Raymond, 58 Vt. 510, 2 Atl. 156; Woonsocket Inst. for Savings v. Ballou, 16 R. I. 353, 354, 16 Atl. 144.]

[See note at end of case.]

2. There is no difference in this respect between a charge on the land, and a trust created to pay the debts. Notice of the charge does not vary the rights of the purchaser.

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[1] [Reported by William P. Mason, Esq.]

[2] [Modified in 12 Wheat. (25 U. S.) 498.]

3. If the purchase money is unpaid, it may be followed into the hands of the purchaser.

4. Real estate being assets for the payment of debts generally, in Rhode Island, by statute, the executrix may sue the devisee and the purchaser before payment of the debts, to compel them to appropriate the purchase money to the payment of the debts, and to exonerate the assets of another devisee entitled to be exonerated. If a purchaser, instead of paying over the purchase money, applies it, with notice of the charge, to the payment of the devisee's own debts, to the injury of the creditors of the devisor, it is misapplication of the purchase money, for which he may be made responsible in equity at the suit of the executrix.

This was a bill in equity [by Hannah Gardner and others against Ezekiel W. Gardner and Elisha R. Potter]. The facts were as follows: Peleg Gardner, of South Kingston, by his will, dated the 7th of July, 1817, having given his wife (one of the plaintiffs) a part of his mansion house and the use of one third of his stock, &c., for her life in lieu of dower, made the following devise: "I give and devise to my beloved son, Ezekiel W. Gardner, two third parts of all that my 'Ferry Farm,' so called, formerly owned by John Franklin, and now in the possession of the said Ezekiel W. Gardner; with two third parts of the sloop, boats, scow, wharf, rights and privileges, to my said Ferry estate belonging, of every kind whatever, to him, the said Ezekiel W. Gardner, and to his heirs and assigns forever, he my son Ezekiel W. Gardner paying all my just debts out of said estate." The testator then proceeds to devise the other third of the Ferry estate and some other real estate to his daughter Isabel in fee. He then devises other real and personal estate to his other daughters, Martha C. Gardner, Hannah Gardner, and Mary Ann Gardner in fee; and gives an annuity to his daughter Dorcas Gardner, of 300 dollars, payable out of the estates given to her four sisters. Then comes the following clause: "And I do hereby order, and it is my will, that my son, Ezekiel W. Gardner, shall pay all my just debts out of the estate, herein given him as before mentioned." He then gives the residue of all his estate, real and personal to his wife, Hannah Gardner, in fee, and makes her the executrix of his will. The testator died, and his will was duly proved in the court of probate, in April, 1818. A commission issued from the probate court to ascertain the debts of the testator in July, 1818, and the commissioners made a report of their doings in July, 1820, which was duly accepted. The report stated the debts of the testator at $7373.14; and rejected two accounts presented to the commissioners, one of which was an account of Ezekiel W. Gardner, the other of John P. Mann. In April, 1819, Ezekiel W. Gardner, having purchased the third of his sister Isabel, sold the whole to the defendant, Elisha R. Potter, for the asserted sum of 15,000 dollars. None of the testator's debts having been paid, and suits at law having been commenced against the executrix, to establish and enforce the rejected claims, the present bill was brought by the executrix and her daughters, Hannah Gardner and Mary Ann Gardner (two of the devisees in the will,) to enforce the trust in the will for the payment of the debts of the testator out of the Ferry estate, devised to the defendant, Ezekiel W. Gardner, and afterwards, fraudulently, as it was charged, conveyed to the defendant, Elisha R. Potter. There was also a prayer for general relief. The defendants put in their answers; and the cause came on for a hearing, after the general replication filed, upon the answers and other proofs in the cause.

Webster, Hazard, and Bridgham, for plaintiffs.

It is a well known principle, long established both in courts of law and equity, that in the construction of a will the intention of the testator is to be sought for and collected from the whole instrument, "ex visceribus testamenti," and when found is always to govern. It is a maxim of the English law, "quod ultima voluntas testatoris perimplenda est." 6 Cruise, Dig. (Eng. Ed.) 157; 7 Bac. Abr. 341, 342; Baddeley v. Leppingwell, 3 Burrows, 1533; Andrew v. Southouse, 5 Term R. 292; Strong v. Cummin, 2 Burrows, 770; Thellusson v. Woodford, 4 Ves. 311; Cook v. Holmes, 11 Mass. 528. Every will ought to be so expounded as to give effect to every part of it; so that each word may have its peculiar operation and not be rejected. "Every string ought to have its sound." Barker v. Giles, 2 P. Wms. 282; 6 Cruise, Dig. (Eng. Ed.) 157; 1 Fonbl. Eq. 448, note; Chambers v. Brailsford, 2 Mer. 25. Applying this principle to the will in question we would ask what the intention of the testator was in regard to the devise to Ezekiel? Did he not mean that his debts should be first paid out of the estate devised to Ezekiel? or in other words, that the estate itself should be the fund out of which his debts should be paid? that the same estate should at all events be liable therefor, and thereby exonerate the whole of the personal and all the rest of the real estate from that burthen? To secure the payment of the debts out of this fund and not to put the payment of them off merely upon Ezekiel personally, who might fail to do it, he guardedly uses the words "he paying," &c. This expression amounts, we conceive, to a condition, and we contend that Ezekiel took under this will a fee simple conditional in the real estate devised to him. "He paying," or "upon paying," or "on condition that he pay," &c. are all terms importing one and the same thing, to wit, a condition precedent. Vide Co. Litt. 236b; Orphans' Leg. 364–366; Crickmere v. Paterson, 1 Cro. Eliz. 146; Id. 205, 379; 6 Cruise, Dig. (Eng. Ed.) 428; 2 Cruise, Dig. 47; Barnadiston v. Fane, 2

Vern. 366; Acherley v. Vernon, Willes, 153; Cary v. Bertie, 2 Vern. 333; Berty v. Faulkland, 12 Mod. 182; Grimston v. Lord Bruce, 1 Salk. 156; Turner v. Goodwin, 10 Mod. 153; Peters v. Opie, 1 Vent. 177; Large v. Cheshire, Id. 147. This testator meant that his debts should be paid out of the estate devised to Ezekiel; that he, Ezekiel, should not have it in his power to defeat that intention; that the other devisees should not be remediless in case Ezekiel should not pay, and therefore he annexed the condition to the devise. Not only the words of this particular devise show this to be the intention of the testator, but the whole tenor of the will confirms it, "Et interest reipublicae suprema hominum testamenta rata haberi." Blackstone, in his Commentaries (volume 2, p. 382), says, "that every will is construed with equal favor and benignity in courts both of law and equity, and is expounded rather on its own particular circumstances, than by any general rules of positive law." But should this devise not be considered as giving a mere conditional estate to Ezekiel, still the will creates a lien upon the land devised to him, to the extent of the testator's debts, and the land will stand charged therewith in whosesoever hands it may be. By the laws of England real estate is not liable or chargeable with the payment of simple contract debts unless made so by will. But in this country, the laws are founded on more just and equitable principles. The relics of feudal law are discarded; a more liberal policy prevails, and just debts of every nature stand on the same footing; and all the property of a deceased, both real and personal, is liable for the payment of them; the latter first, and in case of a deficiency in that, then the former, or so much thereof, as may be necessary to complete the object. This is a principle well known by every citizen of this state old enough to transact any business, and undoubtedly was well understood by the testator when he made his will.

Both in England and here the personal estate is in the first place to be applied to the payment of debts, but a testator may discharge his personal and charge his real estate with the payment of them. Freemoult v. Dedire, 1 P. Wms. 430; Masters v. Masters, Id. 421; Harris v. Ingledew, 3 P. Wms. 95, 98; King v. King, Id. 358; Davis v. Gardiner, 2 P. Wms. 190; Lypet v. Carter, 1 Ves. Sr. 499; Earl of Godolphin v. Penneck, 2 Ves. Sr. 271; Thomas v. Britnell, Id. 313; 4 Bac. Abr. 283–285; Shallcross v. Finden, 3 Ves. 738; 1 Madd. 474 et seq.; Kightley v. Kightley, 2 Ves. Jr. 328; Walker v. Jackson (in chancery) 1 Wils. 24. The debts being made payable out of the estate, is the same as if they had been made payable out of the profits or rents or income of the estate. So says Justice Wilmot in delivering the opinion of the court in the case of Baddeley v. Leppingwell, 3 Burrows, 1541. Ezekiel is not therefore personally answerable or liable for the payment of the debts. The estate alone is chargeable and it is quite immaterial so far as relates to the present case, whether Ezekiel accepted the devise or not. If he had not accepted it, the estate would have gone to the heirs generally of the testator, subject however to the charge. But as he has accepted the devise, he takes the estate subject to the same charge. As words of limitation are used in this will, the estate being devised to Ezekiel and his heirs, no question can arise as to the quantity of estate or extent of interest, which he took. It was, we think, undoubtedly, either a fee simple conditional, as herein first attempted to be shown, or a fee simple subject to the lien or charge thereon for the testator's debts, as lastly above urged. Livingston v. Livingston's Ex'rs, 3 Johns. 189; Denn v. Mellor, 5 Term R. 558; same case decided in same way, 6 Term R. 175; same case decided in same way in house of lords, 2 Bos. & P. 247; Baddeley v. Leppingwell, 3 Burrows, 1541; Jackson v. Harris, 8 Johns. 109; Newman v. Kent, 1 Mer. 240. If Ezekiel had the power to sell as is contended for by the respondents, his power so to do must have been derived from the will, and must have been implied from the circumstance, that the testator's debts were to be paid by him out of the estate, and a sale was needful in order to raise the money out of the estate to enable him to comply with this provision. If this position is correct; if Ezekiel had the power to sell and did sell, for the purpose above mentioned, he could have acted in no other character than that of a trustee under the will, and in that case he was bound to respect the rights of the complainants as beneficially interested under a sort of resulting or constructive trust in their favour. Had not the estate been conveyed by Ezekiel, the complainants could have proceeded against it under a bill in equity, and compelled a sale, and thereby raised the needful sum of money out of it to enable them or the executrix to pay the debts. This being the purpose of the testator the estate is liable even in the hands of a purchaser. 1 Cruise, Dig. 547; Wynn v. Williams, 5 Ves. 130.

Again, viewing Ezekiel, for the reason already mentioned, in the character of trustee under the will, and the complainants as the cestuis que trust, the latter had such a vested interest in the estate as could not be impaired or destroyed by the voluntary act of the trustee, and therefore the trust followed the estate into the hands of Potter, he, as will be shown hereafter, having knowledge of the trust. Shepherd v. McEvers, 4 Johns. Ch. 136; 1 Cruise, Dig. 486, 540, 548, 549, 405, 406; Fearne, Rem. 479; 2 Vern. 5; Crewe v. Dicken, 4 Ves. 97.

Lord Hardwicke is reported to have expressed himself thus emphatically on this subject, "If a person will purchase with notice of another's right, his giving a consid-

eration will not avail him, for he throws away his money voluntarily, and of his own free will." Potter purchased of Ezekiel under a full knowledge of this trust, if it may be called or considered such. The peculiar provisions of this will, taking the whole of it together, are such as to make it the bounden duty of a voluntary purchaser to look to the application of the purchase money, and Potter's failing to do this, in this instance, is such a crassa negligentia as renders him answerable to the complainants in the present suit. 2 Fonbl. Eq. c. 6, § 3; Hiern v. Mill, 13 Ves. 114; Lord Montfort v. Lord Cadogan, 17 Ves. 485.

We contend then, first, that equity will give relief against the person entrusted, and his heirs, and such alienees as have purchased either without a valuable consideration or with express notice. 2 Fonbl. Eq. 145, and note f; Id. 147, and note h; 2 Bl. Comm. 329; Willoughby v. Willoughby, 1 Term R. 763. Lord Bacon, in his readings on the Statute of Uses (page 312), says, that "the chancery looketh farther than the common law, viz. to the corrupt conscience of him that will deal in the land knowing it in equity to be another's, and therefore if there were radix amaritudinis the consideration purgeth it not, but that it is at the peril of him that giveth it, so that consideration or no consideration is an issue at common law, but notice or no notice is an issue in chancery." 2 Fonbl. Eq. 151; Fermor's Case, 3 Coke, 78b; Lord Bacon's Readings, 312. Secondly, that whatever is sufficient to put the party upon inquiry is good notice in equity. 2 Fonbl. Eq. 151, and note m; Id. 152; Bovey v. Smith, 1 Vern. 149; Ferrars v. Cherry, 2 Vern. 384; Dunch v. Kent, 1 Vern. 319; Draper's Co. v. Yardley, 2 Vern. 662; 1 Cruise, Dig. 546; Smith v. Low, 1 Atk. 490; Hall v. Smith, 14 Ves. 426. Thirdly, that notice is not confined to the time of the contract, for if a person, who has a lien in equity on the premises, give notice of such equitable lien before actual payment of the purchase money it is sufficient (2 Fonbl. Eq. 148, in note i; Tourville v. Naish, 3 P. Wms. 307; Story v. Lord Windsor, 2 Atk. 630; Hardingham v. Nicholls, 3 Atk. 304); or before the execution of the conveyance though the purchase-money be actually paid (Wigg v Wigg, 1 Atk. 384). Fourthly, that a person claiming as bona fide purchaser for a valuable consideration must deny the fact of notice of the trust and of every circumstance from which notice might be inferred. Murray v. Ballou, 1 Johns. Ch. 566. He must deny it though it be not charged. Denning v. Smith, 3 Johns. Ch. 345; Frost v. Beekman, 1 Johns. Ch. 302; Brace v. Duchess of Marlborough, 2 P. Wms. 491. Fifthly, that by taking a conveyance with notice of the trust, the purchaser himself becomes the trustee, notwithstanding any consideration paid. 2 Fonbl. Eq. 149; 1 Cruise, Dig. 485, 486, 492, 540, 541; 1 Schoales & L. 262; Saunders v. Dehew, 2 Vern. 271; Murray v. Ballou, 1 Johns. Ch. 566; Fearne, Rem. 479; Pye v. Gorge, 1 P. Wms. 128; Taylor v. Stibbert, 2 Ves. Jr. 437. Sixthly, that it is true, that generally a purchaser is not liable in equity for misapplication of purchase-money where an estate is chargeable generally with payment of debts and vested in a trustee to sell, but that it is otherwise if an estate is made chargeable with particular debts. And that if there is any collusion between the trustee and purchaser, the purchase would be infected with the fraud or collusion. 7 Bac. Abr. 155, in margin, and the cases there cited; 2 Fonbl. Eq. 149, and note k; Dunch v. Kent, 1 Vern. 260; Spalding v. Shalmer, Id. 303; Crewe v. Dicken, 4 Ves. 100; Hill v. Simpson, 7 Ves. 152; Cotterel v. Hampson, 2 Vern. 5; Lloyd v. Baldwin, 1 Ves. Sr. 173; 1 Madd. 496; Culpepper v. Aston, 2 Ch. Cas. 115, 221; Murray v. Ballou, 1 Johns. Ch. 575; Sugd. Vend. 349, and the other cases there cited; Whale v. Booth, 4 Term R. 625, note; Hiern v. Mill, 13 Ves. 114; Crane v. Drake, 2 Vern. 616; Taylor v. Hawkins, 8 Ves. 209; Ewer v. Corbet, 2 P. Wms. 148; Burting v. Stonard, Id. 150; Lord Montfort v. Lord Cadogan, 17 Ves. 485. Seventhly, that a bona fide purchaser has, in equity, been postponed, in respect of his conniving at the subsequent fraud of him under whom he derived his title, and those instances are evidently exceptions to the general rule. 2 Fonbl. Eq. 147, in note h; Hill v. Simpson, 7 Ves. 152; Throughout the whole of these transactions Potter knew that the complainants intended to resort to this fund for the means of paying the debts, and he and Ezekiel both confess, in their answers, that the purchase money, as fast as paid, was applied by Ezekiel, with the knowledge and aid of Potter, to the discharge of Ezekiel's own debts, and that even in June, 1820, when all the first payment, being between six and seven thousand dollars, had been thus applied, Ezekiel was still so hard pushed by his creditors as to induce him to urge Potter so to alter the contract as to obtain more money to relieve himself therefrom, which was accordingly done. Eighthly, that it is the duty of a trustee not to bring the property to sale, until all information has been acquired by him for the benefit of the cestui que trust, under circumstances likely to make it yield its utmost value. Hart v. Ten Eyck, 2 Johns. Ch. 110; Ex parte Bennett, 10 Ves. 385. Agreeably to the above principle Ezekiel ought not in fairness to have sold (admitting he had power to sell) till the commissioners had made their report, and the amount of debts had been thereby precisely ascertained. And Potter, having full knowledge of the trust aforesaid (if trust it may be called), together with all the circumstances attending it, ought not, for the same reasons, to have purchased at that time. Ninthly, we admit that no schedule of the debts has ever been delivered to the respondents,

or either of them; and that the commissioners had not made report of the debts at the time of the sale; but in answer thereto we say, firstly, that Potter, as well as Ezekiel, well knew the debts; and, secondly, that a commission of insolvency was then pending in order to ascertain the debts judicially, and that both the respondents were bound by every principle of justice and equity to take notice of said commission, and to govern themselves by it. It was a public proceeding, a sort of judicial proceeding, a proceeding in a court of record, of which all persons are presumed to be cognizant, and of which, in this instance, both the respondents had actual notice. It was a lis pendens, and a lis pendens is constructive notice, agreeably to the following authorities. Murray v. Ballou, 1 Johns. Ch. 566; 1 Cruise, Dig. 544; Culpepper v. Aston, 2 Ch. Cas. 115. Tenthly, that the law so guards the interests of all mankind that any collusion, by any person, in any transaction, prejudicing the rights of others, cannot and ought not to be supported either in courts of law or equity. Even the alienation of assets by an executor, who has by law complete and perfect controul over them, is not good, if there is collusion between him and the purchaser. Vide 2 Fonbl. Eq. 150, in note 1, and many of the authorities already cited under the ninth head. Eleventhly, the purchasing of assets of an executor for a pre-existing debt is a badge of fraud. Vide McLeod v. Drummond, 14 Ves. 361, and some of the authorities already cited under other heads. In applying this principle to the present case we will but just observe that Potter purchased, as is expressly confessed by him in his answer, for the purpose of securing his own private, pre-existing debt, due from Ezekiel.

Hunter and Searle, for defendants.

It is contended on the part of the defendants, that the complainant is not in a situation to maintain the present suit. She has not paid a single cent of any debt, for which the defendant, Gardner, is liable. A mere liability to pay gives no cause of action. There is no privity in fact, between these parties, and there can be none in law until actual payment has been made. The only relation in which these parties stand to each other, and which law or equity can notice, is, that both may be liable to the creditors of the devisor, and that relation may place them in the situation of quasi sureties, separately, for the same debts. But it will not, we apprehend, be seriously contended that a surety can either at law or in equity call upon his co-surety for indemnity, in any case whatever, nor for contribution, until actual payment. Indeed upon principle, and so far as it relates to creditors, the complainant, Hannah, is first liable, as having the personal estate, which is the fund first liable in point of law and equity. It has never yet been established, that an executor, as residuary legatee, or otherwise, could ever sustain a bill against an heir or devisee, to restrain him from selling the real estate of the original debtor, on the ground merely of its liability for debts in relief of the personal estate. It is not admitted that a bill under any circumstances would lie, but it is confidently contended, that none could be sustained until the executor had paid debts chargeable on the defendant to the bill by reason of the fund in his possession, and also upon full and plenary proof that the defendant was insolvent and wasting the fund Nor is it, we contend, competent even for a creditor to sustain such a bill generally. A creditor could not support a suit in equity, to restrain an heir or devisee from selling, merely because the land might ultimately be required for the payment of debts in case of a deficiency of personal estate. And for the same reason, if the sale had already been made, no bill, either by executor or creditor, would lie to restrain the payment of the purchase money to the heir or devisee. In the case at bar, the creditors are not parties, nor have they ever demanded payment of the defendant, Gardner; and the counsel for the defendants are utterly at a loss to discover any principle upon which the complainant can sustain her present suit, either with a view to set aside the sale of the estate, restrain the payment of the purchase money by the grantee to his grantor, or to appropriate it to any object or purpose whatever. Suppose the court should think the sale to be fraudulent in point of fact, or void in point of law, can they set it aside? For what purpose is it to be nullified? As between the parties, the sale is decidedly legal. If then it is to be set aside, it must be done at the suit of some party, who has a title paramount to that of the defendants; is this complainant of that description? Has she any claim to this estate or its proceeds? Can the court order it sold? Can they apply its avails to the payment of the testator's debts? No creditor is a party, no creditor has ever demanded his debts of the devisee of the land, and no creditor can, under the present bill, have any decree passed, touching himself or his debts. With the creditors, their rights and their remedies, the court has nothing to do, nor can it exercise a single judicial act in relation to either. It is therefore insisted that the court cannot legally exercise any jurisdiction over the subject matter of this bill. There are no competent parties before it, and no decree can be passed touching the defendants, the land, its sale, or its proceeds. It is also in proof, that the note given for part of the consideration, and also a part of the obligation for mortgages, had been negotiated for a valuable consideration long before the exhibition of the bill, and ever since has been the bona fide property of the endorsee, who is no party to this suit; and the lease has expired. There is, there-

fore, no part of the consideration money specifically remaining in the possession of the defendant, Gardner, as his property, except a part of the obligation to be discharged in mortgages. That the intention of the testator, to be collected from the whole will together, is to govern in the construction of his will, is a rule not susceptible of doubt, provided that intention is conformable to the rules of law. We are not permitted, however, to traverse the boundless fields of conjecture in ascertaining it. This legal intention, or that which courts are bound by the established rules of construction, to annex to his language, must undoubtedly furnish the rule of decision.

The counsel for the complainant have laboured exceedingly to show that an estate may be given upon condition, and that the devise in question is of that kind. But there is hardly a colour for such a pretence. It is, we contend, settled, both by principle, and by the uniform current of adjudged cases, that the devise to Gardner, the defendant, is not an estate upon condition, but belongs to a class of cases totally different, and governed by totally different principles. If, however, it should be judged to be an estate upon condition, that consideration alone is, we hold, fatal to the complainants' bill. If Gardner takes an estate upon condition only of paying the debts, he not having paid them, his estate is lost, and he, as devisee, has no interest in it. In such a case the fee is clearly in the heirs at law, who are not parties to this bill and who must be, before any decree concerning it can be passed. The court cannot deal with this estate as to payment of debts or other purposes, upon a bill by the present parties. If this be an estate upon condition, as the complainants' counsel insist, Gardner has forfeited it by non-performance of the condition; and there being no devise over of the estate, it descends to all the heirs at law; and all the heirs at law must be parties, before any decree for the disposition of the land or its proceeds can be passed by this court. That a testator may, by his will, exonerate his personal estate, and subject the devisee of his real estate, to the payment of his debts, is a principle so fully settled as to require, at this day, neither authorities nor arguments to support it. His discharging one fund and charging another, however, is a matter to be arranged between the legatee and devisee. The creditors cannot be affected by it without their consent. The testator may devise his land and impose on the devisee the terms of paying his debts in relief of the legatee of the personal estate; and if the devisee accepts the devise he is no doubt liable. But this by no means concludes the creditors. They have the same right to resort to the personal estate as though no such devise had been made. As to creditors, a testator cannot, in England, exempt his personal, nor in this state, his real or personal, estate, from the payment of his debts. He may direct, as amongst his legatees and devisees, how his debts shall be paid, and that direction will clearly bind all who accept the provisions and gifts in the will. It is also admitted that a testator may, by apt and proper language, charge specifically upon his real estate his debts, so as to create a lien thereon for the same. But none of these provisions can affect his creditors until they assent. They have a right to resort to their legal remedies and to seek the payment of their debts from the whole mass of their debtor's property according to the provisions of law, unembarrassed by any restrictions which that debtor may attempt to impose. By his last will, Peleg Gardner, amongst other devises and bequests, devises to his son, Ezekiel W. Gardner, and to his heirs and assigns forever, two thirds of the Ferry estate, he, Ezekiel, paying his, Peleg's, just debts out of said estate. Peleg Gardner, it is said, left debts to a large amount, and it is contended by the counsel for the complainant, that the language of the devise creates a specific charge and lien, on the land devised, for those debts. That it is a trust estate, and that a purchaser for a valuable consideration, takes it charged specifically with the payment of those debts. It is contended by the defendant's counsel, that Gardner, the devisee, took a clear, absolute, and unconditional fee simple, unincumbered as to his title, and unrestricted in his right to convey a fee simple estate, free of the debts. They insist, that the charge is personal upon the devisee, and not specific on the estate; that it may make the estate less valuable ultimately to him, to the full amount of the debts, but that it does not charge, impair, diminish, or restrict his title, or the nature of the tenure, and that he has precisely the same full and perfect right to sell the estate, exempt from all liability for debts, as though no provision had been made in the devise for the payment thereof.

It has already been observed, that the estate in question was devised expressly to Gardner, the defendant, his heirs and assigns, he paying the testator's debts out of the same. By this devise the fee simple is clearly vested in the devisee; and the only question is, whether the debts create an incumbrance, and a specific lien on the estate, in the hands of a bona fide purchaser for a valuable consideration. The counsel for the defendants hold the negative of this question, and they confidently submit to the court, that they are fully supported both upon principle and authority. Numerous cases have been cited on the other side upon the subject of devises to pay debts, and charges upon land, and the like, but not a single case reaches the point in controversy in the case at bar. The principal point in all or nearly all those cases was, what estate a particular devisee took, not whether the lands are chargeable specifically after a fair sale. In the present case no such question can arise, for, by the

very language of the will, the devisee takes most assuredly a fee simple estate. The cases cited do not, it is believed, present a single instance of a devise similar to the one in the will of Peleg Gardner. There were no words of limitation in them, and the question before the court was, whether, by a sound construction of the will in the particular case, the devisee took an estate for life, or in fee simple, ascertaining the devisor's intention according to the rules of law. Amongst the rules established by law on this subject, is one giving to the devisee a fee simple without words of limitation, when he is personally liable for the payment of debts or legacies, and the question generally raised in the cases cited was, whether or not the will created a charge on the devisee. If it did he took a fee simple. If however there was no charge on the devisee, but on the land devised to him, the authorities are, we admit, not uniform, some few deciding that he takes a life estate only, and the others that he takes a fee simple. But all these cases are different in fact and principle from the one at bar. Here are words of limitation, and a fee simple undoubtedly passes. The two principal cases on which the complainants seem to rely are Doe v. Clarke, 5 Bos. & P. 342, and Jackson v. Bull, 10 Johns. 148. But these cases in fact or principle, hold no relation to the one at bar, and afford no countenance to the argument of the counsel.

In the case at bar the devisee undoubtedly takes a fee, and according to the principle of the complainants' own authorities, his estate is exempt from the charge. By reference to some additional authorities it will, we hold, be perfectly apparent, that Gardner, the defendant, took an estate in fee simple exempt from all charges for debts, and that the charge is on him personally. In Baddeley v. Leppingwell, 3 Burrows, 1533, Thomas Ives devised to Sarah Boreham certain estates, she paying thereout to Elizabeth Boreham 40s. a year. In this case Sarah took the inheritance, though the 40s. were payable out of the estate devised. And the court treat the charge as personal on Sarah, for they say the provision must be considered as a lasting one, to continue through Elizabeth's life and "not that she should be left to starve in case her sister Sarah should happen to die before her." The charge then is clearly on the devisee and not on her estate, for if it were, Sarah could not be left to starve on the death of the devisee, but the land would remain liable. Sarah then, under a devise of land to pay thereout 40s. yearly to her sister, took a fee simple, exempt from any specific lien or charge on it, but was personally chargeable therefor. So in the case at bar, the estate is given to the devisee, he paying thereout the testator's debts. Frogmorton v. Holyday, 3 Burrows, 1618. Margaret Hasselwood devises to her son John certain real estates charged and chargeable with the payment of £50 out of the yearly rents, issues, and profits of the estate devised. John took a fee simple estate. The court do not even intimate any specific charge or lien on the estate, but expressly say that at the age of 21 he might dispose of it himself. Doe v. Holmes, 8 Durn. & E. [8 Term R.] 1. Devise to Elizabeth Gibson, "she paying all my just debts." The devisee, says Lord Kenyon, "is bound to pay the debts at all events in respect of the real estate," and he was adjudged to take a fee simple. Goodtitle v. Maddern, 4 East, 498. Devise by husband to wife of personal and real estate, she to pay all his debts in good time. And if the personal estate was insufficient to pay the debts, she was to sell the house at Penzance first. The court adjudged her to take a fee simple, "for she is charged with the payment of all the debts." "The distinction has turned in all the cases on this; whether the debts &c. were merely a charge on the estate devised or a charge on the devisee himself in respect of such estate in his hands." To the same point the cases of Doe v. Richards, 3 Durn. & E. [3 Term R.] 356; Jackson v. Merrill, 6 Johns. 185; Denn v. Mellor, 5 Durn. & E. [5 Term R.] 561, 562,—may be cited. Andrew v. Southouse, Id. 292. Devise to E. Southouse of certain estates, charged and chargeable with the payment of £20 to T. Tooth during life. Southouse took a fee simple, and the charge was personal on him; for, say the court, if Southouse did not take a fee, and Tooth survived him, the annuity might be lost. Here the charge could not be on the estate; if it were, it would not be lost by the death of the devisee. Doe v. Snelling, 5 East, 87. Devise to George Snelling and Sarah, his wife, of certain real and personal estates, "after having thereout first paid and discharged all just debts &c." The court say that these words "impose a charge on the devisees personally;" and wherever the charge is on the devisee, to be paid at all events out of the estate in his hands, the devisee must take a fee. The payment thereout, say the court, means a payment by the devisee out of the estate in his hands, and imposes personal charges on him.

From the current of authorities then, as well as from the express language of the will, it is submitted that Gardner, the defendant, took an estate in fee; that the charge of the debts is personal on him and not on the estate; that he held the estate free and exonerated from all charge or lien for the testator's debts, and had a perfect right to sell it, and that the purchaser bona fide, and for a valuable consideration, has a right to hold it, fully discharged from all claims of creditors in law and equity. In point of principle no material difference can be discovered between the case at bar and the ordinary case of a devise of land. No new charge is imposed on the estate devised by reason of the will. By the law of this state (Dig. 1798, p. 305), the real estate of

the deceased is liable for debts, if the personal is deficient, and while it remains in the possession of the devisee or heir. The will only limits the liability to the devisee of part of the estate instead of the whole, and requires the devisee to pay the debts out of it, in the first instance, without resort to the personal estate. But this, we contend, does not change or affect the devisee's title, or the nature of it, nor make a shade of difference in the principle of the cause. Here the devisee is liable by the declaration of the testator, and in the ordinary case he is liable by the provisions of the statute. In both cases the devisee is liable, and so the land would be, while in the devisee's possession, by express provision of the statute. Milnes v. Slater, 8 Ves. 306. But was it ever contended that a devisee could not sell before the devisor's debts were paid? or that the land passed to the purchaser, charged with these debts? or that he was liable to creditors for the purchase money, and that he could not pay the devisee? The statute of the state (page 306) settles all these questions beyond all doubt, and our whole system of laws, and the uniform practice under them, perfectly accord with the provisions of that statute. While the devised estate remained the property of the defendant, Gardner, it might, no doubt, have been attached for the testator's debts, not by reason of the will, but because it was a part of the debtor's property, and as such liable under the law of the state. But the will, we contend, imposed no incumbrance on the estate, nor restraint on the devisee as to his right to sell, and when he had sold in good faith, the purchaser will most unquestionably hold a clear indefeasible estate, exempt from all charges for the testator's debts, and the purchaser himself is accountable to no one for the purchase money, except to the devisee of whom he purchased.

The case seems analogous in principle to the case of the heir with assets descended at common law, and who is bound in the bond. In that case the heir is liable at law, and the land descended is liable in equity, while in possession of the heir, but after a bona fide sale even equity cannot reach it for the benefit of the bond creditor. 1 Cruise, Dig. 20, 21. It may be safely admitted, that courts of equity in England may exercise jurisdiction in case of estates devised, charged with the payment of debts, while the estate remains as the property of the devisee. But after a fair sale, equity has never attempted to charge the lands specifically with the debts in the hands of the purchaser. Nor has a court of equity, in such a case, ever compelled a purchaser, who has paid his grantor, to repay the purchase money to creditors, or for their use; although we need not deny that under particular circumstances and with proper parties before it, equity may decree the money, still unpaid by the purchaser, to be applied to the discharge of debts. And the principal reason for the interposition of equity in England is, that land there is not generally liable for debts. Without the aid of equity therefore, creditors might often be remediless in such cases. But in this state, where the will in question was made, and the land devised is situate, the creditors have abundant remedy at law, against the land, while owned by the heir or devisee, and against them personally after a sale. It may perhaps be doubted whether equity has jurisdiction; we are not anxious however to raise that question, until a case, proper for its discussion, shall arise. And in England, wh re equity has exercised the jurisdiction in question, it was not on the ground that the debts created any specific lien or incumbrance on the estate, or that the creditors have any legal vested interest in it, but it is owing to the peculiar powers of that jurisdiction. "A mere charge is no legal interest," says the lord chancellor, "it is not a devise to any one, but that declaration of intention upon which a court of equity will fasten, and by virtue of which they will draw out of the mass, going to the heirs or to others, that quantum of interest which will be sufficient for the debts." Bailey v. Ekins, 7 Ves. 323. If we recur to the powers of executors, in relation to the assets in their hands, to illustrate the principles by which the case at bar is to be decided, the result is conclusively in favour of the defendants. At common law the executors may sell the personal estate of their testator, and vest a perfect and clear title in the vendee. Pow. Mortg. 135, 136, 299; Nugent v. Gifford, 1 Atk. 462; Mead v. Lord Orrery, 3 Atk. 235; Farr v. Newman, 4 Durn. & E. [4 Term R.] 621. And the vendee is not liable either to legatees or creditors, Rayner v. Pearsall, 3 Johns. Ch. 578; Newland v. Champion, 1 Ves. Sr. 105, 125; Andrew v. Wrigley, 4 Brown, Ch. 125; 2 Ves. Sr. 429; 8 Ves. 208; 17 Ves. 165. Even if a chattel, so sold, is specially devised. 1 Cruise, Dig. 545; Ewer v. Corbet, 2 P. Wms. 148. And creditors have no specific lien upon the assets. McLeod v. Drummond, 17 Ves. 162; Nugent v. Gifford, 1 Atk. 463; 2 Ves. Sr. 269 [cited]. And under the statute of Rhode Island (Dig. 1798, p. 295), power is clearly given to executors to sell all the assets at public auction, or by permission of the court of probate, at private sale. In the case of executors, they are decidedly trustees, first for the creditors and then for the legatees and heirs; they have no interest beyond the purposes of the trust, and yet they may sell absolutely and vest a full and perfect title in their vendee. In the case at bar the devisee has an interest beyond the payment of debts; he has the fee simple subject to a personal charge on himself. This charge becomes perfect by accepting the devise, and he must bear it whether the estate is sufficient to reimburse him or not. If then the executor has power to sell and vest

a good title in his vendee, for much better reason would the devisee have power to sell, and to convey a perfect title to, the devised estate. In examining the statute, in respect to the powers of executors, devisees, and heirs, over the estate of the testator, it is apparent that the legislature meant to invest them all with full authority to dispose of the estate, free, and discharged from all lien for debts, in the possession of fair purchasers. Should we resort to the particular intention of the testator, as far as it can be legally collected from the language of the will in relation to this devise, the result is equally in favour of the defendants. On reading the bill no one can possibly believe, that the debts were intended to be a charge on the estate devised, in the sense contended for by the complainants; the language is not such as would have been used to express such a purpose. Although the scribe, or the testator, might not have been familiar with any technical phraseology, pertinent to such a purpose, yet some mode of expression would have been selected, more fully indicating the intention; some circumlocutory provision would have been introduced, showing, plainly enough, the intention that the land should pay the debts, or be holden to pay the debts, or the like. But the plain unequivocal meaning and intention of the testator was, that the devisee, in consideration of the devise, should pay the debts; and he refers to the estate, in the words, "paying out of said estate," not with intent to charge the estate, but merely showing the devisee, he had given him a fund, from which he was, or might, be enabled to pay them.

Looking at the facts and circumstances of the case, it is apparent that the testator knew the devisee must sell. It is not pretended by either party that the devisee could have paid all his father's debts from his own property, exclusive of that devised to him. The testator therefore knew that his son must sell to be in funds to discharge the very debts, with the payment of which he had charged him. The testator therefore could have had no other idea in his mind but that the devisee had the power of absolute disposition. The words used in this will "he paying the debts out of said estate," have not, as has already been observed, ever been holden to create a specific incumbrance on the estate. They amount to no charge of any kind on the land. They have not the same legal import or effect, as the words "charge" or "chargeable," and yet these words by no means give a specific lien on the estate to which they refer. Elliot v. Merryman, Barnard. Ch. 78; Pow. Mortg. 293, and the authorities there cited. The words, "he paying the debts out of said estate," have no legal effect upon the devise; they neither enlarge, restrain, qualify, or in any manner whatever affect the title or interest which the devisee takes. His title and his interest are precisely the same, as to all legal purposes, as though these words had been omitted and he had been charged generally with the payment of the debts. And in the latter case, that he takes a fee with full power of absolute disposition is settled beyond a doubt. Upon the particular intention of the testator, therefore, upon the whole current of adjudged cases, and upon the soundest principles of law, it is contended, that the defendant, Gardner, took an estate in fee simple, with the power of selling it free of all incumbrances for debts or otherwise, and that the defendant, Potter, a bona fide purchaser for valuable consideration, has a right to hold it free from all claims of the creditors thereon, or for him, for the purchase money. The counsel for the complainant have also argued that the devise to the defendant, Gardner, is a trust estate, or in the nature of a trust estate for the benefit of creditors, and that it must be sold, subject to the trust. There is no foundation for this position. It is not of the class of cases denominated trust estates, nor is it governed by the same or similar principles. An estate in trust is one given by deed or will for a particular purpose, and the grantee or devisee has no interest beyond that particular purpose. He has no beneficial interest, but is accountable to the heir for any surplus beyond that particular purpose. The present is a devise in fee, subject to a particular charge on the devisee, and he has all the beneficial interest not exhausted by the particular charge. The former has no individual or personal right or interest. The latter has the whole individual and personal, right and interest, subject to the particular charge. King v. Denison, 1 Ves. & B. 271, 272. But admitting it to be a trust estate, for the payment of debts, the trustee has an undoubted right to sell, and the purchaser will hold, without accountability to the creditors, either for the estate or the purchase money. Sugd. 331, 132; 2 Fonbl. Eq. 148; 1 Madd. Ch. 352; 2 Madd. Ch. 103; 1 Cruise, Dig. 543, 544; Pow. Mortg. 193, 285, 289; 1 Salk. 158; 1 Ves. Sr. 173; 2 Ves. Jr. 215; Amb. 188, 676; 1 Brown, Ch. 186; Barnard. Ch. 78; Sut. 504, note; Jebb v. Abbott, Co. Litt. 290b [note], and the cases there cited; 1 Johns. Ch. 575; 2 Johns. Ch. 327, 628; 6 Ves. 654, note; 16 Ves. 150, 155; 2 Ch. Cas. 115, 221; 1 Eq. Cas. Abr. 358; 1 Vern. 260, 301; 4 Ves. 99. And amongst the other reasons of this rule, one assigned in the books is, that otnerwise the lands could never be discharged of the trusts, without a suit in chancery, which would be extremely inconvenient. Pow. Mortg. 298–300; Elliot v. Merryman, Barnard. Ch. 78; Culpepper v. Austin, 2 Ch. Cas. 221.

Upon the principles then which govern devises and conveyances, strictly in trust, the case is with the defendants. Indeed there never was a doubt in such cases, but that the trustee has a complete right to convey, and that the purchaser would hold. The question has been in relation to the purchase money, and to whom the purchaser was ac-

countable, the trustee, or the cestuis que trust. It is however now settled beyond all doubt, we apprehend, that payment to the trustee is legal, and is a perfect discharge to the purchaser, who is not accountable for its application by the trustee. And upon the same principle it has been holden, that if the trustee mortgage the trust estate for his own debt the mortgage is valid. Pow. Mortg. 291, 300; Jthell v. Beane, 1 Ves. Sr. 216; Spalding v. Shalmer, 1 Vern. 301. And the mortgage is holden to be good, for this reason, we contend, that the trustee has a right to sell and of course to mortgage. He is therefore in the execution of his legal right and power; but how, or in what, he receives payment, is a question about which the cestuis que trust have no right to inquire as to the purchaser. The trustee is accountable to him for the value or amount of the sale, but the mode of payment is a matter exclusively between the vendor and purchaser. It has already been shown that the purchaser is accountable to the trustee for the purchase money, and is not accountable for his misapplication of it. To this general rule an exception, it is said, in some of the authorities exists; and that is in the case of scheduled debts, the purchaser must see to the application of the purchase money in the discharge of those debts. By scheduled debts is meant debts enumerated and specified in the instrument creating the trust, or in some other document referred to and making a part of that instrument. The existence of such an exception has however been denied; and Powell, in his treatise on Mortgages, says the exception is not warranted by the cases, and is unfounded in principle. Pow. Mortg. 311, and the cases there cited. And the master of the rolls, in Balfour v. Welland, 16 Ves. 155, says the doctrine of accountability in the purchaser "has been carried further than any sound equitable principle will warrant." It his already been shown, we presume, that the policy of the laws of Rhode Island is decidedly opposed to this exception. That policy, and those laws, clearly intend to protect purchasers from trustees, and to hold the purchaser accountable for the consideration money or the application of it to no one, except his immediate vendor. By those laws a guardian may sell the real estate of his ward to pay his debts, under the authority from the supreme judicial court. That authority is obtained upon his petition, accompanied by the statement of his ward's debts. But no judge or lawyer ever entertained a suspicion, that the purchaser of the guardian was ever accountable to the creditors of the ward.

So an executor, in particular cases, may sell the real estate of his testator. His power to sell is derived from a decree of the supreme judicial court, founded on his petition. The debts, for which he sells, are all scheduled debts, reported and allowed by the court of probate, and on record in that court; a certificate of all which accompanies and is filed with his petition. The executor sells pursuant to this authority. Is the purchaser's title defective or liable to be affected by creditors? or is he accountable to creditors for the consideration money paid to the executor? It is alleged on the other side, that the debts of the testator have been scheduled, of which Potter, the purchaser, was bound to take notice, and that there was something like a legal fraud in purchasing under such circumstances. By recurring to dates, we find however there was no schedule of debts existing any where at the time of the sale. The estate had, it is admitted, been represented insolvent, but no report made, and not a single debt allowed by the commissioners. They cannot definitively allow, until the time appointed for receiving debts has expired, for during all that time the executor has a right to be heard in opposition to them. And their allowance is nothing until the court of probate have accepted their report and allowed the debts. Long previous to this period the sale was made. The incipient proceedings, therefore, before commissioners amount to nothing, and have no legal effect upon the cause. Besides, both these defendants were strangers to all these proceedings. They were not, and could not be parties to them, and they have never been notified of their progress or result, and ought not, therefore, to be bound by them. But if the report of commissioners had actually been made and allowed, still it would not affect the purchaser. The report of commissioners gave the creditors no new lien on, or interest in, the devised estate. The amount and genuineness of the debts may be ascertained by the report, but no new or additional right or remedy, in relation to these debts, results to the creditors. They are, as to all parties, in precisely the same situation as when the testator died. The report of commissioners does not come within the rule relative to the scheduled debts. It is not that kind of scheduled debts, which binds the purchaser; those are debts scheduled by the testator, when he makes his will. They are his act, and a part of the devise. The report of commissioners gave the purchaser or devisee no new information. The will informed them both, that there were debts, and the amount makes no difference. The rule is one of construction, and is, I presume, founded, if it exists at all, on the idea, that where the debts are scheduled, it is evidence of an intention in the devisor, that the purchaser should see to the appropriation for their payment at the time of sale. So that the sale and the payment are to be considered as one indivisible object of the testator. Pow. Mortg. 311, 312, and the cases there cited. When this object exists, therefore, it must be from the sole and exclusive act of the devisor. In this case he has not done it, and did not intend to do it. And there is no intimation in any of the cases,

that debts afterwards ascertained and scheduled in the course of settling the estate or otherwise, ever brought a general trust within the particular rule of scheduled debts. The case then is not one of a trust, in which the creditors have any interest in, or lien on, the estate, according to any principle of law or equity. And because they have no interest in, and lien on, the estate, any notice, which may immediately come to the defendant, Potter, cannot affect his title to the estate, or his accountability for the purchase money. The doctrine of notice relates to cases of equitable rights, which may be lost from want of it or preserved by fixing it on the party to be charged; but where no such right exists, there is none to lose, and notice is out of the question.

The authority from 4 Johns. Ch. 136, and the other authorities referred to in connexion with that, are, as will be seen, upon the most cursory reading, equally inapplicable. They belong to a class of cases depending upon distinct and different principles. Another attempt has been made to attach fraud to the sale, because it is said part of the consideration money (about $6000) was paid in demands against the grantor personally, which is charged as a misapplication of the fund, and is a fraud as to Peleg Gardner's creditors. It has, we hold, been established beyond controversy, that the estate conveyed was a clear, absolute, fee simple, which the devisee had a right to sell, and Potter had a right to purchase and hold free from all liens and claims. If this position be true, the sale is undoubtedly valid. A man may give away his own estate, and the gift is good against all the world except his own creditors. And as against them, he has assuredly a right to sell bona fide and for a valuable consideration, and receive payment in what he pleases; either in his own debts, negotiable paper, or other property. The sale is no fraud on the creditors in such a case. And if we admit, for the purpose of the argument, that it was a trust estate, still the purchaser is equally protected in his estate, and in the payment he has made. The right of the trustee to sell and of the purchaser to pay him the consideration money has already been shown. The law no where requires the payment to be made in money. If the sale is absolute, for a reasonable price, and the payment made to the amount, the kind and mode of payment are entirely out of the question. This is, we hold, settled by the case in 1 Pow. Mortg. 291 [Spalding v. Shalmer, 1 Vern. 301], and the authorities there cited, where the trustee mortgaged the trust estate for his own debt by bond, and the mortgage was adjudged good.

A further attempt is made by the complainant to prove a secret collusion between the defendants to enable Gardner to sell the estate and conceal and convert to his own use the proceeds with interest, to defraud the creditors of the testator. This charge is unceremoniously and coarsely made in the bill and reiterated in the argument with but little qualification. If we are right in our construction of the will, no fraud could be perpetrated; Gardner had a clear fee simple, which he had a right to sell, and Potter to purchase, upon such terms of payment as the parties agreed. Admitting, however, that it was an estate in trust, and the sale subject to be set aside for actual fraud, it is still contended, that the charge of fraud is unsupported by a title of evidence, positive or circumstantial. The answers of the defendants are evidence, and fully sufficient until disproved. They detail plainly, fully, and explicitly the whole transaction, and positively and unequivocally deny all the imputations of fraud. The complainant has appealed to the oaths and the consciences of these defendants, and by that appeal he must be bound, unless their answers upon their oaths and their consciences can be refuted by clear, conclusive, and indisputable testimony. The sale is fair or fraudulent according to the facts and circumstances attending the transaction and the intentions of the parties at the time it took place, and the deed is valid or void according to the character of that transaction at that time. No subsequent fact or circumstance can vitiate the sale or the deed, if fair and legal at the time of the sale and delivery of the deed. And we maintain, that there is not a single fact or circumstance connected directly or remotely with the sale, which indicates, in the least degree, any collusion, trick, or artifice in either of the defendants to defraud the creditors of Peleg Gardner, the complainants, or any other person. The sale was made long (nearly a year) after the death of the testator; it was attended with no secrecy, and was not made until the grantor had publicly and repeatedly sought other purchasers and could find none, who would give the price, paid by Potter. It was not solicited by Potter, nor agreed to by him, until the application had been repeated by Gardner. The consideration was fully adequate and actually paid, or secured to be paid by legal and negotiable notes of hand. The sale was absolute, without secret trust or confidence. The promise, made by Potter to Gardner in relation to any surplus upon a subsequent sale by Potter, was altogether gratuitous, without consideration, and was no part of the contract, or a condition of the contract, when the sale was made. It was subsequently relinquished and given up, as stated in the answers before the bill was filed. It never was of any value to Gardner, and clearly it was not at the time of its relinquishment, and he had at all times a perfect right to relinquish it upon such terms as he deemed proper.

STORY, Circuit Justice. This cause has undergone so able a discussion, and the authorities bearing upon the points in controversy have been so diligently collected, that the

labor of the court has been materially diminished. My own researches have not added much to the mass of learning brought forth from the books; and if, in deciding this case, I do not enter into a minute commentary upon all the authorities, it is because full explanations have been already given of most of them at the bar; and because, after all, the principles, upon which the case must stand or fall, lie in a narrow compass.

The first question, and upon which the cause mainly hinges, is, whether, by the devise to Ezekiel W. Gardner, the debts of the testator are a charge upon the Ferry estate, or a mere personal charge upon the devisee himself. If the latter, then the present suit, supposing it free from all other difficulties, can be maintined only against the devisee, and must be dismissed as against Potter, the other defendant, who claims it by a purchase. If, on the other hand, the debts are a charge upon the estate, the lands, or the purchase money in the possession of Potter, may be reached, unless he can protect himself by some of the doctrines that have been urged in his defence. My opinion is, that the debts are clearly a charge upon the estate. I do not mean by this to say, that the devisee himself is not personally bound by his acceptance of the estate to pay the debts; for I have no doubt he is. But the estate is also charged with the payment, and may be reached in the hands of the devisee, or any person claiming under him, who does not stand in the situation of a bona fide purchaser for a valuable consideration, who has paid the purchase money. The terms of the devise are, in my judgment, as strong as if there had been an express charge upon the estate. The testator devises the estate to his son Ezekiel, "he paying all my just debts out of the estate;" and in another part he expressly orders his son Ezekiel to "pay all his just debts out of the estate therein given him." The estate is not given to the devisee upon the condition generally, that he shall pay the debts; but it is pointed out expressly as the fund, out of which payment is to be made. And the testator having disposed of all his other estate, real and personal, to other persons, his intention to relieve them from the burden would be manifestly defeated, if the court were to reject the plain meaning of the words, and to declare, that though the testator has appropriated a particular fund to the payment of his debts, that fund shall be held discharged from them. The argument of the defendant's counsel seems founded upon this position, that if the devisee himself is personally chargeable, that establishes, that the estate also is not charged. But this conclusion is utterly inadmissible. It is unfounded in principle, and the current of authorities is irresistibly against it. There is a very numerous class of cases, most of which have been cited at the bar, where an estate devised in terms, which would otherwise have been construed to give a life estate only, has been held a fee, upon the ground, that there was a charge for the payment of debts, legacies, &c. for which the devisee was personally liable.

The general doctrine, etablished in these cases, is this, that if the charge is upon the estate only, and there are no words of limitation, the devisee takes an estate for life; but if the devisee is personally chargeable in respect to the estate in his hands, he takes a fee. See cases collected in Cruise, Dig. tit. "Devise," c. 11, §§ 40, 50, et seq; Id. c. 13, §§ 25, 29. Whatever difficulty there may be in reconciling all the cases, there is no diversity as to the principle. The only conflict is in the application of it to particular cases. In some of the cases the charge is merely upon the person of the devisee; as in Collier's Case, 6 Coke, 16, where the devise was to A, he paying to one 20s. and to others small sums, amounting in all to 45s. and it was adjudged a fee simple. So in Doe v. Holmes, 8 Term R. 1 (see, also, Salmon v. Denham, 1 Comyn, 323), where the devise was of a freehold house and furniture to A, "whom I make my executrix, &c. she paying all my just debts, funeral expenses, and legacies," it was held, that A took a fee. But in by far the largest number of the cases the estate was clearly charged with the debts, &c.; and the only question was, whether the devisee was also personally charged. The observations of Lord Kenyon, in Doe v. Richards, 3 Term R. 356, and Denn v. Mellor, 5 Term R. 558, 2 Bos. & P. 247 (see, also, Merson v. Blackmore, 2 Atk. 341; Doe v. Allen, 8 Term R. 497), evince, in the most satisfactory manner, his opinion on the subject. His language in both cases shows, that he understood, that in the former there was a clear charge upon the land; and adverting to the terms of the devise in the same case, "any legacies and funeral expenses being thereout paid," he says, in Denn v. Mellor, that these words imported, that those sums were to be paid by the devisee out of the interest given to her; and if she had died immediately after the devisor, and had only taken a life estate, the fund, out of which she was to bear those charges, might have failed. In Doe v. Snelling, 5 East, 87 (and see Goodtitle v. Maddern, 4 East, 496), where the devise was to A, &c. all the testator's lands, &c. "after having thereout first paid and discharged all my debts and funeral expenses, also subject to the payment thereout all the aforesaid legacies," and it was held a fee in A, Lord Ellenborough said, that the construction of the devise was, that "the payment thereout was to be made by the devisees, and the word, 'thereout,' means out of the property before given to the devisees;" and he added, that where debts or annuities are to be paid "by the devisee at all events out of the estate in his hands, the devisee must take a fee, otherwise the charge might be greater than the estate devised, and he would be a loser." Mr. Justice Lawrence is still more explicit.

After stating, that where an indefinite estate is given to a person in lands, and that person is charged with the debts and legacies, he must take a fee (thus putting a case of a mere personal charge only,) he puts the very case now in controversy, and says, "It is the same thing, if such indefinite estate be given to one, and the debts are to be paid out of the estate given to the devisee; he must there also take the fee; for otherwise the estate may not be sufficient to pay the debt." Mr. Justice Le Blanc sums up the whole doctrine in a more precise manner. His language is, "According to all the determinations, the question, whether the devisee takes the fee or not, in respect of charges, must depend on this, whether he personally, or the estate given to him, be charged with the payment of debts; or whether the estate be given after payment of debts. If the devisee be personally charged with the payment of debts, or if the debts be charged on the quantum of estate given to the devisee, he must take the fee; otherwise, if he only take for life, he may be a loser, or the estate may be insufficient." In the case of Denn v. Mellor, in error before the house of lords (2 Bos. & P. 247), Lord Chief Baron MacDonald, in delivering the judgment of all the judges, alluding to the terms of the devise in that case, (which had been held in the king's bench to pass a life estate only,) said, "If these words are considered as charging the lands in the hands of the widow, in that case according to established principles she would take a fee, as she might otherwise be a loser by the devise;" which is a positive and authoritative declaration of the doctrine. He goes on to state, "that he formerly held an opinion, that the words of charge in this will were a charge on the lands in the hands of the devisee," and that he was "unable to distinguish the difference between devising lands to any one after paying his legacies, and his legacies being paid thereout. In both cases they are to be paid out of the land, which is the subject of the devise. A devise to an individual after paying debts seemed to him to mark the same intent of charging the lands in the hands of the devisee, as a devise to an individual, the testator's debts being paid out of the land devised. He concluded, however, by admitting the distinction, upon the weight of authority. See Goodtitle v. Maddern, 4 East, 496.

The case of Doe v. Clarke, 5 Bos. & P. 343, affords a still stronger illustration of the doctrine. The devise there was of several portions of the testator's real estate to different devisees, and the testator concluded thus: "And I charge all my estates, both real and personal, with the payment of the above as aforementioned legacies;" and it was held, that the devisees took estates for life only, because the charge was upon the estates only, and not upon the devisee. Sir James Marsfield, in delivering the opinion of the court, adverted to and disputed the doctrine of Lord Ellenborough, in Doe v. Snelling, 5 East, 87, who, he said, seemed "to think, that if debts and legacies are to be paid out of the estate at all events, there the devisee must take a fee. But what difference does it make, whether the testator directs the legacies to be paid out of the estate, or to be paid by the devisee out of the estate? In either case can the devisee be a loser, which is the only principle upon which a fee is given him." As to the value of this criticism upon Lord Ellenborough's opinion, I am not called upon to decide. But I quote the following words, standing in immediate connection with the former, to show the learned chief justice's own opinion (and he was an eminent chancery lawyer) on the point we are now considering. "To consider," said he, "such a charge as a personal charge is most extraordinary, since there can be no doubt, that if such devisee were to die before the testator, it would still be a charge upon the estate. That has been decided repeatedly in the court of chancery; and it is quite established, that the charge exists as a charge upon the estate, notwithstanding the death of the devisee in the lifetime of the testator." If we advert to the fact, that these comments were made in a case, where the charge was created by the direction, that the debts, &c. be paid "thereout," that is, out of the estate devised, it seems impossible to misunderstand the meaning of the language. In the very late case of Roe v. Daw, 3 Maule & S. 518, where the devise was to A, B, and C, "except £20 to be paid out of C's part of the lands to B," it was held that C took an estate for life only. Lord Ellenborough said, "It has been contended, that this is a charge to be paid out of the land, and therefore a fee shall pass; and I agree, if it be a charge to be paid out of the lands in the hands of the devisee, the argument is good." Mr. Justice Le Blanc said, "Where there is a devise of lands, generally without words of limitation, it will convey only a life estate, unless it be accompanied with a charge on the devisee, or on the lands in his hands." Mr. Justice Bailey said, "I agree to the rule, that unless there be words of limitation to denote the quantum of interest, or to charge the devisee, or the lands in the hands of devisee, a fee does not pass. That I consider as determined in Moor v. Denn, 2 Bos. & P. 247, and many other cases, and particularly in Doe v. C'a ke, 5 Bos. & P. 343, where, though the legacies were charged on the land, yet it was held clearly not an estate in fee. In this case I find nothing to make the £20 a charge on C, the devisee, or on the lands in her hands; but it is a charge on the lands in whatever hands they may be. The words neither import a charge on the person, nor on the interest, which she takes."

It seems to me therefore demonstrated, so far as the language or authorities can go, that a charge may be personal on the devisee

in respect to the estate, and that it may also, if apt words are used, be a charge upon the estate; and that, wherever the testator points out the fund of payment, a charge is created on that fund. The cases of Boddeley v. Leppingwell, 3 Burrows, 1533; Frogmorton v. Holyday, Id. 1618; Doe v. Holmes, 8 Term R. 1; Goodtitle v. Maddern, 4 East, 498; Andrew v. Southouse, 5 Term R. 292, which have been relied upon to shake this doctrine, all manifestly support it. They are explained by simply adverting to the qualifications of the general rule laid down in the cases already cited, and have been fully answered at the bar.

But it is argued, that all these were cases where the question was, whether the devisee took an estate for life, or a fee; and that no question arose as to the point, whether the estate was also charged; and that in the case now before the court, Ezekiel, by the very terms of the devise, takes a fee. This is true; but it is also true, that in all these cases no question could have arisen as to the fee, unless the debts were a charge on the estate; and that in every instance where it was decided, that, notwithstanding the charge on the estate, the devisee took a fee, it was necessarily decided, that the charge bound the person as well as the estate. It would be the most extravagant rashness to presume that the whole bar and bench, during so many controversies, should have discussed this question, and admitted the charge, as a charge on the estate, and yet none in reality have existed. But the doctrine is also entirely settled in equity, even in cases where, by the terms of the will, the devisee takes a fee, that if debts and legacies are payable by the devisee out of the estate, they are a charge upon the property. That was the decision in Miles v. Leigh, 1 Atk. 573; s. c. 4 Vin. Abr. tit. "Charge," D 463, pl. 21. There was no doubt in that case, but the devisee took a fee; and the only question was, whether it was a charge on the land. Lord Hardwicke said, "It is objected, that it is not said to be paid out of the estate, &c. nor is it said, by whom it is to be paid; but there are many cases, where it is neither said to be paid out of the estate, nor by whom; yet it has been considered as a charge upon the estate, where the general intent of the testator appeared." "The testator intended it should come out of both estates, and he has charged his son in respect of the whole estate he was to have;" and he affirmed the decree of the master of the rolls, which directed the defendant to pay what should be found due, or in default, to account for the rents of the land, and the land to be sold. Clowdsley v. Pelham, 1 Vern. 411, pl. 386 (and see cases cited Vin. Abr. "Charge," and 1 Mad. Ch. Pr. 474–488; King v. Denison, 1 Ves. & B. 260; Newman v. Kent, 1 Mer. 240; Cary v. Cary, 2 Schoales & L. 173–188), is a strong case to the same effect. But it cannot be necessary to multiply authorities. It is plain from the language of Lord Hardwicke, that where debts &c. are payable out of an estate, they are a charge upon the estate. This is the common sense of the words of the present will; and if we assume any other construction, we must strike from the will the words "out of the said estate," which no court can be justified in doing without necessity, and more especially, when it would defeat the obvious intention of the testator. I know not a single authority, that sustains the argument, that words like the present do not fix a charge on the estate. None has been cited on the present occasion. On the other hand, there are a series of authorities recognising the charge on the estate in cases of this nature; and it is difficult to turn to a decision, where the subject is before the court, that does not contain a direct or implied admission of the existence of the doctrine. In many instances indeed a charge has been created by implication from words and intentions far less significantly expressed. See Noel v. Weston, 2 Ves. & B. 269; Shallcross v. Finden, 3 Ves. 738. I agree that a mere charge is no legal interest. It is not a devise to any one; but as was observed by the lord chancellor, in Bailey v. Ekins, 7 Ves. 319, 323, it is "that declaration of intention, upon which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest, which will be sufficient for the debts." Even as long ago as Lord Holt's time, that eminent judge declared, where a legacy was devised out of the testator's land, that it ought to be paid out of the land, for it was a charge on the land. Anon., 12 Mod. 242, pl. 586. The cases of Livingston v. Livingston's Ex'rs, 3 Johns. 189; Jackson v. Harris, 8 Johns. 109; Jackson v. Bull, 10 Johns. 148; and Jackson v. Martin, 18 Johns. 31,—decided by the supreme court of New York, do not, in the slightest manner, disturb any of these principles; but, as far as they go, confirm them; and the last case particularly contains an implied admission of the very point now under consideration. I have taken up more time than may be thought necessary in considering this question; but the earnestness and ingenuity, with which it has been argued, required some exposition of the grounds, upon which I hold the debts by the terms of the present devise to be a plain charge upon the estate.

It has been argued, that there is something in the peculiar jurisprudence of Rhode Island, which repels this conclusion, or at least prevents its application to the case now before the court. But I am not able to perceive any sound reason for such an opinion. By a statute of this state, the real estate of the testator is made generally chargeable with his debts, upon a deficiency of the personal assets; and the executor may, upon proper application and proof, obtain a license

from the proper court to sell so much of the real estate, as may be necessary to meet such deficiency. But this statute creates a general charge only in favor of the creditors. It does not prohibit the testator from making a particular provision or appropriating a particular fund exclusively for the payment of his debts, which shall bind his heirs and devisees. It does not in the slightest degree interfere with the ordinary construction of wills. It leaves the testator at full liberty to dispose of his property upon such conditions, as he may please, and liable to such charges, as he may please. And when he creates a particular fund for the payment of his debts, and exonerates all the rest of his estate from the charge, as to all other persons except his creditors, that fund becomes exclusively appropriated for the purpose, as much so, as if he had devised it on the special trust. Unless therefore the court were prepared to declare, that the statute overturns all the general rights of testators on this subject, a proposition too extravagant to be maintained for a moment, it is clear that the general liability of the real estate to the payment of debts, created by operation of law, does not destroy the specific charge of the same debts upon the Ferry estate devised to Ezekiel.

This being so, the next question is, whether the land itself in the hands of the other defendant, Potter, or the purchase money now due, remains chargeable with the debts. The argument is, that Potter is a bona fide purchaser, for a valuable consideration, and as such, he takes the estate discharged from the debts, and is not bound to look to the application of the purchase money, even if he had notice of the charge, and the non-payment of the debts. As to notice, it is quite clear, as well upon the answer of Potter, as the circumstances of the case, that he had absolute notice of the devise to Ezekiel, and that it stood charged with the payment of his father's debts, before the asserted purchase. I do not say, that he had merely constructive notice, knowing that the Ferry estate was his father's, and that the son derived it from him by devise, which would be sufficient to put him upon inquiry, and bind him to take notice; but in point of fact he had seen the will, known its provisions, and the opinions of counsel respecting the nature of the devise, at least as early as the time, when he made his purchase; and according to his own confessions he had notice of the material parts of the will at an antecedent period. But notice is of no importance in a case of this nature, unless the purchaser is bound to look to the application of the purchase money. As to this the settled distinction is, that if a trust is created for specific or scheduled debts, the purchaser is bound to see to the application of the purchase money. But if the trust is for the payment of debts generally the purchaser is not bound to see to the application of the purchase money; and if he pays it over to the trustee, he, and the estate in his hands, stand discharged from the trust. But if the purchase money is unpaid, so much of it, as is necessary, may be reached in the hands of the purchaser to execute the trust. The question then arises, whether in this respect there is any difference between a trust created to pay debts generally, and a charge upon lands for the same purpose. There is an anonymous case in Moseley's Reports (page 96), where a distinction seems to be taken between a trust to pay debts, and a charge for the same purpose. It purports to have been decided by Sir Joseph Jekyll, and is thus stated: "If an estate is devised to trustees to be sold for payment of debts, the purchaser need not concern himself to see the money applied; but it is otherwise, if the debts are particularly specified; but if lands are charged with the payment of debts and legacies, the estate remains charged in whosesoever hands it comes." From this brief note it is not perhaps easy to decide what the real meaning of the latter clause is; whether, that the charge being legacies, as well as debts, the purchaser must look to the application of the purchase money,—a doctrine that cannot now be maintained (Jebb v. Abbott, Butler's note to Co. Litt. 290b, § 12; s. c. cited 1 Brown, Ch. 186, note; Rogers v. Skillicorne, Amb. 188); or whether it means to take a distinction (as seems more probable) between a trust and a charge. If the latter be the true meaning, that case is in conflict with subsequent decisions. In Elliot v. Merryman, Barnard. Ch. 78, 2 Atk. 41, where the debts were by the will charged upon the real estate without the intervention of any trustee, and the bill was brought by creditors against the purchasers of the land to obtain their debts out of the land, the bill was dismissed by the master of the rolls, upon the ground, that the purchasers were not bound to see the money rightly applied; and he denied, that there was any distinction between a trust to sell and a charge for payment of debts. And the like opinion was manifestly held by Lord Camden, in Walker v. Smalwood, Amb. 676; and in Jenkins v. Hiles, 6 Ves. 654, note a, Lord Eldon observed, "that it was long settled, that where a man by deed or will charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application." Mr. Sugden (Sugd. Vend., Ed. 1818, p. 441, c. 11, art. 11, § 1. Mr. Patch holds the same opinion. Patch, Mortg. art. 11, § 1, p. 404), upon the authority of these cases, does not hesitate to affirm the same doctrine, and holds it equally strong upon principle. The same may be collected to be the opinion of Mr. Fonblanque (2 Fonbl. Eq. c. 6, § 2, note k, p. 149); and if I rightly understand the state of the facts (very imperfectly reported) in Beynon v. Gollins [2 Brown, Ch. 323] (compare that case as cited

in Butler's note to Co. Litt. 290b, § 14, and 1 Brown, Ch. 186, note, and as reported in another point in 2 Brown, Ch. 323), that was also the determination of Lord Thurlow.

Looking to the principle, upon which the general doctrine is founded, I am not able to perceive any material difference between a direct trust to pay debts and a charge upon the lands for the same purpose. The one is a trust fastened upon the estate by a court of equity by implication to effectuate the intent of the testator. The other is a direct trust created by the testator for the same object. And there is great force in the observation, that the mode, by which the trust is created, cannot be material; for if it comes in esse, it is substantially to be executed in the same manner. Sugd. Vend. (Ed. 1818) p. 441, c. 11, art. 11, § 1. Lord Eldon indeed, on a recent occasion, said, "There is a great difference here between a devise upon trust, and a devise subject to a charge;" but he alluded, as the context shows, not to any difference in the effect of the lien, or charge, as to creditors, but to the nature of the interest taken by the devisee, whether beneficial, or a mere naked trust. And he added, that "the object is effected much in the same way, compelling the party to make good the charge, or trust, by very similar operations, as applied in this court." King v. Denison, 1 Ves. & B. 261, 272, 276. No authority has been cited, which establishes any distinction between the case of a trust and a charge as to seeing to the application of the purchase money; and my own researches have not enabled me to discover any, except those already referred to. I cannot but think, that the current of authority and the analogy of the law, ought to lead us to a rejection of any such distinction, as unsatisfactory in principle and inconvenient in practice.

But the most material question yet remains to be discussed; and that is, whether Mr. Potter stands in the predicament of a bona fide purchaser for a valuable consideration. It is very clear, that he has not yet paid a very considerable proportion of the purchase money; and if the whole purchase money be not paid, nothing is better settled than, that what remains, may be reached in the hands of the purchaser, to discharge the original trust, unless other equities intervene. And there is a still more salutary principle established by incontrovertible authority, viz. that, though a person, being a real purchaser, is not bound to see to the application of the purchase money, if he has bona fide paid it; yet he is not permitted to become a party to any misapplication of the fund, or knowingly to assist in diverting it to his own interest, as in payment of debts due to himself, and then to insist upon the protection of a bona fide purchaser. Even in respect to executors, who, as to personal assets, have a very large authority, but are deemed, in equity, trustees for creditors, legatees, and distributees, it is now clearly settled, that it is a misapplication of the assets to apply them to the payment of the antecedent debt of the executors; and a court of equity will reach them, as trust property, in the hands of any persons, who, knowing them to be assets, have so received them from the executors. There are numerous cases on this subject; and the doctrine was fully discussed in Hill v. Simpson, 7 Ves. 152, and McLeod v. Drummond, 17 Ves. 152, and Bonney v. Ridgard, 1 Cox, 145. But I may well be spared any examination of the cases, since the doctrine has been recently recognised in its fullest extent by the supreme court of the United States. Wormley v. Wormley, 8 Wheat. [21 U. S.] 421. See, also, Adair v. Shaw, 1 Schoales & L. 243, 262.

It becomes material then to sift the particulars of the purchase made by Mr. Potter of the estate in question; and if it shall then appear, that he has been knowingly a party to the misapplication of the trust fund, the court is bound to apply the principles of equity to the case, whatever may be its own private opinion as to the general fairness of the transaction. And I take upon myself to assert, that the imputations in the bill of positive and actual fraud, by Mr. Potter, are not sustained by the evidence. His own answer explicitly denies it; and the other evidence falls far short of establishing any meditated contrivance to cheat the heirs or creditors. Still, however, if the transaction be one, which the law deems incorrect, and admonishes the court to repudiate, as inconsistent with well considered and salutary principles, it is its duty to declare it, and grant the parties an adequate relief. As to the principal facts there does not seem to be any real controversy. It may be gathered from the evidence, that Ezekiel, the devisee, towards the close of his father's life, was in indigent, if not embarrassed, circumstances, owing considerable debts, and among others a debt exceeding three thousand dollars to Mr. Potter. It is apparent also from the answer of the latter, that he was uneasy about his debts, and looked principally, if not entirely, to the bounty of the father for the means, by which it should be paid. Indeed, there is an irresistible implication throughout the whole record, that the son possessed no substantial means of discharging his debts except the Ferry farm devised to him, and a debt asserted to be due from his father, which was controverted and disallowed by the commissioners; and at all events became extinguished in equity by the acceptance of that estate upon the terms of the will. The actual situation of the son and the unascertained state of the debts of the father were fully known to Mr. Potter, and are not even pretended to be denied in the answer. In fact, Mr. Potter puts his chief reliance upon a defence springing from other sources; upon the estate's not being legally charged with the debts, and upon the purchaser's being exonerated from looking to the application of the purchase money.

In this posture of Ezekiel's affairs, Mr. Potter, in April, 1819, about one year after the testator's death, became the ostensible or real purchaser of the whole Ferry farm, and also of a lot of ten acres of land in Jamestown, for the asserted consideration of $15,800. To enable him to make this sale, Ezekiel purchased of his sister Isabel, one third of the Ferry farm and the lot in Jamestown, which had been devised to her by her father; and the value of the lot was, in the sale to Mr. Potter, estimated at $800, and the value of the third of the Ferry farm at $5,000. Neither of those sums has ever been paid to his sister, but it is admitted they both still remain due. The asserted consideration for the purchase of the two thirds of the Ferry farm devised to Ezekiel was therefore $10,000. The terms of the sale were somewhat extraordinary, as they are now stated by the parties. Mr. Potter was to advance the sum of $6,000 towards the payment of Ezekiel's debts, including that of Mr. Potter, and was to reserve the payment of the residue of the purchase money by a note payable on the 25th of March, 1822, without interest. In the mean time Mr. Potter was to be allowed interest upon all the advances made by him. In addition to this, Ezekiel was to have a lease of the whole estate for three years, commencing on the 25th of March, preceding the sale, and of course to end on the 25th of March, 1822, he paying a yearly rent of $948, which was equal to six per cent. upon the purchase money, and was estimated as the fair value of the rent of the estate. It was further agreed, that if Ezekiel could at any time within the three years sell the estate for a larger sum than $15,000, he should have the benefit of the surplus, after deducting all repairs and expenses, which might have been incurred on account of the estate. I observe, also, that it is stated in the answer, that the lease for three years was agreed to be allowed in lieu of interest upon the purchase money, and Ezekiel, in his original answer, asserts, that no rent was in fact to be paid, and that an acknowledgment of the receipt of the same for the whole term was endorsed upon the lease. This assertion is dropped in his second answer, not apparently from mere mistake. In point of fact, upon the original lease (which is annexed to Mr. Potter's answer), there is an indorsement without date, in the following words, "Received the money part of the within lease, it being taken into consideration in the purchase of the within mentioned estate. Elisha Potter." When this endorsement was made does not appear, and it is not in any manner referred to in Mr. Potter's answer. It is an omission somewhat singular if it was made at the time of the execution of the lease, and it constituted a part of the original agreement; and if no rent was in fact to be paid, it is strange, considering Mr. Potter was himself a lawyer, that there should have been inserted in the lease itself, a formal and exact covenant for the payment of the rent annually during the term, a covenant, which was utterly repugnant to the intention of the parties. Indeed I cannot but feel a very strong regret, that the transaction did not originally assume a shape more like the character, which the parties now give it; since the explanations of it are not so satisfactory, or so free from obscurity as to leave no room for hesitation. The reason assigned for taking the lease at all is certainly not very conclusive. It seems, that Ezekiel had previously, in 1818, hired a part of Dutch Island upon a lease of three years (one year of which was expired at the time of the sale of the Ferry farm,) at a small rent, not probably exceeding $70 or $80, and the possession of the lease is made the groundwork of the lease of the Ferry farm for a year beyond the term, at the substantial rent of the whole interest of the purchase money, and with the collateral engagement of Ezekiel to pay interest upon all intermediate advances. But I am content to leave the contract of sale, as it is stated by the parties, without farther observation; and stripped of all disguise, it is in its most favorable view a purchase of the Ferry farm for $15,000, of which $6,000 was to be advanced, or applied to the payment of the debts of Ezekiel, the residue of the purchase money (which was ultimately fixed at $8,806,) was to stand on a credit of three years without interest, and Mr. Potter was to receive interest upon all his advances in the intermediate period. I lay out of consideration the purchase of the Jamestown lot, and one third of the Ferry farm from Isabel, because they were never paid for, and added nothing substantially to the funds of Ezekiel, and do not constitute any part of the fund for the payment of the father's debts.

Here then we have a case, where the trust fund, for the payment of the father's debts, valued by the parties at $10,000, at the very time when the amount of those debts was in course of being judicially ascertained, and before it was actually ascertained, was applied to the exclusive discharge of the debts of the devisee. The father's debts were a known charge upon the estate, and the purchaser knowingly assisted the devisee, who, as to his charge, was also a trustee, to dispose of this estate in payment of his own debts, without in any shape providing for the principal charge. The surplus, after that charge was satisfied, was all that belonged to the devisee; and yet the purchaser assisted the devisee in misapplying the fund, in the first instance, to other purposes. The father's debts have been since ascertained to be about $7,400, not one cent of which has ever been paid by the devisee; and no part of the purchase money, as will be presently seen, has ever come to the hands of the devisee to enable him to discharge those debts. And all this transaction was negotiated and consummated between the parties, with the will before them, upon full deliberation, un-

der their own exposition of the law, and up on the suggestion, that the purchaser was not bound to look to the application of the purchase money.

I agree to the doctrine, in cases of a general charge of debts, that the purchaser need not look to the application, if he has bona fide paid the same. When he has once, in good faith, paid it into the hands of the devisee, he is exonerated. But he is not at liberty to assist in its misapplication; he is not to buy the trust property in payment of antecedent debts, or to aid the devisee in diverting the fund from its proper uses; and if he does, a court of equity will fasten on the estate in his hands the original charge, which he has attempted to displace. It appears, in point of fact, that a sum a little short of $6,000 of the purchase money was, with Mr. Potter's assent, applied to the payment of Ezekiel's own debts, and of this sum more than one half went to extinguish a debt due to himself. But it is necessary to trace the transaction somewhat farther, in order to show, that the parties have always acted with the utmost indifference as to the rights of the father's creditors, and have sheltered themselves, under a supposed rule of law, for any misapplication of the fund. In June, 1820, Ezekiel, notwithstanding the relief already afforded him, was again pressed for some debts. He had then in his possession the note for the purchase money of $8,801. It was then agreed, that Mr. Potter should advance a farther sum to Ezekiel to pay his debts; that Ezekiel should surrender the right of selling the estate for more than $15,000, retained by the former bargain; that the note of $8,801 should be given up; and that the sum which, on a settlement, should be found due to Ezekiel, should be secured to be paid to him on the 25th of March, 1822, partly by a cash note, and partly by a note payable "in mortgages in the town of South Kingston, or in the state of New York." Accordingly Mr. Potter paid to Ezekiel's creditors, by his own notes about $3,705, and Ezekiel gave up the right of reselling the estate, and also the cash note of $8,801. Mr. Potter ascertained his advances, together with interest, to be $7,070.38, leaving a balance due from the purchase of the estate, of $7,929.62. For this last sum Mr. Potter gave two notes antedated as of the 25th of March, one a negotiable cash note for $4,000, the other a note for $3,929.62, payable to Ezekiel, or order, on the 25th of March, 1822, "in mortgages in the town of South Kingston, or in the state of New York." It is not my duty to comment on the wisdom or policy of such an extraordinary bargain, so far as it respects the pecuniary interests of the devisee. It does indeed seem to me utterly unaccountable, how a bargain so indefinite in some of its terms and objects, and so little suited to the exigency of his embarrassed situation, should have received the deliberate assent of the devisee. A readier scheme to disable him from the present means of discharging his debts, without great sacrifices, could have hardly been imagined.

The original note was negotiable, and capable of being turned into cash at any time at a reasonable discount; but by the exchange, nearly a moiety of the amount was invested in a security, not only not negotiable, but so loose in its terms and obligation, that its real value was incapable of any exact appreciation. It appears, also from the answer of the devisee, that the negotiable note of $4,000 was immediately indorsed over to his sister Isabel, and an assignment also made of $1,800, part of the other note, by way of payment, or security, for the estate bought of her by the devisee. And this arrangement was most probably contemplated by all the parties, when the negotiation, in June, 1820, was first entered into. It will at once be perceived, that deducting the amount thus justly secured to Isabel, the whole of the purchase money was exhausted excepting about $2,000; and the latter sum was locked up in undefined mortgages in South Kingston or New York. So that the whole trust fund was in effect gone from the reach of the creditors, the greater part being applied to the extinguishment of Ezekiel's own debts; and what remained was appropriated to other purposes. The very tenor of the note for the mortgages was calculated to embarrass, if not to defeat, any chance for redress; for the option, as to what mortgages should be taken or received, belonged to the parties, and could not be very easily, if at all, exercised by the creditors or strangers. The transaction was about the time, when the commissioners made their report of the father's debts to the court of probate; and as all the parties lived in South Kingston, the amount must have been in a great measure previously ascertained, and could scarcely have escaped the inquiry or attention of any persons interested in the estate. There is, beside, the still stronger fact, that controversies had then arisen between the plaintiffs and the devisee in respect to this very matter; and a suit was avowedly in contemplation to ascertain and adjust their respective rights. To no person was this better known than to Mr. Potter. Now, when he had notice of the non-payment of the debts, and of the application to the devisee to have them paid, of the negotiations for the purpose of an amicable settlement, and of the failure to accomplish that object, he was put upon legal notice and inquiry: and he could not farther negotiate with Ezekiel, in respect to the funds then in his hands, without being liable to have his proceedings scrutinized in a court of equity. There is much other matter in the case, which is open to observation; but the conclusion, to which the court has arrived, renders any discussion of it unnecessary. That conclusion is, that the sale by the devisee, under the circumstances, was a manifest breach of trust, in violation of his

duty to the creditors, and subversive of the great object of the testator in the devise in question.

The next consideration is, whether Mr. Potter was conusant of this breach of trust, and, upon the facts already stated, it seems beyond all doubt, that he had full knowledge of the breach, was a party to it, and voluntarily assisted in the misapplication of the purchase money. He can shelter himself from responsibility in a court of equity only by showing himself to be a bona fide purchaser, who has not aided in such misapplication. In no proper sense can he be considered as such a purchaser. He has chosen to apply the purchase money, so far as it has yet been paid, or liquidated, to the exclusive payment of the devisee's debts, and not of the debts of the testator. In this way he has been privy to the expenditure and appropriation of nearly $8,000, according to his own account of the matter; and, as to the residue of the purchase money, so far from paying it to the devisee, or applying it to the discharge of the testator's debts, he has aided in closing it up in mortgages of an undefined nature, and thus precluded it from being applied as a present fund for the purposes of the trust. Unless the court, therefore, is ready to surrender its duty, it can have no difficulty in holding, that the Ferry farm, to the extent of the estate devised to Ezekiel, remains still charged and chargeable, in the hands of Mr. Potter, with the debts of the testator. I had some doubt, originally, whether Isabel, the daughter of the testator, ought not to have been made a party to the bill, since, according to the allegations in the answer, she has an interest in the outstanding purchase money for the debt due to her. But I am now entirely satisfied, that she is no necessary party to the bill. No decree can be made against her. She is no party to the asserted breach of trust; and has no interest, which can be affected by any decree between the present parties. If she has any lien on the estate for the unpaid purchase money, it is only upon that part of it, which was conveyed by her. As to her interest in any of the notes, the court will do nothing that can disturb her rights; it will act altogether upon that portion of the estate and purchase money, which does not interfere with her claims.

Having stated these results, it remains only to advert to the objection, that the present plaintiffs are not competent to maintain the present suit, because they have not yet paid the testator's debts. The argument is, that the creditors alone have a right to maintain a suit to enforce the charge, unless they have been paid by the executrix or the devisees. The right of the creditors to enforce the charge in equity cannot be doubted. See Green v. Lowes, 3 Brown, Ch. 218. But I am also of opinion that the executrix, who, by the law of the state, is responsible for the payment of the debts, where there are real or personal assets, has also a right to enforce the charge. She might procure a license from the proper authority to sell the real estate, upon a deficiency of the personal assets, pursuant to the statute. She might in this way, perhaps, reach the estate charged with the debts; but the remedy would be circuitous, and might be inadequate to all the purposes of equity. She is not compellable to adopt that course; but may directly, by the assistance of a court of equity, reach the fund, which, in the eyes of such a court, is appropriated for the payment of the debts. If she can do this after payment of the debts, there is no reason why she may not do it before, since she is entitled to avert an impending mischief, and is not bound to advance her own money to pay the creditors. Besides, the testator has disposed of all his real and personal estate by his will, and the executrix, who is residuary legatee and devisee, has no right to apply the personal estate, bequeathed to other legatees, to the payment of the debts, when there are other funds appropriated for the purpose; and she has a direct interest to relieve property devised to herself from the burden of the debts. The like remark equally applies to the other plaintiffs, who are devisees exonerated by the will from any contribution or lien. I entertain no doubt, therefore, that the plaintiffs are competent to maintain the present suit. It is the common case of a party subjected to a burden chargeable upon her in law; but from which she is entitled to be relieved in equity, by a paramount obligation on another to exonerate her from the whole burthen. Upon the whole, this is, in my judgment, a clear case for equitable relief, and I shall decree it according to the principles already suggested.

[NOTE. An appeal was taken by Elisha R. Potter to the supreme court, where the decree of the circuit court was modified, Mr. Chief Justice Marshall delivering the opinion, in which it was held that so much of the decree of the circuit court as may subject Potter to the payment of the debts of Peleg Gardner beyond the purchase money remaining in his hands, and beyond the money paid by him in discharge of the debts of Ezekiel W. Gardner, after deducting therefrom the amount of the estate purchased from Ezekiel by his sister Isabel, ought to be reversed, and that in all other things it ought to be affirmed. 12 Wheat. (25 U. S.) 498.

[The cause being remanded to the circuit court, the decree of the supreme court was referred to a master who made a report, upon which exceptions were taken, but overruled, and a decree pro forma entered against Potter for the payment of $5,972.42, with interest on the same from the time the report was made, and also for the payment of $2,662.23, with interest from the same time, provided that same should not be paid by Ezekiel W. Gardner or collected from him by execution. From this decree, Potter again appealed to the supreme court, where it was held, Mr. Justice McLean delivering the opinion, that as the purchase money was not to be paid by Potter until the 25th of March, 1822, no interest should be charged against him prior to that time, and his objection to the payment of any interest on the ground that it was not in his power to pay the money and discharge his obligation before the final decree in the case was

disregarded upon the ground that he could have discharged himself from the payment of interest by bringing into court whatever balance he conceived to be due, and paying it over under order of the court. As this was not done, it appears that the defendant below did not do all that was in his power to exempt himself from the charge of interest.

[The last decree of the supreme court was to the effect that there was error in so much of the decree of the circuit court as subjects Potter to the payment of interest from the 16th of October, 1820, and that said decree be reversed and annulled, and the cause remanded with directions to enter a decree that said Potter pay into the registry of the circuit court, within 30 days from the next term, the sum of $3,929.62, with interest from March 25, 1822, to be paid over to the complainants or to the creditors of Peleg Gardner, and that a decree be entered that Ezekiel W. Gardner pay into the registry of the court, subject to its order, within 30 days as aforesaid, the sum of $1,751.74, with interest from March 25, 1822, for which he is in the first instance liable, and the said Potter ultimately. 5 Pet. (30 U. S.) 718.]

Case No. 5,228.

GARDNER v. GOODYEAR DENTAL VULCANITE CO.

[See 21 U. S. (Lawy. Ed.) 141.]

GARDNER (GOODYEAR DENTAL VULCANITE CO. v.). See Case No. 5,592.

Case No. 5,229.

GARDNER et al. v. HERZ et al.

[16 Blatchf. 303; 4 Ban. & A. 320; Merw. Pat. Inv. 179; 16 O. G. 1093.] [1]

Circuit Court, S. D. New York. May 9, 1879.

PATENTS — VALIDITY — IMPROVEMENT IN CHAIR SEATS—ANTICIPATION—NOVELTY.

1. The reissued letters patent granted to George Gardner, William Gardner and Jane E. Gardner, July 4th, 1876, for an "improvement in chair seats," (the original patent having been granted to George Gardner and Gardner & Gardner, May 21st, 1872, on the invention of George Gardner,) are void.

2. The invention consisted in constructing chair seats of two or more veneers of wood, with the grains crossing each other, the veneers being glued together by an adhesive substance, and in perforating the seat with holes, for ventilation and ornament.

3. All except the perforations is described in letters patent granted to John K. Mayo, December 26th, 1865, for "improved material for roofing, tubing, tank, wainscotting, boats, and other structures," and in division E of the reissue of that patent, granted August 18th, 1868.

4. As to the perforations, the invention was not patentable, because sheet metal seats of chairs had before been perforated, also india rubber and gutta percha seats for chairs.

[This was a bill in equity by William Gardner and others against Martin Herz and John K. Mayo.]

Andrew J. Todd, for plaintiffs.

Frost & Coe, for defendants.

BLATCHFORD, Circuit Judge. This is a motion for a preliminary injunction, founded on reissued letters patent [No. 7,203] granted to George Gardner, William Gardner and Jane E. Gardner, July 4th, 1876, for an "improvement in chair seats," the original patent [No. 127,045] having been granted to George Gardner and Gardner & Gardner, May 21st, 1872, on the invention of George Gardner. The specification of the reissue states, that the "invention relates to bottoms for seats, and consists in constructing the said seats of two or more veneers of wood, with the grains crossing each other, the said veneers of wood being glued together by an adhesive substance;" that "veneers, when thus arranged, that is to say, with the grains crossing each other, or diversified, will make a seat which, for durability and economy, will be found to be a very useful improvement;" that the seat may be made "either solid or perforated;" that "the perforated seats are made by boring a round hole, of any design desired;" that "the perforated seats are desirable, as they are ventilated and ornamental;" that "the veneers, with the grains crossed or diversified and glued together, become homogeneous, thus making a solid piece of wood," from which the bottom of the seat is made, "which, when perforated and varnished, is ready for the market;" that "veneers, when thus arranged, that is to say, with the grain running crosswise or in diverse directions, will make a bottom for a seat, which, for economy and durability, will be found to be a very useful improvement;" and that "the bottoms thus made may be left solid, or perforated after some design agreeable to the fancy of the one having them made." The specification also states, that a slight concave configuration may be given to the seat, to add to the comfort of the party using it; and that the bottom thus made is secured to a frame, which surrounds it, and, through the latter, is secured to the frame of the seat. The claims are six in number: "1. As a new article of manufacture, a bottom for a seat, constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, and the whole secured together with an adhesive substance, substantially as set forth. 2. As a new article of manufacture, a bottom for a seat frame, constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, said layers being secured together by an adhesive substance, and having perforations formed therein for the purpose of ventilation or ornamentation, substantially as set forth. 3. The combination of a seat bottom, constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, and the whole secured together by an ad-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 320; and here republished by permission. Merw. Pat. Inv. 179, contains only a partial report.]

hesive substance, with the frame of the seat, substantially as set forth. 4. The combination of a seat bottom, constructed of two or more veneers or thin layers of wood, the grain of the one layer crossing that of the other, and the whole secured together by an adhesive substance, and provided with perforations for the purpose of ventilation or ornamentation, with the frame of a seat, substantially as set forth. 5. As a new article of manufacture, a wooden bottom for seats, provided with perforations for the purpose of ventilation or ornamentation. 6. As a new article of manufacture, a seat bottom constructed of two or more veneers or thin layers of wood, the grain of the one layer crossing that of the other, and secured together by an adhesive substance, said bottom thus formed having a curved or concave configuration on its upper side, substantially as set forth." The defendants make seat bottoms constructed of two or more veneers or thin layers of wood, with the grain of the one layer crossing that of the other, and the whole secured together with an adhesive substance; and there are slots or slits cut through the seat, as long as the length of the seat bottom from front to rear, leaving longitudinal holes of that length, and thus forming ribs or slats, the effect of which is to make the seat bottom yielding and elastic.

A patent was granted to the defendant Mayo, December 26th, 1865, for "improved material for roofing, tubing, tank, wainscotting, boats and other structures." The specification of that patent states, that the invention is an "improvement in the manufacture of material for structures generally." The specification says: "The scale used in the ensuing description consists of a thin layer of wood cut from a board or log and forming a veneer. My invention consists in cementing together a number of these scales or veneers, with the grain of the successive pieces running crosswise or diversely. A number of these scale boards, their surfaces having been previously treated with cement or analogous materials, are so laid together as to cross the grain of the respective pieces, so as to form a firm material for the construction of houses, boats, ships, tanks, floors, pipes, drains, sewers, packing cases, boxes, barrels, sidewalks, cans, pails, tubs, firkins, measures, cheese boxes, trunks, valises, dry docks, canal locks, mill and factory flumes, masts, spars, outside covering and inside finish of houses, stores, shops, depots and warehouses, fences, covering of piles, railroad cars, railroad and suspension bridges, railroad tracks and sleepers, wagons, carriages and carts, bedsteads, sacking, mattresses and covering of beds, sofas and sofa bedsteads, divans, lounges, chairs and settees. In house architecture, the weather boarding and inside finish of the house may consist of this material, and in vessels of every kind it may be made the covering or lining of the ribs or skeleton, or, in some instances, may form the body of the articles, as, for instance, in pipes, in which the layers are united by an impervious cement, and so applied to each other that the grain of one will be lengthwise of the pipe, of another will be at the right angles to the former, and, if others are added, may be spirally around it. By the well-known processes of wet and dry heating, such a pliability may be given to the layers as to permit them to readily assume various figures, or be laid upon irregular objects, with the grain of the respective pieces running diversely, so as to prevent splitting. I cannot pretend to anticipate all the various uses to which this scale board may be applied, but, suffice it to say, that, by the means employed, I am enabled to make a very strong and light structure, of whatever shape it may be, or for whatever purpose it may be designed. It is capable of being made an effective and elegant substitute for the usual covering of the walls of rooms. For flooring it is also available, especially in cases where it is an object to make apartments air-tight, as in ice-houses, fruit chambers and other rooms which it is desired to isolate for any purpose." The claim of the patent is: "The application of scale boards or veneers in layers, the direction of whose grain is crossed or diversified, and which are connected together, forming a material for the construction, lining or covering of land and marine structures." This patent was reissued August 18th, 1868, in eight divisions, on eight separate amended specifications, to John K. Mayo, Andre Cushing and G. B. Cushing. Division E is a reissue for an "improvement in house decorations, furniture, fittings and the like." The specification says: "The invention consists in constructing various house decorations, furnishings and fittings of a plurality of scale boards or thin sheets or veneers of wood, cemented or otherwise firmly connected together, with the several scales or thicknesses so placed that the joints (ends or edges) shall be broken by each alternate layer, and the grain of the wood crossed or diversified, so that they will afford to each other mutual strength, support and protection against checking, splitting, swelling or shrinking. * * * In the chair, fig. 2, the bottom, B, may be formed of a flexible material, made up by the union of two or more thin layers of wood, having the grain crossed or diversified in direction, and united by suitable cement." Various other articles of house decoration, fitting and furnishing are specified, to the construction of which the invention is stated to be applicable. The claim is: "The employment or use of the compound scale board hereinbefore described, in the formation of the specified or analogous structures or articles of house decoration, fitting and furnishing."

What is claimed in the first claim of the Gardner reissued patent is clearly described

in the two Mayo patents, both of which were issued prior to the original Gardner patent. The original Gardner patent claimed, "as a new article of manufacture, a chair seat constructed of veneers of wood with the grain running crosswise of each other, and glued together, all substantially as set forth, and for the purposes specified." The specification stated, that "the seats may be left solid, or perforated after some design agreeable to the fancy of the one having them made," but there was no claim in respect of any perforations. On what ground the patent office granted the claim of the original Gardner patent, or the first claim of the reissued Gardner patent, in view of the original and reissued Mayo patents, it is impossible to conjecture. The only conclusion can be that the Mayo patents were twice overlooked.

The next subject is the perforations. A reissued patent was granted to Isaac P. Tice, as assignee of Austin S. Smith, the inventor, June 27th, 1865, for an "improved chair bottom or back," the original patent having been granted to said Smith, May 25th, 1858. The specification of the reissue describes the making of the bottoms or seats of chairs of perforated sheet metal, and attaching the edges of the sheet of perforated metal to a supporting frame of wood or other stiff material of suitable form, by nails, tacks or other suitable fastenings. It states that the perforations may be of any suitable form, as circular or of a form resembling the reticulations produced by interlacing the strips of cane in a cane bottom; that the sheet metal is not only as good as cane in coolness and in the ventilation it affords to the clothing of persons, but is cheaper and more durable and so much smoother as to be less destructive to wearing apparel. A patent was granted to J. W. Cochran, May 22d, 1866, for a "chair, sofa and car seat." The specification states that the "invention consists in the employment of india rubber or gutta percha enamelled in whole or perforated (open worked) sheets for the seats and backs of chairs, sofas, car seats, carriages and lining thereof and for mattresses;" and that "the material may be attached either by lacing, gluing, cementing, screwing or nailing." The drawing shows a chair seat with circular perforations in it. A chair seat of perforated sheet metal, or perforated enamelled india rubber or gutta percha, has every feature of ventilation and ornamentation, as resulting from the perforations, that the perforated chair seat of the Gardner patent has. The perforations in the Gardner seat are not described as serving any other end than ventilation and ornamentation. In view of the prior perforated seats there was no patentable novelty in perforating a wooden bottom. No claim is made that the defendants have infringed the sixth claim of the Gardner reissue. As to the first five claims there is nothing new or patentable in them, in view of the above references.

The motion is, therefore, denied.

[NOTE. On February 24, 1880, a second reissue (No. 9,094) was granted. Subsequently a suit was brought for its infringement, the defendants setting up want of novelty of the invention, and denying the validity of both reissues. The court declared the patent void, and dismissed the bill. 12 Fed. 491. This decision was afterwards affirmed by the supreme court on appeal. 118 U. S. 180, 6 Sup. Ct. 1027.]

Case No. 5,230.

GARDNER v. ISAACSON.

[Abb. Adm. 141;[1] 8 N. Y. Leg. Obs. 77; 3 Am. Law J. (N. S.) 193.]

District Court, S. D. New York. Jan. 24, 1848.

PRACTICE IN ADMIRALTY — SECURITY FOR DISCHARGE FROM ARREST—SUPREME COURT RULES OF 1845—WARRANT IN PERSONAM— STIPULATION FOR COSTS — NON-IMPRISONMENT ACTS — MARITIME COURTS.

1. The practice of the English admiralty and the former practice of the district court, in respect to the security required to be given by a respondent arrested upon bailable warrant, in order to authorize his discharge from the arrest, stated.

2. The standing rules of the district court relating to bail stipulations to be given on the execution of a warrant in personam, and to the method of enforcing them, are superseded by the supreme court rules of 1845, upon the same subject; and stipulations must now be exacted conformably to the supreme court rules.

3. A respondent, arrested in an admiralty suit, is not entitled, upon the return day of the warrant, to be discharged from arrest, on giving a stipulation for costs, pursuant to the rule of the district court, but he must remain in custody until he gives bond or stipulation to satisfy the decree made against him.

[Cited in Pope v. Seckworth, 46 Fed. 859.]

4. The non-imprisonment act of the state of New York (1 Rev. St. 807, § 1), is made to be within this state the law of the United States also by force of the acts of congress of 1839 and 1841 (5 Stat. 321, 410); but it does not embrace arrests upon process issuing out of a maritime court.[2] It is limited to civil process issuing out of courts of law, and executions issuing out of courts of equity.

[Cited in Hanson v. Fowle, Case No. 6,041.]

Three actions in personam were brought, by Joseph Gardner, Samuel Lockwood, and Mordecai T. Bunyan, respectively, against Michael Isaacson. The respondent was arrested on three warrants issued in the three causes, and was held in custody by the marshal. A motion was now made in each of the causes that the respondent be discharged from custody. The grounds upon which the motion was made appear sufficiently in the opinion of the court.

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[1] [Reported by Abbott Brothers.]

[2] See, also, the case of Gaines v. Travis [Case No. 5,180], decided in this court in January, 1849, where this question is further considered.

Griffin & Larocque, for motion.
W. Q. Morton and D. McMahon, opposed.

BETTS, District Judge. The respondent having been arrested on bailable warrants in personam, issued out of this court, in these three causes, and having given no bail to the marshal, was held in custody under the arrest. On the return day of the warrant, the respondent entered into stipulations, conformably to the terms of rule 38 of this court, adopted in 1838; and a motion is now made in his behalf, that he be forthwith discharged. The libellants insist that the marshal is bound to retain the respondent in custody until bail-bonds or stipulations are executed pursuant to the supreme court rules of 1845.

The question raised by the motion is, whether the respondent is entitled to his release, on giving stipulations, with sureties, that he will appear and pay all costs decreed against him, and will himself perform and abide all orders and decrees of the court in the cause, or deliver himself personally for commitment in execution thereof,—such being the course of practice in this court; or whether the rules adopted by the supreme court of the United States, in 1845, have established a different practice in this respect, which the respondent is bound to comply with. By the practice of the English court, as laid down by Clarke, and recognized by Browne, the respondent, on his arrest, is compelled to give bail to the marshal in a sum sufficient to cover the matter in demand, conditional for his appearance on return of the process. This stipulation was pronounced forfeited if he failed to enter his appearance on the day, and he was adjudged in contempt, and subjected to commitment or other process in satisfaction of the demand. This bail stipulation, it would seem, was originally regarded as a penalty, and its forfeiture was by way of mulct, and accrued to the admiral, and was not allotted to the satisfaction of the libellant. The appearance, according to the condition of that bond, was effected by entering into stipulation apud acta, with approved sureties, judicatum solvi; that is, to satisfy the final and all interlocutory decrees of the court in the cause. These are the fundamental properties and effects of an appearance in the English admiralty. Clarke, Praxis Adm. tits. 3, 4, 5, 9, 12; Browne, Civ. Law, 432. This was substantially so in the earlier maritime codes (Consulato del Mare, c. 40); and the regulations coincide with the course of the civil law in the same classes of procedure. Wood, Civ. Law. 245. The doctrine has also been embodied a long time in the rules of American courts. Dunl. Adm. Pr. 144; Greenl. Ov. Cas. This court, in its code of rules adopted in 1838, studiously varied the responsibility imposed on sureties by the antecedent practice. The appearance of the respondent was perfected by his becoming personally bound by stipulation to perform the judgment or decree rendered against him; but his sureties were placed on the same footing as those of the actor or libellant as to the amount they were to pay absolutely; in effect subjecting fidei jussores in admiralty in the position of bail to the action at common law. They could not be charged beyond the costs accruing in the litigation, if the defendant surrendered himself for commitment under the final decree. Betts, Adm. 40; Dunl. Adm. Pr. 147; Dist. Ct. Rules, 21, 38, 39.

The act of congress of May 8, 1792, § 2 (1 Stat. 276), designated the forms of process, and the forms and modes of proceeding in suits at common law, in equity and admiralty, with authority to the courts to vary them at discretion, "subject to such regulations as the supreme court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same." The act of August 23, 1842, § 6 (5 Stat. 518), if it confers no more ample powers on the supreme court to regulate the practice of the district and circuit courts of the United States, yet manifestly implies a mandate on the court to perform that duty. In January term, 1845, the supreme court exercised that power in relation to the practice of all the federal courts in causes of admiralty and maritime jurisdiction on the instance side of the courts. 3 How. Introd. And accordingly those directions, in respect to practice, became the supreme law to all inferior courts, in the particulars regulated by them. Rule 2 authorizes, in suits in personam, a warrant of arrest of the person of the defendant, in the nature of a capias, with an attachment clause against his property or credits, in case he cannot be found, or by a simple monition, in the nature of a summons, to appear and answer the suit. Rule 3 provides, that when the warrant of arrest is executed, the marshal may take bail, with sufficient sureties from the party arrested, by bond or stipulation, upon condition that he will appear in the suit, and abide by all the orders of the court, interlocutory or final in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court. This is the established form of the undertaking of stipulators in the English admiralty. Marr. Form. 272, 316. The standing rule of this court was, that on warrants to arrest the person in admiralty and maritime causes, the marshal might take bail in the form of a stipulation, and in the sum endorsed on the

warrant, conditioned for the appearance of the party on the return day to answer to the libellant in a cause civil and maritime, according to the course of the court. Dist. Ct. Rules, 21, 38. These rules are superseded and displaced by that of the supreme court, before cited. The marshal can no longer accept stipulations pursuant to the district court rule, but must exact them in the more comprehensive terms prescribed by the supreme court. Again: The object of the stipulation directed by the rule of the district court was to carry into effect the warrant of arrest, and nothing more. It contemplated no remedy beyond bringing the defendant personally before the court, and retaining him under its authority. When brought into court, rule 38 provided the manner in which the respondent should become a party litigant, which would perfect his appearance in the action. The subject-matter acted upon by rules 21 and 38 of this court is the same which is specifically regulated by rule 3 of the supreme court: the latter determines the course of proceeding on the arrest, and before return of the process, and also the method by which the appearance of the defendant is to be entered and perfected. The bond or stipulation to the marshal effects both, and after that is given, no further step is to be taken in court in order to subject the respondent to its authority, or to secure the fulfilment of judgments or decrees, and this necessarily rescinds or dispenses with all other procedures to those ends.

The counsel for the respondent contends, that as he remained in custody of the marshal till the return day of the process, and then gave stipulations for his appearance, pursuant to the rules of the district court, he is entitled to be discharged from arrest, and is not bound to execute the bond or stipulation prescribed by the supreme court rule, for three reasons: (1) That the bond demanded is in the nature of bail to the sheriff on an arrest at common law, and cannot be exacted after the return day of the writ, as the party is then in court, and the exigency of the writ is thus satisfied, and cannot act further in coercion of the defendant. (2) That rule 46 of the supreme court saves in full force the application and effect of the district court rules to an arrest so circumstanced, because the method of appearing is not fixed or regulated by any rule of the supreme court. (3) That rule 25 refers cases situated as these are, to the discretion of the court, to compel stipulations to be given for costs only.

The analogy of the common-law practice is not a very close one; but, so far as it goes, the argument from it rather tends to oppose than support the conclusion sought to be established by the respondent. The bail to the sheriff is similar in character to the civil law stipulation in judicio sisti. It only aims to secure the presence of the person in court. But the sheriff is not exonerated merely by producing the body. He must hold the party in custody until another and more stringent undertaking is entered into by him, consummating his appearance according to the course of the court, which is to abide there and perform the final order or judgment in the cause. So here, merely having the respondent under his authority on the return day of the process, or producing him in facie curiae, in no way satisfies the mandate of arrest or exonerates the marshal. The process continues in life and acting upon the defendant, until it fulfils the purpose of the arrest, which manifestly is to compel him to furnish a stipulation in the terms given by the rule, and to that end his custody must necesarily continue until the appropriate stipulation is produced, because the mandate of arrest is executed and made complete in that manner alone. In the view I take of the subject, the matter is specifically provided for by rule 3 of the supreme court, and there is accordingly nothing in these arrests outside the provisions of that rule, coming within the policy of rule 46, and still remaining under the authority of this court.

But it is insisted, for the respondent, that if this construction of the rules is adopted, that then rule 25 of the supreme court supplies the law of these cases, and relieves the party and his sureties from liability other than for costs; and whether that obligation shall be exacted, is left to the discretion of this court. The terms of rule 25 are, that in all cases of libel in personam, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sums as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the process of the suit. This rule evidently has relation to the different modes of bringing a defendant before the court designated by the second rule. If he is proceeded against by citation or summons only, there is no compulsory authority acting upon him, and the libellant has no security, either against his person or his estate, for the demand in prosecution. All that is imposed upon the defendant by the rules in such cases is, that he shall indemnify the libellant against the costs to be created by his interposing a defence and contestation to the action. But in the coercive method of procedure by arrest of the body or attachment of property, the warrant being executed, rule 25 can, in no just interpretation, be understood as intending to deprive the libellant of the security thereby acquired, and set the defendant or his property free from the attachment on a mere stipulation for costs. Acting under the rule

thus construed, the court could not interpolate a condition that the defendant should also surrender himself for commitment; and if it is interpreted conformably to the claim of the respondent, a defendant need only, when arrested, refuse to give bail before the return day of the warrant, and then he will be entitled to a free discharge on intervening and giving a stipulation for costs, and thus all the privileges and securities provided by the rules of the supreme court, as consequent to his arrest, will be abrogated or evaded. I am satisfied such construction of the rules cannot be sustained. It was obviously the purpose of the supreme court to place the admiralty practice, in each of the United States courts, substantially on the same footing of the English practice. That practice, under the first process act, in 1789, was adopted by congress. 1 Stat. 93. It had remained essentially the rule of practice since that period, in the various district courts, but some deviations from it existed. [Manro v. Almeida] 10 Wheat. [23 U. S.] 486. The supreme court designed, by rules 2 and 3, to abolish such diversities of practice, and render the remedies and rights of parties uniform in causes of admiralty and maritime jurisdiction, in all the courts of the Union. The letter and spirit of the regulations of the supreme court, in my judgment, require that a defendant in custody, under a warrant of arrest in an admiralty case, shall so remain until he makes his appearance by giving bond or stipulation to satisfy the decree that may be rendered against him.

It is urged that the acts of congress abolishing imprisonment for debt govern this procedure, and that the federal courts have now no authority to hold parties under arrest on mere civil process. The acts of 1839 and 1841 (5 Stat. 321, 410), abolish imprisonment for debt, on process issuing out of any court of the United States, in all cases whatever where, by the laws of the state in which the said court shall be held, imprisonment for debt has been or shall hereafter be abolished. The act to abolish imprisonment for debt was passed in this state, April 26, 1831, and it enacts that no person shall be arrested or imprisoned on any civil process issuing out of any court of law, or on any execution issuing out of any court of equity, in any suit for the recovery of money, &c. 1 Rev. St. 807, § 1. This statute is made the law of the United States, also, by force of the acts of congress above referred to, and had the proceeding in these causes been on the law side of the district or circuit court, the defendant would have been exempt from liability to arrest, and to give surety to perform the decree of the court. The principle of the act would seem to include arrests by maritime courts (on matters of contract), and for the recovery of money, no less than when made by courts of law. But the words of the statute do not embrace both. They are limited to civil process issuing out of a court of law, and the legislature found it necessary to provide expressly for executions issuing out of chancery, as not embraced within the previous description of process from a court of law; much less can a maritime court be regarded as falling within the designation. The acts of congress of 1789, 1792, and 1793 demonstrate that laws relating to the practice of courts of law, do not include that of admiralty and maritime jurisdiction. Non-imprisonment acts, of the tenor of that passed in this state, had been very common, indeed almost universal, throughout the United States, previous to the promulgation of the code of rules by the supreme court in 1845. That court, in framing these rules, necessarily construed those laws as not applying to proceedings in maritime courts, and accordingly the antecedent scope and effect of that description of process was left in force.

It is unnecessary, and might be unbecoming, after the action of the supreme court upon the subject, to intimate what order this court might feel itself authorized or required to make, if the question as to the effect of those statutes upon its process [under the provisions of the acts of congress of 1839 and 1841 alone][3] had been brought to its consideration prior to the promulgation of the rules of the supreme court. That code must be regarded an authoritative exposition of the non-imprisonment acts in relation to admiralty process. The duty of the inferior court is limited to receiving and executing the law given by its superior. The highest tribunal of the land having, since the enactment of those acts, established the process employed in this case, I shall forbear any further general reasoning upon the subject, and hold these warrants of arrest valid, and and on all the points raised, deny the motion of the respondent for his discharge. Order accordingly.

Case No. 5,231.

GARDNER v. LINDO.

[1 Cranch, C. C. 78.][1]

Circuit Court, District of Columbia. March Term, 1802.[2]

RECORDS OF COURT—CERTIFICATION—LIMITATIONS—PLEA OF NIL DEBET—DEBT ON PROMISSORY NOTE—OBJECTIONS AFTER VERDICT.

1. The record of a court in Virginia must be certified by the presiding magistrate.

2. The act of limitations cannot be given in evidence upon the plea of nil debet.

[Cited in McIver v. Moore, Case No. 8,831.]

3. Debt will lie against the maker of a promissory note.

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[3] [From 8 N. Y. Leg. Obs. 77.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

[2] [Reversed in 1 Cranch (5 U. S.) 343.]

4. After verdict it is too late to object the want of profert of letters of administration—or that the action is in the debet and detinet.

Debt [by Gardner's administrator] against the maker of a promissory note—Pleas nil debet, and a discharge under the insolvent act of Virginia.

THE COURT refused to admit the record of the discharge to be given in evidence because it was not authenticated by a certificate of the presiding magistrate, according to the act of congress (1 Stat. 122).

Mr. Mason, for defendant, contended that the act of limitations might be given in evidence on nil debet. Esp. N. P. 147, 262; Roades v. Barnes, 1 Burrows 9; Draper v. Glassop, 1 Ld. Raym. 153; Darby v. Boucher, 1 Salk. 278.

Mr. Woodward, for plaintiff. There is a difference between debt for rent, and debt on a bond or note. In the first case the debt arises only from the enjoyment of the thing demised. But upon a bond a debt is acknowledged. Esp. N. P. 233, 234.

THE COURT refused to admit the act of limitations to be given in evidence. See [Lindo v. Gardner] 1 Cranch [5 U. S.] 343; [note B., Append.] Id. 462, 465. After verdict for the plaintiff, it was moved, in arrest of judgment, 1st, That debt will not lie on a promissory note. 2d, That it does not appear that letters of administration were granted to the plaintiff. 3d, That the action is in the debet and detinet.

THE COURT, at a subsequent term, decided that debt would lie on a promissory note, and that the other two objections were too late after verdict.

Reversed by the supreme court of the United States (1 Cranch [5 U. S.] 343) because an action of debt will not lie in Maryland, upon a promissory note.

Case No. 5,232.

GARDNER v. LINDO.

[1 Cranch, C. C. 592.] [1]

Circuit Court, District of Columbia. Dec. Term, 1809.

BAIL.

Mr. Law, for defendant, moved to appear without bail on the ground that a suit had been before brought upon the same cause of action, appearing upon affidavit, which suit had been decided by the supreme court of the United States in his favor, but not on the merits.

THE COURT (FITZHUGH, Circuit Judge, absent) overruled the motion.

[See Cases Nos. 5,231 and 5,616.]

[1] [Reported by Hon. William Cranch, Chief Judge.]

GARDNER (MORRIS v.). See Case No. 9,830.

Case No. 5,233.

GARDNER et al. v. The NEW JERSEY.

[1 Pet. Adm. 223.]

District Court, D. Pennsylvania. 1806.

SEAMEN'S WAGES — FOOD ALLOWANCE — SURPLUS FROM SALE OF VESSEL—LIENS ON SAME — MASTER'S WAGES—PHYSICIAN'S WAGES — JURISDICTION OF COURT OF ADMIRALTY OVER FUND.

[1. A seaman engaged at a foreign port on the homeward voyage has the same rights as to wages and food allowance as one shipping at the point of original departure.]

[2. The navy ration is the measurement of a food allowance on a merchant vessel.]

[Cited in The Mary, Case No. 9,191.]

[3. A surplus fund in a court of admiralty arising from the sale of a vessel is subject to the same trusts and liens as the vessel itself was subject to.]

[Cited in Phillips v. The Thomas Scattergood, Case No. 11,106; Ramsay v. Allegre, 12 Wheat. (25 U. S.) 633; Brackett v. The Hercules, Case No. 1,762; The Panama, Id. 10,703; The Rodney, Id. 11,993. Applied in Harper v. New Brig, Id. 6,090; The Boston, Id. 1,669; Leland v. The Medora, Id. 8,237; The Velocity, Id. 16,911; Ex parte Lewis, Id. 8,310; Ex parte Easton, 95 U. S. 76; Gilbert Hubbard & Co. v. Roach, 2 Fed. 394.]

[4. The sums advanced by a master during a voyage for necessaries supplied to a vessel, for claims of material-men, or for pilotage are liens upon the fund before a court of admiralty.]

[Cited in The Jerusalem, Case No. 7,294; The Packet, Id. 10,654; Westcot v. Bradford, Id. 17,429; Zane v. The President, Id. 18,201; The Santa Anna, Id. 12,325; The Stephen Allen, Id. 13,361; Bains v. The James & Catherine, Id. 756; The Calisto, Id. 2,316; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. (47 U. S.) 390; The Richard Busteed, Case No. 11,764; The Scotia, 35 Fed. 908.]

[5. As the laws of the state of Pennsylvania provide for shipwrights and material men at the port of outfit, and also regulate domestic pilotage, a court of admiralty will not take cognizance of these matters.]

[Cited in Cunningham v. Hall, Case No. 3,481; The Kate Tremaine, Id. 7,622.]

[6. The contracts of the master and physician of a vessel are purely personal, and their wages are not liens upon the fund.]

[Cited in The Eolian, Case No. 4,504; Whitney v. The Mary Gratwick, Id. 17,591; Drinkwater v. The Spartan, Id. 4,085; Ex parte Clark, Id. 2,796; Packard v. The Louisa, Id. 10,652. Disapproved in The Larch, Id. 8,085.]

[7. A court of admiralty will not favor an indirect lien upon the fund in hand by those claimants who cannot sue originally in such court, especially where there are adverse interests.]

[Cited in Gates v. Johnson, Case No. 5,268; Zane v. The President, Id. 18,201; Wilson v. Bell, 20 Wall. (87 U. S.) 224.]

Mariners' wages and claim for short allowance. Also petitions of the master

[Cooper] and physician for payment out of remnants and surplus. The voyage was from Philadelphia to Canton, and back to Philadelphia, with liberty to go to other intermediate ports. A suit was commenced for mariners' wages, in which sundry disputes arose, of no general importance. The wages were decreed, and the vessel directed to be sold for their amount, together with a sum adjudged to the seamen for 26 days short allowance of provisions, at one day's pay to each mariner for every day full allowance was not served out. It was contended that, with respect to some of the mariners shipped in foreign ports, the voyage should be considered, so far as they were concerned, as commencing at the ports of shipping them respectively. And as the act of congress only contemplated voyages from the United States, the case of a seaman engaged in a foreign port was not within its purview. But this objection was overruled for the following reasons. The voyage was entire, and commenced at Philadelphia, and there ended. The intermediate circumstances became engrafted into the entire voyage, and this rode over all subordinate considerations. There could be no subdivisions, or apportionments, except as to the time of service of the respective individuals, which determined the amount severally due to them. Endless confusion and difficulties would arise, from such distinctions among the crew, each of whom participated in the general contract, and had the same rights to any benefits, as they shared in all disadvantages, arising out of that contract. The deficiencies of provisions accrued on the home passage, in which all the mariners were alike engaged. The decision in the case of Mariners v. The Washington [Case No. 9,086], was taken as the guide to determine the quantity and species of provisions required on a voyage from China; and the navy ration, the rule by which the allowance was adjusted. Substitutes for articles enumerated in the law on this subject, were allowed. The live-stock, though legally excluded, was, by consent counted in, and yet there was a large deficit on the whole. The payment for the short allowance, at the rate directed by law, was therefore decreed. The ship was sold by the marshal, under the decree; and the monies arising from the sale, were brought into court. There remained a surplus or remnant, after payment of all sums adjudged to be paid, and the costs and charges, accruing in the suit, and on the sale. A petition of James Cooper, the master, was presented, stating, that he had expended, during the voyage, for pilotage, mariners' wages, and other charges necessary for the use of the ship, $257, which remained unpaid. And that there were due to him, for wages as master, $827.60. Another petition, from William Baldwin, was also presented, stating, that he was employed as physician in and for the ship, on her voyage from Philadelphia to Antwerp, Canton, and back to Philadelphia. And that there remained due to him for his services on board, $167. The petitioners prayed that the sums due to them respectively, should be paid out of the surplus monies, remaining in court, after payment of all sums decreed, and the costs and charges thereon. The claim for payment to the petitioners was insisted on, under the authority of a dictum of Sir William Scott, in the case of The Favourite, which it was alleged, justified a payment to the master. 2 Rob. Adm. Cas. (Phila. Ed.) 197. The justice of his claim was farther enforced, by the reasoning in 2 Browne, Civ. & Adm. Law, 95, where the propriety of the master suing in the admiralty is advocated, though it is admitted not to be practised. Abb. Shipp. 94, was cited to shew, that money, paid by the master on a foreign voyage, was a lien on the ship. The general doctrine, that whatever court had possession of the principal, had power over all incidents, was relied on, to support the claim of the physician.

BY THE COURT. When I first came into this court, I made, in several instances, distribution of surplus monies, under the idea, that I had the power so to do, agreeably to the doctrine now stated, to justify me in granting the prayers of the petitions. But on experience, I found myself involved in many difficulties and mistakes, in the application of this doctrine. It was one among the mass of irregularities I had to encounter, before I established, by frequent decisions, and with much consideration, the general principles which now prevail. I found it best and safest, to fix some general rules, applicable to most cases, though at times, some anomalous instances should occur, inducing particular hardships. The rule, by which I have governed myself for several years past, is, that it shall appear, that a sum claimed out of the surplus or remnant, is either of itself, or in its origin, a lien on the ship, or other thing out of which the monies were produced. This rule is not only justified by the practice of the civil law, but in the English chancery, and even in their courts of common law, wherein they are governed, when the case requires, by the principles of other courts, having concurrent cognizance of the subject matter, either incidental, or in chief. Many authorities may be produced to support this position. In chancery, the monies arising from sales of lands, are distributed as liable to the same trusts or liens, to which the land itself was subjected; and so of the produce of any subject or thing, originating the suit, or matter, under the cognizance or the enquiry of the court. Whensoever the courts of common law have occasion to determine questions of admiralty jurisdiction or cognizance, the principles of decisions in the admiralty courts are pursued. Their strict adherence to preferences, given by liens at common law,

is invariable. But it is rare indeed, if at all to be discovered, that liens on monies or other subjects, are attached by considerations not originally subsisting, or exclusively fixed.

With respect to the claim of the master, for sums paid abroad to mariners, or even here, I think, on principle, these, as well as monies advanced in foreign ports for necessaries, supplied to the ship on her voyage, (however it may be at the port of outfit, or where the owners reside) are liens, and the ship was hypothecated therefor. Claims of material men, for supplies afforded to a ship, are within the jurisdiction of the admiralty, and suable there, in England, as well as in other states. Pilotage is a necessary expenditure on a voyage. If a master pays demands for these claims, he represents the claimants, and the lien continues on the monies produced by the sale of the ship.[2] As to pilotage, the master is bound by the laws of Oleron, and other maritime laws, to pay it, for the safety of the ship and goods. In England a shipwright may sue in the admiralty, for building a ship for navigation on the sea (Rolle, Abr. 534), and for repairing a ship. Cro. Car. 296; cited in 2 Bac. Abr. (5th Ed.) 180. But as the laws of this state provide for shipwrights and material men at the port of outfit, and also regulate domestic pilotage, and the sums due and recoverable here, on that account I have generally referred parties exhibiting such claims, to the state jurisdictions; wishing to avoid all collisions and conflicts in such cases. I have confined this to domestic supplies and pilotage. Those furnished, or paid, in foreign ports, or here, on ships on their voyage, and not at a port of outfit, the owners being resident here, I have reimbursed, or distributed, out of surplus monies, where liens or hypothecations have appeared to me to have attached. I have also directed a surplus to be paid over to a master, where the owner or his authorized attorney or agent, did not appear. But this has been done with great caution. Wharfage has been allowed out of proceeds, as the wharfinger might detain the ship until payment.

I do not find any precedent or authority to warrant my granting the prayer of the master's petition, in the case before me, for his wages. His contract is clearly personal, and made with and on the credit of the owners resident here, and not on that of the ship. He is the owner's agent, and responsible to him for his acts, particularly those relating to mariners' contracts, and other transactions in the affairs of the ship. If in any thing he has done wrong, the owners may retain; and the contest is cognizable in another jurisdiction. If he is also answerable to those furnishing supplies by his order, and to the officers and mariners of the ship, he is indemnified by such claims being attached as liens on the ship, or the monies produced on sale, in addition to the owner's responsibility. He has a farther security in the right to collect the freight, and possess the fund out of which wages are payable. So that the law clearly distinguishes his case, as it respects wages, from those usually entitled to liens. I have paid out of surplus, the wages due to masters of Spanish ships, because the laws of Spain entitle them thereto: and I always am regulated, in the affairs of foreign ships, by the laws of the country to which they belong. I could discover no precedent for this in the laws of any other country.

The maritime laws of England,[3] existing before our Revolution, and consistent with our situation, are yet our laws. It is but recently that admiralty cases have been published. We have, therefore, unavoidably, recourse to their common law books, for authorities. These invariably shew, that the master "cannot sue in the admiralty court, for his contract is on the credit of the owners, and not, like that of the mariners, on the credit of the ship." 2 Rob. Adm. Cas. 196. These authorities, as well as the few maritime cases published, also point out what parties may sue in admiralty courts. See 2 Bac. Abr. (5th Ed.) 181, and authorities cited.

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[2] Although, in strictness, it might be contended that the lien was discharged, by payment to those who only held it until satisfaction was made; I have thought myself authorized to give more latitude, from equitable considerations, in such cases, than the inflexibility of rigid legal rules would, perhaps, in general permit. These rules I venerate too much to take unwarrantable liberties with them. The allowance to the master in this case, was not opposed. He had the power to hypothecate the ship for necessaries, in a foreign port; and was under no obligation to advance his own money. Wherever these advances are made, every security for repayment should be encouraged.

[3] The maritime laws, when clearly adopted and settled, became part of the English common law, which is retained by us to this day, in all cases permitted by the principles of our government. In a former note on this subject,—Thompson v. The Catharina [Case No. 13,949],—I have either expressed myself improperly, or there was some mistake in copying. The words (after "the feudal parts of this law") "and such as are," should be struck out, so that it read, "the feudal parts of this law inconsistent with the principles," &c. So it may be said of any other parts of the common law, if such there be. But I do not mean to enter into any controversy, as to what parts, or in what cases, the common law is obligatory and directory in the courts of the United States, having on these subjects often declared my opinion. Whatever difference of sentiment there may exist, as to its being granted by the people—delegated to the federal courts—or it being required that so it should be—it must be indisputably known, to all who are well informed, that without the rules and provisions as settled and made by the common law, the courts would be inoperative. The parties having the privilege of suing therein, or those compelled to become suitors there, would find themselves in a destitute and hopeless condition. Proceedings must be new-modelled, and remedies defined and made efficient. Even crimes (as to the jurisdiction over which there is the most discontent and controversy) could not be

As to the reasonings and opinions of an elementary writer, (2 Browne, Civ. & Adm. Law, 95), whatever weight may be attached to them, as theories to shew what the law ought to be, I think it safest to be guided by what it is. I have had occasion to discuss, in several cases, the subjects of maritime jurisdiction. It will be found that I have endeavoured to establish it on similar principles, where from necessity I was compelled to reason, without a precedent to direct me. It is certainly founded, for the most part, on the subject matter, and not solely on the place of making the contract. But I do not wish to wander into theories, where respectable precedents can be found. All these are opposed to this writer's doctrine.

The authority of Sir William Scott, whose opinions I highly respect, where no diplomatic direction gives a bias to the judgment, is more to be depended upon. He seems to hold, that surplus and remnants have been distributed to the master; or rather, that "upon enquiry, no instance has been found, in which a master has been permitted to sue against proceeds in the registry, except in cases of mere remnants and surplus; and not even then, if there have been any adverse interests opposing it." I have a similar wish to that expressed by Sir W. Scott, to aid an unfortunate suitor. In that case, the bottomry creditor alone, appeared as adverse; and his lien reached the remnants and surplus.—So that Sir W. Scott was not under the necessity of explaining what he meant by "adverse interests," or whether he distinguished them, by such as were accompanied by liens, or general interests, without such preference. In the case under consideration, I am given to understand, that there are creditors of insolvent part owners, whose interests are adverse to the master's claim; and who certainly deem themselves equally entitled to payment; beside, if the master can obtain his object in this mode, it will establish a precedent for such applications in all future cases, wherein monies arising from sales of ships for wages, or other causes, are ordered into court. Thus a lien will be created; and, though not originally attaching directly, will be fixed by circuitous and indirect means. I shall continue to adhere to the principles I have endeavoured to establish, not to admit the distribution or payment of surplus, to others than those who originally had liens, or legal appropriations, on the object from which the monies in court were raised.

From what has been stated it appears, that there is no foundation for the claim of the physician. It is true that a court having possession of the principal, has power over its incidents. But these incidents must rise out of the principal, or be in connexion with it, or flow consequentially from it. Thus, if the original cause arises at sea, and matters happen on land dependent upon it, the admiralty has still jurisdiction. So of goods taken piratically, or as prize, at sea, and brought to land—sails, or other apparel or furniture, taken from a ship under cognizance of the admiralty, and brought to land. So of all questions consequential to that of prize, &c. See authorities cited, 2 Bac. Abr. 178–180. Thus if claims, or liens, are legally attached to things, or monies under the cognizance, or within the jurisdiction of the admiralty, this court has power to decide respecting them. But it does not follow, that claims independent of such things, or monies produced from them, and mere personal demands on their owners, are within the reason of, or entitled to the remedy, prescribed by this principle; and I deem it an exclusion from a distribution, or a claim to a surplus, unless a lien or appropriation is precedently and legally fixed, that those who claim such distribution, could not sue in the admiralty for their demands. There is no doubt that the physician has no capacity, as such, to bring a suit in the admiralty court for his demand, which is merely personal, on the owner, or owners of the ship. The amount of the master's claim for $257, as stated in his petition, for monies expended during the voyage, for the purchase of necessaries required in the service of the ship, and wages paid to mariners, is directed to be paid. The claim for his wages is disallowed; and the prayer of the petition of Dr. Baldwin cannot legally be granted.

I have gone so much at large into this subject, that the principles established in its discussion, may regulate future claims to monies brought into court, under similar circumstances.

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described, prosecuted or punished, according to any other law now extant. Some of the highest, and most of the inferior crimes and offences, are undefined by any law of the United States. For what depends then on any other provision, they may be committed with impunity, if common law designations and definitions, and the forms of process, and modes of proceeding are rejected. We have experience sufficient to convince us of the inefficiency, and often mischief, apparent in attempts to substitute alterations, or supposed amendments, for the rules and principles of the common law. It would be more than human, if it were entirely perfect. If experience and change of circumstances suggest alterations, they are but few. In attempting reform in these, if we shake the whole fabric, it were better to suffer it to remain undisturbed. In another note on the same case—Thompson v. The Catharina [supra],—I have been also careless or unfortunate, in expressing myself, on another part of the subject. The two last sentences of the last paragraph of the first note should read thus—"an agreement not to bring a suit to enforce performance of a contract, if made for a time limited, is well; but if made posterior to the bond, contract, or agreement, indefinitely, it amounts to a general release." See Carth. 64; Comb. 123, 4.

Case No. 5,234.

GARDNER v. PEYTON.

[5 Cranch, C. C. 561.] [1]

Circuit Court, District of Columbia. May Term, 1839.

PLEADING — NON ASSUMPSIT WITHIN FIVE YEARS UPON PROMISE TO COLLECT AND ACCOUNT FOR MONEY.

1. Non assumpsit within five years, &c., is not a good plea to an action of assumpsit upon a promise to collect money and account for it.

2. The cause of action does not arise until the money has been received by the defendant and demanded by the plaintiff.

Assumpsit by the defendant [F. Peyton, Jr.], as an attorney at law to collect a debt due to the plaintiff's intestate [Z. Gardner], and to account for the same when collected. The declaration avers that the defendant collected the money, but refused to pay it to the plaintiff on demand.

THE COURT (THRUSTON, Circuit Judge, absent,) on general demurrer, decided that the plea of non assumpsit infra quinque aunos, was not a good plea to an action upon such a promise.

At the trial, upon the issue on the plea of actio non accrevit, Mr. Neale, for the defendant, contended that the action accrued upon the receipt of the money by the defendant, and cited 3 Bl. Comm. 25; Laws Va. Nov. 19, 1792, p. 97, § 12; Laws Va. Dec. 19, 1792, for limitation of actions, p. 107, § 4; Taylor v. Armstead, 3 Call, 200; Kinney v. McClure, 1 Rand. [Va.] 284; 2 Har. Dig. 1458; Manning's Index, 57; 2 Tuck. Bl. Comm. 388, 430; and thereupon moved the court for an instruction to the jury to that effect.

But THE COURT refused, and stopped Mr. Taylor, for the plaintiff, who was about to reply; being of opinion that the cause of action did not accrue until demand of payment, and the defendant's refusal to pay.

Verdict for the plaintiff.

Case No. 5,235.

GARDNER et al. v. The ROSEDALE.

[2 N. J. Law J. 83.]

District Court, D. New Jersey. Feb. 11, 1879.

MARITIME LIENS—MATERIALS FURNISHED ON OWNER'S CREDIT.

[Where the proof shows that the credit for materials furnished to a vessel was not given to the vessel alone, but to the owner, the only action for the price of the materials is against the owner in personam.]

The libellants having proved that they furnished materials for a vessel upon the personal responsibility of the owner, the libel was dismissed.

NIXON, District Judge. This is a libel in rem to recover the amount due the libellants for furnishing seats to the steamer Rosedale. Both the libellants and claimant reside and carry on business in New York, and the steamer is owned and registered there. She was built at Norfolk, Va., in the year 1877, by George W. Beach for the claimant for the sum of $54,000. The putting in of the seats was in the original contract for her construction, and the seats were ordered by the builder, Beach, before the vessel was launched, but to save the transportation to Norfolk, she was brought to Hoboken, N. J., for the purpose of receiving the seats. After she reached there, and about the time the libellants began to furnish the articles, they learned that Beach had had trouble about paying his bills, and the work was suspended until some more satisfactory arrangement was made respecting payment for the same.

One of the clerks of the libellants called upon the owner's brother, Philemon Smith, who he understood was authorized to act for his brother in all matters pertaining to the steamer, and procured from him a promise that his brother would pay the bill if the seats were furnished. Mr. Gardner, one of the libellants, swears that it was in consequence of this personal guaranty by the owner that the debt was contracted. The claimant on the other hand insists that the materials were furnished and the work done on a contract with the builder, Beach, and as it came without the original contract for building and equipping the vessel, a libel in rem is not maintainable, because the contract was not maritime. The difficulty about the libellants' case is, that the proof which they offer, that Smith, the owner, agreed to pay for the seats, discharges the steamboat from all liability by a proceeding in rem. If the testimony is true, the credit was not given to the vessel, but to the owner, and in such cases the only remedy for the creditor is against the owner in personam.

All lien is lost, if any ever existed under the local laws, by lapse of time; and upon the proofs the libellants must be left to their personal remedy against the owner. The libel in rem is dismissed with costs.

GARDNER (RUAN v.). See Case No. 12,100.

Case No. 5,236.

GARDNER v. SHARP.

[4 Wash. C. C. 609.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1826.

REAL PROPERTY — POSSESSION UNDER TWO TITLES —THE BETTER TITLE—ESTOPPEL—GRANT FROM PROPRIETARIES—SURVEY—LIMITATIONS.

1. The rules of law as to removal from one state to another, as the same affects judicial

[1] [Reported by Hon. William Cranch, Chief Judge.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

citizenship, and the jurisdiction of the courts of the United States.

[Cited in Doyle v. Clark, Case No. 4,053.]

2. The statute of 21 Jac. I. as to twenty years possession, was not adopted in New Jersey by force of the act of 1727; the action of ejectment having been always considered on the same footing as the writ of right.

3. To show a title out of the proprietaries, a grant, warrant and survey under the proprietors, or length of possession against them, may be shown.

4. A, being tenant in tail of the land in dispute, conveys the same in fee with a general warranty to B, who had a title to the land by a warrant and survey under the proprietaries, and who, on such conveyance by A, went into possession and retained it ever afterwards. In an ejectment by the issue in tail of A against B, the latter is not estopped to deny the validity of the plaintiff's title and to set up his own paramount title against him. Estoppels operate equally and reciprocally. The plaintiffs claiming per formam doni cannot be estopped: so neither can the defendant.

[Cited in The City of Aurora v. West, 22 Ind. 520; Evans v. Evans, 29 Pa. St. 279.]

5. How far a survey and report of a deputy surveyor, returned to the surveyor general's office and adopted by him, and by him reported to and accepted by the council of proprietaries and ordered to be recorded, passes the title out of the proprietors. When these things are done, the title of the party relates back to the survey.

6. If a man has two titles to land, one defeasible, and the other indefeasible, and he enters generally, the law adjudges that he entered under his better title.

7. The defendant, at the time he purchased and received a conveyance of the land in dispute from the tenant in tail, the ancestor of the plaintiff, had a regular survey under a warrant for the same land, which survey had been returned by the surveyor general to the council of the proprietors, and was by them accepted and ordered to be recorded, and was so. Having both these titles, the defendant entered in 1753, and has ever since retained the possession. The tenant in tail, died in 1775, leaving a son, the father of the plaintiff, who died in 1776. This suit was brought about 1815. *Held*, that this action is barred by sixty years possession under the first, and by thirty under the second of the act of limitations, of the act of the 5th of June, 1787.

This was an ejectment to recover a tract of land in the state of New Jersey. The declaration avers [Mary Gardner] the lessor of the plaintiff to be a citizen of Pennsylvania, and the defendant a citizen of New Jersey. The title of the lessor of the plaintiff was as follows: The will of John Kyd, dated the 16th of October, 1750, by which he devises to his son Isaac the land in controversy in fee tail. Deeds of lease and release dated in March 1737, by John Champness to John Kyd, for a tract of land, of which the tract in question is a part. A deed of bargain and sale for this land, dated the 9th of November 1753, from Isaac Kyd, the tenant in tail, (John Kyd the devisor being then dead) to Joseph Sharp in fee simple, with a general warranty.

Evidence was given that Isaac Kyd died some time in the year 1776, leaving Ebenezer his heir at law and issue in tail, who died, in the year 1777, leaving the lessor of the plaintiff, then four or five years of age, his heir at law and issue in tail; that she married under age, but came of age before 1795, in which year her husband died. In the year 1799, she married one * * *, who died in the year 1808, and in the same year she married one * * *, who died in the year 1814. In 1817, she married Gardner, who died some time in 1818 or 1819. Evidence was also given, that after the conveyance by Isaac Kyd to Joseph Sharp, the latter went into possession under that deed; and that the possession has ever since remained in the said Sharp and his family claiming under him.

The defendant gave in evidence a survey returned by Jacob Richman, deputy surveyor to James Alexander, surveyor general, dated the 27th of March 1753, signed by him as deputy surveyor, which paper is certified by the surveyor general to be a true copy from the return filed in the office of the surveyor general at Burlington. It sets forth, that by virtue of a warrant dated the 4th of August 1743, for fourteen hundred and fifty-nine acres, and of another for eight hundred and sixty-three acres, dated the 3d of August 1748, to the legatees of Thomas Lambert, and of an assignment by said legatees to John Beaumont of said parcels of land, and of a conveyance by said Beaumont to Isaac and Joseph Sharp for one thousand acres, part thereof, he had surveyed for Joseph Sharp ninety-one acres, part thereof, by certain metes, bounds and marks, all of which are minutely stated. He also gave in evidence a paper signed "James Alexander, Surveyor General," dated the 10th of December 1755, which certifies that by virtue of the two warrants, conveyance by Lambert's legatees to Beaumont, and by Beaumont to Isaac and Joseph Sharp, as set forth in the above report and survey of Richman, "he had caused part thereof to be surveyed for Joseph Sharp, in part of his share thereof, by his lawful deputy Jacob Richman." It then proceeds to state the boundaries by course and distance, precisely as they are stated in the report of the deputy surveyor, containing ninety-one acres. At the foot of this paper, above the signature of the surveyor general who certifies the copy, is the following authentication: "February 5th, 1756, inspected and approved by the council of proprietors, and ordered to be recorded." Evidence was also given by one witness, who had surveyed the land, that the above survey covers the whole of the tract conveyed by Kyd to Sharp. But this was contradicted by another witness who had also surveyed the land.

It was admitted that the title of Joseph Sharp, whatever it was, was regularly vested in the defendant, under a devise in his will. It was also proved that the possession of the land, in dispute, had continued constantly in the family of Joseph Sharp, from the year 1753 to the present time. The plaintiff then

gave the following evidence to prove a title under the proprietors prior to that set up for the defendant under the above survey in 1753, viz.: A deed from Lord Berkley to John Fenwick, dated the 18th of March 1673, for one half of the province of New Jersey. Deed from Fenwick to Edward Champness and wife, dated the 14th of March 1674, for two thousand acres, to be taken and surveyed out of the undivided moiety of New Jersey, in such manner as he, or the governor and council in his absence, or the surveyor general should think fit, in the most equal way with the other proprietors. An assignment by Edward Champness to his son John in 1704, of the above two thousand acres. Deed, 30th of November 1676, by Fenwick to Hedges and wife for two thousand acres of land, similarly expressed with that to Champness. On the 2d of April 1725, under a warrant to Coxe for two thousand acres, and an assignment of twelve hundred and thirty-three acres, part thereof, to Hedges, there were surveyed for him ten hundred and sixty-seven acres, beginning at a corner of John Kyd's land. Hedges, by deed, 30th of November 1725, released to John Kyd all his right to two hundred acres, then in the occupation of said Kyd. A bond, 12th of October 1720, by John Champness and Sarah Hall, conditioned to convey to John Kyd two hundred acres, to be taken out of any part of the undivided estate, manors or lands of John Fenwick, deceased.

Points made by the plaintiff's counsel: (1) This court has jurisdiction of the cause, the weight of evidence being in favour of the averment that the lessor was a citizen of Pennsylvania when this suit was brought. (2) Upon the death of Ebenezer Kyd in 1777, the lessor of the plaintiff became entitled to the land in controversy, as issue in tail under the will of John Kyd. (3) The defendant having purchased and received from Isaac Kyd a conveyance in fee simple of this land, under which he took possession thereof, he is estopped to set up a paramount title under the warrant and survey to Joseph Kyd, or in any manner to controvert the title of Isaac Kyd. The title of Joseph Sharp under the warrant and survey was not perfected or vested in him until the year 1756, when the survey was approved by the board of proprietors, (the report of the surveyor general not referring to that of his deputy by its date) before which period, Sharp was in possession under Kyd. Rev. Laws, 81; Coxe [1 N. J. Law] 172, 432; 10 Johns. 293; 1 South. [4 N. J. Law] 260. (4) The deeds from Berkley and Fenwick, and the subsequent conveyances down to John Champness, show a title out of the proprietors prior to the warrant and survey under which the defendant claims; or if there be any deficiency in this chain of title, the jury ought to presume a grant and possession under it, as far back as 1674, to those under whom John Kyd claimed. (5) The plaintiff is not barred under the act of assembly of June 5, 1787 (Rev. Laws, 81), by a possession of sixty years; because, in this case, the limitation did not begin to run before 1775, when Isaac Kyd died; nor by thirty years possession, because Joseph Kyd's possession did not commence under a proprietary right, but under Isaac Kyd; nor was the possession obtained under a bona fide purchase from a person supposed to have a legal right to the land, as the demise in John Kyd's will, showing that Isaac was only tenant in tail, is recited in the deed of Isaac Kyd to Sharp. Nor is he barred by twenty years possession, under the act of 1799, because, after the number of years of the various disabilities of the lessor of the plaintiff are added together, and deducted from the whole time, since her right accrued, twenty years prior to the bringing of this suit have not run against her. Rev. Laws, 410; 2 South. [5 N. J. Law] 850; Willis, 9, 11; 4 Johns. 211; 2 Halst. [7 N. J. Law] 16–18. (6) The plaintiff has a title by possession of twenty years against the proprietors, which is a sufficient title under the act of 1727 (Allison's Laws, 72), which adopts all the English statutes of limitations, and amongst them that of 21 Jac. I. (7) At all events, the plaintiff is entitled to recover so much of the land conveyed by Isaac Kyd to Joseph Sharp, as is not covered by the warrant and survey of Sharp.

For the defendant it was contended: (1) That this court has not jurisdiction of the cause, the evidence clearly proving that the lessor of the plaintiff was a citizen of this state when this suit was brought. (2) The paramount title of Joseph Sharp under his warrant and survey returned, approved, and recorded, defeats that of John Kyd, in whom no title under the proprietors is shown, either documentary, or possessory. The title pretended to be set up under Fenwick is totally defective, not only because the recitals in the quinque partite deed, and in other documents stated in Leam. and Spicer, show, that Fenwick never had any beneficiary interest in West Jersey under the deed to him from Lord Berkley, but because, if he had, no title from him to the land in controversy is deduced down to John Kyd. (3) The possession of Sharp was under his warrant and survey. But whether so or not, the doctrine of estoppel does not apply, or if it does, as it must operate equally and reciprocally, it will estop the lessor of the plaintiff to deny that Sharp acquired a complete legal title in fee simple, under his deed from Isaac Kyd. Co. Litt. 352. (4) The title of Sharp, though not perfected till his survey was returned and approved and ordered to be recorded, commenced at the date of the survey; those acts when done, relating back to the survey reported to the surveyor general. 1 Halst. [6 N. J. Law] 11. (5) The plaintiff is barred by sixty years possession, which commenced in the

year 1753. He is also barred by thirty years possession, even if the limitation began to run in 1776, for it then ran over all the subsequent disabilities of the lessor of plaintiff. It was founded on a proprietary right, and also it was obtained bona fide, from a person in possession supposed to have a legal right; for the deed of Kyd to Sharp asserts a legal fee simple estate in the grantor, which it conveys with general warranty, and no doubt both parties supposed that such was the estate vested in the grantor. 18 Johns. 355, 360; Pa. St. 447; Cowp. 217; Ball. Lim. 19. (6) The statute of limitations of 21 Jac. I. in relation to ejectments, was not adopted or introduced into this province by the act of 1727, and nothing short of sixty years, the bar to the writ of right, barred the ejectment; the latter having always been considered as on the footing of the former, prior to the act of limitations of 1787 and 1799. Coxe [1 N. J. Law] 222; 2 Halst. [7 N. J. Law] 11.

Elmer & Wall and L. H. Stockton, for plaintiff.

R. Stockton and Mr. Jeffers, for defendant.

WASHINGTON, Circuit Justice (charging jury). The first question for the consideration of the jury is, whether this court can take jurisdiction of the cause now under consideration. This depends upon the question, whether the lessor of the plaintiff was a citizen of the state of Pennsylvania, as the declaration avers, at the time this suit was brought; or was a citizen of this state, as the defendant insists. And this is always a mixed question of law and fact. The decision of the former rests with the court; the latter must be determined by the jury.

In reference to the jurisdiction of the courts of the United States, citizenship means domicil—home—permanent residence. When a citizen of one state removes to another, and a question of jurisdiction arises, it must be decided by the quo animo which induced the removal. If it was to remain permanently in the state to which he has emigrated, it amounts to a change of domicil and of citizenship. If it was merely for a temporary purpose, he can be considered only as a sojourner in the state to which he has gone. Length of residence, although it may afford evidence of the real intention of the party in changing his place of residence, is not of itself a criterion of change of domicil. If the intention of the party be bona fide to change his domicil, the residence of a day at his new home constitutes him a citizen of the state to which he has removed. If, on the contrary, his removal was accompanied by the animo revertendi, he is considered in law but as a sojourner in the state where he has fixed his temporary residence, although that residence may have continued for years. If the removal be for the purpose of giving jurisdiction to the courts of the United States, it is a fraud upon the constitution and laws of the United States; unless it was also accompanied by an intention in the party to change his domicil. For although such a motive, if proved, may subject the good faith of the transaction to suspicion; still it will not be sufficient to prevent the change of citizenship if that was bona fide the intention of the removal, and change of domicile was bona fide. Having laid down these general principles for the information of the jury, it will be for them to apply them to the facts of the case. (Here the judge summed up the evidence in relation to this point.)

We have now come to the merits of the cause, which involves the two following general questions: (1) Has the lessor of the plaintiff shown such a title to the land in controversy, as to entitle him to a verdict? And if he has, then (2) Is his right barred by the act of limitations?

1. The title of the lessor, as deduced by the opening counsel, commences with a deed in the year 1737, from John Champness to John Kyd, for three hundred acres of land, including that in dispute, then in the possession of Kyd. The will of John Kyd in 1750, by which he derives the land in controversy to his son Isaac, in fee tail. On the 9th of November 1753, Isaac conveyed the same to Joseph Sharp, in fee simple, with general warranty, who entered thereon in the course of that year. Isaac died in the year 1776, leaving a son Ebenezer, his heir at law, and issue in tail. In the year 1777, Ebenezer died, leaving the lessor of the plaintiff, then an infant, his heir at law, and issue in tail. In this chain of title it is manifest that an essential link is wanting, and that is, a grant, or something equivalent thereto, to pass the title out of the proprietors to some person under whom the lessor claims. This was to be effected by warrant and survey duly made and returned, approved by the council of proprietors, and recorded, or by length of possession. Whether the title could pass out of the proprietors by any other mode, need not be decided, as none such was alluded to in this case by the opening counsel. No warrant or survey in favour of any person under whom the lessor claims, has been given in evidence. But a title is asserted under the grant from Lord Berkley to John Fenwick, and sundry conveyances by Fenwick and others, claiming under him, which must now be attended to. Whether Fenwick ever had a title, otherwise than as trustee, to West Jersey, may, at least, admit of a doubt; but supposing his title to have been indisputable, it remains to be seen whether it passed, in respect to the land in dispute, to any person under whom John Kyd claimed. The deeds from Fenwick to his two sons in law, Edward Champness, and Samuel Hedges, and their wives, were for two hundred acres to each, to be taken out of the undivided moiety of New Jersey. These deeds could pass a title to no specific tracts of land until they were surveyed, and no evidence of any such sur-

veys has been given. Neither does it appear to what tract of land the release of Hedges to John Kyd, of the 30th of November 1725, for two hundred acres, applied.

But it is contended by the plaintiff's counsel, that the jury may, and ought, to presume an ancient survey of the lands granted by Fenwick to his sons in law, founded upon those grants. Were it to be admitted that the evidence laid a sufficient ground for such a presumption, it is still open to be rebutted by other evidence, leading to the conclusion that no such survey was made. The following circumstances are now submitted to the consideration of the jury in support of this conclusion:

(1) After a thorough search of the records of the surveyor general's office, from the year 1686, the present surveyor general has deposed that he could find no survey of this land in favour of Fenwick, Edward or John Champness, John Kyd, or any other person, except Joseph Sharp, in the year 1753. He stated that the records in that office did not extend farther back than the year 1686.

(2) The bond of John Champness and Sarah Hall, before mentioned, to John Kyd, given as late as the 12th of October, 1720, affords strong evidence that no survey had then been made: since it obliges the obligor to convey two hundred acres of land, not by metes and bounds, or by any other description, but to be taken out of any part of Fenwick's undivided moiety.

(3) The assignment of Edward Champness to his son John, in the year 1704, (eighteen years after the year 1686,) of his interest in the two hundred acres granted to him by Fenwick, makes no mention of any such survey, and gives no description of the said land by metes and bounds, or otherwise.

(4) By the act of 1719 (Rev. Code, § 11) it is enacted, "that all surveys heretofore made, the certificates whereof are in the hands of any of the inhabitants of the province, or any of the neighbouring provinces, which are not within two years; and that all surveys heretofore made, the certificates whereof are in the hands of the people living beyond seas, which are not, within three years after the publication hereof, duly recorded, either in the recorder's office or in the surveyor general's record of the respective division in which such lands are surveyed; be for ever hereafter void, and of none effect; and any succeeding survey, duly made thereof and recorded, shall be as good and sufficient as if no former survey had been made." This was certainly a very awakening act, and it is to be presumed, would have induced all persons who had surveys of their lands previously made, to have them recorded within the prescribed periods. But admit that a survey of the land prior to 1719, instead of being presumed into existence, were proved by positive evidence, I am at a loss to imagine how the plaintiff could extricate himself from the effect of this law, which declares it to be void for want of being recorded, and gives validity to the subsequent survey made in 1753, for Joseph Sharp. This difficulty was foreseen by the plaintiff's counsel, and the answer given to it was, that the law can only make void such unrecorded surveys in favour of subsequent surveys, made without notice of such prior unrecorded surveys. Let this for the present be admitted. It may still be asked, what proof has been given that Sharp or the deputy who surveyed the ninety-one acres in 1753, had notice of a survey not now produced, nor evidence given of its existence, but which the jury are now called upon to presume did once exist?

As to a possessory right in John Kyd, or those under whom he claims against the proprietors, none is pretended beyond twenty-eight years, from 1725 to 1753, when Sharp's survey under his warrant was made. This, it is contended by the plaintiff's counsel, is sufficient under the act of 1727, which it is supposed adopts the statute of limitations of 21 Jac. I. of twenty years. But I take this question to be otherwise settled by the supreme court of this state, where it has been decided, that the action of ejectment had always been considered as on the same footing with the writ of right, and that the statute of Jacobus in that respect did not extend to this state. Den v. Pissant, Coxe [1 N. J. Law] 222; Den v. Morris, 2 Halst. [7 N. J. Law] 11.

I do not understand the plaintiff's counsel to have denied that a right by grant, warrant and survey from the proprietors, or length of possession against them, is an essential link in their chain of title. But they deny that it lies in the mouth of the defendant to question the validity of the plaintiff's title, or to set up an adverse paramount one against her; because he is estopped to do either by the deed from Isaac Kyd, which conveyed a fee simple estate in the land in controversy to Joseph Sharp. The answer given to this argument by the defendant's counsel is conclusive. If he is estopped to deny the title of the lessor to this land, because her ancestor, the tenant in tail, granted to Joseph Sharp a fee simple interest in it; she must be estopped to deny the title so conveyed by that deed, since estoppels operate equally and reciprocally. But the fact is, that the doctrine of estoppels has no application to this case. The deed from Isaac Kyd passed a bare fee to Sharp, and both of those parties were estopped to deny that title. But the lessor is neither party or privy to that deed, but a mere stranger, claiming, not under Isaac Kyd, the tenant in tail, but under John Kyd, the donor, per forman doni. She then is not estopped by that deed to assert her title as issue in tail, and consequently the defendant is not estopped to deny her right to the land, or to set up a better title against her. Whether the survey for Sharp in 1753 covers the whole of the land in controversy, may be a question of doubt. One witness has sworn that it does, and another witness that it does not. But if the jury

should be of opinion that the plaintiff has failed in showing a title, this will be an immaterial point in relation to this branch of the cause, since the defect in the title of the lessor will be fatal to her recovery of any part of the land to which she sets up a claim.

2. The next question to be considered is, whether, if the plaintiff has shown a title to the land in dispute, it is barred by either of the acts of limitation? and this may in some measure depend upon the decision of two preliminary questions. (1) When did Joseph Sharp's title under his survey commence? (2) Under what right did he enter?

(1) On the 27th of March, 1753, Jacob Richman, deputy surveyor, having in his possession certain warrants, one thousand acres whereof had been regularly conveyed to Joseph Sharp, entered upon the land in controversy, and surveyed for him ninety-one acres by metes and bounds. This survey, with his report, he returned to the surveyor general, who placed it amongst the files in his office, as was the uniform practice of that department. He adopted the work as his own, after having made some immaterial formal alterations in the report or certificate of his deputy, such as omitting to state the corner trees, and specifying the names of Lambert's legatees, in whose favour the warrants issued. On the 10th of December, 1755, he made a regular certificate of the survey thus amended, and reported to the council of proprietors that by virtue of those warrants, and conveyances from the original warrantees to Sharp, he had caused part thereof to be surveyed for said Sharp by certain metes and bounds, by his deputy, Jacob Richman, containing ninety-one acres. He does not describe Richman's survey by its date, which he omits altogether; but the recitals, the courses and distances, and the beginning, are precisely the same in both reports, and it is admitted by the plaintiff's counsel that they both describe the same identical parcel of land. The survey and report of the deputy surveyor is a regular office paper, belonging to the archives of the surveyor general's office, and is the foundation of the surveyor general's certificate and report to the board of proprietors. The evidence of the surveyor general given in this cause is material. He stated that the date of the survey and report of the deputy is sometimes inserted in the certificate of the surveyor general, and is sometimes omitted. That according to the regular practice of the office the original survey and report of the deputy is put upon the files; for the purpose of being referred to by the surveyor general, to see when the survey was actually made, and to settle priorities of titles, where there are different surveys for the same land. He further stated that it had been, and continued to be, the practice for the surveyor general to alter and correct the report of his deputy, and that the report and certificate of the surveyor general, with these corrections, is returned to the board of proprietors; and if, after examination, it is there approved, it is ordered to be recorded. The result of all this then is, that the survey of this ninety-one acres of land was duly made on the 27th of March, 1753—was reported to the council of proprietors by the surveyor general on the 10th of December, 1755, and was approved and ordered to be recorded on the 5th of February, 1756. It is admitted on all hands, that the survey passes no title whatever unless it be approved by the council of proprietors and ordered to be recorded. But when this is done, we have the authority of the late Chief Justice Kirkpatrick for saying, that the title relates back to the survey; and this position, upon general principles of law, seems to be incontrovertible. The title then of Joseph Sharp to the ninety-one acres of land, commenced on the 27th of March, 1755.

(2) Under what title did Joseph Sharp enter? One witness, who was but nine years old in the year 1755, has deposed, that he entered under Kyd's title; but this is obviously an inference of the witness from the circumstance of Sharp having received a deed from Isaac Kyd in November 1755, after which he went into actual possession of the land; for he does not state any declarations or acts of Sharp to warrant his conclusion. But be this as it may, and admit that Sharp did not enter until after the date of Isaac Kyd's deed in November 1755. He then entered, having two titles to the land; one prior and indefeasible under his survey, and the other posterior and defeasible after the death of Isaac Kyd. In such a case, the law adjudges that he entered by his paramount and better title; and this entry was adverse to the title of Isaac Kyd.

Now what says the act of limitations? The first section of the act of the 5th of June 1787 [supra] declares, "that sixty years actual possession of any lands, &c. uninterruptedly continued by occupancy, descent, conveyance or otherwise, in whatever way or manner such possession might have been commenced or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, &c. and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatever for the recovery of such lands." It is not to be questioned that Joseph Sharp and those claiming under him, have had upwards of sixty years' actual possession of the land from the year 1753 to the institution of this suit. The case is equally clear against the plaintiff, under the second section of this act; which declares that thirty years' actual possession of any lands, &c. uninterruptedly continued as aforesaid, wherever such possession commenced or is founded upon a proprietary right duly laid thereon, and recorded in the surveyor general's office of the division in which such location was made, or in the secretary's office, agreeably to law, &c. shall be a good and sufficient bar to

all prior locations, rights, titles, conveyances or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands, &c. This act has the usual savings in favour of infants, femes covert, persons non compos, or without the United States at the time the said right or title first descended or accrued; who are allowed to bring their actions within five years after the removal of these disabilities. Under this section, it is quite immaterial whether Joseph Sharp entered under Kyd's title or not, or whether his title under the survey commenced in 1753 or 1755; for in the latter case, having a good title under his survey, his possession was founded upon a proprietary right, duly laid on the land, and recorded in the surveyor general's office, &c. although it might not have commenced upon such right. This possession began to run in 1776, adversely to Ebenezer Kyd, and consequently ran over all the subsequent disabilities of the lessor of the plaintiff, and so continued for more than thirty years before the bringing of this suit.

The jury found for the defendant.

Case No. 5,237.

GARDNER v. SIMPSON.

[2 Cranch, C. C. 405.] [1]

Circuit Court, District of Columbia. April Term, 1823.

SLAVERY—FREEDOM.

A Virginian slave is not entitled to freedom, under the Maryland act of 1796, c. 67, by being hired to a resident of the county of Washington for a limited period.

[Cited in Maria v. White, Case No. 9,076.]

Petition for freedom. Upon the trial, the petitioner's counsel took a bill of exceptions, which stated that he offered evidence to prove that the petitioner [Vincent Gardner, a negro] was residing in the city of Washington previous to Christmas, 1821, and continued so to reside till the end of the year 1822. That the defendant [Thompson Simpson] was a citizen and resident of Virginia, and knew that the petitioner was so residing in Washington, and made no objection to his so residing. That the defendant offered evidence to prove that the petitioner was his slave, born in Virginia, and that he hired the petitioner to the petitioner's father, Tom Gardner, for the year 1821, who then lived in Virginia. And that in 1822, he hired him to one Barnes, for the petitioner's father, not knowing that the father was about to remove into the county of Washington in the District of Columbia, which he did in December, 1821, taking the petitioner with him, where he remained until the 22d of December, 1822, and was at the defendant's house in Virginia, on the 25th of the same month. That the petitioner afterwards returned to Washington, and did not return to the defendant at the expiration of the year, but remained in Washington, and claimed his freedom in consequence of such removal to Washington.

Whereupon, THE COURT, at the prayer of the defendant's counsel, instructed the jury, that if they should be satisfied by the evidence, that the importation of the petitioner into the county of Washington was with the intent that he should be hired to remain for a limited time only, and not permanently, it was not such an importation as is within the first section of the act of Maryland of 1796, c. 67. Verdict for the defendant.

A bill of exceptions was signed and a writ of error taken out, but not prosecuted.

[1] [Reported by Hon. William Cranch, Chief Judge.]

GARDNER (TAYLOR v.). See Case No. 13,791

Case No. 5,238.

GARDNER et al. v. TENNISON.

[2 Cranch, C. C. 338.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.

ASSIGNMENT OF DEBT—PAYMENT TO ORIGINAL CREDITOR.

Payments made to the original creditor, after notice of the assignment of the debt, cannot be given in evidence in a suit brought by the assignee in the name of the original creditor.

Indebitatus assumpsit [by Gardner & Johnson] for the balance of an account for coal sold and delivered. At the foot of the account there was an order on Tennison to pay the balance ($76) to John O. Lay, of Richmond.

THE COURT (THRUSTON, Circuit Judge, absent), on motion of the plaintiff's counsel, instructed the jury, that if they should be satisfied by the evidence that the account was assigned by the plaintiffs to Lay, and that the defendant had notice of such assignment, his payments to the plaintiffs after such notice, could not be given in evidence in this action.

[1] [Reported by Hon. William Cranch, Chief Judge.]

GARDNER (UNITED STATES v.). See Cases Nos. 15,187 and 15,188.

Case No. 5,239.

GARDNER v. The WHITE SQUALL.

[36 Hunt, Mer. Mag. 452; 38 Hunt, Mer. Mag. 322.]

District Court, S. D. New York. Jan., 1857.

SHIPPING—BOTTOMRY—POWERS OF MASTER—RATIFICATION.

[1. The master cannot make a loan on bottomry to pay purchasers of claims for repairs

in a foreign port, contracted five months prior thereto under no expectation of bottomry security.]

[2. Where the owners, with all the facts before them under which a bottomry bond was given by the master in a foreign port, claim and receive their share of the general average from the underwriters, it amounts to a ratification of the making of the bond.]

[This was a libel in rem by John Gardner and others against the bark White Squall, to enforce a bottomry bond.]

BETTS, District Judge. The bark White Squall, commanded by E. J. Harding, master, sailed from New York for San Francisco on the 17th of February, 1855, and on the 25th of March thereafter put into Rio Janeiro, in distress, for repairs. The master consigned the ship to Graham Bros. & Co. Endeavors were then made to obtain money by bottomry sufficient to make the repairs and outfit necessary to enable the ship to prosecute her voyage to San Francisco. The surveyors of the ship estimated the amount necessary at £2,500 sterling; but no loan could be obtained at a less premium than 75 per cent. The master wrote to the owners for directions from them and the underwriters. None had been received on the 1st of July. In the meantime, the vessel having been made nearly ready for sea, a call, by notice through the papers, was again made for an offer of a loan on bottomry to continue the voyage to San Francisco, to be addressed to the consul's office. No offer being given, the master then advertised for such loan to bring the vessel with her cargo back to New York, but obtained none for that voyage either. The master had sold part of the ship's cargo and applied the proceeds towards the repairs, and entered into a contract of charter for the vessel, when Mr. Lang came to Rio as agent of the owners, and brought £2,200 sterling, which was also expended upon the debts contracted for the repairs. Soon after Lang's arrival, Harding left the ship as master, and Burke, her first mate, was on the 1st of October appointed by Lang, master in his place. He executed the bottomry bond on the 5th of December, 1855. The vessel had been ready for sea for about five months. Burke executed the bond under the direction of Lang, without any knowledge of the necessities of the vessel, but because he was told that Lang must have more money.

Upon the facts in proof the master had no authority in law to give the bottomry hypothecation in question. The debts all accrued from separate credits given the master of the vessel, or her consignees, by mechanics, material men, and others, and were entirely incurred at a very considerable period before the treaty for this hypothecation was on foot with the bottomry lender. These facts were notorious. It was, therefore, well understood that the loan was made to extinguish antecedent debts not contracted under any assurance or expectation of a bottomry security, and was not made to the creditors themselves, but to others who bought in the debts in effect at an abatement of 33⅓ per cent. from the amount. The master could not bind the ship, her cargo, and freight, to the satisfaction of such debts. The Virgin v. Vyfhius, 8 Pet. [33 U. S.] 538; The Aurora, 1 Wheat. [14 U. S.] 96; Abb. Shipp. 200 (note 1); [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 386. But although the bond was signed by the master, yet he acted in the matter under the direction of the agent of the owners, and not on his own judgment and discretion. This agent was sent to Rio by the owners with funds for the use of the vessel, and, as must be implied, with general powers to act for the owners in respect to the ship. He displaced the original master and substituted another. He called in the bills of the ship, had them all adjusted, and authorized a composition with the creditors. He then arranged with the consignee of the ship for her hypothecation, for the purpose of raising money to satisfy the debts still outstanding. After the borrowing hypothecation was made, he had all the papers, including the protest of the master and crew, the particular bills and vouchers for all the expenses of the ship at Rio, with the bottomry bond, transmitted to the owners. They laid these documents before the adjuster of general average at New York, and obtained from him a computation and allowance of their share of the general average, and claimed and received that share from the underwriters. These facts, in my judgment, import that Lang possessed all the power of the owner to hypothecate the vessel, or, at the least, if such powers were not originally conferred upon him, that the owners ratified and assented to their exercise after being fully advised of his acts and the facts upon which he acted. Story, Ag. § 239. The authority of an owner to bottom a ship at home or abroad, without regard to her necessities, seems no longer a question with the authorities. Abb. Shipp. 192, note 1; 3 Kent, Comm. (6th Ed.) 361; Fland. Mar. Law, § 253. The principal cannot be allowed to screen himself from the unfavorable consequences following the doings of his agent, after taking to himself the benefits secured by them. Strong, Ag. §§ 250, 253, 258. The libellants are accordingly entitled to a decree in their favor for the due enforcement of the bond.

[See Case No. 17,570.]

GARDNER, The FANNY. See Case No. 4,642.

GARELLY (BOOTH v.). See Case No. 1,646.

INDEX.

[The references are to pages. The asterisk (*) indicates that the case has been reversed.]

ABATEMENT AND REVIVAL.

Page

See, also, "Bankruptcy."

A suit in equity does not abate by the death of a co-plaintiff or co-defendant. If one plaintiff and one defendant survive, the suit is open for amendment..... 138

ACTION.

Debt or covenant is the appropriate remedy on a writing obligatory..... 801

ADMIRALTY.

See, also, "Courts"; "Maritime Liens"; "Pleading in Admiralty"; "Practice in Admiralty"; "Shipping."

Jurisdiction—Waters and places.

The admiralty jurisdiction on the western lakes and rivers is not limited to cases within Act Feb. 26, 1845, but may be sustained under Act Sept. 24, 1789..... 291

Such jurisdiction is not limited to tide waters, but embraces the lakes and navigable rivers through which interstate and foreign commerce is carried on..... 701

The master of a scow took, without authority, a lighter lying in a fish pond staked off from the Detroit river, and used it in carrying wood from the shores of Lake St. Clair to the scow, and neglected to return it. *Held*, that admiralty had jurisdiction in rem for the tort..... 294

—— Rights and controversies.

A contract for building a ship, or supplying materials for her construction, is not a maritime contract..... 534

As the laws of the state of Pennsylvania provide for shipwrights and material men at the port of outfit, and also regulate domestic pilotage, admiralty will not take cognizance of these matters.....1192

Admiralty has jurisdiction over petitory suits..... 822

A libel in rem will lie for the refusal to receive on board, and the refusal to deliver, cargo contracted by the master to be carried from New York to Brooklyn..... 252

Where the possession of movable property has been changed, against the right of the true owner, by a maritime tort, or by the breach of a maritime contract, to which the property was subject, the owner may vindicate his title in admiralty by a proceeding in rem..... 200

The owner of cargo shipped under a bill of lading can maintain a libel in rem for its restitution, where it has been separated from the vessel by the wrongful act of the master. 200

The forcible deportation of a citizen to a foreign country in an American ship, commanded by an American master, in pursuance or execution of a sentence of banishment of an illegal and self-constituted body of men, is a marine tort.....1091

Page

The master of the vessel who willingly and knowingly carries such sentence into execution is liable for exemplary damages.....1091

No damages can be recovered in admiralty for injury to character, etc., by such sentence, or from protracted exile caused by fear to return.....1091

ADVERSE POSSESSION.

See, also, "Ejectment"; "Limitation of Actions"; "Real Property."

Adverse possession for the time limited by the statute not only bars the remedy, but extinguishes the right, and vests a perfect title in the adverse holder..... 592

The possession of one claiming title without definite metes and bounds, will not, in law, be deemed to extend beyond the actual possession proved..... 723

A plea which alleges just title, good faith, the requisite period of possession, and that possession continued peaceful and without interruption, is sufficient (in Lousiana) to show title by prescription.....1036

Information, knowledge or belief, obtained since the possession commenced, cannot impair the efficacy of such possession as a ground of prescription.....1036

The alienee of a disseisor in possession has a good title as against all persons not having a paramount title..... 202

AFFREIGHTMENT.

See, also, "Admiralty"; "Carriers"; "Charter Parties"; "Demurrage"; "Shipping."

The owner is not excused from the performance of a contract for transportation of a cargo by the freezing in of the vessel and the death of the master, but is entitled to a reasonable time to procure a new master, and to await the relief of the vessel... 255

Measure of damages for breach of contract where part of the cargo had been taken on board..... 255

Cargo *held* liable only for the freight specified in the bill of lading given by the master for goods purchased by the charterer, which stated that delivery was to be made to the order of the seller "without prejudice to charter party."..... 591

Freight paid in advance on a cargo lost by calamity may be recovered back..... 260

On refusal of consignees to pay the freight, the owners may retain sufficient of the cargo to cover the amount..... 630

A partial conveyance is not a compliance with the contract..... 260

Delivery of cargo according to the usage of the port is equivalent to delivery to the consignee personally or at his warehouse... 20

An underdeck cargo of grain shifted in a storm because of the absence of shifting boards, and contributed to produce a list of

Page

the ship. *Held*, that the vessel was liable for the value of cattle washed overboard after the list..... 260
The measure of damages for negligence causing injury to cargo is the difference between its cost and the proceeds of sale..... 530

ALIENS.

A plea in bar in a suit between aliens, that the contract was made abroad, *held* good 41

APPEAL AND ERROR.

Where the writ of error pending in the supreme court was not taken out in time to operate as a supersedeas, execution against the bail will not be stayed, nor will an injunction issue..... 651
Nothing can be assigned for error, which contradicts a record..... 15
Where the merits have been fully examined in the court below on the evidence and law, the judgment there rendered though appealed from, is prima facie right until shown to be wrong..... 980
A judgment, broader and more advantageous than a party is entitled to, will be reversed or modified, although, upon the record, it appears to be technically correct.... 592
An appellate court will not reverse a judgment on technical grounds, where substantial justice has been done..... 137

APPEARANCE.

An appearance cannot be entered upon the docket, out of court..... 802

ARBITRATION AND AWARD.

Where a third person was to be chosen in case the two arbitrators disagreed, it need not appear in the award that the two disagreed, or that the third was appointed in writing..... 973

ARREST.

See, also, "Bail."

The nonimprisonment act of New York (1 Rev. St. p. 807, § 1) does not, by force of acts of congress of 1839 and 1841, embrace arrests upon process issued out of maritime courts..... 1188
Since the adoption of the rules of 1845, parties are liable to arrest and imprisonment on process issuing out of the United States courts, irrespective of subsequent legislation in the several states abolishing imprisonment on like process..... 1062
Act Jan 14, 1841, does not adopt subsequent state laws imposing restrictions and conditions on imprisonment for debt..... 751
Act Mass. May 21, 1885, to abolish imprisonment for debt and to punish fraudulent debtors, does not abolish imprisonment for debt, and is not adopted by any act of congress so as to affect process out of that court. 751

ASSIGNMENT.

Payments made to the original creditor, after notice of the assignment of the debt, cannot be given in evidence in a suit brought by the assignee in the name of the original creditor. 1202

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, "Bankruptcy."

A general assignment for creditors *held* fraudulent, where, from the course of business, the assignor must have had ample assets, but the same were not revealed..... 986
The assignee of one partner *held* to have a prima facie title to notes taken by the other partner for goods sold after the assignment, as against a purchaser with notice. 134

ASSUMPSIT.

Assumpsit will not lie for work and labor done under a sealed agreement unless the whole work has been done according to the contract *810
A payment by an executor while in commitment upon a ca. sa., issued upon a judgment of a justice of the peace in an action against him, is under duress, and may be recovered back..... 649

ATTACHMENT.

See, also, "Garnishment."

An attachment on mesne process is only a contingent and conditional charge, until the judgment and levy..... 508
A foreign attachment is a remedy, and may be defeated by any act, that bars, or takes away the remedy or right to judgment under it..... 508
The remedy by a foreign attachment in Pennsylvania cannot be pursued except for a demand arising under contract, and where the measure of damages can be averred 120
Such remedy may be pursued in an action for breach of a contract, made in a foreign country by persons who had never resided in the state, to deliver a quantity of tea of a particular quality..... 120
It is no ground for dismissing a foreign attachment, instituted in the federal court, that plaintiff had sued out another attachment against the defendant in a state court, and afterwards discontinued it..... 120

ATTACHMENT OF PRIVILEGE.

A clerk of the circuit court of the District of Columbia is not entitled to sue by attachment of privilege..... 455

ATTORNEY AND CLIENT.

An attorney, who enters an appearance, without authority, is answerable in damages, for the injury he may thereby have occasioned the parties..... 15

AVERAGE.

A three-masted schooner, being unable to keep her head to the wind through the loss of her mizzen sail in a severe storm, was put before the wind, and, the storm continuing, was finally beached on the New Jersey coast, it being considered safer to run such risk than to attempt to bring her head to the wind. *Held* a voluntary stranding, and that the vessel owners were entitled to contribution from the cargo..... 196

BAIL.

The administrator of appearance-bail cannot be allowed to appear as appearance-bail and plead for the principal..... 71
Bail is not discharged by a discontinuance of the suit at the rules, if it be reinstated 1025

BANKRUPTCY.

Operation and effect of bankrupt laws, and of proceedings thereunder.

Pending proceedings in bankruptcy, either before or after the decree, a prior at-

Page

taching creditor cannot proceed in his suit to trial and judgment..... 508
In such case, the bankruptcy court will enjoin further proceedings in the attachment suit, but will allow it to be continued until the discharge is obtained..... 508
Whether, if the bankrupt fail to obtain his discharge, the attachment would be gone by the mere operation of the bankrupt act; or whether a judgment in personam may be rendered against him, quaere..... 508
The bankruptcy court will not interfere after the process of the state court has been executed by a sale of the bankrupt's property 978
A bankrupt, surrendered by his bail, during the time allowed for his examination, will not be committed in execution under the bankrupt law of 1800..... 644
Under the act of 1841, the district courts are possessed of the full jurisdiction of courts of equity over all subject matters arising in bankruptcy..... 508
The district court has full power, as a court of equity, to settle all controversies between the bankrupt and his creditors... 616
The district court has the same power to restrain creditors in judgments at law against a bankrupt that a state court would have in case the debtor were not a bankrupt 616

Jurisdiction.

The residence or place of business must be within the district to give the court jurisdiction. The objection cannot be waived by the debtor..... 330
The bankrupt carried on business for nearly two years, and until it finally discontinued business, up to four months of the filing of the petition, in New York City and in Massachusetts, and nowhere else. *Held*, that the petition was properly filed in the Southern district of New York..... 521

Commencement of proceedings—Voluntary bankruptcy.

The pendency of a petition in involuntary proceedings, not carried to adjudication, a composition having been made, *held* no bar to a voluntary petition, where the composition was set aside..... 239
A petition by a corporation in voluntary bankruptcy should be authorized by a vote of a majority of the corporators at a legal meeting called for the purpose..... 760
Stock of an intestate, on whose estate administration has not been granted, is not to be counted..... 760
Such meeting need not be called in the manner prescribed by section 21 of Act N. Y. Feb. 17, 1848, in regard to the formation of corporations..... 760
Where the court has jurisdiction over the debtor, an adjudication on his petition cannot be resisted on the ground that he is solvent, as the filing of the petition is an act of bankruptcy..... 614

—— Involuntary bankruptcy.

The proceedings abate by the death of the debtor between the time of serving the rule to show cause and the adjudication... 737
Secured creditors or those claiming liens are not counted in determining whether the requisite number of creditors have joined in the petition. Act June 22, 1874..... 965
Creditors may unite in the proceedings until the judicial ascertainment, made on notice to creditors, that the requisite number and amount have not joined..... 958
The judgment of the court that the requisite number and amount of creditors have petitioned is final, and the matters so adjudged are not thereafter re-examinable, except for fraud.....1005
Petitioners will not be allowed to amend the petition, to show jurisdiction, after an unexcused delay of nearly a year..... 810

Page

The petition inures to the benefit of all the creditors, any of whom may come in, within a reasonable time, and prosecute it. 744
Seventeen months after discontinuance *held* not a reasonable time..... 744
Where the proofs disclose acts of bankruptcy not averred, the petition may be amended so as to conform to the proofs...1108
A petition by one partner against another is quasi in invitum, and the objecting partner may show that the firm is not insolvent 614
The answer of the debtor must be in writing and verified, and the facts alleged as in pleadings in common-law cases..... 55
The oath of the petitioning creditor to his debt, without further proof, is not sufficient, where the debtor offers prima facie evidence that it is not due..... 507
It is discretionary with the court to order a trial by jury where the existence of the debt is denied, though the creditor does not desire it..... 507
The court may in its discretion issue a special venire and impanel a jury to try the issue at any time, without waiting for a regular term..... 55

—— Acts of bankruptcy.

A general assignment for the benefit of creditors, without preferences, is an act of bankruptcy 958
Voluntary aid given by the debtor in taking his property upon attachment, or in perfecting an attachment previously incomplete, is an act of bankruptcy..... 127
The debtor suffers his property to be taken under legal process, by not defending 180
There is no concealment where the debtor makes a bona fide conversion of his property, and shows good faith in respect to the care of the money received therefrom.... 626
A mortgage of a stock of goods to secure the mortgagee as surety on the mortgagor's note, given with the understanding that the mortgagor should continue his business in the ordinary way, and the subsequent taking possession thereunder, *held* acts of bankruptcy 524
The time to be taken at which to test the condition of the bankrupt, and the knowledge of the creditor, *held* to be the time when a confession of judgment was given, and not the time the execution was issued to enforce the claim..... 9
Where the only proof of an act of bankruptcy is the statement of the bankrupt, such statement must be accepted, in its entirety, as true..... 709
An act of bankruptcy by one member of a firm will sustain an adjudication against the other members, where they are all insolvent, and both their joint and separate property will pass to the assignee....127, 1077
An assignment of firm property by two resident members to secure certain creditors, though dissented to by the other members immediately on hearing thereof, *held* an act of bankruptcy.....1077

Schedule.

The description of property as "an interest in half a lot in Buffalo" is not sufficient 959
Amendments of schedules will be allowed on payment of costs where there is proof that the errors arose from inadvertence.. 959

Assignee—Appointment and removal.

If a power of attorney is given to a firm, and not to either member, one alone is not authorized to vote upon it in the choice of an assignee..... 704
The discretion to approve or disapprove the creditors' election of assignee (Act 1867) is a legal discretion, and a disapproval must be based upon sound reasons.....1004

Page

—— Rights, duties, and liabilities.

The assignee in bankruptcy of an insurance company has no power to waive the performance of conditions by the insured.. 72

Where no question of disputable right exists, assignees cannot obtain the instruction of the court whether to do a proposed act, which, if proper on their part, would be within their own discretion and power on the administration of their trust..... 715

An assignee, jointly interested with others in certain judgments for a lien upon a building, is allowed to compromise his claim upon receiving a pro rata share, and not otherwise 1007

The assignee of one partner becomes a tenant in common with the other partner, and his equities depend on the title of his assignor 464

Property of bankrupt—What constitutes.

A permit to occupy a public market stand *held* property of the bankrupt, and he was compelled to execute a transfer.....1082

Where a devise has been made to a bankrupt, and accepted by him, it is a fraud upon his creditors for him to disclaim, or renounce it, and the court will compel him to do all acts necessary to perfect his title to the devised estate..... 976

A note given in payment of a book account after the petition filed, but before the adjudication, *held* properly paid to the holder 1140

—— Exemptions.

Where no property is claimed under the specific exemptions of the bankrupt act, the claim for an allowance must stand upon the exemption granted by the state laws.... 821

Under the law of Georgia which exempts personal property of the value of $1,000 in specie, the bankrupt is not entitled to money the proceeds of articles sold by the assignee 821

Where the assignee ignored the specific exemption clause, and sold the property, *held*, that the bankrupt was only entitled to the proceeds of sale, and not to $1,000.. 821

Unauthorized exemptions of real estate are void, but, in the case of personalty, exception must be made to the allowance within the requisite time, under general order 19.....1065

—— Liens.

The assignee takes the property and rights of the bankrupt, subject to all the liabilities, and with all the rights, that would attach to them in the hands of the bankrupt, except in case of fraud..... 266

The assignee must recognize any valid lien as a preferred claim, though for costs of attachment, if made a lien by the state law 1165

The proviso in section 2, Act 1841, embraces all liens, equitable and legal, which are valid by the lex loci contractus; and is not restricted to such as can be enforced by state laws..... 266

Persons paying drafts drawn for the price of goods shipped to the drawer, under an agreement that the goods should be pledged as security therefor, have a lien as against the assignee in bankruptcy of the purchaser..... 266

A chattel mortgage authorizing the mortgagor to sell the property mortgaged is void as against the assignee..... 394

A delay on the part of the mortgagee in a chattel mortgage in taking possession after maturity is fatal to his rights, as against an assignee in bankruptcy..... 394

An attachment on mesne process, where a judgment is not obtained prior to the commencement of proceedings under the act of 1841, gives no lien enforceable in bankruptcy 508

Page

The rent of mortgaged premises received by the assignee must be distributed to the general creditors. The mortgagee cannot have the rent applied to his lien unless he shows the insufficiency of his security, and actually intercepts it..... 572

The right to intercept the rent ceases with the completion of the foreclosure..... 572

Junior mortgagee, purchasing at a foreclosure sale, *held* not entitled to the rents collected by the assignee pending the foreclosure, or to reimbursement of the amount paid for taxes..... 523

A petition for leave to foreclose a mortgage will be dismissed where it is not shown that the assignee was given notice, and the debt has not been proved..... 965

—— Sale.

The court may order the assignee to expend money in finishing goods for sale, where beneficial to the estate..... 527

The bankruptcy court may order that mortgaged chattels in the possession of the assignee be sold free of incumbrance, and the mortgagee's lien is then transferred to the proceeds of sale..... 527

This power may be exercised, notwithstanding the mortgagee has, by his contract, a right of immediate possession, which he desires to enforce..... 527

Such order will not be made where the mortgagee's rights will be injuriously affected, as where the goods have no market value, or not more than the amount of the mortgage 527

A special order for leave to execute assignments of certain mortgages sold under order of court granted, though considered unnecessary 718

Proof of debts.

A note which is subject to an offset for a larger amount is not a provable debt..... 425

A tax collector will not be allowed to prove, against the bankrupt's estate, taxes which have been deducted from the value of property taken by creditors under attachments valid, as against the assignee, at the time of appraisal..... 554

The costs of an attachment, laid by the wife of the bankrupt in a libel for divorce, are not provable, and are not an equitable charge against the assets..... 649

A note given by the bankrupt firm to a member for his contribution to the capital stock, and by him turned over to his wife, who furnished the money, *held* evidence only of the individual debt of such member, and not provable against the firm..... 967

The mortgagee in a chattel mortgage of a stock of goods cannot prove his claim against a partnership formed after the making of a mortgage, and before its maturity.. 394

A clause in an insurance policy, limiting the right of action to one year from the loss, is valid, and binding even after bankruptcy of the company; but proof of the debt in bankruptcy is equivalent to the commencement of a suit..... 72

An adjustment of the loss before the filing of the petition in bankruptcy is a settlement and a waiver of the limitation clause..... 72

Where the proof was not submitted until after petition filed, the assignee cannot make an adjustment or agreement upon which an action can be maintained..... 72

A waiver of conditions, made in good faith by the company while solvent, is binding upon its assignee in bankruptcy..... 72

The creditor and the bankrupt cannot submit to arbitration the question of the amount due from the bankrupt's estate... 425

The submission of a claim by stipulation to the register to hear and determine does not make his decision final, as a reference under the New York Code..... 425

Page

The holder and owner of a claim can alone make the proof..... 425
On a sale by several creditors to one person of debts proved, the actual owner can alone act, and can cast but one vote..... 704
Though proof of a debt has been regularly filed and accepted as satisfactory, the register may receive proof of fraud in relation thereto before election of assignee..... 704
On motion to expunge a proof of debt and to establish a set-off, personal judgment cannot be rendered against the creditor for money in his hands..... 394
A note given in the firm name in an individual transaction of one member in no manner for the benefit of the firm is not provable against the joint estate..... 465
Copartnership debts may be proved in proceedings instituted by a single partner, on an individual petition, whether there are any assets of the copartnership or not..... 738

Payment of debts: Priority: Dividends.

The costs and charges against a bankrupt for caring for his property prior to filing the petition, however incurred, are not a preferred claim 1165

Examination of bankrupt, etc.

The bankrupt cannot require the register to have his testimony taken down in longhand when the assignee furnishes a stenographer 812
After ample opportunity for an examination is afforded, and it is apparently full, further examination will be refused unless a specific defect or collusion is shown..... 961
A witness may be examined prior to the examination of the bankrupt, and though there be no question in controversy to be settled by testimony..... 740
The only parties to bankrupt proceedings are the bankrupt and the creditors..... 740
A witness cannot take the opinion of the judge on a certificate by a register, or be represented by counsel, except in a proceeding against him for contempt..... 740

Costs: Fees: Disbursements.

Where a suit has been commenced bona fide, and the defendant becomes a bankrupt, the actual costs are to be paid out of the estate, but no subsequent costs..... 508
The assignee is liable for proper charges for the care and custody of the bankrupt's property from the commencement of the proceedings 1165
Costs incurred by a sheriff for insurance, packing, etc., of goods on an attachment which has been dissolved by the proceedings in bankruptcy, where beneficial to the estate, will be ordered to be paid by the assignee 500
If the assignee has taken possession of packing-boxes, policies of insurance, &c., procured by the sheriff, he must pay for the cost of them..... 580
Where the assignee continues to occupy real estate leased by the bankrupt for manufacturing purposes, the landlord is entitled to compensation to the extent of the benefit conferred on the estate..... 613

Discharge—Proceedings to obtain.

A creditor, after a year, may require the bankrupt to have the question of his discharge determined..... 615
A creditor cannot be prejudiced by the loss from the files of his proof of debt. He is still entitled to notice of application for a discharge..... 817
The right to a discharge becomes fixed upon application, due notice given, and failure to object, though an order granting the discharge was not procured..... 615

—— Opposition: Acts barring.

The proceeds of the bankrupt's property in the hands of the assignee, and subject to be divided among his creditors, must be equal to 50 per cent. of claims. Act 1867, § 33 769
The debtor cannot have his assets appraised and determined as being in excess of 50 per cent. of provable claims, before debts are proved, or an assignee appointed.. 769
Section 9 of Act June 22, 1874, applies to cases of involuntary bankruptcy commenced before its passage. Reversing p. 697 696
A creditor who obtains judgment after the adjudication in bankruptcy, and takes out execution against the bankrupt, cannot prove his debt, and is not affected by the discharge, and cannot oppose it.....1109
The court allowed such creditor, who had proved his debt, to be heard in opposition on stipulating to cancel his judgment if the discharge should be granted.....1109
The fact that a suit is prosecuted against the bankrupt merely to ascertain the amount due should appear of record, and the judgment should be modified accordingly 1109
Charges, in general terms, of the destruction and removal of books and papers to defraud creditors, and of procurement of certain creditor's assent by pecuniary consideration, *held* too vague..... 750
After filing of specifications in opposition, there cannot be any examination of the bankrupt by the creditors before a register, on the application by the bankrupt for a discharge 964
Where proofs of debts have been lost, they must be supplied under Rev. St. §§ 899, 900, before the bankrupt can be legally discharged 817
The failure to keep proper books of account in a business which has been entirely closed out, there being no debts or assets arising out of such business, will not prevent a discharge..... 815
Nor will a discharge be prevented by the failure to keep proper books of account prior to the passage of the bankrupt act..... 815
A failure to insert in the schedule property fraudulently conveyed is not a false swearing where a receiver of all the bankrupt's property has been appointed by the state court..... 750
An assignment of a claim to secure a pre-existing indebtedness, made when insolvent, and forming no part of the transaction in which the indebtedness was created, is a fraudulent preference, barring a discharge 520
A discharge was refused in the case of a fraudulent preference, though the bankrupt had acted under advice of counsel, and the transferee had surrendered the goods without suit, it not appearing that the bankrupt had acted in good faith, believing he had a right to do what he did..... 72
A fraudulent conveyance, within section 29, Act 1867, must be a conveyance made as required by section 35, within four or six months before the filing of the petition by or against the debtor..... 750

—— Scope and effect: Annulling.

A discharge obtained before judgment rendered in a suit in which property was attached before the bankruptcy proceedings were instituted may be pleaded as a bar to such suit..... 508
Where a creditor, who neglected to file objections in due time, subsequently discovered fraud, he may require the bankrupt to take his discharge and then apply to annul it 615
The knowledge of fraud which will bar a right to annul the discharge must have been such as to have been available before the return day of the order to show cause 615

Prohibited or fraudulent transfers. Page

An insolvent may borrow money, and give a valid security therefor on his property, if no fraud in fact be intended, and no fraud on the bankrupt act be effected..1026

A deposit of bonds in New York by a bankrupt residing in North Carolina, *held* a device to defraud creditors, where they were delivered up shortly after the petition was filed..... 991

A deposit of securities by a customer of a bank, who had overdrawn his account, for the purpose of a loan from the bank to keep the account good, *held* not in violation of the act..... 787

A mortgage will not be considered for future advances because the notes secured by it are delivered to the mortgagee to prove in a partnership accounting..... 812

A security otherwise valid is not avoided because taken in the form of an absolute deed instead of a mortgage.....1026

A judgment entered after the adjudication, on a default entered before petition filed, without surprise, mistake, or fraud, where the bankrupt had no defense, will not be set aside. Act 1841..... 169

A judgment by default, and execution upon a note given when the creditor had cause to believe the debtor insolvent, are preferences 180

Taking judgment on a cognovit, and levying execution on the bankrupt's property, by his suffrance or permission, before the institution of proceedings in bankruptcy, is a fraud upon the act, although the cognovit is dated more than six months before the filing of the petition..... 426

A judgment taken contrary to the bankrupt act is not void unless a petition in bankruptcy is filed by or against the debtor within six months from its entry..... 978

The payment of a joint debt by joint property is not a voidable preference unless both debtors become bankrupt within the time limited by the statute. This rule applies to partnership transactions.. 464

A creditor who receives money and goods from his debtor, knowing him to be insolvent, is guilty of obtaining a fraudulent preference, and, if he contests the right of the assignee, he cannot prove his claim.. 465

An execution creditor, knowing that his debtor is unable to pay his debts at maturity, is chargeable with knowledge of his insolvency 465

A debtor suffers his property to be taken on legal process when he allows it to be seized in execution on a judgment obtained by default..... 465

A sale by a debtor of all his real and personal property to a creditor, with knowledge of the debtor's insolvency, is in fraud of the act, and trover will lie by the assignee to recover the value of the personal property..... 545

The taking possession of a stock of goods by the seller under a reservation of such right in the bill of sale for nonpayment of the purchase money before petition in bankruptcy filed against the purchaser *held* valid as against the assignee..... 9

A conveyance by a debtor, when in embarrassed circumstances, in trust for his wife, in alleged consideration of indebtedness for lands and personal property belonging to her, *held* fraudulent, where sole power was reserved to the debtor to sell the land 132

Suits in relation to the estate.

The circuit and district courts of the United States have jurisdiction of a bill by an assignee in bankruptcy to redeem a mortgage made in Massachusetts.. 527

A creditor has a right to sue to set aside a fraudulent conveyance by the bankrupt only where the assignee refuses to do so.. 748

Page

A petition will not lie in bankruptcy by creditors of a firm not in bankruptcy, on the bankruptcy of a member, to recover a fund from the estate of a deceased partner not in bankruptcy..... 735

The United States circuit court has jurisdiction of a bill by an assignee to recover money or property of the bankrupt preferentially or fraudulently conveyed..... 242

Any suit to set aside a fraudulent conveyance by the bankrupt is within the limitation of two years..... 748

The statute does not begin to run against the assignee in the case of property concealed until the fraud is discovered..... 991

Where a suit to set aside a fraudulent conveyance is for the benefit of the secured creditors mainly, they should defray the expenses thereof..... 748

The assignee may be required to furnish security for costs when he is prosecuting an expensive litigation, and is without funds belonging to the estate..... 450

Review.

An appeal will lie to the supreme court from a decision of the circuit court in the exercise of its supervisory jurisdiction under the bankrupt law.....*623

BANKS AND BANKING.

Power to receive special deposits is not conferred by a charter "to carry on the business of receiving money on deposit, and to allow interest thereon, giving to the person depositing credit therefor"..... 86

A note was deposited with a bank with the understanding that, in certain contingencies, it was to be handed back to the maker, otherwise to be delivered to the payee. *Held* a special deposit, and that the transaction was ultra vires..... 86

A bank, acting as collecting agent of another bank, is liable for a loss caused by its failure to use reasonable diligence and care 100

A bank receiving a draft from another bank for collection *held* liable for the amount thereof, where it transmitted the same directly to the drawee, its correspondent, and made no inquiry in regard thereto for one month, the drawee having failed in the meantime, and the draft having miscarried 100

Banks holding collateral security for the payment of loans must take the same care that good business men or persons or corporations of their class ordinarily take of such bonds..... 264

A bank holding bonds as collateral security *held* not liable for a loss by robbers after the watchman had left, as was usual, at four o'clock in the morning..... 264

A national bank has authority, under Rev. St. § 5136, to take and hold interest coupons not under seal, attached to railway aid bonds under seal, where each coupon contains an express promise to pay to bearer, and is signed by the proper officer..... 97

A national bank is entitled to the same privileges in regard to charging interest as is extended to state banks of issue in the state in which it is located.....91, 93

National banks cannot be compelled by the auditor or probate judge to present for inspection the deposit books of the bank in order to reach such deposits for purposes of taxation..... 103

BILLS, NOTES, AND CHECKS.

Validity.

A written promise absolutely to pay the note of a third person, written at the foot

Page

of such note, is an original undertaking, and need not express the consideration... 620

Negotiability.

A note for a certain sum payable in "current bank notes" is not negotiable..... 971

Acceptance.

An acceptance for the honor of the payee, after protest, is not binding..... 758

Indorsement and transfer.

The indorsement of a note placed in the hands of a third person for the benefit of a creditor of the indorser *held* to take effect from the date of the indorsement, and not from the date of its delivery to the creditor 506

Want of consideration for a promissory note is no defense, as against one taking it before maturity, without notice, as collateral security for an existing debt..... 334

The accommodation indorser of a renewal note given to a bank may show, in defense to a suit thereon by the bank, that the cashier promised, as consideration for his indorsement, that the bank would set off accruing claims for services rendered by the maker, so that he would not be held liable.. 85

In the case of a raised check, passing through several banks before it was finally paid by the drawee, the loss must fall upon the one who first gave it credit by indorsement 86

Demand: Notice: Protest.

A creditor holding a note whose proceeds are to be collected and applied to discharge the debt is bound to use due diligence to collect the note, and give notice of nonpayment 360

Where there are two joint indorsers notice must be given to both.....1145

If one of the joint indorsers pay the note, he cannot recover a moiety from the other indorser, to whom notice of dishonor was not given 1145

Notice of demand and nonpayment is necessary to charge the guarantor of a note or bill, whether his name be upon the paper or not; but in the latter case reasonable notice is sufficient..... 360

Notice to an indorser by mail must be directed to the post office nearest his place of residence..... 620

Payment.

The taking of stock and cash in satisfaction of a debt on surrendering a note *held* to amount to a payment of such note..... 425

A guarantor may take up the paper guaranteed, and transfer his claim as guarantor to the persons from whom he obtained the means with which to take up the paper... 605

Actions on.

A bill of exchange is evidence under the general counts as between the holder and the acceptor, or a remote indorser..... 731

A judgment against an accommodation indorser, who is considered as a surety, and, also, the drawer, merges the relation of principal and surety..... 62

Bills of Lading.

See "Affreightment"; "Carriers"; "Charter Parties"; "Shipping."

BONDS.

See, also, "Municipal Corporations"; "Railroad Companies."

Assumpsit will lie on interest coupons, not under seal, attached to railway aid bonds under seal, where each coupon contains an express promise to pay to bearer, and is signed by the proper officer..... 97

BOTTOMRY AND RESPONDENTIA.

Page

See, also, "Maritime Liens."

Conditions preceding the authority of a master to hypothecate his vessel in a foreign port by bottomry.....1013

The true grounds of a maritime hypothecation are the necessities of the case, and the want of personal credit..... 406

Bottomry bonds may be given for security of mercantile or other debts, either in places where the owners dwell, or in foreign places by their order..... 406

The master cannot make a loan on bottomry to pay purchasers of claims for repairs in a foreign port, contracted five months prior thereto under no expectation of bottomry security.....1202

Where the master has not suitable funds, or cannot obtain money on the personal credit of the owner, for reasonably fit and proper supplies and repairs in a foreign port, he may take it upon bottomry..... 479

As against the lender, it is sufficient if there is an apparent necessity, so far as he is able, upon due inquiry and due diligence, to ascertain the fact..... 479

Where there is an apparent necessity, the lender is under no obligation to ascertain the cause of the injury, or to inquire as to the manner of making the repairs..... 479

A regular survey, by competent and skillful persons, and repairs made in pursuance of their recommendation, is prima facie evidence of the propriety of making the repairs, to justify the master and lender on bottomry 479

The lender is prima facie presumed to have made inquiries as to the apparent necessity, and to have acted upon the facts and circumstances, as made known by the survey 479

The onus probandi, that the master has other funds, or that the owner has a personal credit in that port, is on the owner, who resists the bottomry bond..... 479

A bottomry covering items of advance not entitled to a bottomry lien is invalid only in part.....1013

The court will order a referee to ascertain and report the actual constituents of a bottomry lien, the validity of which is contested 1013

Where the owners, with all the facts before them under which a bottomry bond was given by the master in a foreign port, claim and receive their share of the general average from the underwriters, it amounts to a ratification of the making of the bond.....1202

A voyage to a foreign port, there to discharge cargo; thence to another foreign port, there to take cargo; thence to a domestic port,—is continuous with respect to liability of freight moneys to satisfy a bottomry bond given for repairs in the first part of the voyage..... 109

An agreement in a respondentia bond to have on board the amount lent, in goods, *held* not a condition precedent, but the lender could recover the deficiency on a loss..... 712

A collateral agreement to indorse bills of lading as further security *held* not a condition precedent..... 712

Questions as to the validity of bottomry claims will not be entertained on motion and notice..... 798

Creditors having obtained decrees against the proceeds of a vessel, where bottomry creditors come in and arrest the fund, may make themselves parties and contest the bottomry claims..... 798

A mortgagee of a vessel can intervene in a suit by a bottomry holder against the ves-

Page

sel, and contest the validity of the bottomry or its priority of lien, as against his mortgage 1013

BOUNDARIES.

The purchaser of land bordering upon a nonnavigable stream or lake takes to the center of the stream or lake..... 471

Where land is purchased bordering upon a nonnavigable stream or lake, and the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary, the grant includes any land between the meandered line and the water 471

CARRIERS.

See, also, "Affreightment"; "Charter Parties"; "Railroad Companies."

The duties of steamboats carrying passengers to guard them against violence or negligence of other passengers stated in a charge to a jury..... 277

The carrier is not liable for baggage in excess of that usually carried by passengers of like station, pursuing like journeys..... 654

The question whether a passenger has carried an excess of baggage, considering his position in life, and the journey, is one of fact for the jury..... 654

Valuable laces *held* reasonable apparel and baggage, reference being had to the social position and wealth of the plaintiff, the state of her health, and the object of her journey to this country from abroad... 652, 654

CHAMPERTY AND MAINTENANCE.

An action will lie for maintenance in this country 266

The pendency of the suit, the court and time, place, and circumstances must be alleged, so as to show the maintenance..... 266

CHARTER PARTIES.

See, also, "Affreightment"; "Carriers"; "Demurrage"; "Shipping."

Vessel all ready for voyage *held* to have "sailed" when she was towed from her moorings, though she was detained in the harbor several days by head winds..... 660

The vessel being seaworthy when she sailed, *held*, that owners were not liable for the spoiling of cargo of beef where the vessel put back on her return voyage to repair boiler tubes..... 692

Circus horses are to be regarded as cargo to which a maritime lien will attach for freight under a charter for a voyage out and return to carry a circus outfit..... 602

Where the charter expressly pledges both vessel and cargo for its performance, the lien for freight will not be held to be waived by making it payable in monthly installments 602

The owner is not bound to wait until the cargo is discharged to enforce his lien for freight, where there is a breach of the agreement to pay the charter money in monthly installments 602

Chattel Mortgages.

See "Bankruptcy"; "Fraudulent Conveyances."

COLLISION.

Page

Nature of liability—Contributive fault.

An error committed under impending danger, or in extremis, produced or brought about by another vessel, cannot be alleged as a fault..... 1020

A change of course made by a sail vessel in response to a hail from an approaching steamer will not be considered a fault..... 448

Inability of the officer in charge of a steamer to give instant orders to the engineer when a collision is impending is negligence 448

Rules of navigation.

A failure to keep to the middle of the East river, as required by law, will not be considered a fault where the approaching vessel was seen in time to take the necessary steps to clear..... 741

Sail vessels meeting.

A collision in open sea, in broad daylight, between vessels on crossing tacks, cannot be attributed to unavoidable accident..... 1020

In the case of vessels close-hauled on opposite tacks, the vessel on the starboard tack must keep her course..... 1020

Steam vessel meeting sail vessel.

A steamer should stop promptly upon discovering in her course an indistinct object, which may be a sail..... 265

Where there is plenty of sea room, the steamer need not slacken her speed so long as the sail vessel is apparently keeping her course, and no danger is apparent..... 762

A steamer *held* in fault in starboarding blindly, in ignorance of course of sail vessel in a fog..... 702

Steam vessels meeting.

A steamer has the right to rely to the last moment upon the power of an approaching steamer to pass in accordance with a single blast given by her..... 741

The obligation to slacken speed under article 16 of the collision act was not intended to be contemporaneous with the duty of porting under article 13..... 762

Steamer having another on her starboard, and failing to give sufficient room to cross, considering the tide, *held* in fault..... 722

Vessels moored, etc.

Negligence in lying in the track of a vessel gives rise to the same degree of liability for collision as any other fault..... 107

A vessel which breaks from her moorings, and comes into collision with another at anchor, has the burden of showing vis major, or inevitable accident..... 771

Vessel at anchor *held* not at fault for omitting to set an anchor watch..... 771

River and harbor navigation.

Steamboat passing tow in narrow channel on the Hudson river at night *held* in fault for failure to slow down, and observe position of tow..... 192

Speed: Fogs.

A speed of nine miles an hour, in the East river, in a crowd of vessels, is an unreasonable speed..... 322

Speed of from seven to eight knots an hour in dense fog off Point Judith *held* excessive 702

The cases upon the subject of speed reviewed and criticised..... 762

Lights; signals, etc.

Failure to carry a light does not put a vessel at fault unless the discovery of her position to the colliding vessel was thereby delayed 265

A light, without reflectors, on a sail vessel navigating the lakes at night, is insufficient, under Act March 3, 1849, § 5..... 560

A vessel carrying the wrong light at the time of the collision has the burden of

Page
showing that it did not contribute to the loss 560
It cannot be said that a loss resulted entirely from the neglect of a vessel to carry a proper light, where the other vessel had not a competent lookout, and should have kept away 560
Particular instances of collision.
Between vessels close hauled, beating up a narrow channel, where the overtaking vessel, being on the port tack, failed to keep away, and the other made no effort to avoid the collision, and both were *held* in fault.. 802
Between a propeller aground on St. Clair flats, not exhibiting a proper light, and a tow whose tug failed to stop, where the tow only was *held* blameless..... 718
Between tows in East river, where tug attempted to pass between a drilling scow and piers, and failed to keep her tow on a parallel course..... 741
Between steamer and tow in Hell Gate near Pot Rock, where the former was *held* in fault in not keeping to the northerly edge of the tide.....1070
Procedure.
A suit is not barred within the time prescribed by the statute of limitations where there has been no change of ownership... 718
The rule giving greater weight to the testimony of persons on board a vessel, as to her movements, does not apply to the exhibition of a light..... 718
The running of a steamer in a thoroughfare of vessels, at night, with no more precaution than is usual in the daytime, raises an inference that she could have discovered an approaching vessel in time to avoid collision 107
Rule of damages.
Claimants are entitled to a deduction for the value of cargo raised by libelant's agent from the sunken vessel, and appropriated by him.....1073
The use of such nautical skill as owners of vessels usually employ in such emergencies sufficiently shows reasonable exertions to save a sunken cargo.....1073
Where it does not appear how the commissioner arrived at the sum allowed for freight pending, an exception to the report, as not showing the principle on which it is calculated, is the only way to bring up the question of the amount.....1073
Division of damages.
Where both vessels are *held* in fault, the loss will be divided equally between them.. 560
Appeal.
On an appeal in a collision case, where the question, on the proofs, is a close one as to which vessel was in fault, the decree will not be reversed..... 322

CONSTITUTIONAL LAW.

A state statute passed before the fourteenth amendment, prohibiting a white person from marrying a negro, and inflicting a penalty upon the former alone for its violation, is not rendered nugatory by the fourteenth amendment..... 699
The provision of the Georgia constitution of 1868 (article 5, § 17), that the courts shall have no jurisdiction to enforce a debt, the consideration of which was a slave or slaves, or the hire thereof, is void, as impairing the obligation of contracts, so far as it relates to contracts made before the emancipation proclamation..... 798

CONTINUANCE.

Plaintiff *held* entitled to a continuance at any time before the fifth term after the appearance term, to obtain the testimony of persons beyond sea, although a day had been set for trial..... 610

CONTRACTS.

A bond to pay an annuity in equal shares to a daughter and her husband if they should become reunited, and live together, and, in case of their separation, a certain sum to the husband, *held* void as to the latter provision, as against public policy... 969
A wager may be recovered at common law, although the parties have no other interest in the subject of the wager, than that which is created by the wager itself.. 262
The act of a party to a contract, and not his intention, is to be considered in construing the contract..... 812
Where fraud is imputed in the making of a contract, the injured party cannot adopt it in part, and reject it as to the rest, but must rescind the entire contract, where he seeks a remedy..... 427
Persons undertaking to pack pork are bound to exercise all the skill and care which the business requires..... 451
The damages sustained for unsoundness in pork, due to the manner in which it was put up, are ascertained by comparing the sales of the unsound article with the market price of the good article at the place where it was sold..... 451
An agreement in a contract to submit disputes arising thereunder to private arbitration will bar an action thereon in which plaintiff does not aver and prove either an arbitration and award, or facts excusing it 627
Any forcible indentation on a parchment, though it be not wax, wafer, or a scrawl, may be a seal, if so intended..... 341

CONVERSION, EQUITABLE.

On a voluntary sale of real estate by persons having independent interests therein, the proceeds of sale do not retain the character of real estate; otherwise, where equity interferes in adversum..... 549

COPYRIGHT.

A mechanical contrivance used in the production of a play, being patentable, *held* not protected by the copyright of the play.. 770
To constitute a piracy it is not necessary that the whole or the larger part of the work should be taken, but only so much as sensibly to diminish the value of the original work, or substantially to appropriate the labors of the author..... 342
An abridgment, in which there is a substantial condensation of the materials of the original work, and which requires intellectual labor and judgment, does not constitute piracy; but an abridgement consisting of extracts of the essential or most valuable portions of the original work is a piracy 342
A preliminary injunction refused where the answer denied the equities of the bill for infringement of a copyright of complainant's edition of the Bible, where there was nothing to indentify the parts copyrighted 276
A work of 866 pages, of which 353 were copies of official and private letters taken from a copyrighted work, which had published them under contract with the owners, *held* a piracy..... 342

CORPORATIONS.

A bona fide purchaser of stock illegally issued by directors at less than the charter

Page

price may rescind his contract, and recover from his vendor, who participated in the illegal issue of the stock, the money paid... 501

Shares issued to the director of a mining company, as paid-up stock, in payment of land greatly overvalued, are to be considered as paid-up shares in the hands of an innocent purchaser in the open market..... 427

The mere fact that a person has become a shareholder as a party to a scheme which is ultra vires will not relieve him from liability as a contributory, if the shares can be considered as legally existing..... 427

Every person connected with a company which issues certificates for paid-up stock, when the money or value has not been paid, is liable therefor..... 427

Stockholders may sue at law or in equity for the protection of their rights as such, and to preserve the corporate property from unlawful diversion by its officers..... 408

Stockholders may come in to take the benefit of the proceedings and decree in a suit by another stockholder against the company to preserve its property, but not to oppose and nullify them..... 408

In a suit by stockholders against the company to preserve its property, which is being sacrificed by the fraud of its officers, other persons cannot intervene unless they show an interest as stockholders, or fraud and collusion between complainants and defendant 408

One stockholder in a corporation can maintain a suit, for the benefit of all, to enjoin the collection of illegal taxes, when the board of trustees refuse to do so..... 401

The stockholder has no adequate remedy at law in such a case..... 401

It is unnecessary, in such a suit, to make all the stockholders, or even the directors, parties 401

On a bill filed against the state auditor and a trust company by a stockholder, a citizen of another state, an injunction was granted against the collection from the trust company of an alleged unconstitutional tax 366

Proceedings for the voluntary dissolution of a corporation under 2 Rev. St. N. Y. pp. 467, 468, are invalid without the entry of the order to show cause..... 760

A state may require that a foreign corporation, as a condition of doing business in the state, shall designate an agent therein to receive service of process in suits founded upon its contracts..... 788

COSTS.

On the removal from a state court of a suit against a collector to recover back an excess of duty paid, plaintiff is entitled to costs, though he recover less than $500, if he would have been entitled to costs in the state court..... 23

No fees or costs are taxable, in a suit to recover back an excess of duties, on a reference to the collector to adjust the amount of the recovery..... 23

Proper costs in admiralty for taking depositions and for marshal's expenses for keeping the vessel..... 327

Clerk's fees in admiralty for filing and entering claim, answer, appearance, and consent, for jurats, for attendance on the justification of sureties, and making up costs on the bonding of the vessel..... 327

An item of $50 paid to a notary public for taking depositions *held* correctly allowed, although he was a clerk of the proctor of the claimant..... 327

The fees of a magistrate in another state for taking a deposition under Act 1789, may be taxed in the bill of costs, in Virginia 971

Page

After rule obtained to give security for costs, nonresidence of plaintiff will be presumed at a subsequent term.....1010

Coupons.

See "Bonds"; "Railroad Companies."

COURTS.

Comparative authority of federal and state courts: Process.

Where the state supreme court has taken judicial control of the property and franchises of a corporation, and ordered their sale, they cannot be taken in execution by process of a federal court..... 628

A federal court or judge cannot discharge a person in custody under process for contempt issued by a state court in a suit pending therein, though, under the acts of congress, the state court has no jurisdiction of the subject-matter 392

The circuit court will not stay proceedings in a state court which are null and void; and it is forbidden by Act March 2, 1793, § 5, to stay valid proceedings in a state court 149

Federal courts—Jurisdiction in general.

A federal court has no jurisdiction of a probate matter 729

The circuit courts have not jurisdiction of suits brought by a state, against a citizen of the same or of another state.....1077

—— Grounds of jurisdiction.

National banks may, by reason of their character as such, sue in the federal courts. 100

The test of jurisdiction is not citizenship at the time a contract is made or broken, but at the time the action is commenced... 706

The declaration in an action by the assignee of a promissory note must show that the assignor had a right to sue in the federal court.....274, 971

The rules of law as to removal from one state to another, as affecting citizenship and the jurisdiction of the federal courts, stated in a charge to a jury.....1196

To give jurisdiction, the citizenship of all of defendants must be stated, as well as that of complainants..... 62

Jurisdiction of corporations attaches from the place where their business is done..... 788

A general appearance by a foreign corporation sued in a federal court of another state is a waiver of objection to the service of process..... 244

Under a resolution of a foreign corporation, filed pursuant to the state statute, authorizing service of process upon its agents within the state, the federal court may obtain jurisdiction over such corporation by service upon its agent within the district.. 353

—— Circuit courts.

The circuit court for the district of Connecticut has jurisdiction of an action for the damage caused by a diversion of a stream in Connecticut, so that it ceased to flow to plaintiff's mill in Massachusetts..... 358

—— Administration of state laws and decisions.

State statutes prescribing rules of evidence in civil cases in trials at common law are rules of decision in similar cases in the federal courts, under the judiciary act of 1789, § 34, whether enacted before or after such act 619

The new form of ejectment provided by state statute must be pursued in the federal court 725

A federal court, when determining the rights of parties under a state law, will never, in a doubtful case, adjudge the statute to be in conflict with the state consti-

Page

tution, unless sustained by some distinct adjudication of the highest court of the state.. 108
The federal courts are not concluded in a matter of general equity jurisdiction by a decision of the state court..... 202
State court decisions upon questions of general law are not binding upon the federal court 1126
In an action on railroad aid bonds, the federal court will follow the decision of the highest court of the state construing the statute under which they were issued... 95, 97
A decision of the state court construing a state statute where the case is pending on appeal in the supreme court of the United States will not be considered as one of authority 366
The circuit court of the United States must follow the decision of the supreme court declaring a state statute constitutional, rather than a later decision of the supreme court of the state declaring the statute unconstitutional..... 364

—— Procedure.

Defect of jurisdiction not patent on the record is available only by plea..... 772
The court will enjoin further proceedings pending determination of the plea to the jurisdiction, where the bill avers the jurisdictional requisites..... 772
Where a federal court has no jurisdiction of a case, it has no power to make any order in it, except to dismiss it for want of jurisdiction..... 149

COVENANTS.

The assignee of a covenant for title may enforce performance against the heir of the covenantor, to the extent of the interest inherited, although such covenant was the joint covenant of the ancestor and another, and such heir is not named therein..... 29
A covenant which runs with the land is divisible, and the grantee of any part or interest in the land may, as to the same, maintain suit upon the covenant against the original covenantor, or his legal representatives 29
A covenant to convey a particular title if after acquired by the covenantor may be enforced in equity, if such covenantor neglect to perform the same, without a prior demand and refusal..... 29
The interest acquired by the husband and children on the death of the wife of a settler under the donation act of 1850 *held* to be within a covenant to convey the title of the United States, if the covenantors obtained the same, in a deed by them made before the passage of the act..... 29

CRIMINAL LAW.

Where nearly the whole county is in a state of insurrection, and is occupied by a military force, a trial for treason may be held in another county..... 826
The court's decision that "great inconvenience" prevented the trial being held in the county where the crime was committed is conclusive after verdict..... 826
A prior conviction and nol pros upon a sufficient indictment at common law, though insufficient under the statute, is a bar to a subsequent prosecution on a new indictment sufficient under the statute, for the same offense 274, 275
The court has power in criminal, as in civil cases, to grant a new trial; but the new trial can only be granted in favor of the prisoner, and not to his prejudice..... 826
A new trial should be granted where it appears that one of the jurors, before the trial, had used expressions to the effect that the prisoners ought to be hung, and that the community would not be safe unless they were hung..... 826

CUSTOMS DUTIES.

Customs laws.

Section 20 of Act Aug. 30, 1842, in regard to the rate of duty on nonenumerated articles, was not repealed by Act July 30, 1846, or Act March 3, 1857.....24, 1140

Rates of duty.

Goats' hair, uncleaned and unmanufactured, *held* entitled to entry duty free, under Act March 2, 1861, § 23..... 44
Silk neckties *held* dutiable as "wearing apparel," under the acts of 1861 and 1862...*172
The rate on washed wool is computed by doubling the specific and ad valorem rates for unwashed wool. (Rev. St. § 2504, Sched. L.) 573
The question of similitude is one of fact for the jury.....1140

Invoice: Appraisal.

The collector is not bound to take the invoice valuation of goods, supported by the owner's oath on the entry, as their dutiable value 329
The place of shipment, as stated in the entry invoice, and the date of the invoice, may be assumed to be the place and time of purchase, in the absence of a written notice of a different state of facts..... 329
All goods subject to an ad valorem duty, though obtained otherwise than by purchase, are to be appraised at the period of exportation under Act March 3, 1851..... 452
In the case of iron purchased at Wales, and transshipped at Liverpool, *held*, that the "period of exportation" was the time when the iron left Liverpool..... 452
The cost of transportation from Wales to Liverpool is not a dutiable charge which can be added to the market price..... 452
Where merchandise is shipped from Smyrna, and transshipped at Liverpool, the estimated freight between such places cannot be added to the market value and charges at Smyrna to make up the dutiable value 1143
The appraisement by the official appraiser will be *held* conclusive, notwithstanding a protest, where the importer asserted that he did not desire a reappraisement, and did not offer the fees therefor..... 27

Payment: Protest: Appeal.

The time for filing a protest in the case of goods imported for warehousing is computed from the date of the original liquidation, which is made at the same time and in the same manner as when the entry is for immediate consumption 573
A protest *held* not sufficiently signed, where the importer's signature was on a distinct paper annexed by a wafer, not referring to the protest, nor in any manner made a part thereof..... 323
Prospective protests may be sufficient.. 620

Actions for duties paid.

A protest must point out specifically the particular omission or irregularity complained of, to be available in an action to recover back the duties..... 329
Grounds of objection not specifically stated in the protest cannot be raised in an action to recover back the duties..... 27
Plaintiff must satisfy the jury that he has fully complied with all the requirements of the statute both as to form and substance..1140
Interest may be allowed from the time of rendering the verdict until the judgment... 620

Bonded warehouses.

The owner of property seized as smuggled is not entitled to have the same bonded under Act March 2, 1799, § 89; but a

Page

delivery on bail is discretionary with the court 43
Goods entered for warehouse, libeled as forfeited and attached while in warehouse, may be bonded to the amount of their value, less the duties, under Act March 2, 1799. § 89..... 585

DAMAGES.

In an action against a carrier for the loss of laces, an heirloom, their value must be ascertained by a money standard, based on evidence 652
In an action for personal injuries, prospective damages may be given when they do not form the basis of a new action..... 475

DEBT, ACTION OF.

Debt will lie against the maker of a promissory note.....1191
Covenant, and not debt, is the proper action on a bond payable by installments until all become due; but debt may be brought if payment be secured by a penalty..... 355

DECEIT.

See, also, "Fraud."

Where part payment for property is made by a note of a third person, taken by the seller under the false and fraudulent representation of the purchaser that the maker was responsible, the seller may recover the amount thereof from the purchaser..... 579
An expression of belief by the seller of a note, that the maker is responsible, is equivalent to an assertion of the fact, if meant to be so understood, and if made with knowledge that he is not responsible..... 579

DEED.

A quitclaim deed is effectual to pass such title as the grantor has at the time of its execution, although he is not in possession.. 12
Delivery may be inferred from circumstances, and need not be proved by positive testimony 1162
A presumption of due delivery arises from the possession of the deed by the grantee.. 202
Deeds, however apparently formal, must be interpreted upon a view of the whole paper, and in subservience to what appears to be their scope..... 774
In construing a deed involving questions of science, the court may refer to the state of public knowledge and learning, and inquire into the actual knowledge of the parties 774
The designation of quantity will not control boundaries clearly indicated; but, where the true description is in doubt, the designation of quantity may be considered.. 12

DEMURRAGE.

Damages in the nature of demurrage are recoverable from consignee without stipulation in bill of lading..... 993
A consignee is bound to give only such dispatch as is reasonable under the circumstances 993
Consignees must provide such reasonable dock room as their business ordinarily requires 993
A vessel required to load or discharge her cargo at a particular dock, and there detained by reason of its crowded condition, is entitled to demurrage.....1017
Where the consignee has provided ample dock room for vessels as they are reasonably expected to arrive, vessels arriving out

Page

of time must wait their turn. He is not obliged to procure other docks..... 993
The custom of the port of Chicago to allow one day to provide a dock, when not rendered unreasonable by controlling circumstances, will be considered a law..... 993
A usage by which vessels allow a few days after reporting for a sale of the cargo will not deprive a vessel of the right to demurrage where her cargo is sold before arrival.. 464
A ship to "be discharged as fast as the custom of the port will admit," demurrage to be charged after the expiration of 10 days, *held* entitled to demurrage, notwithstanding pre-occupancy of the wharf by other vessels.....1017

DEPOSITION.

In common-law actions in the federal courts, depositions may be taken pursuant to the state law or the act of congress, as parties may elect..... 276
A deposition cannot be taken under the act of congress before a judge of a municipal court..... 443
Time of issue of commission to take deposition in a foreign country, and the filing of interrogatories and cross-interrogatories, and notice..... 811

DESCENT AND DISTRIBUTION.

Under the statute of descents of Rhode Island of 1822, brothers and sisters of the half blood inherit equally with those of the whole blood.....1162

DISCOVERY.

If evidence of defendant's title furnishes evidence of the complainant's, the latter may compel a discovery of it.....1049
The fact that in Louisiana titles are registered in a public office does not affect complainant's right to call for such discovery..1049
A bill of discovery will not be allowed in any case where the discovery will subject the defendant to a penalty, unless the bill relinquishes all claim to the penalty..... 54

DISTRICT ATTORNEYS.

The district attorney is not so far an officer of the court that the court can compel him to enter the appearance of the United States 43

DIVORCE.

The court has no authority under Act Or. Jan. 17, 1854, to give the property of either parent to the children, except during their minority, and as a means of providing for their nurture and education during such minority 172

Domicile.

See "Courts."

EJECTMENT.

An action of disseisin is authorized and regulated by the statute of Indiana..... 341
The statute of 21 Jac. I. as to 20 years' possession, was not adopted in New Jersey by force of the act of 1727; the action of ejectment having been always considered on the same footing as the writ of right...1196
Where a new trial is granted as of course in a state court under the state statute, the party cannot abandon the special remedy, and proceed in the federal court..... 725

Page

Ejectment *held* barred by 60 years' possession under Act N. J. June 5, 1787.....1196

Defendant cannot avail himself of an outstanding title in a third person, under whom he does not claim, where such title is barred by the statute of limitations, or by a descent cast 555

A conveyance by plaintiff pendente lite cannot be set up to defeat the recovery. The suit proceeds in the name of the original party 778

The declaration cannot be amended by stating a demise under a new title.....1077

A landlord has no right to apply to be made defendant in place of the tenant until the latter files his answer admitting his tenancy. Code Or. § 226..... 172

Defendant should state in his answer the nature and duration of the estate he claims in the premises, if any, but not the evidence of it. Code Or. 226, 227..... 172

The judgment in ejectment is not a bar to another action where the verdict for defendant only states that he is entitled to the possession. Code Or. 227..... 172

EMBARGO AND NONINTERCOURSE.

The power to remit fines (Act Jan. 2, 1813) extends to cases of joint ownership between citizens of the United States and citizens of Great Britain, so far as the former were concerned.....1105

The power is lodged entirely with the secretary of the treasury. The court has no revisory power.....1105

EQUITY.

See, also, "Injunction"; "Pleading in Equity"; "Practice in Equity."

Jurisdiction.

A party claiming rights under a contract must act at his peril. He cannot come into equity for its interpretation to save himself the consequences of a misconstruction.. 302

The rights of parties to an agreement for a license under letters patent, with a proviso for a corresponding reduction in the fee on a license to others at a lower rate, *held* to be purely legal, giving no right to the interposition of equity for the interpretation of the contract..... 302

Apprehension of a denial of the rights of a licensee to use a licensed invention, or a revocation of the license, will not justify application to a court of equity for an injunction 302

An averment of fraud in the sale of a promissory note, and a request for a discovery of facts accompanying the sale, furnish sufficient ground for jurisdiction.... 579

If fraud is charged against executors in proving a will, and acting under it, and notice of such fraud before their purchase of the property is alleged against the other defendants, a suit at law could not give adequate relief.....1049

A deed will not be rescinded for fraudulent misrepresentations by a stranger; but they may afford ground for relief on account of mistake..... 109

Payment will not be permitted in equity to operate as an extinguishment, as against those equitably entitled to substitution in place of the party receiving payment..... 355

A creditor with a right to two funds may be restrained to the use of one, if sufficient, in favor of a creditor of the other; or, where the former obtains satisfaction out of the common fund, equity will give the latter a lien on the fund not exhausted 62, 355

Equity may enjoin an action at law, on promissory notes, where complainant shows a prima facie title, although he is not a party to the action at law..... 134

A claim by the owners of a bill of exchange for damages for failure of one to whom it was sent for collection to give notice of dishonor to the indorser is ground of equitable relief against such person...1088

Jurisprudence.

The equity jurisdiction and jurisprudence administered in the federal courts are not regulated by the local jurisprudence..... 266

A verdict and judgment at law is not a bar to relief in equity if an equitable ground of relief be laid.....1088

A bill to rescind a deed, when filed after considerable lapse of time, must state sufficient reasons for the delay, where there has been a material change in the character or value of the property..... 109

Though lapse of time be not pleaded as a bar, the judgment of the court will be influenced by unexcused delay..... 109

Lying by, and acquiescence, may be sufficient to induce the court to refuse to rescind a deed, though not pleaded as a bar.. 109

A bill of discovery by an assignee in bankruptcy to recover property fraudulently concealed 10 years prior thereto, alleging that the facts only came to complainant's knowledge "within the past year," *held* sufficient..... 415

The objection that the remedy at law is adequate may be taken on demurrer when it appears on the face of the bill, but it is not too late at the hearing if, after an answer, no disclosure is obtained..... 579

Unless the inadequacy of consideration be so gross as to strike every person with a presumption of fraud, it is not evidence of unfairness 341

Fraud charged as the ground of relief must be proved. Proof of other facts, sufficient to constitute a claim of relief under another head of equity, will not prevent a dismissal of the bill..... 109

ESCROW.

A deed can never be delivered as an escrow to the grantee himself..... 202

ESTATES.

A conveyance "to J. M. and his generation, to endure as long as the waters of the Delaware should run," passes no more than a life estate..... 555

The purchase money, on a sale made jointly by persons having independent interests, will be divided according to their respective interests, in the absence of other countervailing circumstances..... 549

A tenant for life and a remainder-man in fee contribute to discharge a mortgage according to the relative value of their respective interests; the value of the estate of the tenant for life being calculated by the common tables..... 549

The same principle applies where a mortgagee devises the mortgaged estate to one for life, remainder over in fee..... 549

On a sale by a tenant for life with the consent of the guardian of minor remainder-men in fee, *held*, that the value of the estate of the former was to be ascertained by the common tables at the time of the sale, and was unaffected by the fact of his death shortly after the sale..... 549

ESTOPPEL.

See, also, "Judgment."

A person receiving a deed in fee from a tenant in tail is not estopped in eject-

Page

ment, by the issue in tail to deny the validity of plaintiff's title, as the alleged estoppel is not mutual.....1196
Declarations and conduct of party *held* insufficient to create an estoppel in pais.. 29

EVIDENCE.

The court will take judicial notice of the subdivision of the state into counties and the county seats.....1031
Oral evidence is not admissible to vary an agreement in writing..... 62
A will proved in another state, according to the laws of Tennessee, if recorded in that state, is evidence. The record may be made any time before the will is offered in evidence 257
The record of a court in Virginia must be certified by the presiding magistrate..1191
Entries made in the regular course of business by a person since deceased are evidence, but the original book must be produced, and the entries must upon their face appear fair.....1078
On the question of a boundary, hearsay evidence that a particular object (such as a spring) was on the land of one of the parties is inadmissible..... 723
In an action against a steamboat company for an injury to a passenger accidentally caused in a disturbance among soldiers on board the boat, evidence of a conversation between military officers, at about the time of the disturbance, *held* admissible as part of the res gestae..... 280
Person acquainted with parchment patents may be examined, as to the traces of a seal, on the question whether such a writing had been originally sealed..... 341
The person who took the acknowledgment was permitted to state, from his uniform practice in taking acknowledgments, he could not have taken it, in the case under consideration, had no seal been attached to the instrument..... 341
Acts and monuments, and judicial and professional tradition, in the absence of more direct testimony, will be regarded as an authoritative means of ascertaining ancient opinion of fact..... 115
Testimony of persons who have witnessed dawn and sunset at the place and season involved in the issue, together with that of eyewitnesses to the facts in dispute, outweighs the received opinions of geographers and navigators as to the time of such phenomena and the duration of twilight..... 265

EXCEPTIONS, BILL OF.

Order for leave to make a bill of exceptions was granted two years after the trial, where plaintiff had made a case by direction of the trial judge..... 383

EXECUTION.

See, also, "Judicial Sales."

The preliminaries required by Act Pa. 1836, § 75, for a levy on corporate property, are still essential to the validity of a levy under Act Pa. 1870..... 628
Under the California practice act, an execution may be issued and executed as soon as the judgment is entered, and before the judgment roll is actually made up.....*1113
A judgment assigned to one of the debtors after execution has been returned unsatisfied will not support a second execution against the codebtor's property..... 781
When the judgment is for a penalty to be released on the payment of a smaller sum, that sum must be ascertained before the execution can be issued..... 192

Page

Execution in the District of Columbia, on a judgment rendered in Maryland before February 27, 1801..... 192
The interest of persons to whom land was conveyed as trustees of an unincorporated association will pass, on execution sale, under a judgment for a debt of the association, recovered in an action against all the members, including such trustees.. 781

EXECUTORS AND ADMINISTRATORS.

An executor under a domestic will is not liable for legacies which came to the hand of another as executor and guardian under a will made abroad.....1054
Proceedings for the sale of realty to pay debts to which nonresident heirs were made parties by publication under order of the court, as provided by statute, cannot be collaterally attacked..... 473
A stranger cannot object to the irregularity of proceedings for the sale of realty to pay debts, where the heirs make no objection 473
All the executors need not join in an action on a sealed note given to one..... 373
In a declaration by an administrator upon a bond to his intestate he must aver himself to be administrator, and make profert of his letters of administration..... 975
An executor may be ruled to plead before the expiration of the year after letters granted 737

Exemptions.

See "Bankruptcy."

FACTORS AND BROKERS.

The receipt and retention of an invoice of goods by the consignee, without objection, is evidence that the goods enumerated therein were received by him..... 23
If a consignee has rendered no account of sales of merchandise for many years, and at the trial offers no evidence to prove what part was sold, and at what prices, it will be presumed that the goods were sold at the invoice prices..... 23
Where the consignee gives acceptances for the value of the goods, and agrees to account for the whole price, guarantying the sales, and to receive a commission, the transaction is a consignment on sale, as distinguished from a consignment on del credere guarantee..... 247
On a consignment on sale, the consignor cannot, without special agreement, reserve a special property, in notes and accounts which the consignee may take from purchasers, as against other creditors of the consignee in bankruptcy..... 247
A supercargo is not bound to observe the exact terms of his instructions, if thereby the interests of the owner would be sacrificed, or his objects frustrated..... 459
In cases of necessity or great urgency, it is only necessary that the supercargo should act bona fide, and with reasonable discretion, to bind the owner..... 459
All sales by a supercargo except those by del credere commission are at the risk of the shipper..... 459
The owner ratifies a sale by the supercargo by receiving the proceeds without objecting 459
In the absence of a special contract, a credit sale is at the risk of the shipper, where the usage of trade allows discretionary sales on cash or credit 459
The validity of a sale on credit depends upon the usage of trade in the place where

Page

the sale is made, and such usage is a question of fact for the jury..... 459
In the case of a sale on credit, the factor is bound to exercise due discretion in enforcing payment, and must not sue or put the owner to expense unless there is reasonable ground to believe that he will be benefited 459
A failure to give notice of the insolvency of the purchaser will render the factor liable for all damages suffered in consequence of such failure..... 459
Under a written contract to pay a factor one-tenth of the net profits, after deducting expenses "that may appertain to the goods themselves," the expenses of clerk hire, advertising, and taxes are properly deducted 534
Construction of contract with a factor for a share of the net profits arising out of a general foreign trading and shipping business, and the computation of profits at the end of the period..... 534
Under a contract to pay a factor a certain per cent. of the net profits of the business, the owner is liable for the factor's proportion of an amount offered in settlement of a claim barred by statute, which the owner refused to receive..... 534

FRAUD.

See, also, "Deceit"; "Equity."

Notwithstanding fraud committed by one party to a contract upon the other, the contract remains operative until disapproved by the injured party..... 427

FRAUDS, STATUTE OF.

A trust, created by a parol contract, will be enforced in equity against a party, who does not insist upon the defense of the statute of frauds..... 202
A deed from an equitable mortgagee, and an assignment of a bond to reconvey to persons who had agreed to purchase on joint account, *held* to create a fiduciary relation between them, grounded on privity of title or estate, under which the purchase of an outstanding incumbrance or adverse title by one would be a trust for the benefit of both, taking the agreement out of the statute of frauds..... 202

Fraudulent Conveyances.

See "Bankruptcy."

GARNISHMENT.

See, also, "Attachment."

A judgment debtor is not liable to be attached as a garnishee under the foreign attachment act of Rhode Island..... 711
A bank is not liable on trustee process against a depositor for moneys paid out on his check on the day of, but before, the service of the writ on it, though the entry was not made on its books until some days later 583
Judgment against the garnishee is no defense in a suit for the debt, if the plaintiff in the original trustee process has, by his neglect to comply with the local laws, put his judgment in a state of suspension, so that execution can no longer issue upon it, and it cannot be revived by a scire facias 323

GRANT.

See, also, "Deeds"; "Public Lands."

The sovereign may, although an individual cannot, render valid a void act..... 818
The name of a grantee is not essential to the validity of a deed. A grant may be made to classes of persons, if sufficiently designated by descriptio personarum..... 818
Where a grant made by government refers in general terms to a certainty, it is the same as if the certainty had been expressed in the grant, though it be not matter of record..... 818
The grant to certain settlers in the village of Peoria, Ill., whose buildings had been destroyed by a military company, *held* to be for a consideration, and the heirs of a settler who died before it was made are entitled to the patent..... 473
To show a title out of the proprietaries, a grant, warrant, and survey under the proprietors, or length of possession against them, may be shown.....1196

GUARDIAN AND WARD.

See, also, "Wills."

A general guardian cannot voluntarily appear for minor defendants, but they must be served with process, and a guardian ad litem appointed for them, when brought into court..... 172
A petition by a guardian for the sale of his ward's lands is in the nature of a proceeding in rem, and is not adverse to the next of kin, to whom notice is required to be given.....1031
The county court acquires jurisdiction on the filing of the petition for the sale of the ward's lands (Laws Or. p. 738), and its judgment cannot be collaterally questioned for errors in the proceedings, except as provided by statute.....1031
The defect in the title of a person purchasing at a guardian's sale can be taken advantage of only by the cestuis que trust.... 202
A guardian's sale was *held* to have been made upon the original notice, though, upon the day named, it was adjourned for four weeks, where the statute forbade an adjournment for more than one week at a time 1031

HABEAS CORPUS.

An order from a subordinate in the war department, directing a marshal not to produce a person in his custody on habeas corpus, *held* no justification for his disobedience. 1
A jailer who acted as mere servant of the marshal in disobeying the writ *held* not punishable 1

HOMESTEAD.

See, also, "Bankruptcy."

Homestead exemption must exist and be claimed at the time the writ comes to the officer's hands..... 759

HUSBAND AND WIFE.

So long as a legacy to the wife continues a chose in action, it is her property. The marital right of the husband does not attach until it is reduced into possession.....1102
The husband may, as against his creditors, relinquish his marital right in a legacy bequeathed to his wife..... 1102
A court of equity will sustain the bill of a married woman, suing by her next friend, to recover a legacy bequeathed to her, where the husband has transferred all his marital rights in the legacy to his wife.....1102
A husband who has borrowed his wife's funds may secure her by payment, pledge, or in any other proper way..... 815
In Wisconsin a married woman, by simply indorsing a note, does not create a liability

Page

which can be enforced against her separate estate, nor one upon which a personal judgment will be rendered against her..... 242

A husband, who has conveyed all his estate to a trustee for the sole and separate use of his wife, may join with her in an action of trespass quare clausum fregit, and in law would be entitled to the damages recovered 723

INDIANS.

A state court has no jurisdiction over a partition suit in relation to lands of the Shawnee Indians, which have never been conveyed with the approval of the secretary of the interior..... 392

INFORMERS.

The person who telegraphs the collector of customs that a certain vessel within his district has goods on board liable to forfeiture, and not the deputy collector, who receives and forwards it, and verifies some of its statements, is the informer..... 44

An inspector of internal revenue, who acted in co-operation with, and under the direction of, other revenue officers, and whose researches were within his duties, and resulted in forfeitures, *held* not entitled to share as informer 589

INJUNCTION.

A corporation defendant in a suit in a federal court may be enjoined, pending the suit, from taking proceedings for a dissolution, or for the appointment of a receiver, or for the distribution of its assets. Act Sept. 24, 1789, § 14..... 167

Act March 2, 1793, § 5, providing that an injunction shall not be granted to stay proceedings in any court of a state, applies only to proceedings commenced in a state court before proceedings are commenced in the federal court 167

In a suit to obtain a reduction of a license fee, an injunction was granted restraining defendant from terminating the license upon condition of plaintiff's depositing in court the amount of the fees in dispute. The bill was dismissed for want of equity and proper parties. *Held*, that the fund would be retained until the final determination of the controversy by a proper tribunal..... 310

INSOLVENCY.

See, also, "Bankruptcy."

An insolvent debtor, arrested for a debt due before his discharge, can only be relieved by the court, or a judge, before whom the process is returnable..... 805

INSURANCE.

See, also, "Marine Insurance."

Policy *held* to take effect from its delivery, though premium was not paid, notwithstanding its condition to the contrary, where the agent was personally liable to the company. 706

A provision that "if the insured shall cause the property to be insured for more than its value, the policy shall be void," only avoids the policy in case of intentional overvaluation or fraudulent concealment..... 16

The burden is upon the company to show that the over-valuation was intentional... 16

A policy cannot be avoided under its terms because the exact interest of the insured in the property is not shown, where the company's agent knew the actual condition of the title, and neglected to make the proper note in the policy..... 16

Where the ownership of property lies between the husband and wife, and the husband is estopped from claiming it, the wife has a sufficient title to support an action on a policy under which it was insured as belonging to her..... 16

A married sister, in no way dependent upon her brother for support, and not his creditor, has an insurable interest in his life 657

In the case of a negative answer to the question whether the applicant ever had a rupture, it is for the jury to say whether a rupture, considered as cured, was material to his soundness of health.....*657

Statement of age *held* not to import absolute accuracy 657

The company *held* estopped to deny liability as against one who purchased policy after death of insured, relying upon the representations of its agent..... 657

Prompt payment of premiums on the date when due is waived by a previous course of dealing in respect to the particular policy, and to other policies generally, by which 30 days' time has been habitually allowed....1146

Failure to disclose the fact that the insured is dangerously ill will avoid a renewal certificate, issued on payment of a premium 11 days after it is due, where prompt payment has not been waived.....1146

Breach of a condition as to place of residence is waived when, with knowledge thereof, premiums are accepted, and renewal certificates issued 1146

If proofs of loss are presented in apt time, and substantially in compliance with the requirements of the policy, it is sufficient, unless the company asks for more specific proof 16

Proofs of loss will be considered as waived where the company's adjuster, after examining the premises, states that the company is not liable on the ground that the policy is invalid 16

Objections to proofs of loss, not made when the same were served, but first brought forward at the trial, will be considered as waived..... 706

Proof of the claim in bankruptcy is equivalent to the commencement of a suit against a bankrupt insurance company, under a clause in the policy limiting the right of action to one year..... 72

An insurance company has no right to divide its risks and capital into classes, and restrict the liability upon stock notes to the class in which they are placed..... 199

The fund deposited by a foreign insurance company as required by the Mississippi statutes is intended for the protection of domestic policy holders, and is to be refunded on its withdrawal from business, so far as it is not charged with unpaid losses and premiums due such holders..... 75

Such company, on withdrawing from business within the state, may assign such fund to a company succeeding to its business.... 75

Such an assignment, though made within four months of an adjudication in bankruptcy, *held* not void as to foreign creditors.... 75

A state treasurer *held* not personally liable for moneys paid out of a fund deposited by the company for the protection of its policy holders, where he acts in good faith under the advice of the law officers of the state that the claims paid are proper charges on the fund 75

Insurrection.

See "Treason."

Interest.

Page

See "Banks and Banking"; "Usury."

INTERNAL REVENUE.

The United States cannot impose a tax on the salary of a judge of the superior court of the city of New York, by imposing a tax on such salary as the income of such judge.. 746

The fact that such salary is fixed by the board of supervisors of the county of New York, or that it is payable out of the treasury of the city of New York, is immaterial.. 746

Federal collection officers may be enjoined from claiming moneys of citizens, and levying for them as if for taxes..... 728

Tobacco removed from the manufacturers' factory to their store *held* not subject to increased duties under Act July 1, 1864.....1079

The secretary of the treasury has no power to suspend the issue of certificates to importers of distilled spirits, under Act March 2, 1799..... 568

The collector will not be allowed a per diem for watching seized property, where he fails to turn it over to the district attorney, to have proceedings commenced, for 37 days after the seizure..... 42

Judgment for defendant was ordered in this case upon the ground that the claim of the plaintiff was barred by the act of July, 1862, as construed by the supreme court... 689

Joint Tenancy.

See "Tenancy in Common."

JUDGMENT.

Rendition and entry.

Upon executing a writ of inquiry upon a judgment by default, the jury must find at least one mill in damages..... 737

Validity.

The judgments of a court not having jurisdiction are void ab initio.....*129

A judgment of a state court whose jurisdiction was acquired under a state statute, which was virtually repealed by the adoption of a treaty before the judgment was rendered, is void ab initio.....*129

A stipulation in a judgment that the interest on it shall bear interest if not paid annually is void, and does not make such judgment usurious 978

Judgment by confession under Act Cal. 1850 781

A judgment by confession *held* not void, under the Oregon Code, for want of a sufficient statement of the facts, except as to creditors who have acquired a lien before sale thereunder 978

Decree in consolidated action *held* valid, though the court failed to acquire jurisdiction in one of the actions so consolidated..*1113

Operation and effect.

The title acquired by a stranger through a sale of lands regularly made under a judgment of a court of record, valid upon its face, cannot be defeated by a subsequent reversal of the judgment on appeal.....*1113

Under a local law allowing a new trial as to some issues, without disturbing the findings upon others, a judgment supported by findings not vacated is not an estoppel as to matter embraced in a vacated finding..... 592

Notwithstanding the judgment might have been rested upon an issue upon matter of abatement, the matter upon the merits will be res adjudicata, where both issues are found for defendant, and the judgment is entered generally under a local law allowing all defenses to be set up in the answer..... 592

When the findings and judgment in a given case are conclusive on both parties if conclusive on one, the estoppel is mutual, within the meaning of the rule requiring estoppels to be mutual..... 592

A judgment based upon an estoppel by a previous judgment in ejectment *held* no defense on a new trial after reversal of the first judgment 778, 781

Relief against; amendment.

A court of equity has power to reduce the amount of judgments at law rendered on Confederate contracts to the equivalent in legal money..... 616

A court of equity may require the abatement of war interest embraced in judgments in Virginia 616

Of different jurisdictions.

The federal courts are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them....1126

Where the state court has jurisdiction, the merits of the controversy involved are not open to examination in the federal court after judgment 1126

The presumption in favor of judgments of courts of general jurisdiction only extends to matters and persons falling within the scope of such general jurisdiction. When the proceeding is outside of such general scope, the record must show compliance with the special authority.....1126

There can be no personal judgment upon constructive or substituted service by publication against a nonresident, except as a means of reaching property situated at the time within the state, or of affecting some interest therein, or determining the status of the plaintiff with respect to the non-resident party 1126

When constructive or substituted service by publication in a personal action is authorized by statute in place of personal citation, the statute must be strictly pursued..1126

On a collateral attack upon a judgment of a superior court, the court will be conclusively presumed to have acquired jurisdiction, unless the record, on its face, affirmatively shows a want of jurisdiction.....*1113

If the record is silent as to the proof of a jurisdictional fact, due proof of the fact will be presumed in support of the judgment *1113

The recital of a jurisdictional fact, there being nothing to the contrary in the record, is conclusive of the determination of the fact upon sufficient evidence, although the evidence does not appear in the record.....*1113

The determination by the court issuing the summons, that it was duly served by publication, as authorized by law, is conclusive when collaterally brought into question...*1113

Actions on judgments.

Facts, in opposition to the record of a judgment obtained in one state, cannot be alleged to contradict the judgment, in an action brought upon it in another state..... 15

In a suit founded upon the record of a judgment, where the court had jurisdiction, no error in the proceeding can be considered, nor can nil debit be pleaded..... 788

Defendant cannot set up in defense to a suit on a foreign judgment that he was not served with process, and did not appear in the suit in which it was rendered, where the record shows a general appearance by an attorney 15

JUDICIAL SALES.

See, also, "Execution."

A guardian's sale, authorized by the proper court, is a "judicial sale," and cannot be questioned collaterally for error in the adjournment thereof 1031

JURY.

Page

Where a juror is taken ill during the opening address in a civil action, he may be discharged, and another drawn from the panel in his stead..... 373

JUSTICES OF THE PEACE.

Plaintiff can only recover upon the cause of action stated in the warrant..... 649

A judgment of a justice of the peace, being in part for a matter not within his jurisdiction, is void in toto..... 649

A justice of the peace is not liable in damages for judicial acts, and for ministerial acts only in case of intentional or gross negligence 1142

The justice is not liable for taking a supersedeas on Sunday, and from a minor...1142

LIBEL AND SLANDER.

It is actionable per se to charge a director of the bank with being a swindler..... 456

A breach of trust, accompanied by falsehood, does not amount to swindling unless there was an intent to defraud..... 456

Official communications between government officials are privileged, and neither the sending such communication nor retaining a copy amounts to a publication.....1158

All the facts stated in a plea of justification must be substantially proved..... 456

A verdict for one cent damages carries full costs 456

LIENS.

See, also, "Bankruptcy"; "Mechanics' Liens"; "Maritime Liens"; "Pledge."

By the common law, liens exist only where the party has actual or constructive possession of the goods; but in the maritime law, and in equity, liens exist independently of possession 508

A lien in equity is not a property in the thing nor does it constitute a right of action for the thing; but is a charge upon the thing 508

An equitable lien is valid (in Massachusetts), although no remedy for its enforcement is provided by the state jurisprudence. 266

Where a lien, or equitable claim, constituting a charge in rem, is a matter of agreement, it will be enforced in equity against the party himself, or his personal representatives, or persons claiming under him, or assignees in bankruptcy..... 266

LIMITATION OF ACTIONS.

Parties cannot, by a contract, agree upon a limitation different from the statute, within which suit shall be brought, or the right to sue be barred..... 788

Civ. Code La. art. 3540, limiting the time to sue to annul a will, is not applicable to a suit in which the will is relied upon as a muniment of title by a party out of possession 1042

Non assumpsit within five years, &c., is not a good plea to an action of assumpsit upon a promise to collect money and account for it, as the cause of action does not arise until the money has been received by defendant and demanded by plaintiff.....1196

The act of limitations cannot be given in evidence upon the plea of nil debet.....1191

LIS PENDENS.

Lis pendens is created in equity by filing a bill and actual service of subpoena. At law, suing out the writ without service of the same is sufficient..... 616

LITERARY PROPERTY.

Page

The author of letters, of whatever character, has a property therein; and no person has a right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character 342

No private person has the right to publish official letters, addressed to the government, without its sanction..... 342

Maintenance.

See "Champerty and Maintenance."

MARINE INSURANCE.

See, also, "Average."

The applicant is not bound to communicate intelligence known to the insurer, nor the expectations, opinions or speculations of such party, based upon facts known to the insurer 349

A policy insuring a vessel from a past date will cover a loss already accrued, of which neither party knew when the policy was issued, though it does not contain the words "lost or not lost"..... 349

The omission of the master to telegraph the loss of a vessel *held* not to vitiate the policy 349

Construction of valued policy as to place where goods were to be taken on board....1165

An offer to abandon made as soon as the assured obtains the preliminary proofs of loss, to be laid before the underwriters, is not too late.....1165

The defense of concealment of material facts must be made out affirmatively by the insurer 349

In an action upon a valued policy on a cargo, defendants will not be permitted to give evidence of its actual cost, except in support of an allegation of fraud.....1165

In the absence of any claim of fraud or misrepresentation, *held*, that the application for insurance, when merged in the policy, was properly excluded from evidence when unaccompanied by any offer of evidence of misrepresentation 352

MARITIME LIENS.

Nature and grounds.

A lien arises for repairs in a foreign port, where apparently reasonable and proper, although not absolutely necessary. All that is required on the part of material-men is good faith and reasonable ground for action. 479

There is no lien where the materials were furnished to a vessel upon the credit of the owner 1196

The sums advanced by a master during a voyage for necessaries supplied to a vessel, for claims of material-men, or for pilotage are liens upon the fund before a court of admiralty 1192

The contracts of the master and physician of a vessel are purely personal, and their wages are not liens upon the fund....1192

A court of admiralty will not favor an indirect lien upon the fund in hand by those claimants who cannot sue originally in such court, especially where there are adverse interests 1192

Priority and enforcement.

Seamen's wages are entitled to priority of payment out of the proceeds of the vessel, over a bottomry lien.....1013

The time of bringing suit determines the priority of payment of claims which are of like character, without extrinsic priority; otherwise, as to claims of seamen, pilots, and bottomry lenders 798

Page

To impound a fund in admiralty until a decision can be had upon the validity of a contested claim, the creditor must have sued out attachment or pleaded his lien to an antecedent action 798

A surplus fund in a court of admiralty arising from the sale of a vessel is subject to the same trusts and liens as the vessel itself was subject to.....1192

Waiver: Discharge: Extinguishment.

The lien of a material man is not waived by taking the negotiable paper of the owner or master of the vessel..... 190

The departure of a vessel from port on Sunday on a trial trip, and again secretly Sunday night, will not discharge the lien.. 743

A sheriff's sale of a vessel on execution against the owners discharges the lien for wages of a seaman who is a part owner. Reversing page 569.....1100

A mortgagee is a bona fide purchaser where a present valuable consideration is given, or money subsequently advanced or liability incurred on the faith thereof... 190

Liens under state laws.

A state statute, giving a preferential lien for materials or supplies furnished in the construction or repair of a vessel, *held* valid and operative as to surplus proceeds in the registry after satisfaction of maritime liens 678

The successive decisions of the supreme court abrogating the practice of enforcing such liens by proceedings in rem, reviewed and explained 678

Person furnishing supplies in home port on a credit *held* to have a lien where satisfactory paper was not given as agreed..... 743

MARSHAL.

The marshal is entitled only to his actual necessary expenses for ship-keeping, which must be established by vouchers or otherwise to the satisfaction of the court..... 769

MARTIAL LAW.

The president had authority to issue his proclamation of September 24, 1862, proclaiming martial law and the suspension of the writ of habeas corpus in the case of military arrests 1

The two orders issued by the war department August 8, 1862, one "to prevent the evasion of military duty, and for the suppression of disloyal practices," and the other "authorizing the arrest of persons discouraging enlistments," *held* unconstitutional 1

MASTER AND SERVANT.

The rule which exempts the employer from liability for the negligence of a fellow servant is not applicable to the case of a minor servant ordered to a dangerous service wholly outside the contract of employment 475

MINES.

Under the act of 1866, the right to purchase a mining claim to a silver or gold bearing lode is in the nature of a pre-emption right, and was granted to the one who, under the local laws and regulations, was recognized as entitled to the possession.... 592

The state statute of limitations relating to mining claims constitutes a part of the local laws by which the rights of parties are to be determined 592

MORTGAGES.

Page

See, also, "Bankruptcy."

The question, whether a conveyance amounts to a mortgage, does not turn on the question whether there be a defeasance. 202

Courts of equity are not governed by the same rules as courts of law in declaring whether there be a mortgage..... 202

Where a transaction resolves itself into a security, it will be treated in equity as a mortgage, regardless of its form, and the parties cannot, by agreement, limit the rights of the mortgagor, or cut off his equity of redemption..... 202

A quitclaim deed and a bond to reconvey on the payment of a certain sum *held* to constitute an equitable mortgage, and not a conditional purchase, giving the grantor an equity of redemption subject to conveyance 202

Quaere if a bond given by a grantee to one of several grantors, in order to defeat and make void the conveyance, if executed at the same time with the conveyance, will amount to a technical defeasance..... 202

A mortgage is governed by the law of the state where the land is situated when executed and sought to be enforced there, though payable in another state..... 181

The remedy by a sale of the mortgaged property to pay overdue installments given in the mortgage *held* to be merely cumulative, not preventing foreclosure.....1009

A provision that the mortgage shall become security for the performance of a certain agreement at the election of the mortgagor becomes of binding force after election and notice.....1009

The right of the mortgagee to foreclosure or possession is barred, in Connecticut, where the mortgagor has been permitted to remain in possession for 15 years without payment on the debt, or recognition of the mortgage 624

A junior mortgagee, out of possession, may, in such case, sue to have the first mortgage canceled, as barred by the statute.... 624

MUNICIPAL CORPORATIONS.

Construction of the Virginia laws of 1779 and 1796, in relation to corporations..... 606

Powers, duties, and liabilities of the corporation of Alexandria, Va..... 606

A corporation aggregate, having, or supposed to have, a common fund, is liable in an action at common law for negligence in its duty 606

Municipal corporation (Washington, D. C.) *held* to have power to fix a prohibitory license tax on the lottery business..... 660

Failure of mayor or register of Washington, D. C., to publish monthly notice of price of flour, *held* a good defense to suit for penalty for selling short weight bread.... 822

NEUTRALITY LAWS.

The landing of a cargo contraband of war on the shore of the country of one belligerent at a point not blockaded, is not an act of hostility against the other belligerent..... 321

NEW TRIAL.

It must appear that the newly-discovered evidence was unknown to the party at the time of the trial, as well as his counsel..... 50

An objection to testimony as a whole will not raise the point that part of it was incompetent 280

NUISANCE.

A livery stable in the residence portion of a city is not, as a matter of law, necessarily

Page

to be considered as a nuisance to the improved property adjoining or near it..... 286
Where the facts stated in the bill showing that the erection and use of a livery stable would be a nuisance to the adjoining property were denied by the answer, a preliminary injunction will be refused..... 286

OATH.

A commissioner of the United States may, as an officer under the state law, take the verification of all necessary papers in order to procure the arrest of defendant..... 995

PARDON.

A proclamation by the president ordering people in insurrection to disperse to their homes does not operate, even when it is obeyed, as a pardon of offenses already committed 826
An alleged pardon for treason in raising an insurrection by the operation of the president's proclamation ordering the people to disperse, to be available, must be pleaded.. 826

PARTIES.

In a suit to obtain the reduction of a license fee, *held*, that all of the joint owners of the patent and grantors of the license were necessary parties defendant, and no decree can be made without bringing them in. 302
An objection for want of proper parties defendant, not made by demurrer, plea, or answer, will be *held* too late, where a decree can be made granting the relief sought without affecting the rights of absent parties; otherwise not, though they are beyond the jurisdiction of the court..... 302

PARTITION.

A parol partition executed by taking actual exclusive possession of the portions respectively assigned is valid, and the parties cease to be tenants in common..... 592

PARTNERSHIP.

See, also, "Bankruptcy."

Participation in profits is prima facie proof of partnership, rebuttable by showing that they were received as wages or interest for money loaned..... 664
A partnership *held* to exist where the transaction was intentionally, and for collateral reasons, disguised under the cloak of a pretended loan and employment as bookkeeper 664
A note signed with a firm name after dissolution will not support assumpsit against the partners 726

PATENTS.

Patentable inventions.

An art is entitled to protection, as well as the machinery or processes which the art teaches, employs, and makes useful..... 790
A combination of known elements in new proportions, where a product possessing distinct properties and new uses results, is patentable 685
A combination which, by the addition of a new part, produces a new result with greater rapidity and economy than before produced, is patentable.....1093
A new effect, produced by a change of proportion, may involve patentable invention. 998
To make a valid claim for a combination, it is not necessary that the several elementary parts of the combination should act simultaneously 423
Nor need all parts of the machine which are necessary to its action be included in the claim, save as they may be understood as entering into the mode of combining and arranging the elements of the combination. 423
A new and useful combination of known elements is patentable, though two out of three of them have been combined in a prior machine 423
Decisive evidence that a new mode of operation has been introduced is shown where the practical effect of a new combination is either a new effect, or a materially better effect, or as good an effect, more economically attained 423
In such case, the amount of thought, time, expense, or experiment required to make the change is not material..... 423
The inventor has a right to use any means, old or new, in the application of the new property to produce the new and useful result, to the exclusion of all other means.... 385
Increasing the curve of a wagon reach, and diminishing the diameter of the wheel, so as to allow it to pass completely underneath, where before it only passed partly under, *held* not a patentable invention.... 289
The application of the principle of the expansion and contraction of a metallic rod by different degrees of heat, to the regulation of the heat of a stove, is the subject of a patent 373
The previous application of the principle to the regulation of heat, and a suggestion of its use in stoves, will not invalidate the patent to one who first practically applied it. 373
A machine never brought into effective operation, and taken apart without intention to reconstruct it, *held* an abandoned experiment 1093

Who may obtain patent.

The commissioner of patents is not disqualified from obtaining a patent after expiration of his term of office, for an invention made during such term..... 362

Foreign invention: Printed description.

Defendant may show prior invention in a foreign country, and knowledge thereof by the patentee, though such foreign invention has not previously been patented or described in a printed publication..... 423
Evidence of mere use in a foreign country prior to plaintiff's application is not alone sufficient to justify refusal of a patent. Act 1836, § 15..... 972

Application and issue: Interference.

The jurat to an application for a patent need not be dated..... 790
The drawings are a part of the description, and are to be considered with the specification 503
The duplicate drawings, required by Act 1837, § 6, are unnecessary until the patent issues, and need not accompany the application 790
The invention need only be described in terms which will enable persons skilled in the art to produce the invention..... 395
Where the application here is made before the issue of a foreign patent, it does not bear the date of the foreign patent, though the latter is first issued..... 790

Appeal from commissioners' decisions.

Appellant may assign, as a reason of appeal, the refusal to hear certain evidence offered, and the court may order such evidence to be taken to determine its relevancy and materiality..... 998
The unopposed oath of the inventor, though not of itself sufficient, is some evidence of the novelty, invention, and usefulness of the improvement..... 998

Page

But slight evidence of invention is required when it is shown in what the invention consists, and where proof is given of practical utility 998

Extent of claim.

Rules for construing patents..... 685

The patentee must be limited within the claims of the patent, and the description of the particular mechanism, and the application he has made, by which the result is produced 987

The patent is not limited in its scope to the patentee's theory of his invention..... 503

A claim for an entire machine does not deprive the patentee of his right to claim the parts also..... 503

Where only approximate proportions are named in the specification for the several elements of a given composition of matter, the right to vary these proportions is not unlimited 685

Reissue: Disclaimer.

If a reissue is invalid for want of authority to make it, the surrender is ineffective.. 790

There may be more than one reissue of the same patent. Reissues are favored where the patentee is more specific or more modest in his claims..... 790

A patentee, whose devices are new, is at liberty to claim each, by way of reissue, although he may have represented and claimed them originally as acting conjointly.....1093

The patentee need not describe and claim, in the specification of a reissue, either in words or idea, just what he described and claimed in his original..... 790

But the specification must describe the same invention, and the claim cannot embrace a different subject-matter than that which he sought to patent originally..... 790

The sufficiency of a disclaimer, as to whether or not the patentee stated in it "the extent of his interest" in the patent, as required by Act March 3, 1837, § 7, considered 373

The action of the commissioner in granting a reissue has more than prima facie influence in finally deciding the question of identity of invention..... 790

A pending application for a reissue does not supersede the original letters..... 395

A surrender and an application for a reissue may be withdrawn, by leave of the commissioner, for good cause shown, at any time before the proceedings are fully completed and duly recorded..... 395

A presumption as to the regularity of the surrender and reissue of the patent will prevail, in the absence of controlling evidence to the contrary..... 395

Interfering patents.

In a suit under Rev. St. § 4918, concerning interfering patents, the court may declare either one or both of the patents void on any ground which, in a suit for infringement, would invalidate it.....556, 558

The answer in such a suit may allege a want of novelty in complainant's invention. 556

Where the court holds that either one of the patents is void, a decree should be entered annulling it..... 558

Infringement—What constitutes.

A patent for a combination of several distinct parts is not infringed by a machine which does not embrace all of such parts.. 122

A patent for a machine composed of new parts is infringed by the use of any one of such new parts..... 503

A change which constitutes a mechanical equivalent, though accomplishing something useful beyond the effect accomplished by the patentee, is nevertheless an infringement, as respects what is covered by the patent..... 503

Page

The mere substitution of one known device for another, though complex, is an infringement 563

The fact that a machine is an improvement on a patented machine will not prevent its being an infringement if it is substantially the same..... 395

What is technically a combination, and how it may be infringed, though improved.. 563

A knuckle metallic joint in a hydraulic mining apparatus *held* to be a known mechanical substitute for one made of India rubber, or other flexible material..... 122

—— Who liable.

Damages may be recovered for the use, without license, of plaintiff's patented improvement, by an American citizen on an American vessel on the high seas.....1157

—— Preliminary injunction.

The application may be granted or refused unconditionally, or terms may be imposed on either of the parties, as conditions..... 422

The state of the litigation, where the plaintiff's title is denied, the nature of the improvement, the character and extent of the infringement, and the comparative inconvenience which will be occasioned to the respective parties, by allowing or denying the injunction, must all be considered..... 422

The exclusive possession for eight years under a patent for a useful machine, affecting an extensive business, *held* sufficient prima facie evidence to entitle a patentee to an injunction..... 563

—— Procedure.

Nonjoinder of licensees in a bill for an infringement of a patent constitutes no defense after the cause has been set down for final hearing..... 395

A surrender and reissue puts an end to a suit pending on the original patent, and plaintiff must proceed by a new bill. He cannot file a supplemental bill..... 970

A feigned issue will be awarded in a suit for an injunction founded on a verdict, in an action at law, on newly-discovered evidence tending to show a want of novelty, and defendants will be allowed to amend their answer on payment of costs by inserting the new matter..... 384

When the effect and operation of mechanical contrivances enter into the question of the extent of a patented combination, it is a mixed question of law and fact, and, therefore, a proper one for the jury..... 373

Prior knowledge and use is a question of fact, and the burden is upon defendant to show the same by satisfactory proof..... 148

On a reference to take an account, defendant cannot be examined as a witness in his own favor, if objection be made by plaintiff, though he was first called and examined as a party by plaintiff..... 391

Although the broad claim of plaintiff's reissue covers defendant's device, the court will look into the body of the specification of both the original and reissued patents, to ascertain whether there is any invention to support the claim..... 468

A juror will not be withdrawn on defendant's motion, on the ground of surprise, arising out of the exclusion by the court of evidence offered under a defective notice of special matter 373

On a reference to a master to ascertain damages and profits, where the bill is taken pro confesso, the master can report only nominal damages where complainants fail to make satisfactory proof..... 168

Where, in such case, complainant's exceptions to the master's report are overruled defendant will be allowed costs subsequent to the interlocutory decree, to be set off against complainant's costs up to such time. 168

— **Evidence.** Page

A disclaimer must be properly proved, before it can be admitted in evidence, either as an original paper or by a certified copy.... 373

The indorsement on a patent of a disclaimer *held* inadmissible for defendant, without proof that it was made by the patentee 373

A reference to a dictionary, without specifying the place, *held* not sufficient notice of special matter 373

Nor is the book admissible under a notice stating that the patentee's invention was previously known to the author..... 373

In such case, it is not competent to prove by experts that they could easily find in such dictionary the parts relating to the subject-matter, without specific reference.. 373

A notice in a special plea, stricken out before the trial, is not sufficient to admit a public work in evidence to show want of novelty 373

A decree will be entered for complainant where the facts averred, showing the validity and infringement of the patent, are admitted by defendant, who also admits the want of any valid defense..... 721

Review.

A judge of the circuit court, sitting at chambers, has power to allow a writ of error under Act July 4, 1836, § 17..... 383

Various particular inventions and patents.

Bag ties. No. 135,899, for improvement in ties for grain bags, *held* valid and infringed 362

Chair seats. Reissue No. 7,203, for improvements in chair seats, *held* invalid.... 1186

Coffins. Patent to Fish for a metal air-tight coffin, *held* valid and infringed..... 395

Corset skirt-supporters. Nos. 22,532, 39,910, 39,920, 45,296 (reissued No. 4,831), 54,323, and reissue No. 2,654, for improvements, *held* valid and infringed..647, 648, 648

Furnaces. No. 92,822 (reissued No. 7,254), for an improvement in hot-air furnaces, *held* valid, and infringed..... 284

Glove-fastenings. No. 155,077, for improvement, construed, and *held* not infringed 14

Hand mirror. No. 92,942, for improvement, *held* not infringed..... 297

Hydraulic mining. No. 110,222 (reissued, No. 5,193, for an improvement in hydraulic mining apparatus. *held* valid and infringed.. 122

Inking rollers. Reissues Nos. 1,771, 1,772, for composition for printer's inking rollers, *held* valid, but not infringed..... 685

Knitting machines. No. 99,426 and reissue No. 7,368, for improvements, *held* valid. 721

Mouldings. No. 74,068, for an improvement in machine for forming sheet metal mouldings, *held* valid and infringed..... 103

Pegging machine. Nos. 9,947, 23,361, and 36,292, and reissues Nos. 3,533 and 3,517, for improved machine for pegging boots and shoes, construed, and *held* valid and infringed 1093

Ploughs. Reissue No. 6,824, for improvement in attachments, construed, and *held* infringed 1081

Reflectors. Reissues Nos. 3,826 and 3,827, for improved reflectors for gas lights, construed, and *held* valid and infringed..... 949

Sewing machines. Nos. 28,633, and 40,084 (reissued, No. 3,218), for improved tucker, construed, and *held* not infringed.. 987

Sizing machine. No. 41,214, for machine for surface sizing fibrous materials, construed, and *held* not infringed.....1018

Stamps. No. 91,108, for an improved government revenue stamp, *held* valid, but not infringed 272

Stoves. No. 2,636, for an improvement in regulating the draft of stoves, construed in a charge to a jury..... 385

Suspenders. Patent to Flagg, September 14, 1869, for an improvement in suspender ends, *held* valid and infringed..... 148

Wagon reach. No. 69,789, for improvement, *held* invalid for want of novelty..... 289

Wringer roll. No. 101,994 (reissued No. 5,081), for an improvement in rubber rolls for wringers, *held* valid, but not infringed.. 468

PAYMENT.

The taking of new notes in place of others temporarily delivered up, and their renewal, *held* not a payment or discharge of a mortgage given as security for the original notes. 812

A bill of exchange is not payment of a pre-existing debt unless paid or accepted as such, or the debtor sustain injury by the laches of the creditor receiving it.....1089

If the holder of a bill remitted as payment of a pre-existing debt does all in his power to notify the one remitting it of its dishonor, he is not liable.....1089

A decree for freight payable in sterling money will be for the amount of such money in gold and silver coin of the United States. 415

PERSONAL PROPERTY.

Liens and mortgages are good as between the parties and against creditors, although the possession is not changed, if there be no fraudulent intent..... 266

PILOTS.

A vessel that is within pilotage ground, but disabled so that she cannot get into port without steam, is not bound to accept the offer of a pilot, or pay his fee..... 246

A pilot is not bound to take charge of a disabled vessel for the usual pilot's fee.... 246

PLEADING AT LAW.

Mistake in plaintiff's name in declaration drawn by the clerk must be regarded as the mistake of the attorney, and amendment allowed only on defendant being permitted to plead de novo.....1010

A plea of estoppel which does not show that the defendant was misled by the plaintiff, or those under whom he claims, is frivolous 1031

Defendant has the burden of sustaining, by record evidence, his plea of another action pending..... 616

Matters of abatement alleged as special causes for demurring will be disregarded, and the demurrer will be considered independently of them.....1010

On a general demurrer, unless for misjoinder of actions, judgment must be given for the plaintiff, if there is one good count in the declaration..... 801

In Virginia defendant may demur and plead to issue to the whole declaration.... 606

Where, in Virginia, defendant pleads the general issue, and demurs, and plaintiff joins issue only on the plea, he will be nonsuited. 1010

Denial of citizenship of the plaintiff pleaded with matter to the merits becomes frivolous 1031

Ambiguity or uncertainty is not a ground of motion to strike out.....1031

After receiving and replying to a pleading the party cannot treat it, upon any ground of defect afterwards discovered, as a nullity, and proceed as if none had been served....1060

An exhibit is no part of a pleading in an action at law; a record or instrument should be stated in a pleading either according to its tenor or legal effect..... 172

PLEADING IN ADMIRALTY.

Page

Exceptions, dilatory or declinatory, should be interposed on the return day of process, or at the day appointed for answering the libel 1013

An exception that the suit was commenced before the cause of action was matured, not taken until after its maturity, will be considered waived 1013

In causes on the instance side, the answer of the claimant should be verified by oath.. 1142

Where, in the case of a joint tort, separate answers are put in, each respondent must rely for his defense upon his own answer and the proofs 1159

PLEADING IN EQUITY.

A bill is not multifarious because it joins defendants holding distinct tracts of land, under distinct conveyances, if the main ground of defense is common to all 1049

If the bill contain no ground for relief, defendant ought to demur 1088

A corporation must answer under its common seal, and not on oath 786

The corporation is not required to answer interrogatories, where the bill requires its president, cashier, and agent to answer... 786

Where the officers of a corporation are not parties to a suit against it, they cannot be compelled to answer the interrogatories, but the bill may be amended to obtain a discovery from them 786

An allegation in an answer, which is not responsive to the bill, is not evidence; and the onus probandi is on the defendant to establish it 202

Defendant may, under equity rule 39, set up a bar in his answer to excuse him from answering further 1036

Where the bar set up is insufficient for any reason, complainant may except, and set the cause down on bill and answer only, or may file a replication, and proceed to proofs 1036

In the former case, the answer is taken as true, and the bar therein as proved; and, though insufficient as a defense, complainant cannot have a decree, unless the answer admits the allegations of the bill on which the prayer for relief is founded 1036

If the bar set up is a sufficient defense to the whole relief sought, it is immaterial whether the defendant answer the allegations of the bill or not 1036

A plea containing matter proper for a demurrer, for a plea in bar, for a plea in abatement, and for an answer, is bad for duplicity 1049

A plea set down for argument by complainant, without replying, must be considered as true 1088

Plaintiff, suing to enjoin infringement of a trade-mark belonging to a firm of which he alleged that he was the sole member, allowed to amend to bring in another, whom the proof showed was also a member..... 806

An amendment will be allowed when its refusal will put plaintiff out of court, and defendant can avail himself, on appeal, of the matter on which he objects..... 138

The staleness of the demand, or the want of proper parties, is no objection to amending the bill..... 138

The averment of citizenship may be added at any stage if the amendment be moved for in a reasonable time after the defect is suggested 138

Where a plea of the statute of limitations is overruled, it cannot be again put in by the same parties or their privies..... 138

It cannot be objected at the hearing that there was no replication to the answer, where proofs in support of the answer, and proofs in contradiction thereof, and in rebuttal, have been put in without objection.. 103

PLEADING UNDER STATE CODES.

Matters arising since the complaint, which increase plaintiff's damages, but do not change the cause of action, may be alleged by supplemental complaint..... 805

Code Civ. Proc. N. Y. does not authorize a demurrer unless it is to the whole complaint or to a separate cause of action alleged therein 805

PLEDGE.

A bill of sale intended for security operates (in Massachusetts) as a pledge and not as a mortgage, and does not require, or admit of, registration 185

Delivery to the pledgee may be either actual or constructive..... 185

Possession may be kept by an agent, and that agent may be the pledgor..... 185

Railroad coupons held by a creditor as security were converted into land, the unrecorded deeds for which were deposited with the creditor in place of the coupons. *Held*, that such creditor had an equity in the land superior to the lien of a general judgment creditor 81

PRACTICE AT LAW.

A mistake in entitling a referee's report in the district court, where it was duly filed in the circuit court, and no one was misled, will be disregarded, or the report amended nunc pro tunc..... 604

Plaintiff is entitled to judgment by default where defendant does not plead by the rule day, though the term continues beyond such day 610

On a trial before a jury the court has no power to grant a nonsuit against plaintiff's will 373

The courts of the United States, in actions at law, can require the production of books and papers in the hands of the adverse party only where the relief might have been had by a bill of discovery, and as a substitute therefor. Act 1789, § 15..... 54

An action, discontinued at a preceding term for want of appearance of defendant, will not be reinstated unless the omission was by neglect of the clerk..... 802

PRACTICE IN ADMIRALTY.

See, also, "Admiralty"; "Maritime Liens."

A vessel under arrest by attachment from a state court is entirely withdrawn from the cognizance of the federal courts, whether sitting in the same or a different state..... 136

A creditor cannot proceed against a vessel both in the state and federal courts on the same claim..... 136

A respondent arrested must remain in custody until he gives bond or stipulation to satisfy the decree made against him. Rule 3 1188

After pertinent evidence offered involving the merits, plaintiff cannot become nonsuit, so as not to be barred, except by consent of the opposite party, or on leave given by the court for sufficient reason..... 335

On an appeal in admiralty, after the case is entered, plaintiff, who is appellant, and recovered judgment below for less than he asked, cannot become nonsuit without prejudice, on payment of costs, if defendant object 335

Page

A new trial is not ordered in an admiralty suit, on the mere ground of oversight in not putting in evidence which might have been put in..... 692

An application will not lie to set aside a sale by default in admiralty, where it is not entitled in the same cause, and it does not appear that the promovents were parties or privies to that action..... 753

Irregularities in entering default are waived by the voluntary appearance of respondent before the commissioner without objection, but such default will be set aside to permit a real defense.....1060

Objections to an action merely formal in their character, cannot be taken on final hearing 1013

After the respondent has given a bond to the marshal, as provided by the rules, libelant cannot exact any additional stipulation 1060

Libelant is not entitled to ground any proceedings on the omission of respondent to give security for costs.....1060

No notice need be given the opposite party of a final decree before proceedings to enforce it.....1062

Execution issues against stipulators summarily upon the decree rendered against the principal.....1062

In a suit for seamen's wages, libelant may compel the adverse party to answer special interrogatories.....1142

PRACTICE IN EQUITY.

A motion or petition in the suit is the proper method to stay proceedings, where it is not properly prosecuted in the federal court. A formal bill is not necessary..... 973

A question of fact, essential to the decision, may be referred to a jury upon an issue framed..... 202

Where defendant fails to pay the examiner's fees, plaintiff cannot compel defendant's proofs to be filed without paying such fees 809

When a witness has been cross-examined by a party, with a full knowledge of an objection to his competency, he will not be allowed to raise the objection at the hearing.. 202

Exceptions to a master's report, not made before the master, will not be heard by the court, in the absence of special circumstances 1051

Unless a particular error is pointed out, or an erroneous principle is shown to have been adopted, the master's report will not be disturbed.....1051

A complainant, residing in another state, but in the same circuit, cannot be required to furnish security for costs, except at the first term 579

PRACTICE UNDER STATE CODES.

Supplemental answers are in the nature of pleas puis darrein continuance under the former practice, and like such pleas, should be interposed at the first opportunity after coming to the knowledge of the parties.... 778

Leave to file supplemental answer, setting up good technical, though inequitable, defense, refused where there was unreasonable delay 778

PRINCIPAL AND AGENT.

See, also, "Factors and Brokers."

A contract made by an agent in excess of his power, by means of false and fraudulent assertions, is void, and may be rescinded, or, where the principal receives the benefit and proceeds, he is liable in damages..... 579

PRINCIPAL AND SURETY.

Equity will not hold a surety liable, when he is discharged at law..... 26

On the death of the surety in the case of an obligation joint, and not joint and several, the remedy at law is gone, as against his legal representatives..... 26

No state statute, enacted after the making of such an obligation, can change the contract of the surety to his prejudice..... 26

A debtor has a right, without the assent of his surety, to convey his property, fairly, in payment of his debts..... 62

PRIZE.

See, also, "War."

A naturalized citizen of the United States, domiciled in the enemy country at the breaking out of war, is deemed an enemy, and his property is confiscable as such..... 673

If a party so domiciled puts himself in itinere, to resume his acquired country, he is deemed to have returned to its domicile.. 673

In war, property cannot change its hostile character in transitu..... 670

A shipment made by an enemy shipper to his correspondent in America, to belong to the latter at his election, in 24 hours after arrival, is liable to condemnation as hostile property 670

All goods found on board an enemy's ship, are presumed to be enemy property unless a distinct neutral character is impressed upon, and accompanies, them..... 326

If the shippers in a hostile ship neglect to put on board any documentary evidence of its neutral character, they will not be allowed the benefit of further proof..... 326

Cotton purchased during the Civil War with the proceeds of debts collected by a citizen of a loyal state, who went south before the war to collect such debts, captured while water borne in Texas, *held* not enemy's property. (Reversing) 49

In the case of a joint shipment from enemy country, the share of the partner domiciled in the enemy country was condemned. 674

In the absence of notice of a blockade, an inquiry at a blockaded port excused..... 446

An entry into a blockaded port to obtain necessary supplies excused..... 446

A prize court of the United States has no jurisdiction on the capture of a British vessel by a French privateer, within the territorial jurisdiction of the United States..... 57

Vessel condemned for attempting to violate a blockade where, having been chased at sea, she was beached, and set on fire.... 256

Vessel and cargo condemned as enemy property, and for an attempt to violate the blockade of Little River inlet..... 321

Vessel sailing under neutral flag, whose open papers show neutral ownership, was condemned upon other papers found, artfully concealed, tending to show enemy ownership 494

A part of the vessel condemned as enemy property; the rest of the vessel restored... 446

The vessel will not be condemned to the United States for failure of the captors to bring in the master of the captured vessel, where he was released from motives of compassion 326

Cargo restored, being neutral property, and there having been no attempt to violate the blockade, but no costs or damages awarded, as the vessel was confiscable in part 446

As to costs to be taxed on several claims in one information, upon a remission of the forfeiture 672

PUBLIC LANDS.

Page

The donation act of 1850 does not include settlers upon the public lands in Oregon, who died before its passage..... 29

A grant to a settler under such act does not take effect prior to its passage, although made in consideration, or on account, of prior residence and cultivation thereon.... 29

Though a married man limits his settlement under the donation act to the quantity of land granted to a single man, one-half thereof inures to the benefit of the wife, and she takes the same in her own right as the direct donee of the United States, and not subject to any of the previous acts or contracts of the husband..... 29

On the death of the wife of a settler under such act, her interest passes directly to her husband and children in equal parts, as donees of the United States, and not as her heirs 29

A quitclaim deed by the occupants of land in Oregon before the passage of the donation act, containing a covenant of warranty against all claims except that of the United States, and a covenant to convey the title of the United States, if obtained by the covenantors, will transfer only the possession 29

The possession delivered with the deed is a sufficient estate to carry the covenants therein to the assignee thereof..... 29

The prohibition contained in the proviso to section 4 of the act does not include covenants or contracts made prior to the passage of such act..... 29

The rights of vendees of a married settler under the act, on a partition of the wife's share after her death, determined... 29

The notice of settlement given to the proper officer under such act relates back to the commencement of the application, unless the same was prior to the passage of the act 193

The donation act was a present grant to the settler thereunder, but the completion of "a settlement" was a condition precedent to the vesting of any estate or interest in the land, in such settler..... 193

A wife divorced before notice and proof of a claim is not entitled to share in the settlement, although the land was occupied before the divorce was obtained..... 193

Intermediate the treaty of Guadalupe Hidalgo and the admission of California into the Union, no military officer of the United States could make any alienation of the public land 818

A mere permission to search for and take possession of land did not bind the Mexican government to make a title, and the United States are not required under the treaty to recognize such claim.....1147

History of the settlement on islands in the rivers of Pennsylvania..... 115

QUIETING TITLE.

A title acquired under a statute of limitations will be quieted in the adverse holder on bill filed for that purpose, even against the holder of the paper title barred..... 592

RAILROAD COMPANIES.

Construction of Act Mo. March 24, 1868, amending the charter of the Louisiana & Missouri River Railroad Company, in relation to municipal subscription for stock.... 530

The provisions of the Missouri constitution as to aid to railways, amendatory acts, and titles to acts, discussed..... 530

A railroad company, or its assignee with notice, cannot enforce bonds issued to pay a subscription to stock, where a condition under which the city was authorized by statute to issue them has not been complied with 368

A purchaser under a decree of foreclosure of a railway mortgage *held* not a bona fide purchaser as to municipal aid bonds, given on a subscription to stock under a condition with which the company has not complied.. 368

A railroad contractor, taking aid bonds from the company in good faith in payment for work, is a purchaser for value..... 363

The purchaser of railroad aid bonds need not look behind their recitals, where the bonds, on their face, do not put him on inquiry 363

The bona fide purchaser of railroad aid bonds is entitled to rely upon a recital therein that the conditions precedent to their issue have been fulfilled..... 363

A person who has succeeded to the title of a bona fide purchaser of the bonds, is entitled to stand on such title, though not a bona fide holder of them himself..... 363

A person can recover on coupons on the bonds, although his sole purpose, in buying them, was to bring suit on them in the federal court 363

In a suit on railroad aid bonds, defendant cannot impeach the order of the county judge reciting the proceedings under which the commissioners to issue the bonds were appointed 363

A provision in a statute under which railroad aid bonds were issued, that they should be registered in the office of the county clerk, *held* directory merely..... 95

In a suit on railway aid bonds, evidence of declarations made to taxpayers before they assented to the issuing of the bonds, inducing such assent, *held* inadmissible.... 95

The assent by majority taxpayers to the issuing of railway aid bonds, once duly made under Laws Vt. 1867, No. 1, cannot be withdrawn, though attempted to be made before the assent has been certified..... 98

Duties and liabilities of the parties in the case of a man walking along a railroad track in front of an approaching train, stated in a charge to a jury..... 69

REAL PROPERTY.

See, also, "Adverse Possession"; "Ejectment"; "Estates."

If a man having two titles to land, one defeasible, and the other indefeasible, enters generally, the law adjudges that he entered under his better title.....1196

Distinct actions may be brought in California to recover possession of land, and for damages for withholding its possession.... 12

The period prescribed within which actions for mesne profits must be brought in California is three years; but if the statute be not pleaded, mesne profits for a longer period may be recovered..... 12

The value of permanent improvements cannot be set off against damages for withholding possession in California unless defendant held the land not only in good faith, but under color of title..... 12

Any instrument gives "color of title" which, by apt words of conveyance from grantor to grantee, in form passes what purports to be a good title..... 12

A plea of set-off for permanent improvements in an action for mesne profits must allege that the same were made while holding under color of title adversely to the claim of plaintiff, and in good faith. Code Or. 227..... 172

One in possession, claiming under an adverse but defective title, without fraud, cannot be *held* to be the trustee of the true

Page

owner, nor be made to account for the proceeds of a sale by him.....1039
But where the possession was not in good faith, the possessors are liable for rents and profits, and are not entitled to compensation for improvements.....1039
Possessors in bad faith in Louisiana will not only be charged with what they have received, but with what they might have received, and cannot claim the benefit of the prescription with regard to the rents and profits 1051
Possessors in bad faith are entitled to compensation for improvements accepted by the owner. The latter may require them to be removed.....1051
Manner of estimating rents and profits on lands, buildings and draining machine in possession and use by the city of New Orleans 1051
Where a person, having permission by will merely to reside in a house, leased the same, *held*, that her executors should account for the net income for six years back 1154

REFERENCE.

Following the practice of the state courts, the judgment upon a referee's report may be entered without an application to the court 604

REMOVAL OF CAUSES.

See, also, "Courts."

Right of removal.

Under Acts Sept. 24, 1789, § 12, July 27, 1866, and March 2, 1867, the right of removal is made to depend upon citizenship or alienage 149
All those connected with the suit on each side must be citizens of different states from those on the other side..... 729
A suit to quiet title to real property against several defendants, who claim to be the owners of the same as tenants in common, "is one in which there can be a final determination of the controversy," as to each defendant, without the presence of the other 20
Where there is a separable controversy, each defendant has the right of removal without reference to the status of his codefendant 20, 27
A suit may be removed under Act March 2, 1867, by a defendant who is a citizen of a different state, although there be other defendants who are citizens of the state in which it is brought.....*298
Act March 2, 1867, only adds another cause for removal, and does not repeal the act of 1866..... 27
In an action on the mortgage note of a resident corporation, *held* that a controversy between plaintiff and a nonresident defendant, who was a mortgagee of the company, and had purchased its entire property, was merely incidental to the main controversy, and the cause was not removable..... 88
Under Acts March 2, 1833, March 3, 1863, and June 27, 1868, the right of removal is made to depend upon the subject-matter.. 149
Under these acts, the entire suit is removed if any part of it is removed..... 149
The act of July 27, 1868, is constitutional. 149
Act July 27, 1868, § 2, construed, as to what suits are removable under it, and at whose instance, and what is the mode of removal 149
A member of a corporation, sued for a debt or liability of the corporation, may have the suit removed under Act July 27, 1868, § 2.....1149

Page

But a member sued for alleged misconduct as an officer of the corporation cannot have the suit removed under such section.....1149
The fact, that questions may arise, in the course of the litigation, besides those under the acts of congress, and which depend upon general principles of law, cannot withdraw the cause from the jurisdiction of the federal courts..... 164
Nor can the suit be withdrawn from such jurisdiction, by joining defendants who are not within the limitation prescribed by the statute with those who are within such limitation 164
Rev. St. § 643, providing for removal to the federal court of prosecutions against federal revenue officers, *held* constitutional... 67
Such section is applicable to an indictment of such an officer in a state court for an act done under color of the United States revenue law, but charged to be in violation of the criminal law of the state..... 67
A colored citizen, when sued by another citizen of the same state, cannot remove the cause because of local influence or prejudice 621
A written stipulation of submission of a pending cause *held* a waiver of the right of removal after reversal and return for a new trial.....1026

Time for removal.

After a decree in the probate court, the case cannot be removed to the federal court under Act 1875..... 729
The petition is too late where filed several terms after the cause could have been tried but for the neglect of the rules of the court for the taking of testimony..... 996

Proceedings to obtain.

The right of removal under any act of congress is not dependent upon the volition, or action, or nonaction of the state court..... 149
The federal court has no jurisdiction to issue a mandamus to compel a state court to allow a removal, as a mandamus is not necessary 149
When the proper petition is presented with the proper surety, so that the state court acts upon the matter judicially, it loses jurisdiction of the cause eo instanti, unless its refusal is placed upon a valid defect in the petition, or insufficiency in the surety..... 149
After presentation of the petition, and a compliance with the act, the state court cannot take any proceedings in the suit except to perfect the removal, as other defendants may appear and present their petitions.... 164
The application to the state court is ex parte. No notice need be given, and no affidavits can be read in opposition..... 164
The averment in the petition, that defendants have a defense arising under the constitution and laws of the United States, must be accepted as true in the federal court, until disposed of on the trial..... 149
The affidavit for removal and bond having been filed in term time, but during a temporary recess of the state court, and the record not having been filed in the federal court, *held* that the state court, on a proper case being shown, had jurisdiction to appoint a receiver..... 88
All the defendants need not apply at the same time for the removal.....20, 164
Defendants not served or appearing in the state court when the order for removal is made are not affected by it, and as to them the cause is still pending in the state court.. 20
The federal court must determine for itself the question of its jurisdiction; the allowance of the petition for removal by the state court cannot confer jurisdiction..... 20

Effect of removal: Subsequent proceedings.

A case was removed in the circuit court of the southern district of New York on the

Page

allegation that plaintiff was a citizen of New York, and defendant a citizen of Massachusetts. *Held*, that a motion to remand on the ground that plaintiff is an alien should be granted, the fact not being denied.....1139

The averment in a petition that the suit has been brought for a cause of action specified in the act of July 27, 1868, cannot be tried on affidavit on motion to remand.... 164

When a suit has been removed under the act of 1868, as respects all the parties and all the subject-matter, the court will not make an order staying all proceedings in the state court, as such order is not necessary to the exercise of its jurisdiction..... 149

After removal, the federal court may entertain a motion to dissolve an attachment or discharge the attached property where such practice is authorized by the state law 1153

The court may hear such motion, though a similar motion was overruled by the state court prior to the removal.....1153

A bill filed after the removal, naming as a party defendant a person who was not a party to the suit as brought in the state court, will be stricken from the files on motion.. 166

A declaration filed in the federal court after removal of a bill in equity, asking relief at law against some only of the defendants, if within the allegations of the complaint filed in the state court, will not be stricken from the files, nor will complainants be compelled to elect whether to proceed at law or in equity..... 166

A counterclaim which might have been interposed in the state court may be set up after removal..... 706

REWARD.

To entitle a person to a reward agreed in writing to be paid for recovering certain property, which was subsequently returned by the police, he must show that it was recovered through information furnished by him 709

SALE.

See, also, "Vendor and Purchaser."

A shipment made without or contrary to orders still remains at the risk of the shipper 675

If a shipper have general discretionary orders to ship goods, the shipment will remain at his own risk until he appropriates the shipment to his correspondent..... 675

The seller has the right of stoppage in transitu as to goods sold for cash to be paid for on receipt of the invoice, where they were warehoused by the master of the canal boat on which they were loaded, on its being stopped by ice..... 357

SALVAGE.

Right to salvage compensation.

A salvage service is performed when a raft of timber is saved from peril on navigable waters..... 47

A claim for such salvage service may be maintained in a court of admiralty, if there is no local custom making the service gratuitous 47

If a vessel, though disabled, is manageable, and receives assistance for expedition only, the fact of being disabled will not of itself make the service salvage..... 706

Contracts for salvage services.

A contract for salvage services will be enforced where it was deliberately made, and not apparently oppressive.....1027

Page

Forfeiture or reduction of salvage.

Only compensation for work and labor performed in saving cargo allowed, where stranded vessel was bored with augers, and guilt could not be fixed..... 688

A share declared forfeited for fraudulent concealment of a part of the cargo will inure to the owners thereof..... 275

Amount.

Liberal compensation will be made not only with a view to the value and danger of the thing saved, but for the general interest in promoting exertions in such cases... 141

In a case of derelict, where there are no peculiar circumstances, a moiety is awarded 1075

A vessel with slaves on board but no white person, considered as derelict, and one-third given as salvage..... 275

Towing oil barges cast loose from a burning wharf, and still in danger, to a place of safety, *held* a salvage service, but only entitled to small compensation..... 992

Remedies for recovery.

A suit for salvage may be maintained by the master and owner of the salvor vessel without joining its crew.....1027

A suit for salvage in rem, as well as in personam, will lie for salvage services, though performed under a previous agreement for a fixed amount.....1027

The pendency of an action for salvage by the salvor vessel is no bar to a suit by the passengers of the injured vessel for salvage services rendered at the same time..... 413

Apportionment.

Rule of distribution between vessel, officers, and crew.....1075

SCIRE FACIAS.

A scire facias to revive a judgment is not a new action..... 192

SEAMEN.

The contract of shipment.

A person shipping as cook and steward undertakes that he has experience and skill to enable him to perform the duties of those positions 417

By the general maritime law, a seaman taken sick during the voyage is entitled to be cured at the expense of the vessel..... 443

Where the seaman is removed ashore, or where there is no person on board the vessel who can safely administer medicine, the vessel is liable for medical advice and attendance, though she carries a medicine chest, as provided by Act July 20, 1790, c. 56, § 8..... 443

A general averment that a vessel was supplied with a medicine chest according to law is not, of itself, sufficient evidence to discharge a master from his liability for a physician's bill for attendance upon a sick seaman 754

An express promise by a sick seaman to pay the amount of a physician's bill for attendance is without consideration and void 754

Where the mates and crew of a vessel discharge ballast into a lighter or barge so carelessly as to load her on one side, and cause her to sink, they are liable to the owner for the loss..... 332

Seamen are liable where a loss is caused by their strict obedience to orders which they know are improper, where they fail to remonstrate 332

When the fault or negligence is not clearly fixed on any particular one connected with the ship, all must contribute in the ratio of wages..... 332

Where a vessel sails without the statute quantity of bread, and the crew are put up-

Page

on a short allowance of bread, it is no defense to their claim for double wages that flour was furnished as a substitute..... 572

Where double wages are allowed, under the statute, for such short allowance, damages may also be given for a deficiency of other food..... 572

The owner is bound by his contract to furnish the seamen suitable subsistence. What is suitable depends upon what is usual in similar voyages..... 572

A seaman engaged at a foreign port on the homeward voyage has the same rights as to wages and food allowance as one shipping at the point of original departure..1192

The navy ration is the measurement of a food allowance on a merchant vessel....1192

The measure of damages for a wrongful discharge in a foreign port *held* to be the contract wages and expenses to the time when the seaman might have reached the home port, less what he actually earned, or might have earned, on the passage home.. 650

A stipulation, in shipping articles for whaling voyages, that the owners may ship catchings home on freight, is valid..... 726

The owners are not liable for their value, as of the time when received, where, in good faith, they held them waiting for a rise in the market..... 726

Conduct of master or mate in respect to seamen.

A seaman is, in general, entitled to recover damages for an assault and battery from the officer of a ship where personal violence is inflicted, not excessively, but wantonly and without provocation or cause; where there was provocation or cause, but the punishment was cruel or excessive; or when the punishment is inflicted with a deadly, or dangerous, weapon..... 417

The law which governs the deportment of men to each other on shore, cannot be applied to their habits and intercourse on board of a ship..... 417

A seaman is punishable corporally for deportment or language not obedient or respectful to the master..... 980

The punishment, however, must be not excessive, considering the nature of the offense. A single blow with the hand, producing no wound, is not excessive..... 980

A seaman on receiving such a blow for such an offense is not justified in brandishing a knife or an axe, nor in using them to prevent his arrest..... 980

If a seaman is attacked by master or mate without provocation or disobedience on his part, he may defend himself..... 980

The master and mate may seize deadly weapons to put down mutinous and insubordinate conduct, and to restore order and obedience 980

In the absence of cruelty or needless severity, the court will not measure the degree of punishment inflicted for insubordination 1159

A single act of insubordination on the part of a seaman cannot be considered as mutinous, or as justifying an imprisonment 1159

The second mate may refuse obedience to an order of the master to slush the masts, or take in light sails, as a punishment, when no offense has been committed that would justify it.....650, 650

The master has no right to imprison him, for such refusal..... 650

A person who, shipping as cook, is unwilling or unable to do his duty, and keeps the galley in a filthy condition, may be punished 417

A blow with a dirty frying-pan, or wiping a dirty knife on the face of the person whose duty it was to keep those articles

Page

clean, *held* not an aggravated or cruel assault 417

An action against a mate by a seaman, for false imprisonment, will not lie, where the imprisonment was ordered by the master through the advice and request of the mate 1159

Actions for aggravated assaults upon seamen are in personam only..... 980

Wages—Right to.

Seamen absent from a ship without any fault of their own, are nevertheless entitled to full wages..... 201

A vessel abandoned to the underwriters on report of surveyors that she be condemned as unseaworthy is "condemned as unfit for service," under Rev. St. § 4582, relieving the vessel from liability for the three months' extra wages where seamen are discharged abroad.....1087

Feeding and caring for sailors after their discharge cannot be *held* to be a revocation of the discharge.....1087

A seaman, having drawn the full wages due under an oral shipment cannot, after leaving the vessel, demand a greater sum.. 770

—— Remedies for recovery.

A seaman, though at the time of service a part owner of the vessel, is not thereby precluded from libeling for wages.....*569

No statute prohibits the filing of any libel within ten days after the discharge of the cargo 677

Act July 20, 1790, § 6, prohibiting actions for wages within a certain time, does not apply to actions in personam..... 754

The right of a seaman to sue in personam for his wages, is perfect as soon as the period of his service is completed..... 754

A seaman discharged before the delivery of the cargo may sue in personam at once 754

Owners of fishing vessel *held* liable for the wages of the seamen to the extent of the proceeds of the sale of the wreck, though the vessel was hired by the master for the season, and he had undertaken to pay the wages 237

A lien for wages is discharged by a sale on execution against the owners, of which the seaman is one. Reversing page 569...1100

The fact that a vessel has made several voyages since the contract was terminated will not discharge the lien where the seaman exerted himself to follow the vessel, and commenced suit at the earliest moment 758

Where there has been no change of ownership in a vessel, forbearance by a seaman to enforce his lien for wages until after 21 months' continuous service does not render his claim stale.....1111

A seaman was refused payment of a portion of the sum claimed unless he would sign a receipt in full against the vessel and owners. *Held*, that the receipt was only good for the sum actually paid.....1111

Interest is allowed from the time of a demand proved; and if no demand is proved, from the commencement of the suit..1142

—— Deductions: Extinguishment, etc.

A deduction will not be made where, because of illness, the seaman left the vessel after the voyage was ended, but before the cargo was discharged..... 677

If any part of the cargo be missing, all the seamen contribute to make it good, unless the guilt can be placed..... 741

Forfeiture of wages is not given merely as a compensation to the owner for actual loss suffered by the seaman's misconduct; it is enforced also by way of punishment... 295

The seizure and carrying away of the ship's chronometer by a mate, to force the settlement of his claim for wages, *held* not an act of misconduct, working a forfeiture 295

Page

Wages are not forfeited by leaving the vessel after the voyage is ended, and before the cargo is unladen..... 677
Going ashore to apply to an American consul for redress for alleged cruel treatment on board does not work a forfeiture of wages..... 754
The performance of his duty after the forcible return of a deserting seaman is a condonation of the offense, and a remission of the forfeiture, regardless of stipulations in shipping articles..... 754

SEIZURE.

A doubt of law is a proper case for a certificate of probable cause of seizure. In what cases such a certificate ought to be allowed 825
A motion for a certificate of probable cause of seizure may be made subsequent to the decree, and upon the hearing the court is not limited to the evidence introduced upon the trial.....1067
In determining the question, the court cannot consider the fact that the officer acted in an oppressive manner, and without a warrant.....1067
The fact that the claimant was selling the goods at a low price in an obscure town, declaring them to have been imported, and that duty had been paid upon only a small portion, was held sufficient to justify their seizure 1067

SHIPPING.

See, also, "Admiralty"; "Affreightment"; "Carriers"; "Charter Parties"; "Demurrage"; "Maritime Liens."

Public regulation: Title to vessel.

A bona fide purchaser of the whole interest in a vessel, subsequent to a forfeiture incurred by a sale to an alien (Act Dec. 31, 1792, § 16), is not within the proviso of such section 316
The forfeiture takes place at the moment of sale or transfer to an alien, and any subsequent judgment of forfeiture relates back to that time..... 316
The title of the alien purchaser, if he acquires any, is divested eo instanti by the statute, and he has left in him no interest which can be seized on execution..... 316
A levy on the forfeited property, under an execution against the alien, previous to the prosecution of the forfeiture, will not prevent the forfeiture..... 316
Such forfeiture does not avoid the lien of seamen and material men, existing at the time of forfeiture..... 316
Whether previous possession by a state sheriff, under a fi. fa. issued by a state court, excludes the marshal from arresting a vessel forfeited for a breach of the laws of the United States, quaere..... 316
An omission in the registry and enrollment of an American vessel does not make her foreign, but only deprives her of American privileges..... 642
The forfeiture of a coasting vessel for proceeding on a foreign voyage does not attach until the vessel quits the port with intent to proceed on the foreign voyage. Act Feb. 18, 1793, c. 8, § 8..... 822
The title of a sunken vessel passes to the one who pays the full value of the vessel to the owner, whether after a decree or not.. 638
The title will pass to the defendant, in a suit for collision, who pays the full value on a decree against him, as against underwriters to whom the owner has previously abandoned the vessel..... 638
A part owner may sustain a petitory suit against a merely fraudulent possessor, without joining the other part owners, and have a decree for possession on proving his title 822
A part owner, though his name is omitted from the registry and enrollment procured by the others, *held* entitled to ask security for the safety of the vessel on a voyage not approved by him..... 642
Where the owner of one-eighth disapproved of the proposed voyage, the other part owners were ordered to secure him in double the value of his share..... 642

Carriage of merchandise.

Duty of the ship master, where consignee refuses to pay freight, and there is no proper place for storage at the port of destination 630
A vessel employed generally to carry stone to a certain port *held* a general freighting vessel as to return cargoes collected by the master under a custom of the business 630

Liability of vessel or owners, etc.

By the general law maritime, the vessel is bound to the shipper for the performance of a contract of affreightment made with the master, whether by charter-party, by bill of lading, or by parol..... 252
A vessel equipped in a manner which renders her competent to encounter the ordinary perils of a voyage is seaworthy..... 196
The fact that the mizzen sail of the vessel gave out in the extraordinary storm, and that she had no spare mizzen sail, does not show that she was unseaworthy when she sailed..... 196
A vessel is not responsible in rem for cargo lost from the pier through negligence of her officers, but after delivery to the consignee 20
A scow will be *held* liable for the conversion by its master of a lighter used, without authority, in carrying wood from the shores of Lake St. Clair to the scow..... 294
The vessel owners are not liable for supplies furnished to a vessel while frozen in, and in charge of the mate as ship keeper, except for implements for necessary and permanent use on board the vessel..... 630

The master.

A master in possession of a vessel absent from her home port will be deemed to have been master until his actual displacement after return of the vessel, notwithstanding the vote of a majority owners to discharge him 630
The master of a vessel, frozen in before the return voyage was commenced, and left in charge of the mate, may contract for cargo for the return voyage after the vessel is released..... 630
A master is personally liable on a contract for the transportation of goods in discharge of a debt due from him, part of which does not rest on a maritime contract 630
The master has authority in a foreign port to procure all supplies and repairs necessary for the safety of the ship and the due performance of the voyage..... 479
This authority includes all such supplies and repairs as are reasonably fit and proper, although not indispensably necessary.. 479
A master, acting with reasonable diligence, discretion, and skill, upon the advice of competent persons, will be protected, though more skillful persons would have advised a better course.....479
The circumstances enumerated under which the master has the right to sell the vessel in a foreign port..... 186
All liens upon a vessel which is lawfully sold by the master in a foreign port from necessity are transferred to the proceeds of sale, the purchaser taking a title free therefrom 186

Slander.

Page

See "Libel and Slander."

SLAVERY.

A Virginia slave is not entitled to freedom. under Act Md. 1796, c. 67, by being hired to a resident of the county of Washington, D. C., for a limited period.....1202

Importation of slaves into Washington, D. C., effect of..... 579

STATES.

A written stipulation of submission of a pending cause to the state supreme court after the admission of Colorado *held* a waiver of the right to remove the cause to the federal court. Act June 26, 1876....1026

A compact entered into between two states, with the assent of congress, is binding on those states and the citizens of each. 257

Grants made by North Carolina and Tennessee, beyond their boundaries, as admitted in the compact between the states of Tennessee and Kentucky, are void by such compact 257

SUNDAY.

Sunday is not a day on which a supersedeas can be given.....1142

TAXATION.

Ores extracted from mining claims immediately become subject to state taxation, though the legal title to the land is still in the United States..... 401

Ores extracted from mines within a state, and there reduced, may be taxed by the state, although mined by a corporation of another state, and though the assessment is not made until the end of a quarter after the proceeds are carried out of the state.. 401

Under the statutes of Nebraska, national bank shares may be taxed, and the tax enforced by distraint against the property of the bank..... 84

Taxation by state authority of the capital stock of a national bank, invested in United States securities, restrained..... 100

Where no remedy exists to recover back illegal state taxes when paid into the treasury, equity will restrain their collection, and, having jurisdiction in such a case, will determine the validity of county as well as state taxes, embraced in the same collection warrant and levy..... 100

The owner may rely upon the truth of the record made by the sheriff's return showing a tax sale to be void..... 781

An ex-sheriff cannot, under order of court years after the time to redeem has expired, amend his return of a tax sale so as to show that the sale was valid, when it appeared on the record to be void..... 781

TENANCY IN COMMON.

A purchase made by one of two parties interested together by mutual agreement, made agreeably thereto, will inure to the benefit of the other..... 202

Where two persons are in possession of lands by an imperfect or tortious title, as by disseisin, a release to one of them will inure to the benefit of both..... 202

The holder of an undivided interest in land under the laws of California may recover the entire land, as against all parties, except his cotenants..... 781

Under a joint demise, by the statute of Tennessee, a tenancy in common may be proved 257

Page

The statute of limitations is set in motion by an ouster of a cotenant, and an adverse claim 592

Torts.

See "Admiralty."

TOWAGE.

The steamer must arrange her tow with reference to her capacity and the nature of the voyage and the waters to be navigated 251

Steamboat *held* in fault for unwieldy arrangement of tow on the Schuylkill river.. 251

A hawser, lengthened by a piece of stern line, parted when another tug took hold to help in the increasing wind, and the tows were seriously injured by pounding together, and afterwards sank. *Held*, that the tug was liable..... 690

The master may recover damages for injuries to cargo on board of his vessel as a common carrier 691

Item of cost of raising cargo of sunken tow will be stricken from a decree against the tug where libellant is shown to have been released from claim of the cargo owner 691

TRADE-MARKS AND TRADE-NAMES.

The name "Dr. J. Blackman's Genuine Healing Balsam," given to a medicine by its inventor, *held* a valid trade-mark, the exclusive right to use which would pass on an assignment of the exclusive right to make and sell it..... 50

The words "J. C. Frese & Co., Hopfensack, 6, Hamburg," in an oval, *held* a valid trade-mark for a medical preparation known as "Hamburg Tea"..... 805

A trade-mark for seamless bags, consisting of the word "Stark" over a semicircular arch with the letter A below, is infringed by a like device, except that the word "Star" is substituted for "Stark"..1159

Under an assignment of the exclusive right to use the name of the inventor in the manufacture and sale of certain medicine for a term of 10 years, with the condition that, on the performance of the covenant for such time, the assignee shall have "all of the rights and privileges" to use the inventor's name, without reward, for 50 years, the assignee acquires, arter the 10 years, the same exclusive rights which he had during such years..... 50

When a partnership is formed to make an article to which a given trade-mark is properly applied, such trade-mark, if belonging to one partner, becomes, in the absence of special regulations, part of the partnership property 50

In a contest between manufacturers of "quack medicines," a court of equity will not interfere to protect the use of trade-marks by injunction..... 611

A preliminary injunction will be granted to restrain the use of a trade-mark where plaintiff has been in exclusive possession of the same for a number of years, and defendant has just commenced to manufacture under such name..... 50

Imitation of package of medicine, as to form, color, and style, enjoined, though defendants substituted their own names in the various places where plaintiffs used theirs 805, 806

Defendants manufactured and sold stoves, containing plaintiff's patented improvement, under the name "Charter Oak," originated by plaintiff, for the entire term of the pat-

Page
ent. *Held*, that plaintiff could not enjoin such use by defendants after expiration of the patents..... 53

TREASON.

Congress has no power to change, in any way, the crime of treason, as defined by Const. art. 3, § 2, and acts of congress cannot be considered as legislative definitions of the crime..... 826
Opposing by force of arms, an act of congress, with a view of defeating its efficacy, and thus defying the authority of the government, is levying war against the United States, and constitutes treason.... 826
Treason in the assembling of bodies of men, armed or arrayed in a warlike manner, is determined by the intent. If the purpose be of a private nature, it is not treason, regardless of the acts actually committed; otherwise, where the intent is to effect some object of general public nature 924
An insurrection to resist by force the execution of a federal tax law, or the militia called out to enforce it, on any ground whatever, is a levying of war against the United States..... 924
A conspiracy to raise an insurrection to resist the execution of a federal statute by force is only a misdemeanor. Treason is not committed until the persons proceed to carry the intention into execution by force 924
There are no accessories to the crime of treason; but all the particeps criminis are principals. All persons present, aiding, assisting, or abetting any treasonable act, or who are present, countenancing, and are ready to afford assistance, if necessary, to those committing a treasonable act, are principals 924
If a man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law judges of the intent by the fact..... 924
Where the overt act has been proved by two witnesses, evidence is admissible to show the course of the prisoner's conduct at other places, and the purpose with which he went to the place where the treason is laid; and, if he went with a treasonable design, then the proof of treason is complete 826
A voluntary confession made by the prisoner on his preliminary examination may be received in corroboration of matters already testified to by two witnesses; but, as to matters not thus testified to, it must be disregarded 826

TREATIES.

The adoption of a treaty, with the stipulations of which the provisions of a state law are inconsistent, is equivalent to a repeal of such law.....*129

TRESPASS.

There must be actual possession by the plaintiff, of the locus in quo, at the time of the supposed trespass..... 723
None can recover where all the plaintiffs have not a right to recover..... 723
Plaintiff must prove every abuttal set forth in his declaration..... 723

TRIAL.

Where there is doubt whether an instrument has been sealed, the fact is properly referable to the jury..... 341
The court need not give an opinion upon a point of law not raised by the evidence...1162
The court is not bound to instruct the jury after they have retired, unless the jurors request it..... 456
Where a jury trial is waived, the court is not required to make a special finding upon the facts..... 352
After verdict it is too late to object the want of profert of letters of administration—or that the action is in the debet and detinet 1191

TROVER AND CONVERSION.

A person who tortiously sells the property of another, without his consent, is liable for its full value at the time of the sale, though he does not receive any of the purchase money..... 231

TRUSTS.

See, also, "Frauds, Statute of."
The presumption of a reconveyance of lands conveyed in trust, after it becomes impossible to execute the trust, *held* to be conclusive 781
A written agreement to purchase lands on joint account creates a fiduciary relation, and a purchase by one, on his sole account, will be treated as in trust for the joint account..... 202
When money or other assets of one person are used by another to purchase property in his own name, a resulting trust arises in favor of the former..... 815
A creditor, in Mississippi, cannot enforce payment out of property purchased by a debtor in his own name, but with his wife's funds, unless he show that credit was given in specific reliance upon such property.... 815
One party to an agreement to purchase lands on joint account, who takes title from a guardian, cannot set up the adverse title of the cestuis que trust to defeat the equitable rights of the other party to the agreement 202
It is not a breach of trust for a person who has agreed to purchase outstanding titles on joint account to take the title in his own name..... 202
A secret trust *held* to be executed by a deed from the trustee and the cestuis que trust to a third person..... 202
A conveyance from a cestui que trust, confirmed by the trustee, will entitle the purchaser to protection against a secret trust unknown to him..... 202
Commissions are not allowed to a trustee, who makes a sale in violation of his trust.. 231

UNITED STATES.

The United States can be brought into court by the entry of an order that it shall plead, etc., within a given time, and the service of a copy of such order upon the proper representatives of the government.. 43

USURY.

See "Banks and Banking."
A bill drawn, accepted, and indorsed to raise money for the use of the payee is void for usury where discounted by a broker at a usurious rate.....1066

VENDOR AND PURCHASER.

See, also, "Frauds, Statute of."
Where a rightful estate is claimed by each of two purchasers, whose titles in other respects are equal, the maxim pre-

Page

vails, "Qui prior est in tempore potior est in jure" 202
The grantee under a quitclaim deed from one who purchased land on joint account *held* entitled to protection as a bona fide purchaser without notice to the extent of the purchase money paid before notice of the title of the other party to the agreement 202
The other party to the agreement *held* entitled to a lien to the extent of the purchase money unpaid at the time of notice to the grantee, for the payment of his moiety of the purchase money..... 202
Possession by a tenant is constructive notice to the purchaser of the tenant's title, though not of the title of the lessor, or of the party under whom the tenant claims.. 202
Vague reports and rumors from strangers, and suspicion of notice, are not sufficient to charge a purchaser with notice of title in a third person..... 202
A judgment creditor is not a bona fide purchaser who as such is protected against a resulting trust..... 244
A plea of a purchase for a valuable consideration, without notice of the plaintiff's title, must aver that the person who conveyed was seised, or pretended to be seised, at the time when he executed the purchase deeds 202
The question of a defeasance and its effect considered on a deed of land..... 202

WAR.

See, also, "Prize."

Construction of the New York statute limiting the period of bringing claims and prosecutions against forfeited estate..... 129
Proceedings for the confiscation of enemy's property under a state law *held* coram non judice on the adoption of a treaty of peace stipulating against subsequent condemnation *129
A judgment of a state court of Georgia, rendered in a civil suit between citizens of the state during the war of the Rebellion, is valid as between the parties.....798

WHARVES.

The wharfinger under Act N. Y. 1875, is entitled to full rates for the use of a stage berth 662
The presentation of a bill made out in English to the mate, a foreigner who cannot read it, the wharfinger agreeing to refer it the master, is not such a demand of payment as Act N. Y. 1875, requires to entitle to double rates..... 662
The mere fact of insufficiency of water in a berth does not show fault on the part of the wharfinger that renders him liable to the vessel for damage or delay..... 662
Vessel not allowed to set off, against wharfage, damages for delay in loading by the wharfinger..... 662

WILLS.

The month alone is sufficient to show the dating of an olographic will, under Civ. Code La., requiring that such a will shall be written, dated, and signed by the testator 1042
Evidence as to the execution and destruction by Daniel Clark of a will making his daughter, Myra Clark, his universal legatee, reviewed 1042
Code Prac. La. arts. 942, 943, relating to proving wills, do not apply to lost wills..1042
Rev. St. Me. c. 62, § 25, in relation to the probate of wills, is merely affirmative of the law, as it antecedently stood..... 976
The probate of a will, in Louisiana, is not conclusive against parties in possession of property which is sought to be recovered from them by virtue of it, unless they were parties litigant in the probate proceedings 973
When the validity of a will is brought in question incidentally on question of title to property, it is open for investigation in any court in which the title may be litigated.. 973
Parties to a suit in equity in the federal court, who are not barred by prescription, waiver, estoppel, or some other supervening cause, may contest the validity of a will involving the question of title to property by answer, or by proceedings for revocation in the probate court..... 973
Parol evidence is not admissible to affect the construction of a will, but it is admissible where its introduction is required by considerations extrinsic of the will, and which, necessarily, depend upon such evidence 1102
Bags, bottles, and casks, containing coffee, wine, and brandy for current use, do not pass under a bequest of all "furniture and other household effects," but go with their contents, as incidents thereto..... 645
A bequest of the use of testator's "property" in a certain banking business *held* to include the use of slaves employed therein 645
An advancement by the testator to a husband, whose wife was an heir, with direction that it be deducted "from the share coming to the family," *held* should not be deducted from a legacy to the wife.....1102
A devise of two houses to a daughter, the mother to be permitted to "occupy and dwell" in the better one during her life, *held* not a grant to the mother of a beneficial interest, but a mere permission to reside in one house.....1154
Under a devise to a son in fee of two third parts of a certain farm, "he paying all my just debts out of said estate," *held*, that the land was charged, but a bona fide purchaser was not bound to look to the application of the purchase money.....1167
If the purchase money is unpaid, it may be followed into the hands of the purchaser, and he is liable in equity for its misapplication after notice.....1167
The appointment of a guardian by will cannot be predicated upon words of implication which do not convey the powers essential to the office.....1054
The recognition, in a will made abroad, of the executors under a will made here, as guardians, will not amount to an appointment of them by implication, where it does not appear that testator had the domestic will before him when he executed the foreign will 1054
The title passes to the devisee of real estate at the death of the testator, and the probate of the will relates back to that time 976
In the absence of an unequivocal act of disclaimer or renunciation, the consent of the devisee will be presumed where the devise is plainly for his benefit..... 976

WITNESS.

The master of a vessel who hypothecated her on bottomry, is a competent witness in favor of the holder of the bottomry.....1013
One defendant in a joint action upon a promissory note, who suffers judgment by default, is not a competent witness for the other defendant 711
The maker of a note, released from costs, is competent in a suit against indorsers to

Page

impeach the note by facts subsequent to its execution, and negotiation by him.... 731

In an action by the indorsee against the acceptor of an inland bill of exchange, the indorser is a competent witness for defendant to prove usury in plaintiff's discounting of the bill.....1066

In New York, defendant in a federal court in a civil case in a trial at common law may be required to appear and be examined as a witness for plaintiff..... 619

WRITS AND NOTICE OF SUITS.

See, also, "Judgment." Page

If a defendant appear to a sci. fa., it is not material by whom the writ was served..1025

Classification of suits in rem, and service of process upon infants of tender years, considered 1126

Mistake in name of plaintiff in writ made by the clerk may be corrected by the memorandum filed by counsel.....1010

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